No. 317498

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CARY and CATHLEEN SCHENCK, husband and wife,

Appellants,

v.

DOUGLAS COUNTY, subdivision of the State of Washington,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Statutes

Administrative Regulations

Court Rules

County Codes

I. INTRODUCTION

The County will refer to the Appellants as the Schencks, pursuant to RAP 10.4(e), and in the same manner as the Brief of Appellants.

The County cites to the record throughout this brief. The administrative record before the Douglas County Hearing Examiner consisted of 529 pages and was submitted to the superior court in digital format. Each page of the administrative record is sequentially numbered in the lower right-hand corner. The administrative record has been indexed by the Clerk as Clerk's CD Copy of Record, Volume II, pages 37-565. The administrative record will be cited as CP, with an additional cite to the sequentially numbered page as AR.

II. COUNTER-STATEMENT OF THE CASE

Statement of Procedure

On July 3, 2012, Douglas County issued a Notice of Land Use Violations and Order to Comply (NOV) relating to unauthorized Columbia River shoreline development by the Schencks on property they owned and on adjacent property owned by Public Utility District No. 1 of Chelan County (the PUD). CP 71-77; AR 34-40. *See,* Exhibit B to Staff Report, Photographs, CP 167-175; AR

130-138. The Schencks filed a Notice of Appeal to the Douglas County Hearing Examiner on July 17, 2012. CP 80-83; AR 43-46.

A hearing was held on November 15, 2012. The Hearing Examiner entered his Findings of Fact, Conclusions of Law and Decision affirming the NOV on December 19, 2012. CP 550-560; AR 513-523.

The Schencks filed a Land Use Petition in the superior court on January 9, 2013, challenging the Hearing Examiner's decision. CP 1-22.[1] Following the hearing on the Land Use Petition, the superior court entered its Order Dismissing Land Use Petition on May 30, 2013. CP 646-647. The Schencks filed a timely Notice of Appeal to the Court of Appeals, Division III. CP 648-653.

Statement of Facts

On October 4, 1999, the Schencks filed a signed Joint Aquatic Resource Permit Application (JARPA) with the County requesting issuance of a Shorelines Management Act (SMA) exemption for installation of single family residence dock on the Columbia River. The JARPA containing a detailed plan for the

[1] The PUD was not named as a party in the Schencks' LUPA Petition or served with a copy of the Petition. The County's Motion to Dismiss Land Use Petition was argued at the initial hearing. The superior court ruled the PUD is not a required party under RCW 36.70C.050 and is not otherwise a party needed for just adjudication. *See*, Order on Joinder of Chelan County PUD as Party, CP 568-569.

proposed dock and was based upon the representation the proposed dock and related structures would have a fair market value of less than $10,000. CP 512-518; AR 475-481. In their JARPA application the Schencks specifically represented they would comply with all permitting requirements of Douglas County, the Department of Fish and Wildlife (DFW), Department of Ecology (DOE) and the U.S. Army Corps of Engineers (Corps). CP 512-518; AR 475-481. The County issued an SMA exemption on October 26, 1999, which contained the following language:

> Exemption is **based on plans received** from the applicant. **Any changes should be reviewed by this department** to ensure continued compliance with goals, policies and requirements of the shoreline management act and master program, **and that the exemption is still valid**. **The applicant is responsible for obtaining and complying with all federal, state and local permits required.**

CP 495; AR 458 (Emphasis added)

On October 26, 1999, the County also issued the Schencks a building permit for the proposed dock. CP 507-510; AR 470-473. The Schencks obtained a Hydraulic Project Approval (HPA) from DFW on February 10, 2000. CP 381-389; AR 344-352. The transmittal letter from DFW to the Schencks warned that the Schencks were responsible to see that "all provisions within this

HPA permit are **strictly** followed at all times." CP 435; AR 398 (Emphasis original). Paragraph 6 of the HPA provided as follows:

> **PROJECT ACTION (AND NEW PERMIT REQUIRED FOR MODIFICATIONS OR FUTURE WORK):** This HPA authorizes the construction **ONE** (1) rectangular-shaped combination floating dock and moveable ramp system consisting of: one (1) "minimum" 24 foot long by maximum 3 foot wide fully "open grated" aluminum moveable ramp **and** one (I) "maximum" 20 foot long by maximum 8 foot wide rectangular float section (with required minimum 36-inch wide 60% ambient light grid and bright white marine grade floatation),.**AND** the installation or driving of a ***"maximum"*** of two (2) white PVC encapsulated pilings, and the optional placement of two (2) large dock anchors and appropriately sized anchor chains (in combination with **OR** in lieu of the pilings) within the OHWL of the Columbia River upon the Carey & Cathy Schenck property only. ***Any modifications to this project or future work within, below* or *over the OHWL will require a separate HPA from the Washington Department of Fish and Wildlife (WDFW).***

CP 369; AR 332 (All emphasis original).

The Schencks also applied for a federal permit with the Corps.[2] CP 99-100, 520-531; AR 62-63, 483-494. The Corps acknowledged receipt of Schencks' application in a letter to the Schencks' project consultants dated November 9, 1999, with a copy also sent to Schencks, and requested additional information.

[2] The Corps has jurisdiction over the Columbia River and its shoreline under the Rivers and Harbors Act and under the Clean Water Act. Correspondence, CP 99-100, 521-531; AR 62-63, 484-494.

CP 523-524; AR 486-487. The letter concluded, "Since a Department of the Army permit is necessary for this work, **do not commence construction before the permit has been issued**." (Emphasis added) CP 524; AR 487.

The Schencks installed a dock and related structures in April 2000 that were substantially changed from the approved design. CP 412-413; AR 375-376. The Schencks did not obtain county inspections and the building permit expired. Declaration of Rich Poole, CP 504-505; AR 467-468; Permit Inspection Report, CP 510; AR 473. The Schencks did not obtain an SMA substantial development permit or exemption for the new dock from the County, a new HPA from DFW, and a federal permit from the Corps.[3] The Corps wrote directly to the Schencks on November 24, 2000, to inform the Schencks their permit application was stale, incomplete and had been cancelled. CP 521-522; AR 484-485. This correspondence included the statement, "Do not proceed with the work until you have received a permit from the Corps." CP 522; AR 485.

[3] DFW submitted written comments to the Hearing Examiner that the Schencks' dock did not conform to the HPA issued in 2000. The dock and ramp do not have ambient light grids, do not use pilings, and the dock configuration is not perpendicular to the shoreline. Also, the boat lift and jet ski float were installed without obtaining an HPA. The Schencks' development impacts fish and wildlife species habitat. Written Comment, CP 378-389; AR 341-352.

After more than two years of communicating regarding the Schencks' continuing violations, the County issued a Notice of Land Use Violations and Order to Comply (NOV) on July 3, 2012, to the PUD and to Schencks. CP 41-59, 84-90; AR 4-22, 47-53.

The Schencks do not dispute the development identified in the NOV has occurred, but contend the development is "exempt" or permits, exemptions or other governmental approvals were not required. The Schencks' violations are set out in the NOV and include the following:

1. Installation of a dock and dock ramp.

   The Schencks admit they installed a dock in April 2000 that was different from the dock authorized by the SMA exemption and the HPA. CP 134-135, 412-413, 526-529; AR 97-98, 375-376; 489-492.

2. Installation of a floating structure to support jet skis.

   The Schencks admit they installed the floating structure to support jet skis in August 2001 and did not obtain a permit or exemption. CP 415, 526-529; AR 378, 489-492.

3. Installation of a boat lift.

   The Schencks admit they installed the boat lift in May 2000 and did not obtain a permit or exemption. CP 414, 526-529; AR 377, 489-492.

4. Construction of concrete pad(s) and a fixed bench.

> The Schencks have not disputed or otherwise responded to the violation involving concrete pads and a fixed bench.

5. Construction of a concrete retaining wall and fence.

> The Schencks admit they constructed the concrete retaining wall and fence after 2002 and did not obtain a permit or exemption. CP 416; AR 379.

6. Construction of a structure (shed/changing room) and a concrete pad (patio).

> The Schencks admit they constructed the shed next to the shoreline in 2004 and did not obtain a permit or exemption. CP 418; AR 381. The Schencks have not disputed or otherwise responded to the violation involving the concrete pad (patio).

7. Grading, filling and sand placement.

> The Schencks admit they imported and placed sand onto the shoreline in 2002, and did not obtain a permit or exemption. CP 417; AR 380.

The Schencks appealed the NOV and a public hearing was held before the Douglas County Hearing Examiner on November 15, 2012. The County submitted the entire administrative file, including a Staff Report and Supplemental Reports. CP 118-353, 473-531; AR 81-316, 436-494. Agency comments were received.[4]

[4] The administrative record included written comments from Washington State DOE concluding that the Schencks' development of the shoreline was unauthorized and not exempt under the SMA, WAC Chapter 173.27, and the County's Shoreline Master Program. Written Comment, CP 94-

The Schencks submitted evidence through the testimony of Cathleen Schenck and exhibits. A representative of the PUD also testified regarding the PUD's ownership of the property, but did not contest the NOV. The Hearing Examiner left the record open for additional evidence and briefing by the County and the Schencks. The Hearing Examiner issued his Decision on December 20, 2012. CP 540-550; AR 513-523. The Decision affirmed the NOV.

The Schencks filed and served their LUPA Petition on January 9, 2013. CP 1-22. Following the hearing on the Land Use Petition, the superior court entered its Order Dismissing Land Use Petition on May 30, 2013. CP 646-647. The Schencks filed a timely Notice of Appeal to the Court of Appeals, Division III. CP 648-653.

95; AR 57-58. The DFW submitted written comments to the Hearing Examiner that the Schencks' dock did not conform to the HPA issued in 2000, as referenced at Footnote 3. CP 378-389; AR 341-352. The administrative record also included a 2012 violation letter from the Corps to the Schencks explaining federal permit requirements and notifying the Schencks their boat dock, boat lift and floating structure on the Columbia River were violations requiring federal permits. CP 99-100, 521-531; AR 62-63, 484-494.

III. ARGUMENT

A. *Summary of Argument*

Development of the Columbia River shoreline within Douglas County requires authorization in the form of a permit or an exemption determination, both of which require an application, review and action by Douglas County. Exemptions are not self-executing. An exemption determination issued by the County requires compliance with all buffers, mitigation and other environmental protections, as required by both the SMA and the County's Shoreline Master Program and by the County's critical areas ordinance (CAO).

The Schencks' claim much of their shoreline development is "exempt" or is not subject to either the SMA or the County's CAO. However, the Schencks never applied for or obtained an exemption for any of their *actual development* of the shoreline. A new exemption and HPA were required for the revised dock, but were never obtained by the Schencks. The Schencks abandoned their application for a required permit from the Corps.

The County did not have an opportunity to investigate and review the scope, intensity and impacts of the Schencks' *actual development*, or the fair market value and purpose of the

development. Further, the County did not have an opportunity to impose conditions to protect the shoreline, critical areas, water quality and habitat as required by the Shoreline Master Program and/or critical areas ordinance.

The Schencks cannot avoid their violations by merely claiming the development *would have been exempt*. Their argument essentially substitutes the appeal hearing on their violations for the required application, review and determination process by the County.

The Douglas County Hearing Examiner properly affirmed the County's NOV. The superior court properly affirmed the Hearing Examiner's decision.

B. *Burden of Proof and Standards for Review*

The Land Use Petition Act (LUPA), RCW Chapter 36.70C, provides standards for review and the burden of proof for LUPA actions, at RCW 36.70C.130(1):

> The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. **The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met**. The standards are:
>
> (a) The body or officer that made the land use

> decision engaged in **unlawful procedure or failed to follow a prescribed process**, **unless the error was harmless**;
>
> (b) The land use decision is **an erroneous interpretation of the law**, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is **not supported by evidence that is substantial** when viewed in light of the whole record before the court;
>
> (d) The land use decision is a **clearly erroneous application of the law to the facts**;
>
> (e) The land use decision is **outside the authority or jurisdiction of the body or officer making the decision**; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

(Emphasis added.)

The Brief of Appellants cites RCW 36.70C.130 once, at page 12. There are no other references to RCW 36.70C130. The Brief of Appellants does not connect any of the applicable standards under RCW 36.70C.130(1) to an issue or assignment of error and to the record before the Hearing Examiner.[5]

[5] In their Brief of Appellants, the Schencks list six issues, but fail to include any specific assignments of error, fail to include the language of challenged Findings of Fact and Conclusions of Law for this Court, fail to include any argument whatsoever as to specific Findings of Fact or Conclusions of Law, other than

The party seeking relief under LUPA has the burden of proving error under the standards of review. RCW 36.70C.130(1). The appellate court applies the LUPA standards of review directly to the administrative record of the land use decision. *Griffin v. Thurston County*, 165 Wn.2d 50, 196 P.3d 141 (2008); *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Services*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003); *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

When the sufficiency of the evidence is challenged under LUPA, the appellate court reviews the administrative record under the substantial evidence standard. The substantial evidence standard has been most recently applied as "whether a fair-minded person would be persuaded by the evidence of the truth of the challenged findings." *Lauer v. Pierce County*, 173 Wn.2d 242, 252-53, 267 P.3d 988, 992 (2011). *See also*, *Griffin v. Thurston County*, 165 Wn.2d at 55; *Woods v. Kittitas County*, 162 Wn.2d 597, 616, 174 P.3d 25 (2007); *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d at 751-752; *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Finding of Fact 20, and fail to otherwise identify how the issues pertain to RCW 36.70C.130(1). RAP 10.3(a)(4).

When applying this substantial evidence standard, the evidence is to be considered in the light most favorable to the party who prevailed in the highest forum that exercised fact finding authority. In this case the County is entitled to this most favorable interpretation. *Lauer v. Pierce County*, 173 Wn.2d at 253; *Julian v. City of Vancouver*, 161 Wn.App. 614, 625, 255 P.3d 763 (2011); *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 756, 768, 129 P.3d 300 (2006).

In their Brief of Appellants, the Schencks have generally listed Findings of Fact and Conclusions of Law as erroneous, but have not specifically challenged any Findings of Fact, other than a single reference to Finding of Fact 20, at page 19. Alleged erroneous language is not set forth in the assignments of error or elsewhere in their Brief. The Schencks' argument does not cite to any challenged Finding of Fact or Conclusion of Law and provide corresponding citations to evidence in the administrative record. The Hearing Examiner's findings are, therefore, verities on appeal. *Hilltop Terrace Homeowner's Association v. Island County*, 126 Wn.2d 22, 29, 35, 891 P.2d 29 (1995) (Unchallenged findings of hearing examiner constitute substantial evidence).

When a LUPA Petition challenges erroneous interpretation and application of the law, the appellate court reviews the alleged error *de novo*. *Griffin v. Thurston County*, 165 Wn.2d at 55; *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d at 751. When the LUPA Petition challenge is for unlawful procedure, the alleged error is subject to a harmless error analysis. RCW 36.70C.130(1)(a).

The Hearing Examiner clearly has expertise in conducting administrative hearings, the application and interpretation of the County's Shoreline Master Program and critical areas ordinance, and weighing evidence and the credibility of witnesses. Deference should be given to the Hearing Examiner in this LUPA appeal on these matters. *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. at 768; *Timberlake Christian Fellowship v. King County*, 114 Wn.App. 174, 180-181, 61 P.3d 332 (2002).

The Schencks have the burden of proof and must establish one of the standards for relief under RCW 36.70C.130(1).

C. *Shoreline Management Act – Growth Management Act Overview*

There has been overlap between the SMA and the Growth Management Act (the GMA) with respect to protection of shorelines

and regulation of critical areas. This section of Respondent's Brief provides an overview of interplay between the SMA and GMA.

1. *The Shoreline Management Act – A Brief Overview*

The SMA was adopted in 1971 to protect Washington's shoreline environment and is codified at RCW Chapter 90.58. The policies of the SMA include preserving the natural character the shorelines of statewide significance, such as the Columbia River, as well as protecting the resources and ecology of the Columbia River shoreline. RCW 90.58.020; RCW 90.58.030(2)(f).

Each local jurisdiction having shorelines is required to develop a Master Program addressing the policies and requirements of the SMA. RCW 90.58.030(3)(c). The Master Program, after approval and adoption by the Department of Ecology, comprises the State Master Program. RCW 90.58.030(3)(d); RCW 90.58.090. Douglas County's Shoreline Master Program was initially adopted in 1975. CP 310-358; AR 273-321. The updated Shoreline Master Program was adopted in 2009. CP 121-123; AR 84-86.

The SMA and the Shorelines Master Program protect the County's "shorelines," including those areas 200 feet landward from the ordinary high water mark. *Buechel v. State Dept. of Ecology,*

125 Wn.2d 196, 203-204 (1994); RCW 90.58.030(2); RCW 90.58.040. The County has responsibility for administration and enforcement of permitting under the SMA and the Shoreline Master Program. RCW 90.58.050; RCW 90.58.140(3); WAC 173-27-240, et seq.

The SMA prohibits development within shorelines unless development is consistent with the SMA and the Shoreline Master Program. RCW 90.58.140(1). Development may be authorized under a substantial development permit, a variance, a conditional use permit, ***or an exemption***. RCW 90.58.140; WAC 173-27-040(1)(b); WAC 173-27-140 through -170; WAC 173-27-250. Depending upon the scope and details of a proposed development, a combination of SMA permits may be required. In addition to SMA permits, a proposed development may also require building permits and other approvals.

"Substantial development" within shorelines is **prohibited without first obtaining a substantial development permit** from the local jurisdiction. RCW 90.58.140(2). "Substantial development" is defined at RCW 90.58.030(2)(e), in part, as follows:

“Substantial development" shall mean **any development** of which the total cost or fair market value exceeds five thousand dollars, or **any development** which materially interferes with the normal public use of the water or shorelines of the state. . . . The following shall not be considered substantial developments for the purpose of this chapter:

> (i) Normal maintenance or repair of existing structures or developments, including damage by accident, fire, or elements;
>
> (ii) Construction of the normal protective bulkhead common to single-family residences;
>
> (iii) Emergency construction necessary to protect property from damage by the elements;
>
> (iv) Construction and practices normal or necessary for farming, irrigation, and ranching activities . . . ;
>
> (v) Construction or modification of navigational aids . . . ;
>
> (vi) Construction . . . of a single-family residence . . . ;
>
> (vii) Construction of a dock, including a community dock, designed for pleasure craft only, for the private noncommercial use of the owner, lessee, or contract purchaser of single and multiple-family residences. This exception applies if . . . **in freshwaters, the fair market value of the dock does not exceed ten thousand dollars, but if subsequent construction having a fair market value exceeding two thousand five hundred dollars occurs within five years of completion of the prior construction, the subsequent construction shall be considered a substantial development for the purpose of this chapter**;
>
> * * *

(Emphasis added)

This "fair market value" component within the definition of "substantial development" increased from $2,500 to $5,000 in 2002, and is now adjusted for inflation. RCW 90.58.030(2)(e). However, the County's former Shoreline Master Program and implementing regulations, effective from 1975 through 2009, *set* ***a lower threshold of $1,000*** as the fair market value limitation on substantial development. CP 353; AR 316. "Fair market value" is defined at WAC 173-27-030(8):

> "Fair market value" of a development is the open market bid price for conducting the work, using the equipment and facilities, and purchase of the goods, services and materials necessary to accomplish the development. **This would normally equate to the cost of hiring a contractor to undertake the development from start to finish, including the cost of labor, materials, equipment and facility usage, transportation and contractor overhead and profit. The fair market value of the development shall include the fair market value of any donated, contributed or found labor, equipment or materials.**

(Emphasis added)

Exemptions under the SMA are not self-executing and are narrowly construed. WAC 173-27-040(1)(a). An "exemption" is the ***express authorization*** granted by a local jurisdiction determining the proposed development is exempt from the SMA's substantial development permit requirements. WAC 173-27-040(a) and (e);

WAC 173-27-250(2). The development proponent has the burden of proving a development is exempt. WAC 173-27-040(1)(c). Even though a development may be "exempt," the development is still subject to regulation under the SMA and the Shoreline Master Program and the local jurisdiction may impose conditions on the development to assure consistency and compliance with the SMA. WAC 173-27-040(1)(b) and (e); WAC 173-27-250(2). If any part of a proposed development project does not qualify for an exemption, then a substantial development permit is required for the entire development project. WAC 173-27-040(1)(d).

The Schencks' development occurred within the Columbia River shoreline. The federal government, through the Corps, has jurisdiction under the Rivers and Harbor Act and the Clean Water Act for all development waterward of the ordinary high water mark. The Schencks' waterward development requires federal permits. CP 100-101, 521-522; AR 63-64, 484-495. When a Corps permit is required, a local jurisdiction determining development is exempt under the SMA must also issue a "letter of exemption." This "letter of exemption" must set forth the specific SMA exemption provisions applicable to the development and analyze consistency with the

SMA and the Master Program. WAC 173-27-040; WAC 173-27-050.

Therefore, in order for the Schencks' waterward development to be exempt under the SMA, not only is an exemption determination by the County required under WAC 173-27-040(1) and WAC 173-27-250(2), but the County must also issue a letter of exemption meeting the requirements of WAC 173-27-050.

The Schencks' did not build the dock for which they obtained an exemption. CP 496-532; AR 459-495. The Schencks did not obtain any substantial development permits, exemption determinations, letters of exemption or other approvals required by the SMA for the dock and related structures actually constructed, or for any of their other development within the shoreline.

2. *The Growth Management Act – Critical Areas Ordinance*

The GMA, codified at RCW Chapter 36.70A, was adopted in 1990 to coordinate land use planning and attain several specific planning goals, including conservation of resource lands, conservation of fish and wildlife habitat, and protection of the environment. RCW 36.70A.020.

The GMA directed local jurisdictions to adopt development regulations protecting "critical areas." RCW 36.70A.060(2); RCW 36.70A.170(1)(d); RCW 36.70A.172(1). "Critical areas" are defined as wetlands; areas with a critical recharging effect on aquifers used for potable water; fish and wildlife habitat conservation areas; frequently flooded areas; and geologically hazardous areas. RCW 36.70A.030(5). These local development regulations are commonly referred to as a "critical areas ordinance" or CAO.

The County adopted its initial critical areas ordinance in 1997. The critical areas ordinance is codified at DCC Chapters 19.18 through 19.18E, as amended in 2003. CP 180-306; AR 143-269. The entire Columbia River shoreline in Douglas County is identified as a habitat critical area under the County's critical areas ordinance. DCC 19.18C.020.B.1 and B.4.[6] Because it is an aquatic habitat, the Columbia River shoreline is also protected and regulated as a "wetland" under DCC Chapter 19.18B.[7]

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[6] DCC 19.18C.020.B provides "Fish and wildlife habitat conservation areas include: 1. Areas in which endangered, threatened, and sensitive species have a primary association . . . 4. Waters of the state . . . ."

[7] DCC 19.18C.020.B provides: "Identification and regulation of all wetlands, riparian areas, lakes, ponds, streams and rivers shall be in accordance with DCC Chapter 19.18B, Resource Lands Critical Areas—Wetlands."

Development within critical areas requires prior approval of mitigation, maintenance, monitoring and contingency plans, drainage and erosion control plans, geotechnical reports, and a grading and excavation plan. DCC 19.18.070, et seq. More specific to the Columbia River, development within wetlands is prohibited, unless the development proposal includes "appropriate mitigation and enhancement measures as determined on a site-specific basis." DCC 19.18B.050. In wetland critical areas, development may also require prior approval of a wetland management and mitigation plan, a wetland boundary survey and rating evaluation report. DCC 19.18B.035, et seq. Finally, development in wetland critical areas requires approval of buffers 50 feet to 150 feet landward from the ordinary high water mark. DCC 19.18B.050.B.

The County's CAO contains exemptions from permitting and, like the SMA, an exemption from permitting is ***not*** self-executing. The County must review and determine whether an exemption applies. DCC 19.18.030. Exemptions under the County's CAO are much more limited than exemptions under the SMA. The County's ordinance ***does not provide*** for exemptions based on fair market value, for single-family residences, docks, dock ramps, jet ski

floats, boat lifts, concrete pads and retaining walls, fences, grading and sand placement, or sheds/changing rooms.

The Schencks conducted these specific development activities, but did not obtain any permits for development or any determinations regarding exemptions, as required by the County's critical areas ordinance.

3. *SMA and GMA Overlap*

GMA wetland and habitat critical areas may be within 200 feet of a shoreline and, therefore, may also be within the jurisdiction of the SMA.

- Prior to July 27, 2003, the SMA and the County's Master Program protect shorelines, including regulation of development within shoreline critical areas.
- *Effective July 27, 2003,* the County's SMA continues to protect shorelines, but the County's CAO protects and regulates shoreline critical areas.
- *Upon adoption of an updated Master Program* (which was done by the County in 2009), the SMA and the County's updated Master Program protect shorelines ***and*** also regulate development within shoreline critical areas. The CAO does not apply to shoreline critical areas,

except the CAO buffers will apply if the updated Master Program does not provide for critical area buffers.

See, Kitsap Alliance of Property Owners Central Puget Sound Growth Management Hearings Board, 160 Wn.App.250, 256-264, 255 P.3d 696 (2011) (Upheld the retroactive provisions of RCW 36.70A.480 applying GMA critical area ordinances to shorelines, effective July 27, 2003); RCW 36.70A.480.

4. *The Current, Updated Shoreline Master Program Applies*

Under either regulatory scheme, the Schencks' development required issuance of a permit or a determination that development was exempt from permitting. The Schencks did not comply with either set of regulatory requirements.

More importantly, the Schencks' development is no longer subject to the former Shoreline Master Program and the County's CAO. The Schencks' must now comply with the County's current, updated Shoreline Master Program.

The Schencks do not have any "vested right" based upon the date of their development of the shoreline. The case of *Samuel's Furniture v. Department of Ecology*, 105 Wn.App. 278, 288 (2001), *reversed on other grounds*, 147 Wn.2d 440 (2002),

recognizes that an unlawfully issued permit cannot create vested rights:

> [T]he SMA gives the Department the responsibility for reviewing local land use decisions to ensure compliance with the act. RCW 90.58.050. To that extent, land use decisions by local governments are not final. Consistent with this analysis, a landowner has no vested rights under the SMA if the building permits he or she receives from a local government are issued in error. *See Parker v. Dep't of Ecology,* No. 82-41, Shorelines Hrg's Bd., Final Findings of Fact, Conclusions of Law & Order, at 5 (Apr. 11, 1983).

The case of *Kelly v. Chelan County*, 157 Wn.App. 417, 237 P.3d 346 (2010), is instructive on the need to comply with current regulations. In *Kelly*, from 1989 through 2005 the applicant made several changes to a conditional use application for construction of condominiums and boat slips on Lake Chelan. Chelan County adopted a new comprehensive plan and new development regulations in 1994. In 2000, Chelan County amended the plan and regulations, and decreased the property's development density from 10 dwelling units per acre to one dwelling unit per acre. A conditional use permit was eventually granted in 2005 based on the 1994 plan and development regulations. This Court held the applicant did not have a vested right to apply the development regulations existing prior to 2005 because none of the applicant's successive application amendments complied with the

comprehensive plan provisions and development regulations existing at the time of each amendment. *Kelly v. Chelan County,* 157 Wn.App.at 428.

The case of *Lauer v. Pierce County*, 173 Wn.2d 242, 267 P.3d 988 (2011), also provides guidance. In 2004, the Garrisons obtained a building permit and began construction of a home. The Garrisons' application materials failed to identify a stream and buffer area on the property and the home was built within the stream's 35 foot buffer. Litigation followed and, in 2007, Garrison applied for a variance to allow their encroachment into the stream's buffer area. However, in 2005, Pierce County increased buffer requirements from 35 feet to 65 feet. The Supreme Court held the Garrisons' rights did not vest in 2004 because their building permit application contained misrepresentations or omissions and, therefore, was not complete. The 65 foot wide buffer was held applicable to the Garrison's development. *Lauer v. Pierce County*, 173 Wn.2d at 262-263.

In the case before this Court, the Schencks did not submit any applications for the waterward improvements they actually constructed, nor did they obtain any permits for their landward development. The new dock and related components did not

comply with the plans submitted to and approved by the County and DFW. The Schencks also abandoned their federal permit process before the Corps. The vested rights doctrine does not benefit persons who misrepresent actual development activities or otherwise develop illegally. *Lauer v. Pierce County, supra.*

The Schencks' development must comply with the current development regulations under the County's updated Shoreline Master Program, as well as applicable building and/or grading permit requirements.

D. *The Schencks' Legal Issues*

1. *Statutes of Limitation Do Not Bar the NOV*

The Schencks claim the NOV issued by the County pursues civil penalties and is, therefore, barred by the two year statute of limitations. RCW 4.16.100(2). The Schencks also claim the one year statute of limitations for misdemeanor crimes is applicable.[8] RCW 9A.04.080. The enforcement language in the NOV provides:

> III. ENFORCEMENT ON FAILURE TO COMPLY
>
> **Your failure to comply** with the requirements of this Order shall result in **further enforcement action**. Such

[8] The Schencks' assertion is beyond the scope of the sixth issue under Assignments of Error in their Brief of Appellant, which is limited to the two year statute of limitations. However, the County will address both statutes of limitation.

enforcement may include one or more of the following actions:

1. **Civil Enforcement**. **Civil enforcement** pursuant to DCC Chapter 14.92.040, including the following:

A. Any permit, variance, subdivision, or other land use or development approval issued for the subject property may be revoked, suspended and/or modified; and/or

B. A civil enforcement action may be brought in the Douglas County Superior Court and include:

i. **A civil penalty of $50.00 per day per violation may be imposed** until corrective action is fully completed; and/or

ii. The County may be authorized to enter upon the subject property and complete all corrective action. The actual costs of labor, materials and equipment, together with all direct and indirect administrative costs, incurred by the County to complete the corrective action shall constitute a lien against the subject property until paid. In any action to foreclose the lien, all filing fees, title search fees, service fees, other court costs and reasonable attorney's fees incurred by the County shall be awarded as an additional judgment against the record owner(s); and/or

iii. **The County may obtain temporary, preliminary and/or permanent injunctive relief from the Superior Court**.

2. **Criminal Penalties**. Pursuant to DCC 14.92.050, any person, or any managing director, officer or partner of a corporation, partnership, association or other legal entity, **who willfully fails or refuses to complete corrective action and comply with a notice of violation and order shall be guilty of a misdemeanor** and shall be punished by not more than ninety days in jail or a one thousand dollar fine, or both. Failure or refusal to complete corrective action shall be a separate offense as to each violation in the notice of violation and order.

> 3. **Shoreline Management Act Penalties**. **Civil and/or criminal penalties as provided in the Douglas County Regional Shoreline Master Program**, RCW 90.58.210, RCW 90.58.220, RCW 90.58.230, and WAC 173-27, Part II Shoreline Management Act Enforcement.

CP 89; AR 52. (Emphasis added)

The NOV does not impose civil penalties and does not impose criminal liability. These enforcement methods are within the array of enforcement alternatives available to the County *if the Schencks fail to comply with the NOV*. The proceedings before the Hearing Examiner, the superior court and this Court constitute the process to determine validity of the NOV. The date of non-compliance cannot begin any earlier than the conclusion of these proceedings. Non-compliance will then trigger the running of the applicable statute of limitations, if any.

The Schencks rely upon *U.S. Oil & Refining Company v. State Department of Ecology*, 96 Wn.2d 85 (1981) (Department of Ecology's imposition of $90,000 in civil penalties against U.S. Oil for illegal discharge of pollutants, which had occurred three years earlier, held subject to two year statute of limitations and remanded for application of the discovery rule to the violations). The *U.S. Oil* case is clearly distinguishable from the facts before the Court. The

U.S. Oil case involved separate, distinct discharges of pollutants. This case involves the Schencks' continuing violations. Further, the *U.S. Oil* case involved imposition of penalties. The NOV in this case does not impose any penalties, either civil or criminal.

In the case of *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 258 P.3d 36 (2011),the Supreme Court held that, even though counties take the lead in developing local shoreline master programs under the SMA, such programs *are the product of the State*. The Supreme Court further held that prohibitions applicable *to counties* regarding imposition of development taxes and fees do not apply to the shoreline master program because such programs are *state programs*. *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d at 396-397. Applying the holdings and rationale of *Citizens* to this case, RCW 4.16.160 is dispositive of the Schencks' statute of limitations argument. RCW 4.16.160 provides, in part:

> **[T]here shall be no limitation to actions brought in the name or for the benefit of the state**, and no claim of right predicated upon the lapse of time shall ever be asserted against the state . . . .

(Emphasis added)

The Schencks' unauthorized development is a continuing violation of the SMA and the County's Shoreline Master Program and/or CAO. Every day the Schencks' unauthorized development continues is a violation. *See*, *Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006) (Continuing violation doctrine allowed recovery where original trespass occurred decades earlier).

The Schencks have failed to meet their burden of proof under RCW 36.70C.130(1). The Hearing Examiner did not err.

2. *The Schencks Had the Burden of Proof*

The Schencks assert the burden of proof before the Hearing Examiner was solely upon the County.

The Schencks rely upon the administrative decision in *Twin Bridge Marine Park, LLC v. Department of Ecology,* 2002 WL 1650523, SHB Nos. 01-016 and 01-017 (Findings of Fact, Conclusions of Law and Order, July 17, 2002). However, this administrative decision was reversed on appeal. *Twin Bridge Marine Park, LLC v. Department of Ecology*, 130 Wn.App. 730, 125 P.3d 155, affirmed 162 Wn.2d 825, 175 P.3d 1050 (2008). *Twin Bridge Marine Park* is also distinguishable because it involved action by DOE to invalidate *an existing permit* issued by a county and issue fines for non-compliance with the SMA. Burden of proof

was briefly referenced in the administrative decision, but was not an issue litigated in the administrative decision or on judicial review.

The Schencks also cite WAC 461-08-500(3) as authority:

> Persons requesting review pursuant to RCW 90.58.180(1) and (2) shall have the burden of proof in the matter. The issuing **agency** shall have the initial burden of proof in cases involving penalties or regulatory orders.

(Emphasis added)

WAC 461-08-500 applies to the procedures followed by the Shorelines Hearings Board, which reviews cases *de novo*. The term "agency" used in WAC 461-08-500(3) is limited to "any *state* governmental agency." WAC 461-08-305(1). A county falls within the defined term "local government." WAC 461-08-305(7). The burden of proof provision in WAC 461-08-500(3) is not applicable to local government proceedings before a hearing examiner.

It is undisputed the Schencks conducted development within the Columbia River shoreline and within a critical area. The SMA, the County's Shoreline Master Program and the County's CAO prohibited this development, unless a permit was obtained or an exemption was granted. RCW 90.58.140; WAC 173-27-040; WAC 173-27-050; DCC 19.18.050; DCC 19.18.030.

Under RCW 90.58.140(7) the proponent seeking an SMA development permit has the burden of proving the policies and regulations of the SMA have been met. The statute also places the burden of proof on any party challenging the granting or denial of a permit. *See also*, WAC 173-27-140. Similarly, the proponent of development has the burden of proving the development is exempt from permitting. WAC 173-27-040(1)(c).

The evidence submitted to the Hearing Examiner by the County regarding the Schencks' development and the lack of any permits, exemption determinations or other development approvals was substantial. In Finding of Fact 20, the Hearing Examiner gave no weight to certain hearsay evidence submitted by the Schencks and found some evidence "not credible." CP 552; AR 515. In response to the Schencks' argument before the Hearing Examiner on burden of proof, the Hearing Examiner further held at Conclusion of Law 4:

> Even if the burden of proof is placed upon the County in this proceeding, **the County has clearly met that burden of proof and has proven all allegations supporting the Notice of Land Use Violations and Order to Comply issued July 3, 2012, by clear and convincing evidence**.

CP 559; AR 522. (Emphasis added)

The scheme of the SMA clearly, and rightfully, places the burden of proof on the Schencks to demonstrate they did not develop within the shoreline, or they obtained all necessary permits, exemption determinations and other approvals for their actual development activities. The Schencks failed to present any evidence to controvert the factual and legal grounds for the NOV.

The Schencks have failed to meet their burden of proof under RCW 36.70C.130(1). The Hearing Examiner did not err.

3. *The Hearing Examiner's Weighing of Evidence and Determining Credibility is Entitled to Deference*

The Schencks submitted evidence to the Hearing Examiner regarding statements made by other people, including statements by the their consultants, by Bob Steele, a former DFW employee, and by Joe Williams, a former employee of the County.[9] The Schencks' third issue under Assignments of Error in their Brief of Appellants states:

> Did the Hearing Examiner err in ruling that certain testimony by Cathy Schenck concerning what she was told regarding permitting for boat lifts would be given no weight?

The Schencks provide limited argument on this issue at pages 19-20 in their Brief and do not cite any legal authority.

[9] The transcript of the proceedings before the Hearing Examiner was not designated by the Schencks in the Appellants' Designation of Clerk's Papers. Mrs. Schenck's testimony is not part of the record before this Court.

Contrary to the Schencks' argument, the Hearing Examiner did admit hearsay evidence. However, the Hearing Examiner gave *no weight* to hearsay evidence regarding statements of the Schencks' consultants and Bob Steele. The Hearing Examiner also held that hearsay evidence regarding the statements of Joe Williams may fall within an exception to the hearsay rule, but the evidence regarding the alleged statements was not credible. The Hearing Examiner entered Finding of Fact 20:

> Ms. Schenck's live testimony at the hearing, as well as her Declaration, contained numerous hearsay statements. The Hearing Examiner gives no weight to those hearsay statements presented in Ms. Schenck's testimony attributed to Bob Steele and Bob and Tama Magnussen. And while the statements attributed to Joe Williams may be outside the hearsay exemption, the Hearing Examiner finds that those alleged statements of Mr. Williams are not credible.

The Hearing Examiner was the finder of fact in the proceedings below and had fact-finding discretion regarding credibility and the weight of evidence. The evidence before the Hearing Examiner is to be considered by this Court in the light most favorable to the County. *Lauer v. Pierce County*, 173 Wn.2d at 253; *Julian v. City of Vancouver*, 161 Wn.App. at 625; *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. at 768.

The record before the Hearing Examiner contains a detailed and lengthy submittal by the County's staff refuting the assertions made by Mrs. Schenck in her signed declaration and during her testimony. CP 473-531; AR 436-494. The materials include the Declaration of Joe Williams and permit documents refuting Mrs. Schenck's assertions. CP 492-502; AR 455-465. The materials include the Declaration of Rich Poole, Douglas County building inspector, and permit documents refuting Mrs. Schenck's assertions. CP 504-518; AR 467-481. The materials also include correspondence between the Corps and the Schencks regarding the Schencks' lack of compliance with federal requirements. CP 520-531; AR 483-494.

The evidentiary record before the Hearing Examiner contains the bare, self-serving assertions of Mrs. Schenck and the contravening detailed, specific and documented evidence submitted by the County. The Schencks' allegations regarding telephonic approval of unreviewed plans by agencies directed to preserve and protect the Columbia River, its shorelines and aquatic life forms are not just lacking credibility, they strain believability.

The Hearing Examiner is entitled to deference in his fact-finder's role evaluating the weight and credibility of the evidence.

Families of Manito v. City of Spokane, 172 Wn.App. 727, 740, 291 P.3d 930, 936 (2013); *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn.App. 633, 641-42, 234 P.3d 214, 218 (2010); *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. at 768, 783; *Timberlake Christian Fellowship v. King County*, 114 Wn.App. at 180-181.

The Schencks have failed to meet their burden of proof under RCW 36.70C.130(1). The Hearing Examiner did not err.

E. *The Schencks' Analysis Regarding Specific Development Activities is Erroneous*

The Schencks' Brief limits their issues and argument to violations regarding the dock, boat lift, and the concrete wall with attached fence. Any challenges to the remaining violations in the NOV have been abandoned.

1. *The Dock*

The Schencks present no legal authority for their argument regarding the dock. They contend the 1999 SMA exemption issued by the County and the HPA issued by DFW authorizes the dock they installed because "cost was kept below $10,000"[10] and the

[10] The Schencks believed the dock would cost $7,000 when they submitted their JARPA, but the cost of complying with the requirements of the HPA increased the cost to over $10,000. CP 411-412; AR 374-375. The Schencks presented no evidence regarding the actual cost of the

County did not rescind the exemption. However, the exemption issued by the County contained the following language:

> Exemption is **based on plans received** from the applicant. **Any changes should be reviewed by this department** to ensure continued compliance with goals, policies and requirements of the shoreline management act and master program, **and that the exemption is still valid**. **The applicant is responsible for obtaining and complying with all federal, state and local permits required.**

CP 495-502; AR 458-465 (Emphasis added).

The HPA transmittal letter from DFW to the Schencks warned the Schencks they were responsible to see that "all provisions within this HPA permit are strictly followed at all times." CP 435; AR 398. Paragraph 6 of the HPA provided as follows:

> **PROJECT ACTION (AND NEW PERMIT REQUIRED FOR MODIFICATIONS OR FUTURE WORK):** This HPA authorizes the construction **ONE** (1) rectangular-shaped combination floating dock and moveable ramp system consisting of: one (1) "minimum" 24 foot long by maximum 3 foot wide fully "open grated" aluminum moveable ramp **and** one (I) "maximum" 20 foot long by maximum 8 foot wide rectangular float section (with required minimum 36-inch wide 60% ambient light grid and bright white marine grade floatation),.**AND** the installation or driving of a ***"maximum"*** of two (2) white PVC encapsulated pilings, and the optional placement of two (2) large dock anchors and appropriately sized anchor chains (in combination with **OR** in lieu of the pilings) within

---

dock and related structures installed in 2000. This vague assertion by the Schencks highlights the need and public policy for the required review by the County, DFW and the Corps.

> the OHWL of the Columbia River upon the Carey &Cathy Schenck property only. ***Any modifications to this project or future work within, below* or *over the OHWL will require a separate HPA from the Washington Department of Fish and Wildlife (WDFW).***
>
> CP 369; AR 332 (All emphasis original).

The Corps application acknowledgement stated, "Since a Department of the Army permit is necessary for this work, **do not commence construction before the permit has been issued**." (Emphasis added) Acknowledgement Letter, CP 524; AR 487.

The Schencks knew they were installing a dock and related structures that did not conform to the exemption issued by the County and the HPA issued by the DFW. The Schencks knew they had not obtained a required federal permit from the Corps. Mr. Schenck is a Principal Plant Electrical Engineer for the PUD. CP 410; AR 373. As a high-level engineer, Mr. Schenck certainly must be familiar with the need to comply with government and industry standards and permitting requirements, and the role of the Corps.

The Schencks' allege excuses for their failure to comply with permitting requirements: 1) the County and DFW had "full knowledge" of their changed plans; 2) the county and DFW orally approved such changes over the telephone without any review of

written plans and details; and 3) the County refused to inspect the Schencks' development. The Schencks contend their allegations are undisputed. However, their allegations *were clearly disputed* in the record. Declaration of Joe Williams, CP 491-493; AR 454-456; Declaration of Rich Poole, CP 504-518; AR 467-481; Written comments by DFW, CP 379-374; AR 342-343; Staff Report, CP 120-124; AR 83-87; Supplemental Staff Report, CP 473-477; AR 436-440. The building permit has a hand written notation, "Project Not Started," and there are no notes, comments or other indications that the Schencks ever called for an inspection or notified the County that a different dock and configuration was being installed. CP 507-510; AR 470-473.

The Hearing Examiner gave *no weight* to the Schencks' testimony regarding "oral approval" of the dock changes by Bob Steele and found their testimony regarding "oral approval" by Joe Williams to be "not credible." *See,* Section III.D.1 in the County's Argument, *supra*.

The unpermitted dock installed by the Schencks diminishes habitat for wildlife and aquatic species. Written Comment, CP 378-389; AR 341-352. The Schencks' allegations regarding telephonic approval of unreviewed plans by agencies directed to preserve and

protect the Columbia River, its shorelines and aquatic life forms are not just lacking credibility, they are unbelievable.

There is substantial evidence supporting the violation. The Schencks have failed to meet their burden of proof under RCW 36.70C.130(1). The Hearing Examiner did not err.

2. *The Boat Lift*

The Schencks installed the boat lift in May of 2000, clearly within five years of their unpermitted dock construction. Based upon the materials submitted at the hearing below, the total cost of the boat lift was $6,010.09. Reed Shoreline Corporation Invoice, CP 455; AR 418.

The Schencks contend they were "repeatedly told" the boat lift installation did not require any permitting.[11] The County presented contravening evidence. Declaration of Joe Williams, CP 491-493; AR 454-456; Declaration of Rich Poole, CP 504-518; AR 467-481; Written comments by DFW, CP 379-380; AR 342-343; Violation letter from Corps, CP 99-100; AR 62-63; Staff Report, CP 120-124; AR 83-87; Supplemental Staff Report, CP 478; AR 441.

[11] The Schencks allege they were told by their consultants that a permit was not required. The Schencks allege both Mr. Steele from the Department and Mr. Williams from the County also stated a permit was not required. This evidence was given "no weight" or found "not credible" by the Hearing Examiner, as discussed above in the County's argument.

As waterward development, the boat lift was subject to the SMA and the County's former Shoreline Master Program. The boat lift also required an HPA issued by the DFW[12] and a federal permit issued by the Corps.[13]

Under the SMA, "substantial development" within shorelines is **prohibited without first obtaining a substantial development permit** from the local jurisdiction. RCW 90.58.140(2). "Substantial development" was defined in 2000 as "**any development** of which the total cost or fair market value exceeds **five thousand dollars . . . ."** RCW 90.58.030(2) (Emphasis added). The County's former Shoreline Master Program and implementing regulations, effective in 2000, set *a lower threshold* of $1,000 as the fair market value limitation on substantial development. Douglas County Shoreline Master Program (1975), CP 353; AR 316. Neither the SMA or the Shoreline Master Program list a boat lift as exempt from the definition of substantial development, or otherwise not subject to SMA permitting requirements.

The boat lift installed by the Schencks exceeded the fair market value dollar thresholds of both the SMA and the Shoreline

[12] Written Comments, CP 379; AR 342.
[13] Violation Letter, CP 99; AR 62.

Master Program and , therefore, constituted substantial development. Further, the boat lift was installed within five years after the dock and, therefore, requires a Substantial Development Permit. RCW 90.58.030(2)(e)(vii)(B) sets outs the SMA exemption for freshwater docks and provides:

> [I]f subsequent construction having a fair market value exceeding two thousand five hundred dollars occurs within five years of completion of the prior construction, the subsequent construction shall be considered a substantial development for the purpose of this chapter;

The Schencks admit they intended to install a dock, related structures and a boat lift as part of one project. The cost of the project, based on the evidence submitted by the Schencks would have been in excess of $13,000. CP 411-412; AR 374-375. When any part of a proposed development project does not qualify for an exemption, then a substantial development permit is required for the entire development project. WAC 173-27-040(1)(d).

The Schencks' argument at pages 16-20 of their Brief regarding the applicability of an SMA conditional use permit is not relevant to the Schencks' violation. A boat lift could have been permitted through a conditional use permit, a substantial development permit or an exemption, depending upon the fair market value and other circumstances as discussed above. *See*,

Staff Report Chart. CP 483; AR 446. However, the Schencks' boat lift constituted "substantial development" based upon its fair market value and proximity in time to the dock construction, as discussed above. A substantial development permit was required. As waterward development, the boat lift also required an HPA issued by DFW and a federal permit issued by the Corps.The Schencks did not obtain any permits or exemptions.

The Schencks have failed to meet their burden of proof under RCW 36.70C.130(1). The Hearing Examiner did not err.

3. *The Concrete Wall and Attached Fence*

The Schencks did not provide a date on which they constructed the concrete retaining wall and attached fence along the shoreline. Based upon aerial photographs, the concrete retaining wall and attached fence were constructed between the dates of June 6, 2003, and July 30, 2005. Photographs, CP 169-170; AR 132-133; Staff Report, CP 132; AR 95.

The Schencks assert the concrete retaining wall and fence were exempt from SMA because fair market value was "far below

the $2500 threshold."[14] The former Shoreline Master Program exempted development having a fair market value of under $1,000.

The concrete wall is 40 feet long, is located 27 feet from the OHWM, was constructed by the Schencks themselves, and cost "approximately $1,000." Declaration of Cathleen Schenck, CP 416-417; AR 379-380. No evidence of "fair market value," as defined under WAC 173-27-030(8), was submitted by the Schencks.

The Schencks also claim the concrete wall and fence were exempt under WAC 173-27-040(2)(g), which provides:

> (2) The following developments shall not require **substantial development permits**:
>
> > (g) Construction on shorelands by an owner, lessee or contract purchaser of a single-family residence for their own use or for the use of their family . . . . "Single-family residence" means a detached dwelling designed for and occupied by one family **including those structures and developments within a contiguous ownership which are a normal appurtenance** . . . . On a statewide basis, normal appurtenances include **a garage; deck; driveway; utilities; fences; installation of a septic tank and drainfield and grading** which does not exceed two hundred fifty cubic yards and which does not involve placement of fill . . . .

[14] In their argument the Schencks confuse an "exemption" under the SMA, which is a form of permit, with a "letter of exemption" submitted when the Corps has waterward jurisdiction for federal permitting. The concrete retaining wall and fence are clearly landward from the OHWM. The County does not contend the Schencks failed to obtain a "letter of exemption" for this component of their development.

(Emphasis added)

Exemptions under the SMA are not self-executing. WAC 173-27-040(1)(a). WAC 173-27-040(2) does not eliminate the requirement to applying for and obtaining an exemption from the County.

Even if the Schencks had applied for an exemption under the SMA, the County's Shoreline Master Program does not provide that concrete retaining walls are "normal appurtenances" for single-family residences. CP 353-358; AR 316-317. The wall is approximately 2-3 feet in height, and is located approximately 115 feet away from the home. A concrete retaining wall located 115 away from a home and 27 feet from the OHWM is not considered a "normal appurtenance." CP 480; AR 443.

Even if the Schencks could have qualified for either exemption the assert, they did not apply for any exemption under the SMA. The County did not have an opportunity to review their plans, determine whether 'fair market value" and or "normal appurtenance" was a basis for issuing an exemption, or to provide for shoreline mitigation required by the development.

This SMA analysis is only applicable if the concrete retaining wall and fence were constructed prior to July 27, 2003. If

constructed after July 27, 2003, the development must comply with the County's CAO requirements. The County's CAO does *not* provide exemptions for retaining walls, fences or "normal appurtenances," as claimed by the Schencks. DCC 19.18.030, CP 264; AR 227. Additionally, the CAO imposes a minimum 50' buffer area on the Columbia River shoreline. DCC 19.18B.050, CP 282; AR 245. The concrete wall and fence are within the buffer area and were *prohibited development* under the County's CAO.

The Schencks have failed to meet their burden of proof under RCW 36.70C.130(1). The Hearing Examiner did not err.

F. *The County is Entitled to an Award of Fees and Costs*

This appeal by the Schencks is frivolous, as it has been advanced without reasonable cause. There are no debatable issues over which reasonable minds could differ. The evidence of the Schencks' unauthorized development of the Columbia River shoreline was undisputed. They have failed to prove any of the standards for relief under RCW 36.70C130(1).

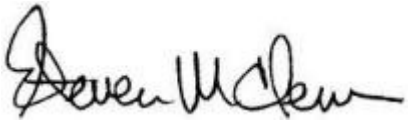
The County should be awarded its reasonable attorney's fees and costs incurred in this appeal pursuant to RAP 18.9(a) and/or RCW 4.84.185.

IV. CONCLUSION

The Schencks' entire argument is an attempt to substitute their administrative appeal before the Hearing Examiner for the County's required application process under which it reviews and determines exemptions under the SMA and/or its CAO, and imposes conditions to protection the Columbia River shoreline.

The Schencks have failed to meet their burden of proof on all issues raised in their Brief of Appellants. The Hearing Examiner did not err. The decision of the superior court dismissing the Schencks' Land Use Petition should be affirmed.

Respectfully submitted this 5th day of December, 2013.



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For Respondent Douglas County

APPENDIX

DOUGLAS COUNTY CODE SECTIONS
(Relevant Excerpts)

19.18.030 Exemptions.
The activities enumerated below are exempt from the provisions of this chapter. The final determination of whether an activity is exempt is an administrative function of the director.

A. Normal maintenance or repair of existing buildings, structures, roads or development, including damage by accident, fire or natural elements. Normal repair of buildings and structures involves restoring to a state comparable to the original condition including the replacement of walls, fixtures and plumbing; provided that the value of work and materials in any twelve-month period does not exceed twenty-five percent of the value of the structure prior to such work as determined by using the most recent ICBO construction tables, the repair does not expand the number of dwelling units in a residential building, the building or structure is not physically expanded, and, in the case of damaged buildings and structures, a complete application for repair is accepted by the department within six months of the event and repair is completed within the terms of the permit;

B. Emergency construction necessary to protect property from damage by the elements. An emergency is an unanticipated event or occurrence which poses an imminent threat to public health, safety, or the environment, and which requires immediate action within a time too short to allow full compliance. Once the threat to the public health, safety, or the environment has dissipated, the construction undertaken as a result of the previous emergency shall then be subject to and brought into full compliance with this chapter;

C. Agricultural activities normal or necessary to general farming conducted according to industry-recognized best management practices including the raising of crops or the grazing of livestock;

D. The normal maintenance and repair of culverts and bridges that does not involve the use of heavy equipment, and that does not require permit issuance from other local, state or federal agencies.

19.18.070 Mitigation, maintenance, monitoring and contingency.

A. Mitigation, maintenance, monitoring and contingency plans shall be implemented by the developer to protect resource lands, critical areas and their buffers prior to the commencement of any development activities.

B. The property owner shall be responsible for reporting to the department and undertaking appropriate corrective action when monitoring reveals a significant deviation from predicted impacts or a failure of mitigation or maintenance measures.

19.18B.030 Designation.

All existing lands, shorelands and waters of Douglas County classified according to the provisions in DCC Section 19.18B.020, as determined by the review authority, are designated as wetlands.

19.18B.035 Wetland management and mitigation plan.

A. A wetland management and mitigation plan shall be required when impacts to a wetland are unavoidable during project development.

B. Wetland management and mitigation plans shall be prepared by a biologist or wetland ecologist who is knowledgeable of wetland conditions within North Central Washington.

C. The wetland management and mitigation plan shall demonstrate, when implemented, that there shall be no net loss of the ecological function or acreage of the wetland.

D. The wetland management and mitigation plan shall identify how impacts from the proposed project shall be mitigated, as well as the necessary monitoring and contingency actions for the continued maintenance of the wetland and its associated buffer.

E. The wetland management and mitigation plan shall contain a report that includes, but is not limited to, the following information . . . .:

F. Mitigation ratios shall be used when impacts to wetlands cannot be avoided . . . .

19.18B.040 Application requirements.
Development permit applications shall provide appropriate information on forms provided by the review authority, including without limitation the information described below. Additional reports or information to identify potential impacts and mitigation measures to wetlands may be required if deemed necessary.

Development within a wetland or its buffer shall provide the following information:

1. Wetland boundary survey and rating evaluation pursuant to DCC Section 19.18B.020;

2. Wetland management and mitigation plan pursuant to DCC 19.18B.035 . . .

19.18B.050 General standards.
The following minimum standards shall apply to all development activities occurring within designated wetlands and/or their buffers.

A. Wetlands will be left undisturbed, unless the development proposal involves appropriate mitigation and enhancement measures as determined on a site-specific basis.

B. Appropriate buffer areas shall be maintained between all permitted uses and activities and the designated wetland . . . .

19.18B.060 Specific standards.
The following standards shall apply to the activity identified below, in addition to the general standards outlined in DCC Section 19.18B.050.

A. Docks. Construction of a dock, pier, moorage, float or launch facility may be authorized subject to the following standards:

1. The dock/facility shall be in substantial conformance with the Douglas County shoreline master program;

2. The dock/facility and landward access shall not significantly alter the existing wetland or buffer vegetation; and,

3. For all land divisions, dock/facilities shall be designed, designated and constructed for joint use.

B. Road Repair and Construction. . . . .

C. Developments within a wetland buffer shall comply with the following minimum standards . . . .

D. Stream Crossings. . . .

19.18C.020 Identification.
A. All fish and wildlife habitat conservation areas shall be identified by Douglas County to reflect the relative function, value and uniqueness of the habitat area . . . .

B. Fish and wildlife habitat conservation areas include . . .
4. Waters of the state . . .

Identification and regulation of all wetlands, riparian areas, lakes, ponds, streams and rivers shall be in accordance with DCC Chapter 19.18B, Resource Lands Critical Areas—Wetlands.

19.18C.030 Designation.

All existing areas of unincorporated Douglas County identified as stated in DCC Section 19.18C.020, as determined by the review authority, are designated as fish and wildlife habitat conservation areas.

19.18C.035 Habitat boundary survey.

A. A wildlife habitat boundary survey and evaluation shall be conducted by a fish or wildlife biologist . . . .

19.18C.037 Fish/wildlife habitat management and mitigation plan.

A. A fish/wildlife habitat management and mitigation plan shall be prepared by a biologist who is knowledgeable of wildlife habitat within North Central Washington.

B. The fish/wildlife habitat management and mitigation plan shall demonstrate, when implemented, that the net loss of ecological function of habitat is minimal.

C. The fish/wildlife habitat management and mitigation plan shall identify how impacts from the proposed project shall be mitigated, as well as the necessary monitoring and contingency actions for the continued maintenance of the habitat conservation area and any associated buffer.

D. The fish/wildlife habitat management and mitigation plan shall contain a report containing, but not limited to, the following information . . . .

19.18C.040 Application requirements.

Development permit applications shall provide appropriate information on forms provided by the review authority, including without limitation the information described below. Additional reports or information to identify potential impacts and mitigation measures to fish and wildlife habitat conservation areas may be required if deemed necessary.

Projects processed according to DCC Section 14.10.030 or Section 14.10.040 within a fish or wildlife habitat conservation area or its buffer shall provide the following information . . . .

19.18C.050 General standards.
The following minimum standards shall apply to all development activities occurring within designated habitat conservation areas and their associated buffers . . . .

19.18C.060 Specific standards.
The following standards shall apply to the activity identified below, in addition to the general standards outlined in DCC Section 19.18C.050.

A. Road Repair and Construction. . . .

B. All developments processed according to DCC Section 14.10.020, 14.10.030 or Section 14.10.040 authorized within a designated habitat conservation area shall comply with the following minimum standards . . . .