

70218-1-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

DAVID C. COTTINGHAM and JOAN S. COTTINGHAM,
Appellants

v.

RONALD J. MORGAN and KAYE L. MORGAN, husband and wife,
MARK COSTELLO, WHATCOM COUNTY and WHATCOM
COUNTY BUILDING SERVICES DIVISION of PLANNING AND
DEVELOPMENT SERVICES,
Respondents.

APPEAL FROM
SUPERIOR COURT OF WASHINGTON,
Whatcom County No. 12-2-03029-1

HONORABLE DAVID NEEDY,
VISITING SKAGIT COUNTY
SUPERIOR COURT JUDGE

2011 OCT 28 PM 4:50

COURT OF APPEALS
STATE OF WASHINGTON
K

APPELLANT COTTINGHAMS' REPLY BRIEF

DAVID C. COTTINGHAM WSBA
No. 9553, *pro se* and Attorney for
Plaintiff Joan Cottingham
Cottingham Law Office PS
103 East Holly Street, Suite 418
Bellingham, Washington 98225
(360) 733-6668

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

COTTINGHAMS' REPLY 1

I. CONCLUSION No. 9'S HOLDING REGARDING LACK OF JURISDICTION OVER THIS LUPA REVIEW OF REQUIRED AGENCY INTERPRETATION DECISIONS REGARDING MORGAN'S COMPLIANCE WITH A CONDITIONAL EXEMPTION AND DRIVEWAY LOCATION DENIAL REMAINS ERROR WHEN ENFORCEMENT WAS MANDATED UNDER AN ORDINANCE WHICH ALSO RENDERS THE DATE OF THE EXEMPTION'S EFFECTIVE DATE AS "THE DATE OF LAST ACTION REQUIRED ON THE SHORELINE EXEMPTION." 1

 A. *Timeliness and Finality*. FOR PURPOSES OF RCW 36.70C.020(2)(B) (*INTERPRETATION DECISIONS*) AND (C)(*ENFORCEMENT*) FINALITY IS ADJUSTED BY WHATCOM COUNTY ORDINANCE AT WCC 23.60.190.a.3 (Finding/Conclusion 7 and 9)..... 1

 B. *Timeliness and Finality*. FOR PURPOSES OF RCW 36.70C.020(2)(B) (*INTERPRETATION DECISIONS*) AND (C)(*ENFORCEMENT*) FINALITY IS ALSO ADJUSTED BY WHATCOM COUNTY ORDINANCE AT WCC 23.05.02.B. (Finding/Conclusion 7 and 9)..... 2

 C. *Timeliness and Finality*. FOR PURPOSES OF RCW 36.70C.020(2)(B) (*INTERPRETATION DECISIONS*) AND (C)(*ENFORCEMENT*) FINALITY IS ALSO ADJUSTED BY REQUIREMENT OF REVISION ACTION FOR ANY ACTION IN VIOLATION OF AN EXEMPTION CONDITION OR PRESENTING SUBSTANTIAL CHANGE TO AN SHORELINE EXEMPTION CONDITION. WCC 23.60.170.A. (Finding/Conclusion 7 and 9). 2

II. IF THE SHORELINE ORDINANCE DELAYS THE FINAL LAND USE DECISION TO ENSURE ENFORCEMENT, THE INTIAL DECISION WAS NOT THE "FINAL LAND USE DECISION" UNDER RCW 36.70C.030., .040.WHICH MAY BE APPEALED..... 3

III. RES JUDICATA OFFERS NO SUPPORT FOR DISMISSAL WHERE THE NATURE AND PURPOSES OF REVIEW AND THE IDENTITY OF PARTIES IS DIFFERENT. 4

IV. NO LITIGATION INCLUDING DEFERENCE TO WHATCOM COUNTY PLANNING AND DEVELOPMENT'S EXEMPTION CONDITION DECISIONS BEFORE RESORT TO EQUITABLE RELIEF CAN BE FOUND IN THE PLEADINGS, FINDINGS AND CONCLUSIONS IN 09-2-01773-1 IDENTIFIED IN FINDING Nos.13 and 14 AS ADDRESSING ALL ISSUES..... 9

V. NO LITIGATION INCLUDING SATISFACTION OF MORGANS' EXHAUSTION BURDEN BEFORE RESORT TO EQUITABLE RELIEF CAN BE FOUND IN THE PLEADINGS, FINDINGS AND CONCLUSIONS IN 09-2-01773-1 IDENTIFIED IN FINDING Nos.13 and 14 AS ADDRESSING ALL ISSUES. (Assignment No. 4)..... 10

VI. THE DISMISSAL ORDER EMPLOYED NEITHER THE SCOPE NOR STANDARDS OF RCW 36.70C.120 AND .130,E ALLOWING "OPPORTUNITY, CONSISTENT WITH DUE PROCESS, TO CREATE A RECORD," BEFORE APPLICATION OF RES JUDICATA. 11

VII. THE REQUIREMENT OF A DETERMINATION AT FINAL OCCUPANCY IS STRONG ADDITIONAL EVIDENCE OF A LAND USE DECISION AT SUCH TIME AND IT IS ERROR TO FAIL TO SECURE THE ADMINISTRATIVE RECORD. (*Assignment No. 3*) 12

VIII. JURISDICTION WAS NOT AFFECTED BY ACTION FRUSTRATING COTTINGHAMS' ADMINISTRATIVE REMEDIES. 13

IX. THE JUDGMENT FOR WRONGFUL TIMBER TRESPASS WASTE ENTERED WITHOUT DEFENSE BY MORGANS THAT THE TRESPASS WAS CASUAL OR INVOLUNTARY, OR THAT THE MORGAN HAD PROBABLE CAUSE TO BELIEVE THAT THE LAND ON WHICH SUCH TRESPASS WAS COMMITTED WAS HIS." RCW 64.12.040..... 14

X. AWARDING FEES TO MORGANS REMAINS ERROR. (*Assignment No. 8*)
14

XI. DISMISSAL SHOULD BE VACATED AND REVIEW ORDERED UNDER RCW 36.70C.140 and WCC 20.92..... 19

XII. CONCLUSION..... 20

APPENDIX 1

TABLE OF AUTHORITIES

Cases

Asche v. Bloomquist, 132 Wn.App. 784, 133 P.3d 475 (Div. 2, 2006).....	13
Biggs v. Vail, 119 Wn.2d 129, 133, 830 P.2d 350 (1992).....	17
Durland v. Skagit County, 175 Wn. App. 316, 305 P.2d 246 (2013).....	20
Ferguson v. City of Dayton.....	13
Hayes v. City Of Seattle, 131 Wn.2d 706 (1997).....	5
Jensen v. Torr, 44 Wn. App. 207, 721 P.2d 992 (1986)	11
Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)..	7
Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 962, 954 P.2d 250 (1998)	7
Nieshe v. Concrete Sch. Dist., 129 Wn. App. 632, 641-42, 127 P.3d 713 (2005)	7
Robinson v. City of Seattle, 119 Wn.2d 34, 58, 830 P.2d 318 (1992)	7
Shanks v. Dressel, 540 F .3d 1082, 1088-89 (9th Cir. 2008)	7
Sintra, Inc. v. City of Seattle, 119 Wn.2d 1,23.829 P.2d 765 (1992)	7
Tiger Oil v. Dept. of Licensing, 88 Wn. App. 925 (1997)	16

Statutes

RCW 36.70C.080	13
WCC 23.05.02.B	4
WCC 23.60.170.C.2	4, 21

Whatcom County Shoreline Ordinance

WCC 23.110.190 (2)	1
WCC 23.110.190 S	1
WCC 23.50.02.B	1, 4, 5, 9, 16, 17
WCC 23.60.190.....	5
WCC 23.60.190(a)(3).....	1, 5
WCC 23.60.190.a.3.....	1, 9
WCC 23.60.190.A.3	4, 5
WCC 23.60.190.A.3.C.....	4

International Building and Residential Code Regulations

IBC/IRC §110.2	20
----------------------	----

Whatcom County Zoning Ordinance

WCC 20.92.....	20
----------------	----

COTTINGHAMS' REPLY

I. CONCLUSION No. 9'S HOLDING REGARDING LACK OF JURISDICTION OVER THIS LUPA REVIEW OF REQUIRED AGENCY INTERPRETATION DECISIONS REGARDING MORGAN'S COMPLIANCE WITH A CONDITIONAL EXEMPTION AND DRIVEWAY LOCATION DENIAL REMAINS ERROR WHEN ENFORCEMENT WAS MANDATED UNDER AN ORDINANCE WHICH ALSO RENDERS THE DATE OF THE EXEMPTION'S EFFECTIVE DATE AS "THE DATE OF LAST ACTION REQUIRED ON THE SHORELINE EXEMPTION."

A. *Timeliness and Finality.* FOR PURPOSES OF RCW 36.70C.020(2)(B) (*INTERPRETATION DECISIONS*) AND (C)(*ENFORCEMENT*) FINALITY IS ADJUSTED BY WHATCOM COUNTY ORDINANCE AT WCC 23.60.190.a.3 (Finding/Conclusion 7 and 9).

Cottinghams provided WCC 23.50.02.B and WCC 23.60.190 in the Appendix to their Opening Brief and again provide them for the direction provided in WCC 23.60.190(a)(3) that, in Whatcom County, the effective date of a shoreline *exemption* is "the date of last action required on the shoreline permit *or exemption* and all other government permits and approvals." (*emphasis is added*). The "date of the last action" is the date of a, RCW 36.70C.030 "Land Use Decision" because the same ordinance that delays the exemption date also makes mandatory the enforcement of permit conditions, at WCC 23.50.02.B. The significance of the last date of land use decision regarding interpretation and enforcement review of the condition is for Shoreline Exemption Condition enforcement,

here that is a material Land Use Decision in the specific area of Morgans' waste of Cottinghams improvements for a driveway in its place although the condition denied within five feet of the boundary.

B. Timeliness and Finality. FOR PURPOSES OF RCW 36.70C.020(2)(B) (*INTERPRETATION DECISIONS*) AND (C)(*ENFORCEMENT*) FINALITY IS ALSO ADJUSTED BY WHATCOM COUNTY ORDINANCE AT WCC 23.05.02.B. (Finding/Conclusion 7 and 9)

Regarding timeliness of the petition, Morgans identify no date of an RCW 36.70C.020(2)(c) decision for void enforcement of their shoreline exemption condition or to relieve from requirement for revision. They also identify no date of an RCW 36.70C.020(2)(b) interpretive or declaratory decision " regarding the application to [their own *and* Cottinghams'] property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property," including the mandatory shoreline exemption condition denying their driveway within five feet of their boundary or location of that boundary.

C. Timeliness and Finality. FOR PURPOSES OF RCW 36.70C.020(2)(B) (*INTERPRETATION DECISIONS*) AND (C)(*ENFORCEMENT*) FINALITY IS ALSO ADJUSTED BY REQUIREMENT OF REVISION ACTION FOR ANY ACTION IN VIOLATION OF AN EXEMPTION CONDITION OR PRESENTING SUBSTANTIAL CHANGE TO AN SHORELINE EXEMPTION CONDITION. WCC 23.60.170.A. (Finding/Conclusion 7 and 9).

WCC 23.60.170.A requires revisions.

"A revision is required whenever the applicant/proponent proposes substantive changes to the design, terms or conditions of a project from that which is approved in the permit and/or statement of exemption. Changes are substantive if they materially alter the project in a manner that relates to its conformance to the terms and conditions of the permit, this program or the Act. Changes that are not substantive in effect do not require a revision."

The section identifies the moment of an agency decision to relieve Morgans from seeking a revision even while revealing existence of a remedy before resort to equity, by redress through revision:

An application for a revision to a shoreline permit shall be submitted to the administrator. The application shall include detailed plans and text describing the proposed changes. The county decision maker that approved the original permit may approve the request upon a finding that the proposed changes are within the scope and intent of the original approval, and are consistent with this program and the Act.

WCC 23.60.170.C.2 (emphasis added). If the Revision has not occurred, and substantial change occurred by installation of driveway in area wrongfully wasted but denied by the Exemption Condition, revision remains the last action required under WCC 23.60.190.A.3 and WCC 23.05.02.B. WCC 23.60.170.C.2.

II. IF THE SHORELINE ORDINANCE DELAYS THE FINAL LAND USE DECISION TO ENSURE ENFORCEMENT, THE INTIAL

DECISION WAS NOT THE "FINAL LAND USE DECISION"
UNDER RCW 36.70C.030., .040.WHICH MAY BE APPEALED.

Under WCC 23.60.190.A.3 (appendix) the permit issuance date is not the relevant date of the last land use decision when the Shoreline Exemption Condition has attached. The date of a shoreline exemption is "the date of last action required on the ... exemption." Morgans are "responsible for informing the county of the pendency of ...legal actions...[AND] the date of the last action by the county shall be the effective date."

Conditions must also be satisfied prior to occupancy or use of a structure. WCC 23.60.190.A.3.C. Cottinghams alleged that enforcement decisions are required under WCC 23.50.02.B.WCC 23.60.190.A.3 (appendix) offers a second reason to conclude that a RCW 36.70C.020(1)(c) Land Use Decision, enforcement is involved and subject to later-dated review.

III. RES JUDICATA OFFERS NO SUPPORT FOR DISMISSAL
WHERE THE NATURE AND PURPOSES OF REVIEW AND THE
IDENTITY OF PARTIES IS DIFFERENT.

Essential issues and the agency party were missing from the Title Trial precluding application of res judicata to bar review. the nature of the two claims is entirely disparate, one involving limited and exclusive jurisdiction for judicial review focused exclusively on

the propriety of the decision making process as in *Hayes v. City Of Seattle*, 131 Wn.2d 706 (1997).. Where judicial review focuses exclusively on the propriety of the decision making process the quiet title are easily distinguishable. Furthermore, It cannot be said that review sought merely addressed "claims and issues that were litigated, or might have been litigated, in a prior action," if RCW 36.70C.020 decisions by the agency were not even ready to be shown final under WCC 23.50.02.B because of language in WCC 23.60.190.

Proceedings in 09-2-01773-1 never addressed Morgans' burden to show exhaustion after pursuit of agency remedies¹ or agency interpretation and enforcement decisions. RCW 36.70C.020(2)(b),(c). With no pleading or conclusion to such effect it is frivolous to argue that,

"If Cottinghams had taken issue with Morgans' 2006 building permit, which Cottinghams had notice of; they were required to appeal the building permit to a Hearing Examiner and/or the Whatcom County Appeals Board."

The issue is what theories were framed *by Morgans*. The *essential* issues are whether *Morgans* showed the court's deference to agency interpretation and met their own exhaustion of

¹ Cost Management Services v. City of Lakewood, __ Wn. 2d __ (No. 87964-8, Oct. 10, 2013).

remedies burden if the Quiet Title Trial record is scrutinized for claim or issue preclusion. Exhaustion was never Cottinghams' Burden in *Morgans'* approach to an equitable remedy. it is frivolous and without reasonable cause to urge otherwise.²

Dismissal held Cottinghams to Morgans' burden. Conclusion No. 13's holding that "all issues...were tried" IS unsupportable without addressing the importance of *Morgans'* exhaustion of administrative remedies, *and* the importance of the later dates at which action is "final" under Shoreline Management regulations, WCC 23.

Cottinghams' petition clearly asserts Morgans did not exhaust remedies. They did not disclose the need of equity to the agency, including condemnation and insufficient area. (In. Pet. 3.41, 3.45, 3.,48, 3.50, 3.52, pg. 14) Fairly construed, the petition alleges acts by Morgans and expectation of action by an agency on an issue in which Cottinghams' interest is constitutionally protected³,

² Cost Management Services v. City of Lakewood, __ Wn. 2d __ (Slip Opinion, No. 87964-8, Oct. 10, 2013), and *infra*.

³ A protected property interest exists if there is a "legitimate claim of entitlement" to a specific benefit. *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 641-42, 127 P.3d 713 (2005); *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998); *Robinson v. City of Seattle*, 119 Wn.2d 34, 58, 830 P.2d 318 (1992); . *Shanks v. Dressel*, 540 F .3d 1082, 1088-89 (9th Cir. 2008)(Where lack of enforcement follows assurance by ordinance that such conditions will be performed);

occurring on and even beyond Morgans' property, upon Cottingham's property and Morgans' pursuit thereof without required disclosure to the agency. Cottinghams therefore identified a request to review an agency decision to waive Morgans' Exemption Condition violation for its quality as an interpretive and enforcement decision affecting their reliance upon announced assurance by ordinance, in a petition brought as soon as mandated enforcement was actually decided against and administrative remedies had been requested without responsive acceptance of jurisdiction by Whatcom County.

Absent findings and conclusions on Morgans' exhaustion of remedies it was error to dismiss the LUPA petition on the mere fact of prior title litigation. Morgans' argument for application of res judicata fails for the reasons that exhaustion -and findings and conclusions thereon- was required of them and neglected, and also because the issue decided in the title trial was not identical.

The Morgan's cannot resort to equity without such burden met are to (1) insure against premature interruption of the administrative process; (2) allow the agency to yet occur develop

See, Sintra, Inc. v. City of Seattle, 119 Wn.2d 1,23.829 P.2d 765 (1992); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994).

the necessary factual background on which to base a decision; (3) allow exercise of agency expertise in its area; (4) provide for a more efficient process; and (5) protect the administrative agency's autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts.⁴ It is impossible to understand argument that the dismissed review included agency decision review that did not and could not have occurred. They did not even show that decisions had been made by the time of the Title Trial. The petition itself reveals it was filed well *after trial* at the first notice of *later* decisions finalizing agency jurisdiction with the agency's *final* occupancy decision and its required International Building Code finding *-at such time-* that all laws of the jurisdiction were satisfied.⁵ For review of Agency interpretation and enforcement decisions the petition could not have been filed sooner, they had not been made.

Under the specific mandate of WCC 23.50.02.B, Whatcom County's Shoreline Management Program ordinance, driveway location denial was not only a development restriction but *sine qua non* of Morgans' exemption from other shoreline program

⁴ Cost Management Services v. City of Lakewood, ___ Wn. 2d ___ (No. 87964-8, Oct. 10, 2013).

⁵ The

requirements and, for RCW 36.70C LUPA purposes, *final* action regarding it is delayed *as a matter of law* -and compared with initial building permits- to the *last possible date* under WCC 23.60.190.a.3.⁶

The petition's dismissal order would have entered *nunc pro tunc* if its purpose was to resolve *past* agency decisions. Whatcom County Planning and Development is not shown, properly or improperly, to have adopted such findings and conclusions, with or without the requisite deference of the court, yet Morgans apparently urge that civil litigation proceedings accomplished a review of agency decision-making and shoreline condition review.

IV. NO LITIGATION INCLUDING DEFERENCE TO WHATCOM COUNTY PLANNING AND DEVELOPMENT'S EXEMPTION CONDITION DECISIONS BEFORE RESORT TO EQUITABLE RELIEF CAN BE FOUND IN THE PLEADINGS, FINDINGS AND CONCLUSIONS IN 09-2-01773-1 IDENTIFIED IN FINDING Nos.13 and 14 AS ADDRESSING ALL ISSUES.

The decision in *Cost Management Services v. City of Lakewood*, __ Wn. 2d __ (No. 87964-8, Oct. 10, 2013) comments specifically upon a decision rendered on the side yard setback encroachment litigation. After reminding that Washington has long required demonstration of exhaustion of administrative remedies

⁶ " The effective date of a shoreline permit or exemption shall be the date of last action required on the shoreline permit or exemption." wcc 23.60.190.a.3. *Appendix*.

before resort to equitable relief, The Supreme Court reminds that it is error in equity proceedings to fail to demand a showing of pursuit of agency remedies and exhaustion thereof, retaining as essential to any claim for relief from agency decision-making, a showing of the burden to exhaust administrative remedies before resort to the court's equity. To give effect to CR 8 a litigant must plead more than general facts. A complaint must at least identify the legal theories upon which the plaintiff is seeking recovery. *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993). Although inexpert pleading is permitted, insufficient pleading is not. *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986). "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." *Id.*, at 197 (*citation omitted*). *Finesse Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999)

V. NO LITIGATION INCLUDING SATISFACTION OF MORGANS' EXHAUSTION BURDEN BEFORE RESORT TO EQUITABLE RELIEF CAN BE FOUND IN THE PLEADINGS, FINDINGS AND CONCLUSIONS IN 09-2-01773-1 IDENTIFIED IN FINDING Nos.13 and 14 AS ADDRESSING ALL ISSUES. (Assignment No. 4)

Review under RCW 36.70C is in the nature of certiorari which has so long been considered distinct from liability claims as to have been obvious, even obviously waived as a remedy.

"The nature of certiorari is such that its procedure cannot be used to decide damages issues. Therefore, although the certiorari and damages causes of action were included by appellant in the same complaint, they were necessarily decided separately.

Jensen v. Torr, 44 Wn. App. 207, 721 P.2d 992 (1986)

No exhaustion burden is shown even attended to by Morgans' reference to prior title litigation. No pleading, finding, conclusion, effort or evidence demonstrated review of agency decision-making for Morgans' satisfaction of their burden to exhaust administrative remedies before pursuit of equity against Cottinghams' property. Application of res judicata against the Petition is frivolous. Cost Management Services v. City of Lakewood, __ Wn. 2d __ (No. 87964-8, Oct. 10, 2013)

VI. THE DISMISSAL ORDER EMPLOYED NEITHER THE SCOPE NOR STANDARDS OF RCW 36.70C.120 AND .130,E ALLOWING "OPPORTUNITY, CONSISTENT WITH DUE PROCESS, TO CREATE A RECORD," BEFORE APPLICATION OF RES JUDICATA.

RCW 36.70C.120 and .130 would have resulted in rather clear conclusions after a prescribed process which Morgans' summary judgment cannot duplicate. Implicit in Morgans' Response is an assumption that Cottinghams had "opportunity consistent with due Process to create a record" of review of a Land Use Decision as they pursued the forced sale equitable remedy in the Title Trial.

Morgans' argument that they actually raised and sustained the administrative deference and remedy exhaustion burdens in the identified Title Trial proceedings meets the strong pronouncement attending to the necessity of "an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues." RCW 36.70C.120(1). Supplemental evidence is permitted under RCW 36.70C.120 (2)-(4). No record of agency proceedings was certified however, and Summary Judgment procedure did not allow procedural support for Finding Nos. 13 and 14.⁷

VII. THE REQUIREMENT OF A DETERMINATION AT FINAL OCCUPANCY IS STRONG ADDITIONAL EVIDENCE OF A LAND USE DECISION AT SUCH TIME AND IT IS ERROR TO FAIL TO SECURE THE ADMINISTRATIVE RECORD. (*Assignment No. 3*)

Quoting *Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (Div. 2, 2006), Morgans argue that "Final occupancy approval is not a land use decision under LUPA." But the *Asche* court did not so decide; no continuing shoreline ordinance condition applied; and no shoreline ordinance defined the finality as the date of the last required decision, so the court did not have need to consider

⁷ Finding No 13. received a handwritten interlineation at entry characterizing it as also a conclusion, holding or finding "that all issues raised and claims made by Cottinghams in this matter, were raised by Cottinghams, litigated by Cottinghams and Morgans, previously decided by Judge Meyer and are now the subject matter of several appeals."

the IBC/IRC §110.2 finding that all other laws of the jurisdiction were complied with at the time of a final occupancy decision. When an administrative appeal process is provided, a LUPA petition filed within 21 days of the final administrative action is timely even if the ultimate challenge is to a land use action taken more than 21 days earlier. *Ferguson v. City of Dayton*.. The agency record should have been secured at the initial hearing. RCW 36.70C.080.

VIII. JURISDICTION WAS NOT AFFECTED BY ACTION FRUSTRATING COTTINGHAMS' ADMINISTRATIVE REMEDIES.

Cottinghams' exhaustion declaration is dispositive as to their exhaustion of administrative remedies. Morgans' assert that petitioners Cottingham admit "the county has no record of any pending appeals. CP 354-58" however their Declaration Of David C Cottingham Re Exhaustion Of Administrative Remedies reveals receipts from Whatcom County Planning and Development. Whether forwarded by Whatcom Planning and Development Services to the Office of the Hearing Examiner or not, Ln. 9 - 13, CP 355, the agency cannot be frustrate the court's jurisdiction given such good faith and proper initiation and is irrelevant to the question whether Cottinghams timely attempted to exhaust all remedies that were available to them. Cottinghams need only

exhaust remedies available to them, and they did so. See Exhaustion Declaration at CP 354.

IX. THE JUDGMENT FOR WRONGFUL TIMBER TRESPASS WASTE ENTERED WITHOUT DEFENSE BY MORGANS THAT THE TRESPASS WAS CASUAL OR INVOLUNTARY, OR THAT THE MORGAN HAD PROBABLE CAUSE TO BELIEVE THAT THE LAND ON WHICH SUCH TRESPASS WAS COMMITTED WAS HIS." RCW 64.12.040.

Morgans collaterally attack the judgment in No. 09-2-01773-1. (App. Cottinghams Opening Brief, line 2, page 2) It awarded damages against Morgans for "*timber trespass waste*" trebled for wrongful commission. Morgan had no defense "that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his." RCW 64.12.030,.040.

X. AWARDING FEES TO MORGANS REMAINS ERROR.
(Assignment No. 8)

"...the time for Cottinghams to seek judicial review of any the County's Building Permit Decision began to run on August 17, 2006.(court's own interlineation underlined, deletion by ~~strikeout~~; line 2, Finding 3, page 6). By contrast, no finding or conclusion holds review of the *Shoreline Exemption Condition's interpretation and performance enforcement decisions* untimely. When no review of RCW 36.70C.020(1)(b) or (c) Land Use Decision records can be

shown and the court actually rejected Morgan's offer, Cottinghams exhausted all remedies, and the Title Trial decision referred to is not final and reveals reversible error for failure to provide Morgans' burden to show exhaustion of remedies before the equitable remedy, the matter must be regarded as not based upon existing law but on misdirected and Impermissible Fact Finding, pursuit of Client Immunity, And Avoidance Of Statutory LUPA Procedure.

Cottinghams identified a Final Land Use Decision which is reviewable under LUPA before the reviewing court in Petitioners' Objection To Order And Judgment, CP 861-865, and again in their opening brief. As mentioned in CP 861 and 865, the Order Awarding Fees⁸ remains unsupported in fact by Morgans Response for failure to segregate fees for attribution to legitimate focus under RCW 36.70C any claims specifically found frivolous. If fees are attributable to review of the petition they should have been segregated. By continuing to refer to the civil trial record and refusing to address the continuing agency jurisdiction required for mandatory condition enforcement under WCC 23.50.02.B the courts discretion was abused. An abuse of discretion occurs where

⁸ Order On: 1) Defendant Morgans' Motion For Fees And Terms-RWC 4.84.185 And Cr 11 2) Plaintiff/Petitioners' Motion To Strike Counterclaims, Determine Finality, Granting Terms And Sanctions. CP 871.

the court's basis for an award is not tenable. Legitimate issues and no fact finding trial leave no support for any finding that petitioner's purpose is to annoy and the award should be vacated because it was not frivolous in its entirety.

Tiger Oil v. Dept. of Licensing, 88 Wn. App. 925 (1997) reminds that the statute requires that the action be "frivolous in its entirety." Morgans have cited no authority establishing that a land use decision cannot be made after initial permit issuance, or that it was not made under WCC 23.50.02.B and IBC/IRC §110.2; decisions made mandatory regarding the enforcement of the shoreline exemption condition WCC 23.50.02.B; or that misrepresentation in permit applications may not, once discovered, be reviewed. *Lauer v. Pierce County*.

The petition was not frivolous because there is in the pleadings in No. 09-2-01773-1 no review of a Land Use Decision on Morgans' Performance of the shoreline exemption condition attached to the petition. There is no conclusion that Morgans' met the condition for the required IBC/IRC §110.2 finding that WCC 23.50.02B and other laws of the jurisdiction were performed, and there is no conclusion that WCC 23.60.190.a.3 ("effective date of a shoreline permit or exemption shall be the date of last action

required on the ...exemption ") should not apply to delay the moment of such a land use decision and render the petition timely. If any part of the action is not frivolous, then the action is not frivolous. *Biggs v. Vail*, 119 Wn.2d 129, 133, 830 P.2d 350 (1992).

The reviewing court *did not find* and could not find that review of agency land use decisions other than danger by septic failure were considered in the civil trial. It could not have held that enforcement decisions cannot be land use decisions under RCW 36.70C.020(2)(c), since agency decisions on the mandatory shoreline exemption denying driveway location were not shown made yet. It would be error for the court to hold it frivolous to believe that agency expertise was no longer material after the civil trial. *Cost Management Services v. City of Lakewood*, ___ Wn. 2d ___ (No. 87964-8, Oct. 10, 2013). I.

Cottinghams filed their explanation addressing investigation and reasonableness, CP 811-836.⁹

Cottinghams' petition sought review and Morgans point to a decision which committed the error of not holding Morgans to the

⁹ Leave Was Granted By Order Granting Leave To File Delayed And Overlength Response To Morgans Motion Morgans Motion For Fees, Petitioners' Fees Declaration.

burden of exhaustion before employing equitable relief. The Supreme Court decision in *Cost Management Services v. City of Lakewood*, ___ Wn. 2d ___ (No. 87964-8, Oct. 10, 2013) informs that it is error to fail to consider the agency, distinguishing its jurisdiction and retaining as essential to any claim for relief from agency decision making, a showing of the burden to exhaust administrative remedies before resort to the court's equity, informed that exhaustion of remedies

In the proceedings pointed at, Cottinghams highlighted the inclusion of setback conditions without inclusion of and deference to agency interpretation, doing so in post trial motions. The Supreme Court decision in *Cost Management Services v. City of Lakewood*, ___ Wn. 2d ___ (No. 87964-8, Oct. 10, 2013) informs that it is error to fail to consider the agency, distinguishing its jurisdiction and retaining as essential to any claim for relief from agency decision making, a showing of the burden to exhaust administrative remedies before resort to the court's equity jurisdiction.

Nothing reveals, either, that deference occurred *or that* the court required exhaustion, and nothing is found in the findings and conclusions in 09-2-01773-1 to move the setback condition except the equitable sale of Cottingham's property, founded on Morgans'

failure to exhaust remedies. Cottinghams Petition therefore addresses the exhaustion requirement following error.

XI. DISMISSAL SHOULD BE VACATED AND REVIEW ORDERED UNDER RCW 36.70C.140 and WCC 20.92.

Cottinghams' administrative review should have been allowed under WCC 20.92 (Response, pg 14). WCC 20.92.210¹⁰ provides an appeal from any decision or determination made by an administrative official in the administration of the zoning title WCC 20, the land division ordinance WCC 21¹¹, and Health regulations.

The requirement of the IBC/IRC §110.2¹², requiring determination that all other laws of the jurisdiction have been complied with (Assignment 2, pg. 25, Cottinghams Opening Brief) and WCC 23 (page 60, Appendix, Cottinghams' Opening Brief) combine to provide the court jurisdiction absent in *Durland v. Skagit County*, 175 Wn. App. 316, 305 P.2d 246 (2013); pg. 16, Morgans' Response), even before the substantial difference noted when the final land use decision corresponds to conduct upon property of

¹⁰ WCC 20.92.210 was appended to the Petition. Also, under WCC 20.84.240, "The hearing examiner shall have the authority to hear and decide, in conformity with this chapter, appeals from any order, requirement, permit decision or determination made by an administrative official in the administration or enforcement of this chapter where more than one interpretation is possible."

¹¹ WCC 21 Land Division Regulations and Development Standards were appended to the Petition.

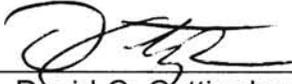
¹² The International Building Code ("IBC") and International Residential Code ("IRC") have are identical on any citation used herein and thus are cited as "IBC/IRC".

another without reapplication based upon substantial change in the permit presented by expansion of the conducted development as required in WCC 23.60.170.C.2..

XII. CONCLUSION.

The standard applicable to review of a Petition remains as stated in RCW 36.70C.120, and .130, and remains contested by Morgans. The dismissal should be vacated with vacation of the fees award to Morgans and review should be directed to proceed according to WCC 20.92 with fees award to Cottinghams for this appeal. Remand for modification and further proceedings should follow. RCW 36.70C.140. The hearing should result in an order to conduct review without the prejudice of proceedings in No. 09-2-01773-1, under specific pronouncement that they proceed unaffected by the decision or the use of equity therein.

Respectfully submitted this 28 day of October, 2012.



David C. Cottingham WSB No. 9553
pro se, and Attorney for Joan Cottingham.

Declaration of Service

David C. Cottingham, under penalty of perjury under the laws of the State of Washington, at Bellingham, Washington, declare that on this day I served a copy of the attached as follows:

By deposit in the United States Mail, first class postage prepaid as Priority Mail, addressed to Attorney for Defendants Ron Morgan and Kaye Morgan: Douglas Shepherd, Attorney, Shepherd, Abbott, 2011 Young Street, Suite 202 Bellingham, Washington 98225.

By deposit in the United States Mail, first class postage prepaid as Priority Mail, addressed to Attorney for Whatcom County, Washington at 311 Grand Avenue, Bellingham, Washington 98225

Dated this 26 day of October, 2013, at Bellingham, Washington.



David C. Cottingham WSB No. 9553

APPENDIX

WCC23.50.020 Relationship to other local regulations.

A" ...the county building official shall not issue a building permit for such development until a shoreline permit has been granted; provided, that any permit issued by the building official for such development shall be subject to the same terms and conditions that apply to the shoreline permit.

B. "... The building official shall attach and enforce conditions to the building permit as required by applicable regulations of this program pursuant to RCW 90.58.140(1)."

C. In the case ...variances required by WCC Title 20 for development that is also within shorelines, the county decision maker shall ...shall attach conditions to such permits and variances as required to make such development consistent with this program.

D. In the case of land divisions, such as short subdivisions, long plats and planned unit developments that require county approval, the decision maker shall document compliance with bulk and dimensional standards as well as policies and regulations of this program and attach appropriate conditions and/or mitigating measures to such approvals to ensure the design, development activities and future use associated with such land division(s) are consistent with this program.

WCC 23.110.190 S definitions." Shall" means a mandate; the action must be done. WCC 23.110.190 (2).

WCC 23.60.190 Expiration.

A. The following time requirements shall apply to all substantial development permits and to any development authorized pursuant to a variance, conditional use permit, or statement of exemption:

3. The effective date of a shoreline permit or exemption shall be the date of last action required on the shoreline permit or exemption and all other government permits and approvals that authorize the development to proceed, including administrative and legal actions on any such permit or

approval. The applicant/proponent shall be responsible for informing the county of the pendency of other permit applications filed with agencies other than the county and of any related administrative and legal actions on any permit or approval. If no notice of the pendency of other permits or approvals is given to the county prior to the date of the last action by the county to grant county permits and approvals necessary to authorize the development to proceed, including administrative and legal actions of the county, and actions under other county development regulations, the date of the last action by the county shall be the effective date.

C. When permit approval includes conditions, such conditions shall be satisfied prior to occupancy or use of a structure or prior to the commencement of a nonstructural activity; provided, that different time limits for compliance may be specified in the conditions of approval as appropriate.
WCC 23.60.170 Revisions.

A. A revision is required whenever the applicant/proponent proposes substantive changes to the design, terms or conditions of a project from that which is approved in the permit and/or statement of exemption

WCC 23.60.170 Revisions

D. Revisions to shoreline permits and statements of exemption may be authorized after the original authorization has expired

SHORELINE MANAGEMENT PPLAN

EXCERPTS

WCC 23 revised, approved DOE 2008.

23 60 15.A

6. When the project has been modified in the course of the local review process, plans or text shall be provided that clearly indicate the final approved plan.
- B. Notice of decision for shoreline statements of exemption shall comply with SMP 23.60.02.3.E.
- C. This Program shall only establish standing for parties of record for shoreline substantial development permits, shoreline variances, or shoreline conditional use permits. Standing as a party of record is not established by this Program for exempt actions pursuant to SMP 23.60.02.2; provided that, in such cases standing may be established through an associated permit process that provides for public notice and provisions for parties of record.
- D. The applicant/proponent or any party of record may request reconsideration of any final action by the decision maker within ten (10) days of notice of the decision. Such requests shall be filed on forms supplied by the county. Grounds for reconsideration must be based upon the content of the written decision. The decision maker is not required to provide a written response or modify his/her original decision. He/she may initiate such action as he/she deems appropriate. The procedure of reconsideration shall not pre-empt or extend the appeal period for a permit or affect the date of filing with the Department of Ecology, unless the applicant/proponent requests the abeyance of said permit appeal period in writing within ten (10) days of a final action.
- E. Appeals to the Shoreline Hearings Board of a decision on a shoreline substantial development permit, shoreline variance or shoreline conditional use permit may be filed by the applicant/proponent or any aggrieved party pursuant to RCW 90.58.180 within twenty-one (21) days of filing the final decision by Whatcom County with the Department of Ecology.
- F. Whatcom County shall consider an appeal of a decision on a shoreline substantial development permit, shoreline variance or shoreline conditional use only when the applicant/proponent waives his/her right to a single appeal to the Shoreline Hearings Board. Such waivers shall be filed with the county in writing concurrent with a notice of appeal within ten (10) days of a final action. When an applicant/proponent has waived his/her right to a single appeal, such appeals shall be processed in accordance with the appeal procedures of SMP 23.60.15.H and shall be an open record hearing before the Hearing Examiner.
- G. Any order, requirement or administrative permit decision, or determination by the Administrator based on a provision of this Program, except a shoreline substantial development permit, may be the subject of an appeal to the office of the Hearing Examiner by any aggrieved person. Such appeals shall be processed in accordance with the appeal procedures of SMP 23.60.15.H and shall be an open record hearing before the Hearing Examiner.
- H. Appeal procedures:
 1. Appeals shall be filed on forms supplied by the county within ten (10) calendar days of the issuance of a substantial development permit, shoreline variance or

4. A private entity seeking development authorization under this section first posts a performance bond or provides other evidence of financial responsibility to the Administrator to ensure that the site is restored to preexisting conditions; and
 5. The activity is not subject to the permit requirements of RCW 90.58.550.
- N. The process of removing or controlling aquatic noxious weeds, as defined in RCW 17.26.020, through the use of an herbicide or other treatment methods applicable to weed control that is recommended by a final environmental impact statement published by the Department of Agriculture or the Department of Ecology jointly with other state agencies under RCW 43.21C.
- O. Watershed restoration projects as defined in Chapter 11 and by RCW 89.08.460. The Administrator shall review the projects for consistency with the Program in an expeditious manner and shall issue its decision along with any conditions within forty-five (45) days of receiving a complete application form from the applicant/proponent. No fee may be charged for accepting and processing applications for watershed restoration projects as defined in Chapter 11.
- P. A public or private project, the primary purpose of which is to improve fish or wildlife habitat or fish passage, when all of the following apply:
1. The project has been approved in writing by the Department of Fish and Wildlife as necessary for the improvement of the habitat or passage and appropriately designed and sited to accomplish the intended purpose;
 2. The project received hydraulic project approval by the Department of Fish and Wildlife pursuant to RCW 77.55; and
 3. The Administrator has determined that the project is consistent with this Program. The Administrator shall make such determination in a timely manner and provide it by letter to the project proponent.

23.60.02.3 Statements of Exemption

- A. The Administrator is hereby authorized to grant or deny requests for statements of exemption from the shoreline substantial development permit requirement for uses and developments within shorelines that are specifically listed in SMP 23.60.02.2. Such statements shall be applied for on forms provided by the Administrator. The statement shall be in writing and shall indicate the specific exemption of this Program that is being applied to the development, and shall provide a summary of the Administrator's analysis of the consistency of the project with this Program and the Act. As appropriate, such statements of exemption shall contain conditions and/or mitigating measures of approval to achieve consistency and compliance with the provisions of the Program and Act. A denial of an exemption shall be in writing and shall identify the reason(s) for the denial. The Administrator's actions on the issuance of a statement of exemption or a denial are subject to appeal pursuant to SMP 23.60.15.
- B. Exempt activities related to any of the following shall not be conducted until a statement of exemption has been obtained from the Administrator: dredging, flood control works and instream structures, development within an archaeological or historic site, clearing and ground disturbing activities such as landfill or excavation, dock, shore stabilization,

23.60.02.3.

- free-standing signs, or any development within an Aquatic or Natural shoreline designation; provided that no separate written statement of exemption is required for the construction of a single family residence when a County building permit application has been reviewed and approved by the Administrator; provided further, that no statement of exemption is required for emergency development pursuant to WAC 173-27-040(2)(d).
- C. No statement of exemption shall be required for other uses or developments exempt pursuant to SMP 23.60.02.2 unless the Administrator has cause to believe a substantial question exists as to qualifications of the specific use or development for the exemption or the Administrator determines there is a likelihood of adverse impacts to shoreline ecological functions.
- D. Whether or not a written statement of exemption is issued, all permits issued within the area of shorelines shall include a record of review actions prepared by the Administrator, including compliance with bulk and dimensional standards and policies and regulations of this Program. The Administrator may attach conditions to the approval of exempted developments and/or uses as necessary to assure consistency of the project with the Act and this Program.
- E. A notice of decision for shoreline statements of exemption shall be provided to the applicant/proponent and any party of record. Such notices shall also be filed with the Department of Ecology, pursuant to the requirements of WAC 173-27-050 when the project is subject to one or more of the following Federal Permitting requirements:
1. A U.S. Army Corps of Engineers section 10 permit under the Rivers and Harbors Act of 1899; (The provisions of section 10 of the Rivers and Harbors Act generally apply to any project occurring on or over navigable waters. Specific applicability information should be obtained from the Corps of Engineers.); or
 2. A section 404 permit under the Federal Water Pollution Control Act of 1972. (The provisions of section 404 of the Federal Water Pollution Control Act generally apply to any project that may involve discharge of dredge or fill material to any water or wetland area. Specific applicability information should be obtained from the Corps of Engineers.)
- F. Whenever the exempt activity also requires a U.S. Army Corps of Engineers Section 10 permit under the Rivers and Harbors Act of 1899 or a Section 404 permit under the Federal Water Pollution Control Act of 1972, a copy of the written statement of exemption shall be sent to the applicant/proponent and Ecology pursuant to WAC 173-27-050.

23.60.03 Variance Permit Criteria

- A. The purpose of a variance is to grant relief to specific bulk or dimensional requirements set forth in this Program and any associated standards appended to this Program such as critical areas buffer requirements where there are extraordinary or unique circumstances relating to the property such that the strict implementation of this Program would impose unnecessary hardships on the applicant/proponent or thwart the policy set forth in RCW 90.58.020. Use restrictions may not be varied.

2. The SEPA checklist, threshold determination, Environmental Impact Statement, or other environmental studies and/or documentation;
 3. Written comments from interested persons;
 4. Information and recommendations from any public agency and from the Administrator in cases where the Administrator is not the decision maker;
 5. Information or comment presented at a public hearing, if held, on the application; and
 6. The policy and provisions of the Act and this Program including the criteria enumerated in SMP 23.60.01, .03 and .04, as applicable.
- C. In compliance with the provisions of WCC 2.33 the decision maker shall be responsible to process permit applications for shoreline substantial development permits, shoreline variance and shoreline conditional use permits, in a timely manner.
- D. Shoreline statements of exemption shall be processed in accordance with the provisions of SMP 23.60.02.3.A.
- E. Any application for a shoreline permit or approval that remains inactive for a period of one-hundred-eighty (180) days shall expire and a new application and repayment of fees shall be required to reactivate the proposal; provided that, the Administrator may grant a single ninety (90) day extension for good cause. Delays such as those caused by public notice requirements, State Environmental Policy Act review, litigation directly related to the proposal, or changes in government regulations shall not be considered as part of the inactive period.
- F. If a shoreline permit is denied, no reapplication for the same or essentially similar development may be made until one (1) year from the date of denial.

23.60.10 Consolidated Permit Review

- A. Whenever an application for a permit under the Program requires a permit or approval under another county permit authority, such as zoning or subdivision, the shoreline permit application, time requirements and notice provisions for processing the shoreline permit shall apply, in addition to those of other regulatory programs.
- B. The provisions of WCC 2.33 shall apply to the consolidated application, review and approval of applications that require an open record hearing. Any shoreline use or development that is subject to other approvals or permits that requires an open record hearing under another permit authority, such as zoning or subdivision, shall be subject to consolidated review and the decision maker designated for the open record hearing shall be the decision maker for the consolidated review.

23.60.11 State Environmental Policy Act (SEPA) Compliance

- A. Whenever an application for shoreline substantial development permit, shoreline variance, shoreline conditional use permit, or statement of exemption is subject to the

6. When the project has been modified in the course of the local review process, plans or text shall be provided that clearly indicate the final approved plan.
- B. Notice of decision for shoreline statements of exemption shall comply with SMP 23.60.02.3.E.
- C. This Program shall only establish standing for parties of record for shoreline substantial development permits, shoreline variances, or shoreline conditional use permits. Standing as a party of record is not established by this Program for exempt actions pursuant to SMP 23.60.02.2; provided that, in such cases standing may be established through an associated permit process that provides for public notice and provisions for parties of record.
- D. The applicant/proponent or any party of record may request reconsideration of any final action by the decision maker within ten (10) days of notice of the decision. Such requests shall be filed on forms supplied by the county. Grounds for reconsideration must be based upon the content of the written decision. The decision maker is not required to provide a written response or modify his/her original decision. He/she may initiate such action as he/she deems appropriate. The procedure of reconsideration shall not pre-empt or extend the appeal period for a permit or affect the date of filing with the Department of Ecology, unless the applicant/proponent requests the abeyance of said permit appeal period in writing within ten (10) days of a final action.
- E. Appeals to the Shoreline Hearings Board of a decision on a shoreline substantial development permit, shoreline variance or shoreline conditional use permit may be filed by the applicant/proponent or any aggrieved party pursuant to RCW 90.58.180 within twenty-one (21) days of filing the final decision by Whatcom County with the Department of Ecology.
- F. Whatcom County shall consider an appeal of a decision on a shoreline substantial development permit, shoreline variance or shoreline conditional use only when the applicant/proponent waives his/her right to a single appeal to the Shoreline Hearings Board. Such waivers shall be filed with the county in writing concurrent with a notice of appeal within ten (10) days of a final action. When an applicant/proponent has waived his/her right to a single appeal, such appeals shall be processed in accordance with the appeal procedures of SMP 23.60.15.H and shall be an open record hearing before the Hearing Examiner.
- G. Any order, requirement or administrative permit decision, or determination by the Administrator based on a provision of this Program, except a shoreline substantial development permit, may be the subject of an appeal to the office of the Hearing Examiner by any aggrieved person. Such appeals shall be processed in accordance with the appeal procedures of SMP 23.60.15.H and shall be an open record hearing before the Hearing Examiner.
- H. Appeal procedures:
 1. Appeals shall be filed on forms supplied by the county within ten (10) calendar days of the issuance of a substantial development permit, shoreline variance or

WAC 173-27-110(6), the department shall render and transmit to the decision maker and the applicant/proponent its final decision within fifteen (15) days of the date of the Department's receipt of the submittal from the decision maker. The decision maker shall notify parties on record of the Department's final decision. Appeals of a decision of the Department shall be filed in accordance with the provisions of WAC 461-08C.

23.60.18 Rescission and Modification

- A. Any shoreline permit granted pursuant to this Program may be rescinded or modified upon a finding by the Hearing Examiner that the permittee or his/her successors in interest have not complied with conditions attached thereto. If the results of a monitoring plan show a development to be out of compliance with specific performance standards, such results may be the basis for findings of non-compliance.
- B. The Administrator shall initiate rescission or modification proceedings by issuing written notice of non-compliance to the permittee or his/her successors and notifying parties of record at the original address provided in application review files.
- C. The Hearing Examiner shall hold a public hearing no sooner than fifteen (15) days following such issuance of notice, unless the applicant/proponent files notice of intent to comply and the Administrator grants a specific schedule for compliance. If compliance is not achieved, the Administrator shall schedule a public hearing before the Hearing Examiner. Upon considering written and oral testimony taken at the hearing, the Hearing Examiner shall make a decision in accordance with the above procedure for shoreline permits.
- D. These provisions do not limit the Administrator, the Prosecuting Attorney, the Department of Ecology or the Attorney General from administrative, civil, injunctive, declaratory or other remedies provided by law, or from abatement or other remedies.

23.60.19 Expiration

- A. The following time requirements shall apply to all substantial development permits and to any development authorized pursuant to a variance, conditional use permit, or statement of exemption:
 - 1. Construction shall be commenced or, where no construction is involved, the use or activity shall be commenced within two (2) years of the effective date of a shoreline permit or exemption or the permit shall expire; provided that, the Hearing Examiner or Administrator, as appropriate, may authorize a single extension for a period of not more than one (1) year based on a showing of good cause if a request for extension has been filed with the Hearing Examiner or Administrator as appropriate before the expiration date of the shoreline permit or exemption, and notice of the proposed extension is given to parties of record and the Department of Ecology.
 - 2. Authorization to conduct development activities shall terminate five (5) years after the effective date of a shoreline permit or exemption, provided that the Hearing Examiner or Administrator, as appropriate, may authorize a single extension for a period of not more than one (1) year based on a showing of good cause, if a request for extension has been filed with the Hearing Examiner or Administrator, as appropriate, before the expiration date of the shoreline permit or exemption

and notice of the proposed extension is given to parties of record and the Department of Ecology.

3. The effective date of a shoreline permit or exemption shall be the date of last action required on the shoreline permit or exemption and all other government permits and approvals that authorize the development to proceed, including administrative and legal actions on any such permit or approval. The applicant/proponent shall be responsible for informing the County of the pendency of other permit applications filed with agencies other than the County and of any related administrative and legal actions on any permit or approval. If no notice of the pendency of other permits or approvals is given to the County prior to the date of the last action by the County to grant county permits and approvals necessary to authorize the development to proceed, including administrative and legal actions of the County, and actions under other county development regulations, the date of the last action by the County shall be the effective date.
- B. Notwithstanding the time limits established in SMP 23.60.19.A.1 and .2, upon a finding of good cause based on the requirements and circumstances of the proposed project and consistent with the policies and provisions of this Program and the Act, the Hearing Examiner or Administrator as appropriate may set different time limits for a particular substantial development permit or exemption as part of the action to approve the permit or exemption. The Hearing Examiner may also set different time limits on specific conditional use permits or variances with the approval of the Department of Ecology. The different time limits may be longer or shorter than those established in SMP 23.60.19.A.1 and .2 but shall be appropriate to the shoreline development or use under review. "Good cause based on the requirements and circumstances of the proposed project" shall mean that the time limits established for the project are reasonably related to the time actually necessary to perform the development on the ground and complete the project that is being permitted, and/or are necessary for the protection of shoreline resources.
 - C. When permit approval includes conditions, such conditions shall be satisfied prior to occupancy or use of a structure or prior to the commencement of a nonstructural activity, provided that different time limits for compliance may be specified in the conditions of approval as appropriate.
 - D. The Hearing Examiner or Administrator as appropriate shall notify the Department of Ecology in writing of any change to the effective date of a permit, authorized by SMP 23.60.19.A through C, with an explanation of the basis for approval of the change. Any change to the time limits of a permit other than those authorized by the sections of this Program previously listed shall require a new permit application.

Chapter 7 Administration

23.70.01 Administrator

- A. The Administrator, as defined in SMP 23.110.A, is hereby vested with the authority to:
1. Overall administrative responsibility for this Program.
 2. Determine if a public hearing should be held on a shoreline permit application by the Hearing Examiner pursuant to SMP 23.60.13.
 3. Grant or deny statements of exemption.
 4. Authorize, approve or deny shoreline substantial development permits, except for those for which the Hearing Examiner or County Council is the designated decision maker.
 5. Issue a stop work order pursuant to the procedure set forth in WAC 173-27-270 upon a person undertaking an activity on shorelines in violation of RCW 90.58 or this Program; and seek remedies for alleged violations of this Program's regulations, or of the provisions of the Act, or of conditions attached to a shoreline permit issued by Whatcom County.
 6. Decide whether or not a proposal is subject to the consolidated review process of WCC 2.33 and determine what other permits are required to be included in the consolidated review.
 7. Make field inspections as needed, and prepare or require reports on shoreline permit applications.
 8. Make written recommendations to the County Council or Hearing Examiner as appropriate and insofar as possible, assure that all relevant information, testimony, and questions regarding a specific matter are made available during their respective reviews of such matter.
 9. Propose amendments to the Planning Commission deemed necessary to more effectively or equitably achieve the purposes and goals of this Program.
 10. The Administrator shall perform the following administrative responsibilities:
 - a. Advise interested persons and prospective applicants/proponents as to the administrative procedures and related components of this Program;
 - b. Collect fees as provided for in SMP 23.60.07 of this Program; and
 - c. Assure that proper notice is given to interested persons and the public through news media, posting or mailing of notice.

11. Review administrative and management policies, regulations, plans and ordinances relative to lands under County jurisdiction that are adjacent to shorelines so as to achieve a use policy on such lands that is consistent with the Act and this Program.
 12. Review and evaluate the records of project review actions in shoreline areas and report on the cumulative effects of authorized development of shoreline conditions. The Administrator shall coordinate such review with the Washington Department of Ecology, the Washington Department of Fish and Wildlife, the Lummi Nation and Nooksack Tribe and other interested parties.
 13. Make recommendations to the Planning Commission for open space tax designations pursuant to RCW 84.34.
- B. The Director of Planning and Development Services shall have the authority to develop administrative guidance materials related to the interpretations of principles and terms in this Program as required to provide for consistent and equitable implementation of this Program. Such administrative guidance documents shall be developed in consultation with the Washington State Department of Ecology to insure that any formal written interpretations are consistent with the purpose and intent of RCW 90.58, the applicable guidelines, and the goals and objectives of this Program.

23.70.02 SEPA Official

The Whatcom County SEPA Responsible Official is designated by WCC 16.08.040. The Responsible Official or his/her designee is hereby authorized to conduct environmental review of all use and development activities subject to this Program, pursuant to WAC 197-11 and RCW 43.21C.

23.70.03 Hearing Examiner

The Whatcom County Hearing Examiner is hereby vested with the authority to:

- A. Grant or deny shoreline permits requiring public hearings.
- B. Grant or deny variances from this Program.
- C. Grant or deny conditional uses under this Program.
- D. For consolidated applications for permits for which the County Council is designated as the decision maker, the Hearing Examiner shall have the authority to hold an open record public hearing and make a recommendation to the County Council on shoreline permits as part of a consolidated review as provided in WCC 2.33.
- E. Decide on appeals of administrative decisions issued by the Administrator of this Program.

23.70.04 Planning Commission