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STATE OF WASHINGTON
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NO. 39861-3-II

IN THE COURT APPEALS OF THE STATE OF WASHINGTON
DIVISION II

REBECCA JULIAN and GRETCHEN BROOKS,

Petitioners,

vs.

CITY OF VANCOUVER, a municipal corporation, and WAYNE
and DELORES MONROE, individually and as a marital community

Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION.

Although this case appears to be complex because of the factual and legal detail included in the Hearing Examiner's decision, the issues on appeal are straightforward. Many key rulings by the Hearing Examiner are not appealed here. The remaining issues surround the staggering internal inconsistency with both the Hearing Examiner's rulings and the City/Applicants Briefing. The Examiner found that two (2) stream segments at issue here are "not physically isolated". Hearing Examiner Decision at 28, CP 43, a key finding under the new 2007 Vancouver code. Then the Examiner goes on to not require protection for these two (2) sections because they are "physically isolated". Hearing Examiner Decision at 29, CP 44. The City won't say which version of the "completely functionally isolated" exemption law, 2005 or 2007 applies. Some of Garden Creek's creek gets a buffer, while identical habitat next to it does not. All of these twists to prevent giving the small tributary that drains directly into the Columbia River the 150 foot buffer code requires.

We respectfully ask this Court to reverse these inconsistencies, and give the two (2) "remaining portions" of Garden Creek's abused creek the legal protection it requires under Vancouver City Code.

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II. STATEMENT OF THE CASE.

Garden Creek's creek¹ is not a manmade drainage ditch as Applicants suggest. To the contrary, the Hearing Examiner found it to be "natural watercourse modified by humans". Hearing Examiner Decision at 23, CP 38. The Garden Creek creek was found by the City to be a "critical area" required to be protected under Washington's Growth Management Act and the City's Critical Habitat Ordinance. AR 1 at 12.

III. ARGUMENT.

ASSIGNMENT OF ERROR NO. 1: DID THE CITY OF VANCOUVER/HEARING EXAMINER ERR BY FAILING TO REQUIRE A CRITICAL AREAS ORDINANCE (CAO) BUFFER FOR GARDEN CREEK'S CREEK UNDER VANCOUVER'S "COMPLETELY FUNCTIONALLY ISOLATED" EXCEPTION TEST?

ISSUE 1. THE STANDARD OF REVIEW SUPPORTS JULIAN PETITION FOR REVIEW.

A. APPELLANTS JULIAN ACKNOWLEDGE BURDEN OF PROOF.

Under LUPA, Appellants Julian acknowledge our burden of proof to meet one of the six tests under RCW 36.70C.130(1). Both the City's Response Brief (hereinafter City Brief) at 6, and the Applicant Monroe's Response Brief (hereinafter Applicants' Brief) at 14, properly note that we have the burden of proof on appeal under RCW 36.70C.130(1).

¹ The terms "watercourse," "water course", "waterbody, "creek" and "stream" are used interchangeably in this Brief.

However, as our Opening Brief and these materials show below, the following LUPA standards under RCW 36.70C.130(1)(a)(b)(c) and (d) were met here. Those standards will be discussed in each section herein.

B. APPELLATE COURT "STANDS IN THE SHOES" OF THE TRIAL COURT.

The Appellate Court here need not re-review Trial Court Decision to reinstate Hearing Examiner "dicta" Decision. We acknowledge case law cited by the City indicates in LUPA review, the Court of Appeals "stands in the shoes of the Superior Court". The City Brief at 6 states:

On review of a LUPA decision, this Court stands in the shoes of the superior court and reviews the Hearing Examiner's action on the basis of the administrative record. *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 525 (2004).

This doctrine, taken to its furthest extent, would call for a Court of Appeals re-review of the trial court's Decision here to reinstate the Hearing Examiner's "dicta" Decision. At the Trial Court, the Applicants moved to Dismiss our case based on this procedural issue. CP 63. This was Denied by the Superior Court. CP 340-45. The parties then entered into a Stipulated Order regarding the Decision to proceed with the case as the Hearing Examiner dicta decision as the Decision. CP 345-49.

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1. No Re-review of Superior Court Decision Needed.

Neither the City, nor the Applicant, has appealed this trial court ruling². The Applicants clearly states in their Brief that "the applicants have not appealed any aspect of the decision of the city, the Hearing Examiner or the Superior Court." Applicant Brief at 15. The City's Brief³ makes consistent reference to the Hearing Examiner's "dicta" decision as the Decision to be reviewed here, nor has the City "appealed the Hearing Examiner's new riparian management area buffer". City Brief at 8. In any case, as both the City and the Applicants fully support the Hearing Examiner's Decision, any procedural defect would be harmless. *Id.*

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²While as we believe re-review is inconsistent with LUPA's and Washington caselaw doctrine of exhaustion of administrative remedies, these does appear to be some caselaw to support this appeal re-sets Trial Court decision. Also, this case differs from most as this procedural issues was separately argued and separately reserved here. See CP 63 (Monroe Motion to Dismiss) and CP 345. (Order re: Supplemental Memorandum). Therefore, we will provide a basis to support the Trial Court.

³See, e.g. City Brief page 3, 4, 10 - 24.

2. In the Alternative, Trial Court Properly Reinstated Hearing Examiner “Dicta” Decision.

While we believe it would be inconsistent with LUPA and the doctrines of exhaustion of administrative remedies to judicially review this un-appealed decision, we will (briefly) defend the superior courts action here.

In this case, Julian filed a timely appeal of the City’s Type II Decision. AR 3. At the hearing, the Hearing Examiner raised the issue of *sua sponte*, that Julian's written comments were not specific enough to allow further appeal. RP 1A at 22. This was originally opposed by the City of Vancouver *Id.* at 23-4, as well as by Julian *Id.* At 89-94. The City said:

Ms. Marousek: Your Honor, I am going to look at that more closely. The City is not really inclined to make that argument. It’s a due process thing, I think. RP at 23.

The Examiner went on to deny Julian's appeal based on the procedural issue, but found, in dicta, that the city erred in finding the stream “completely functionally isolated” and failing to provide adequate storm water treatment. Note that neither the City, nor the Applicant, are challenging the requirements to follow the “dicta” decision here.

The trial court stated:

The hearing examiner committed a plain error of law in his interpretation of VMC 20.210.130.A(4). Section 130, which deals with the procedures to be followed during appeals of several types of land use decisions, must be read in its entirety. That section broadly covers the procedures for types I, II, III, and IV decisions, and discusses both open and closed record reviews.

VMC 20.210.130.B(2) identifies the individuals who have standing to appeal type II decisions. Certain individuals may appeal even if they do not demonstrate “that they participated in the decision process through the submission of written testimony.” Section B.2(c). The petitioner have standing to appeal because they were “eligible for written notice of a pending type II administrative decision”. Section B.2(b).

The hearing examiner erred by interpreting Subsection A(4) to require a demonstration by the petitioners that specific issues were raised during the comment period. The language of Subsection A(4) does not mention the comment period; it references “the period in which the record was open”. In a type II appeal, the record is open during the hearing before the examiner. VMC 20.210.120.B(4), (5). The appeal process contemplates that a person with standing to appeal may raise issues during the hearing which are not addressed during the comment period. Memorandum of Opinion, pages 3 & 4, CP 343 - 4..

This Decision was set out as a separate Order, CP 345 - 9. Thus to the extent that it is necessary to include a rationale defending the Trial Court’s ruling here, (which we still deny), the Hearing Examiner engaged in an unlawful procedure or failed to follow a procedural process and/or created an erroneous interpretation of the law under RCW 36.70C.130(1) and the Trial Court’s Decision reinstating the “dicta” Decision should be affirmed.

ISSUE 2. THE CITY OF VANCOUVER HEARING EXAMINER MADE AN UNAPPEALED FINDING THAT GARDEN CREEK’S CREEK WAS A “CRITICAL AREA” SUBJECT TO VANCOUVER’S CAO, VMC 20.740.110.

Here, over the protests of the applicant, Exhibit 18, page 3, the Hearing Examiner properly ruled that the Garden Creek creek is a Critical

Area that requires protection under the Vancouver Critical Areas Protection Ordinance. Hearing Examiner's Decision at 23, CP 38.

Is this still an issue here? No. The City of Vancouver agrees with this saying at 13:

The City does not disagree with, and has not appealed, the Hearings Examiner's conclusions that the watercourse affected by this project is a critical area subject to the City's riparian buffer and riparian management area ordinance.

The Applicant Monroes "do not contest any findings or conclusions of the Hearing Examiner". Monroe Brief at 6.

ISSUE 3. THE CITY OF VANCOUVER AND THE APPLICANT DO NOT CONTEST THAT VANCOUVER CODE REQUIRES A RIPARIAN BUFFER FOR THIS CLASS OF CREEKS.

The City of Vancouver code requires a 150' buffer for Garden Creek's creek, unless some exemptions are lawfully applied. VMC 20.740.110. Before the Hearing Examiner, the Applicant argued for a 25 foot buffer, AR 28, page 1, Julian argued for a 150' buffer. AR 31, at 33. The Hearing Examiner agreed with Julian and granted a 150' buffer. Hearing Examiner's Decision at 30, CP 45. The Hearing Examiner said:

c. The examiner finds that the watercourse is subject to the 100-foot Riparian Management Area and 50-foot Riparian Buffer required by the 4th section of VMC Table 20.740.110-1. *Id.*

The Examiner imposed the 150' buffer on the northernmost part of the stream here. Hearing Examiner's Decision at 28, CP 43. This finding was

not appealed and is a verity. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992).

This issue remains uncontested in the appellate briefing.

ISSUE 4. THE VANCOUVER CAO HAS A BUFFER SIZE REDUCTION, NOT A CAO EXEMPTION, FOR SITES THAT ARE “COMPLETELY FUNCTIONALLY ISOLATED”.

The 2005 code only exempts from CAO buffer requirements areas that are “completely functionally isolated” by “impervious surfaces”. If both of these tests are met, the buffer is reduced from the area of Ordinary High Water Mark (“OHWM”) to the impervious surface. This is mandatory “shall”. As the 2005 Code says:

The 2005 code says:

If impervious surfaces from previous development completely functionally isolate the Riparian Management Area or the Riparian Buffer from the lake, stream, or river, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. An example would be an existing industrial paved area and warehouses in the Riparian Management Area and buffer.

However, under the 2007⁴ code, waterbodies that are "completely functionally isolated", but are not isolated by impervious surfaces, may have the riparian area "adjusted." Specifically,

When impervious surfaces from previous development completely functionally isolate the Riparian Management Area of the Riparian Buffer from the waterbody, the regulated

⁴ Erroneously stated as 2008 in Julian’s Opening Brief.

riparian area shall extend from the ordinary high water mark to the impervious surfaces. If the waterbody is not completely physically isolated, but is completely functionally isolated, the Planning Official may adjust the regulated riparian area to reflect site conditions and sound science. VMC 20.740.110.A(1)(e).

Here, the City made no such “adjustment”. The Hearing Examiner did, after overruling the City determination of a blanket exemption under the 2005 code. See Hearing Examiner Decision at 28, CP 43⁵. The City’s Response Brief claims the buffer is “adjusted” to zero. City Brief at 19. This is error.

First, this Decision does not “adjust” a buffer, it eliminates it. As “adjust” is not defined under code, we use the common meaning of the word in its interpretation – its dictionary definition. *Mall Inc. v. City of Seattle*, 108 Wn.2d 369, 739 P.2d 668 (1987). Using the dictionary definition of “adjust”, the City and the Hearing Examiner elimination of the buffer fails to comply with the Code. As the Oxford Dictionary says:

Adjust: 1. To arrange; to put into the proper position. 2. To alter by a small amount so as to fit or be right for use. 3. To be able to be adjusted. 4. To adapt or adapt oneself to new circumstances. 5. To assess. Oxford American Dictionary, (emphasis added).

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⁵Northern section ruled not completely functionally isolated by impervious surface, 150 foot buffer required.

The common meaning of “adjust” means a fine tuning of the buffer size. Here, the Examiner committed an error of law eliminating all 150 feet of riparian buffer as an “adjustment”.

Second, this is a buffer size issue, not a Critical Areas Ordinance (“CAO”) applicability code. The Hearing Examiner finds the watercourse is a CAO protected waterbody. Hearing Examiner Decision at 23, CP 38. Yet the Hearing Examiner Decision exempts all of the stream but the northern portion from CAO standards compliance. The Examiner did not review any of the areas that we believe should be buffers for CAO compliance. If successful, on remand, this analysis should be required.

ISSUE 5. HEARING EXAMINER PROPERLY OVERRULED CITY OF VANCOUVER’S USE OF THE “COMPLETELY FUNCTIONALLY ISOLATED” EXCEPTION AND REQUIRED A 150 FOOT CAO BUFFER FOR THE NORTHERN PORTION OF GARDEN CREEK’S CREEK.

The City issued a letter in 2005 indicating the site was “completely functionally isolated” under the 2005 code. AR 1.10. In the City’s Type II Decision here, it adopted that letter as part of its final decision. AR 1 at 12. The City’s Decision cited the support of Washington Fish and Wildlife in determining the site was “completely functionally isolated”. *Id.*

Washington Department of Fish and Wildlife also agreed with this assessment after visiting and assessing the site and issuing an HPA permit to the applicant. ...
...to the stream without impacts. Decision AR 1 at 12.

In fact, the City never contacted Washington Fish and Wildlife, who strongly disagreed with the finding of “completely functionally isolated”, indicating the site was “not functionally isolated” at all. AR 17 at 1-2.

The Hearing Examiner overruled this City finding of the entire site being completely functionally isolated by impervious surfaces, and ruled the northern portion of the site did not meet either the 2005 test, or the 2007 test.

c. The examiner finds that the riparian area abutting the section of the watercourse between the northernmost culvert and the north boundary of the site is not “completely functionally isolated.” ...Therefore the applicants should be required to modify the preliminary plat to provide a 100-foot Riparian Management Area and a 50-foot buffer adjacent to the segment of the watercourse between the northern end of the northern culvert and the north boundary of the site. Hearing Examiner’s Decision at 28, CP 43.

This finding was not appealed, and unappealed findings are a verity.

Cowiche Canyon, supra. Is this an issue here? No. Both the City and the Applicants Monroe agree that the northern part of the site does not meet the 2005/2007 exemption and requires a 150’ buffer.

The Hearings Examiner correctly concludes that the riparian area abutting the section of the watercourse between the northernmost culvert and the north boundary of the site is not “completely functionally isolated,” and imposes a new buffer requirement on the northernmost segment of the watercourse. City Brief page 17, emphasis added.

The applicants do not contest any of the findings or conclusions of the Hearing Examiner, including that the section of the drainage channel between the northernmost culvert and the north boundary of the property is not completely functionally isolated. The applicants accept the

Hearing Examiner's condition that a riparian management area and buffer be applied to this northernmost section of the channel. Applicants Brief, page 17, footnote 10, emphasis added.

ISSUE 6. THE HEARING EXAMINER ERRED IN FAILING TO REQUIRE A FULL BUFFER FOR THE "REMAINING PORTIONS" OF GARDEN CREEK'S CREEK.

A. THE HEARING EXAMINER ERRED IN FAILING TO USE THE 2005 CODE.

The first and most basic question here is: which code applies, the 2005 or the 2007 code?

The Hearing Examiner Decision clearly rejected the 2005 code and used the 2007 code. In its rebuttal, the City does not say which code applies.

See City Brief at 9.

1. The City Used the 2005 Code in its Decision.

The City applied the 2005 code in its Decision, referring to AR 1.10, the City's June, 2007 "completely functionally isolated" letter which used the 2005 code. AR 1 at 12. The City also wrote a Brief to the Hearing Examiner arguing that the 2005 code applied stating:

"[T]his (2007) ordinance was not in effect at the time of the Garden Creek short plat:. AR 27, pg 2-3, emphasis added.

2. Hearing Examiner Did Not Have Jurisdiction to Use 2007 Code.

The Hearing Examiner erred in applying the 2007 code here. As shown above, the City was clearly using the 2005 code in regard to the buffer

issue. The Garden Creek short plat case number, PRJ2005-01852 clearly shows the City processed this as a 2005 case.

The Examiner ruled this case was vested in 2007 because the project was not properly “technically complete” in its 2005 pre-application. Hearing Examiner Decision at 23, CP 38. Yet, this issue was not properly before the Hearing Examiner as it was outside the scope of Julian’s appeal. See AR 2. The Examiner denied other issues for lack of appeal. See Decision at 23, CP 38:

“The applicant did not appeal this determination and it is now final”.

As the Examiner did not have jurisdiction to go beyond the pleadings to the vesting issue, see, *Lakeside Industries v. Thurston County*, 119 Wn.App. 886, 83 P.3d 433 (2004), *rev. denied* 152 Wn.2d 1015 (2004), his Decision to use the 2007 code was an error of law, and a clearly erroneous application of law to fact.

3. 2007 Code is Not Useable as a “Clarifying Amendment”.

Both the City⁶ and the Applicant⁷ claim the change to the 2007 code is a “clarifying amendment”. The City refers to *Hale v. Island County*, 88

⁶City Brief at 9.

⁷Respondent Monroes Brief at 26.

Wn.App. 764, 946 P.2d 1192 (1997) and *Tomlinson v. Clarke* 118 Wn.2d 498, 510-11, 825 P.2d 706 (1992), cases for the proposition that:

...a court may consider a later-enacted clarifying ordinance if the ordinance evidences the board's or council's original intent and does not plainly contradict the law as it existed at the time the administrative decision was made. City's Brief at 10.

First, there is no proof in the record that this code change "evidences the Board's original intent". The "supporting" materials for the amendment, AR 27, Exhibit 1 Staff Report 187-07 makes no mention of this issue. Second, the 2007 code adds a completely new exception, for the first time allowing discretionary buffer reduction for areas not isolated by impervious surfaces. This appears to plainly contradict the 2005 code, despite the City's claim, and the Hearing Examiner's Decision, to the contrary. Thus, the second *Hale/Tomlinson* factor is not met.

B. 2005 CODE REQUIRES THE USE OF BUFFERS HERE.

The next big question is: do the differences in the two (2) codes make a difference? The Hearing Examiner Decision ruled that it did. The City, while agreeing with the Hearing Examiner's ruling, says no.

The 2005 version of the riparian management area ordinance only allows exemptions when a creek is completely functionally isolated "by impervious surfaces". Then, the buffers are limited to "the ordinary high

water mark to the impervious surfaces”. VMC 20.740.110.A(1)(e)(4) (04/29/05 version). Emphasis added.

Applying that test here, the Examiner made an express finding that the “remaining two (2) sections” of Garden Creek’s stream “are not physically isolated by impervious surfaces”. Hearing Examiner’s Decision at 29, CP at 44. Hearing Examiner Decision at 29, CP 44.

The examiner further finds that the remaining two sections of the watercourse on the site that are not physically isolated by impervious surfaces from the adjacent Riparian Management Area and Riparian Buffer,... Hearing Examiner Decision at 29, CP 44, (emphasis added).

This unappealed finding means the creek does not warrant a buffer exemption as the 2005 code “by impervious surfaces” criteria is not met. Yet, in its Brief Respondent City of Vancouver goes to great lengths to argue that this Court is free to use either version of the ordinance. In fact, the City states the 2007 ordinance may be used “[i]n the alternative,” thus solidly implying that the 2005 version should be governing authority in this case. City Brief at 10.

If the 2005 test applies, the Hearing Examiner made a clear error of law by not requiring a 150 foot buffer for these “remaining sections”.

C. ASSUMING, *ARGUENDO*, THAT THE 2007 TEST APPLIES, THE HEARING EXAMINER ERRED IN FAILING TO PROVIDE ADEQUATE BUFFER PROTECTION FOR THE GARDEN CREEK STREAM.

First, the Examiner found the northern section not completely functionally isolated and gave it a 150 foot buffer for the area between the northern culvert and the northern boundary of the site⁸. Assuming, *arguendo*, that the 2007 code applies, and the Examiner has found no physical isolation by impervious surfaces, what is the remaining issues for the Hearing Examiner under the 2007 code? If the Applicant can show a “complete functional isolation”, the Examiner may adjust the riparian area to reflect “site conditions” and “sound science”. VMC 20.740.110A(1)(e).

Then, after the Examiner found the two (2) remaining creek segments not completely physically isolated, but he totally reversed himself 180° and ruled that the creek/buffer was completely functionally isolated. On that basis, he did not require any buffer under the 2007 code. Hearing Examiner Decision at 29, CP 44.

The Hearing Examiner said:

⁸The Hearing Examiner erroneously found this buffer limited to the area between the northern culvert and the northern boundary. Hearing Examiner Decision at 28, CP 43. Under Vancouver code, buffers are applied “horizontally in each direction”. VMC 20.740.110A(1)(e). Had that complete buffer been applied here, it would have provided substantial protection for the mid-stream segment.

Given the small size and physical isolation of these riparian areas and based on the multiple environmental analyses in the record, the examiner finds that the applicants demonstrated that these areas are completely functionally isolated and a Riparian Management Area and Riparian Buffer should not be required consistent with sound science. Examiner's Decision at 29, CP 44, emphasis added.

This is error.

1. Not "Completely Functionally Isolated" - Site has Substantial Functions.

First, does the creek, and its buffers, have functions under Vancouver's CAO? While the quality of these functions have drawn extensive debate, their existence is undeniable from evidence in the record. The City and the Applicants try to make this an issue of substantial evidence. City Brief at 13, Applicants Brief at 26. However, failure to review and apply the code definitions of function is more an error of law, and a clearly erroneously application of law to fact.

Regarding the buffer testimony, the Examiner gave little weight to the testimony of Washington Fish and Wildlife who testified the site was not "functionally isolated". AR 17, at 1. He also confused testimony regarding the functions, claiming that only in stream functions occur on site. Decision at 27, when these functions clearly include functions in the creek's buffer.

Under the 2007 code, the Hearing Examiner should have looked primarily at the on site presence of habitat functions, as defined by code⁹. Here the stream's buffers performed the vast majority of these code desired functions, as shown by the evidence of Washington Fish and Wildlife, biologist Tammy Mackey, and even the data of Applicants' first biologist, whose report finds ten (10) buffer functions.

As Fish and Wildlife said at AR 17, 1 & 2:

On the other hand, macro-invertebrates produced in or near the stream could and most likely are transported to downstream areas where fish are present. Also, the mouths of these tributaries to the Columbia River, of which there are several in the general vicinity, serve as important cold-water refuse for salmonids. Therefore, WDFW does not feel the stream is "functionally isolated". (Emphasis added).

Biologist Tammy Mackey said at AR 21, Attachment 7, page 2:

My assessment of the creek and the associated riparian area is that it serves to convey storm water, reduce water velocities, filter potential pollutants, and regulate water temperature through shading. While I did not do a macro-invertebrate survey, previous assessments have indicated that macro-invertebrates are present on the site. This would indicate some function as food chain support, maybe for salmonids but probably for water fowl or amphibians. There is some erosion control function as well. ...These functions all have the potential to improve water quality before the water reaches the Columbia River. (Emphasis added).

⁹VMC 20.740.020A No net loss of functions. The beneficial functions provided by critical areas include, but are not limited to water quality protection and enhancement; fish and wildlife habitat; food chain support; flood storage; conveyance and attenuation of flood waters; ground water recharge and discharge; erosion control; and wave attenuation.

Applicants' original expert's studies found 13 functions in 9 function categories. AR 5, page 4. Ten (10) of these are clearly buffer functions:

Stream Flow Influence, Vegetative Cover
Canopy Cover
Slope/Vegetative Cover
Vegetative Cover
Canopy Cover
Dominant Tree Species
Native Woody Plant Species
Multiple Canopy Layers
Native Woody Plant Species Exhibit 5, page 4.

Finally, the Hearing Examiner found the habitat north of the first culvert worthy of protection and required a 150 foot buffer. Yet, the habitat immediately adjacent to this is identical... and is not protected. See Fish & Wildlife Photo, AR 17, page 3.

2. Not "Completely Functionally Isolated" - Site's Functions Not Completely Isolated.

The Hearing Examiner flatly contradicts himself by ruling that the remaining two sections of the watercourse "are not physically isolated by impervious surfaces". Decision at 29, CP 44, yet, goes on and finds these two (2) areas completely functionally isolated "given their... physical isolation". *Id.* There is plenty of available opportunities for interaction/"mutual influences" between the buffer and the creek. The large trees on site can shade the water. AR 21, attachment 4. Even lawns can cool and filter stormwater, absorb stormwater peak flows and filter sediment and washes macroinvertebrates (bugs) downstream to provide food.

3. Hearing Examiner Erred Using Size as a Primary Basis of Determining Whether the Garden Creek Creek Was “Completely Functionally Isolated”.

Here, from the clear wording of the Hearing Examiner's Decision, he based his Decision on whether Garden Creek's stream buffer was completely functionally isolated largely because he felt it was "small". Hearing Examiner Decision at 29, CP at 44. That is not a proper criteria under the code and is an error of law/application of law to fact.

4. Hearing Examiner Erred in Failing to Use Sound Science.

The 2007 code requires, after a finding of a site being completely functionally isolated, that any discretionary buffer adjustments being made based on site conditions and sound science. Here, the Examiner ignores the testimony of Fish and Wildlife, and makes an internally inconsistent Decision on the buffer. It appears that the Hearing Examiner was more concerned by the potential impact of the buffers on development, Hearing Examiner Decision at 28, CP 43, than he was on protecting the stream.

ISSUE 7. RESPONDENTS MONROE ARE NOT ENTITLED TO ATTORNEY FEES.

Applicant Monroes has claimed fees under RCW 4.84.370(1). The City has not claimed any such fees in their Brief and is now barred from claiming them under RAP 18.1. Applicant Monroes' claim for fees fails for a number of reasons.

First, we believe we prevail here, and fees are only awarded to prevailing parties who prevail on all appeals. RCW 4.84.370, see also *Baker v. Tri-Mountain Resources*, 94 Wn.App. 849, 973 P.2d 1078 (1999) (noting that only attorneys fees on appeal are recoverable under RCW 4.84.370).

Second, Rebecca Julian has prevailed on significant issues before both the City Hearing Examiner and the Superior Court. It is well settled under Washington case law that when more than one party prevails on significant issues in an administrative proceeding or judicial appeal neither prevailing party is entitled to attorneys fees. *See Guillen v. Contreras*, 147 Wn.App. 326, 195 P.3d 90 (2008) (noting in dicta that where multiple prevailing parties seek attorneys fees under RCW 4.84.370(1) none are entitled to such fees. *See also Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-235, 797 P.2d 477 (1990); *McGary v. Westlake Investors*, 99 Wn.2d 280, 288, 661 P.2d 971 (1983); *Puget Sound Serv. Corp. v. Bush*, 45 Wn.App. 312, 320-321, 724 P.2d 1127 (1986); *Tallman v. Durussel*, 44 Wn.App. 181, 189, 721 P.2d 985, *review denied*, 106 Wn.2d 1013 (1986); *Rowe v. Floyd*, 29 Wn.App. 532, 535-536, 629 P.2d 925 (1981).

The City approved this project with a “completely functionally isolated” exemption and no downstream stormwater analysis and protection. Julian filed a timely Type II appeal. The Hearing Examiner issued a "Final

Order" which dismissed the appeal for a technical flaw of not raising adequate comments in the comment letter. The Hearing Examiner included a "dicta" ruling in which many of the resulting findings and rulings were favorable to Julian. These favorable rulings include the following:

First, the Examiner's Decision at 23, CP 38, ruled the project was subject to Vancouver's Critical Areas Ordinance (hereinafter "CAO"). He also noted the on-site stream was a "natural watercourse modified by humans".

The examiner finds that the City determined that, although a critical areas permit is not required, this development is subject to the CAO. ...The CAO applies to "Water bodies including lakes, streams, rivers, and naturally occurring ponds." 20.740.110.A(1)(c). The definition of "stream" in VMC 20.150.040B provides "streams also include natural watercourses modified by humans." Hearing Examiner Final Order at page 23, CP 38.

Second, the Hearing Examiner finds that none of the 78 feet of open water course is physically isolated under Vancouver code.

Third, the Examiner ruled the northern part of the Garden Creek creek was not "completely functionally isolated". Hearing Examiner Decision at 28, CP 43.

Fourth, the Examiner went on to rule the proper buffer of the Garden Creek creek was 150': a 100' Riparian Management area, and a 50' riparian buffer. Hearing Examiner's Decision at 30, CP 45:

On that basis, he required a 150' buffer for the northern portion of the site. Hearing Examiner Decision at 28, CP 43.

The Examiner also made other rulings favorable to Julian that are not at issue in this appeal. This includes the requirement of a downstream analysis for stormwater leaving the site. Hearing Examiner Decision at 37, 38 & 43; CP 52, 53 & 57.

The Hearing Examiner's *dicta* decision, and the Superior Court's reinstatement of the Hearing Examiner's *dicta* rulings are both fatal to Respondent's claim for attorneys fees on appeal. Therefore, Respondents have not prevailed in all "prior judicial proceedings," an express requirement of RCW 4.84.370; see also *King County v. Central Puget Sound Growth Management Hearings Board*, 138 Wn.2d 161, 979 P.2d 374 (1999)("[4.84.370(1)] allows for attorneys' fees only if the party prevailing on appeal prevailed before the county and in all prior judicial decisions.") Likewise, because the reinstated rulings of the Hearing Examiner resolve multiple substantive issues in favor of Julian, Respondents cannot claim that they prevailed on all major issues. See *King County v. Central Puget Sound Growth Management Hearing Board*, 138 Wn.2d 161, 979 P.2d 374 (1999) ("If both parties prevail on major issues there may be no prevailing party."

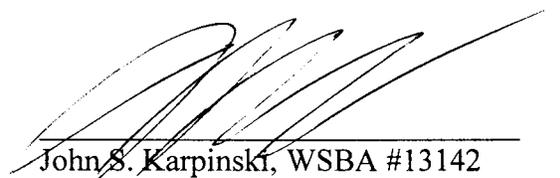
As Appellants Julian have prevailed on major issues at both City and Superior Court levels, there is not “one prevailing party” entitled to fees under RCW 4.84.370.

V. CONCLUSION.

Garden Creek’s creek has suffered numerous indignities by man, but still plays a small but cumulatively important role in providing habitat to the City of Vancouver, and the mighty Columbia River basin. Washington’s Growth Management Act, and Vancouver’s Critical Areas Ordinance, both say that streams such as this must be protected. Yet, the stream was not protected. Why? Not because it did not meet the standards. It may not be extraordinary habitat, but it does provide many of the functions sought for protection under City Code VMC 20.740.020A. Even Applicants own experts note the site provides 13 functions in 9 categories. AR 5, page 4. This creek was “adjusted” to a zero buffer because it *might* have interfered with the ability of an already developed property to tear down its existing Columbia River view home, and replace it with four (4) houses. The City and the Hearing Examiner claim that stream culverts, a common item in our land of numerous rivers and streams, forever destroys the habitat of the land adjacent to them downstream. That is not what the Vancouver Code says here, and that is not “sound science”. Please restore what little dignity we can

to this abused creek, and remand to require the 150 foot buffer on the 78 feet
of the two (2) portions of remaining creek on site.

DATED this 13th day of July, 2010.



John S. Karpinski, WSBA #13142
Attorney for Appellants
Julian/Brooks

APPENDIX:

VMC 20.210.130.
Trial Court Order
Fish and Wildlife Picture, Exhibit 17, page 3
AR 21, attachment 4

VMC 20.210.130 Appeals.

A. Appeal submittal. Any party with standing under Section 20.210.130(B) VMC may submit a written appeal of any Type I, II or III decision to the planning official containing the following items listed below. The appeal must be received no later than 14 calendar days after written notice of the decision is mailed. Receipt of a complete appeal submittal shall stay the original decision until the city reaches a final decision on the appeal, except as provided for by 20.210.040G VMC.

1. The case number designated by the city and the name of the applicant;
2. The name and signature of each petitioner or their authorized representative and a statement showing that each petitioner has standing to file the appeal under this chapter. If multiple parties file a single petition for review, the petition shall designate one party as the contact representative for all contact with the planning official. All contact with the planning official regarding the appeal, including notice, shall be with the contact representative;
3. The specific aspect(s) of the decision or determination being appealed, and the specific reasons why each aspect is in error as a matter of fact or law;
4. A statement demonstrating that the specific issues raised on appeal were raised during the period in which the record was open;
5. The appeal fee as per Chapter 20.180 VMC, Fees. The fee shall be refunded if the appellant requests withdrawal of the appeal in writing at least 14 calendar days before the scheduled appeal hearing date.

B. Standing to appeal

1. Type I decision. Only the applicant and property owner have standing to appeal a Type I decision, unless otherwise specified in this title.
2. Type II decision. The following parties have standing to appeal a Type II decision:
 - a. The applicant or owner of the subject property;
 - b. Any party eligible for written notice of a pending Type II administrative decision.
 - c. Any other party who demonstrates that they participated in the decision process through the submission of written testimony.
3. Type III decision. The following parties have standing to appeal a Type III decision:
 - a. The applicant or owner of the subject property;

- b. Any party who testified verbally or in writing at the public hearing;
- c. Any other party, who demonstrates that they participated in the decision process through the submission of written testimony;
- d. Any party who provides a written request for a copy of the notice of decision; and
- e. City staff.

4. **Type IV Map Amendment Decision.** The following parties have standing to appeal a Type IV Map Amendment decision:

- a. The applicant or owner of the subject property;
- b. Any party who testified verbally or in writing at the public hearing;
- c. Any other party, who demonstrates that they participated in the decision process through the submission of written testimony;
- d. Any party that provides a written request for a copy of the notice of decision; and
- e. City staff.

C. Appeal review process

- 1. All complete appeals submitted which are eligible as specified in this chapter shall be scheduled for review at a public hearing such that a final decision can be rendered within 60 calendar days for closed-record appeals, and within 90 calendar days for open-record appeals. Further extensions are permitted upon mutual agreement of the appellant, the applicant, and the planning official. If a final decision is not reached within this time, the planning official shall so notify the appellant and shall provide a reason for the delay and an estimated date of final decision issuance.
- 2. Notice of the appeal hearing shall be mailed to all parties listed in Section 20.210.120(B)(11) and (13) VMC.
- 3. Appeal hearings shall be open or closed record as indicated in Table 20.210.130 -1 below.
 - a. An open-record appeal hearing before the Hearings Examiner shall be conducted according to the procedures set forth in Section 20.210.120-B VMC.

b. A closed-record appeal hearing before the City Council shall be limited to argument from the appellant, the applicant and city staff, and deliberation by the City Council. Argument and deliberation shall be limited to the record established at the original open-record hearing. The record shall consist of testimony and deliberation at the original hearing as recorded by an audio/visual tape or transcript certified as accurate and complete, any other materials submitted into the record, and the final order being appealed.

c. Hearing rules shall otherwise be as specified by the review body.

d. Notice of appeal decisions shall be mailed to all parties listed under Section 20.210.130(C)(2) VMC.

4. See Section 20.285 VMC for additional rules applicable to appeals for Type IV decisions.

Table 20.210.130 - 1

Appeal Bodies

Land Use Action	Review Authority if Appealed, and Open (O) or Closed (C) Record Hearing
Type I Applications	Hearings Examiner (O); Further appeal to Superior Court
Type II Applications	Hearings Examiner (O); Further appeal to Superior Court
Type III Applications	City Council (C); Further appeal to Superior Court
Type IV Applications	Superior Court

D. Subsequent appeals.

1. Appeal decisions by any review body may be subsequently appealed to Superior Court within 21 calendar days after the date of decision, subject to compliance with appeal eligibility and notice provisions as specified by Chapter 36.70C RCW.

2. Appeal decisions by the Hearings Examiner or City Council on shoreline substantial development permits, shoreline variance permits, and shoreline conditional use permits may be subsequently appealed to the State Shoreline Hearings Board pursuant to applicable law.

(M-3931, Amended, 11/02/2009, Sec 4-Effective 12/02/2009, Prior Text; M-3922, Amended, 07/06/2009, Sec 11, Prior Text; M-3643, Added, 01/26/2004)

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Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

REBECCA JULIAN and GRETCHEN)	
BROOKS,)	NO. 08-2-06307-4
)	
Petitioners,)	MEMORANDUM OF OPINION
vs.)	AND ORDER DENYING
)	RESPONDENTS' MOTION TO
CITY OF VANCOUVER, a municipal)	DISMISS NON-SEPA ISSUES
corporation, and WAYNE and DOLORES)	
MONROE, individually and as a marital)	
community;)	
)	
Respondents.)	

THIS MATTER came on regularly before the undersigned Judge of the above-entitled Court, on February 6, 2009, on the respondents' motion to dismiss non-SEPA issues on appeal. Respondents Wayne and Dolores Monroe were represented by and through their attorney, Steve C. Morasch. Respondent City of Vancouver was represented by and through its attorney, Assistant City Attorney Linda Marousek. Petitioners Rebecca Julian and Gretchen Brooks were represented by and through their attorney, John S. Karpinski. The Court considered the records and files herein, and the written and oral arguments of the parties. Based on this review, it appears that the respondents' motion should be denied.

FACTUAL BACKGROUND

Wayne and Dolores Monroe requested approval from the City of Vancouver to short plat an approximately one-acre parcel into four lots. Petitioners live near the Monroe property. As required by the Vancouver Municipal Code, the City mailed public notice of the short plat application to the petitioners, and invited their comments on the proposal by 5:00 p.m. on March 4, 2008.

Rebecca Julian emailed the City at 5:11 p.m. on March 4, 2008, after the close of the public comment period. The email stated "I am a homeowner on SE Lieser Point Drive (8601) I have been out of town and had not received notice of the change. I have concerns that I feel need to be addressed. Please consider this as notice." No other written comments were received from Ms. Julian. There is no indication in the record that Gretchen Brooks submitted written comments.

The City's planning official conditionally approved the short plat on April 1, 2008. Petitioners timely appealed the decision to approve the short plat, as well as the determination that this project was exempt from SEPA requirements.

Consideration of a short plat application is a type II decision under the Vancouver Municipal Code. The appeal was assigned to a hearing examiner, to conduct an open record hearing. The petitioners appeared at the hearing, and raised multiple issues, both on SEPA and non-SEPA grounds. During the hearing, the examiner raised the issue of the effect of VMC 20.210.130.A(4). That section requires that an appeal notice contain "a statement demonstrating that the specific issues raised on appeal were raised during the period in which the record was open." The hearing examiner interpreted this provision to mean that specific issues needed to be raised by the petitioners during the

comment period, and that failure to do so precluded consideration of those issues on appeal. Based on this ruling, the examiner dismissed all non-SEPA issues raised on appeal.

Although the hearing examiner concluded that he was without jurisdiction to hear non-SEPA issues, he allowed the parties to present evidence on these issues during the hearing. In his written ruling, the hearing examiner indicated *in dicta* the rulings he would have made on non-SEPA issues, in the event he should have considered them. No party asserts that they would have presented additional evidence or argument on non-SEPA issues, if the hearing examiner had ruled differently.

The petitioners filed this LUPA appeal, asserting both SEPA and non-SEPA challenges to the decision to grant the short plat application. The respondents moved to dismiss the non-SEPA issues, asserting that the hearing examiner was correct, and that this Court does not have jurisdiction to hear non-SEPA issues. The Court's ruling on this preliminary motion will affect the issues to be briefed by the parties during the substantive portion of the appeal.

DECISION

The hearing examiner committed a plain error of law in his interpretation of VMC 20.210.130.A(4). Section 130, which deals with the procedures to be followed during appeals of several types of land use decisions, must be read in its entirety. That section broadly covers the procedures for type I, II, III, and IV decisions, and discusses both open and closed record reviews.

VMC 20.210.130.B(2) identifies the individuals who have standing to appeal type II decisions. Certain individuals may appeal even if they do not demonstrate "that they

participated in the decision process through the submission of written testimony.”

Section B.2(c). The petitioners have standing to appeal because they were “eligible for written notice of a pending type II administrative decision”. Section B.2(b).

The hearing examiner erred by interpreting Subsection A(4) to require a demonstration by the petitioners that specific issues were raised during the comment period. The language of Subsection A(4) does not mention the comment period; it references “the period in which the record was open”. In a type II appeal, the record is open during the hearing before the examiner. VMC 20.210.120.B(4), (5). The appeal process contemplates that a person with standing to appeal may raise issues during the hearing which were not addressed during the comment period.

This interpretation does not render VMC 20.210.130.A(4) superfluous. Individuals are required to raise specific issues on the record during open appeals. In a closed record appeal, a statement that the specific issues raised on appeal were raised while the record was open is mandated. This interpretation is consistent with the broad scope of Section 130.A, which deals with both open and closed record appeal notices.

This interpretation of the jurisdictional requirements for raising non-SEPA issues in a type II proceeding is also consistent with the overall purpose of the administrative process. The open record hearing before the examiner may only be initiated by certain interested parties. These parties are given a brief initial opportunity to comment, their comments are not required to be specific or detailed. Because the initial opportunity for comment is brief, the hearing before the examiner is open, and it is contemplated that additional evidence will be provided by all interested parties.

The Court's decision is not based upon estoppel or waiver of jurisdictional requirements by the City, or by the individual applicants.

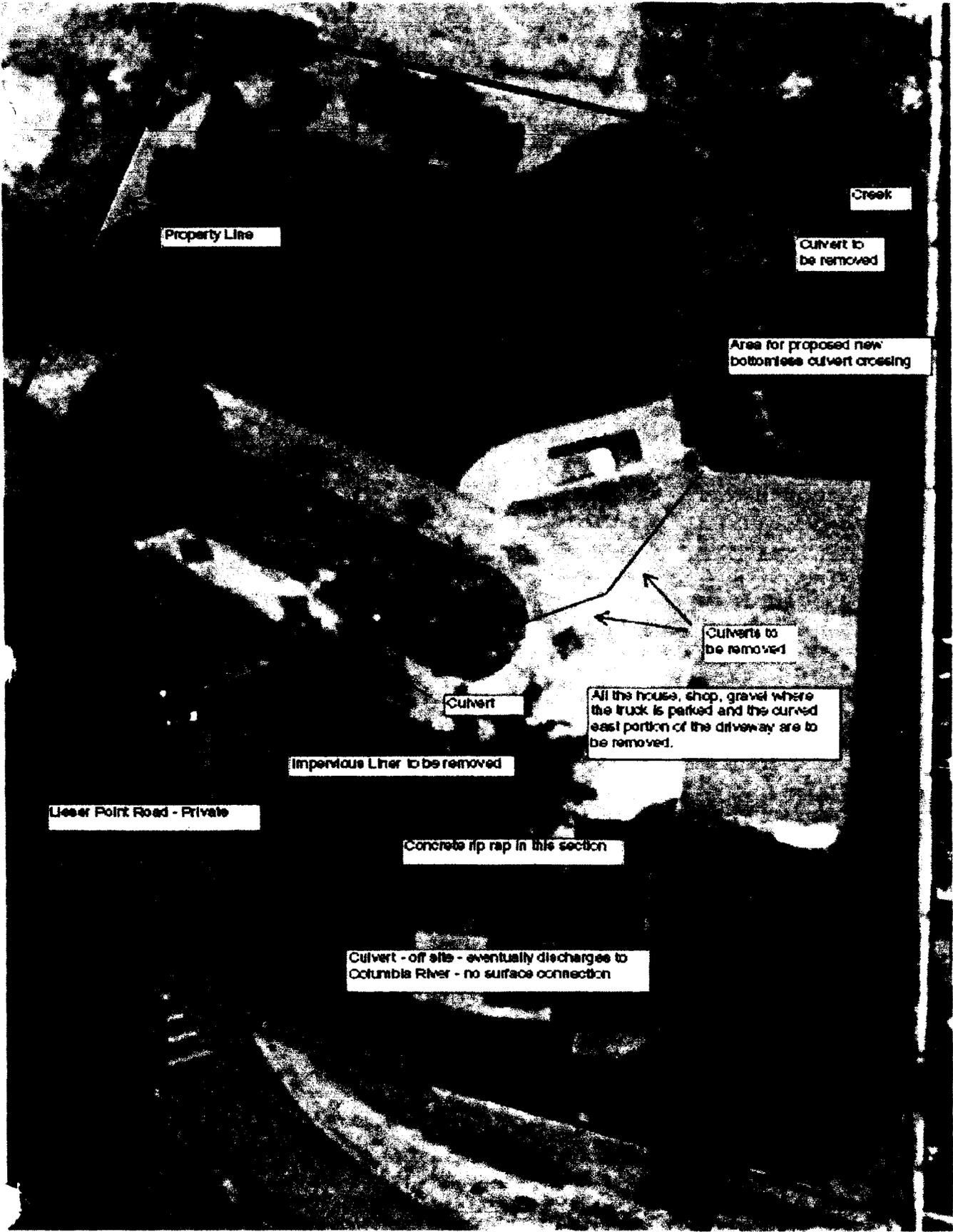
ORDER

Based on the foregoing decision, and the Court being fully advised, now, therefore, it is hereby ORDERED, ADJUDGED and DECREED that the respondents' motion to dismiss non-SEPA issues is denied.

DATED this 3rd day of March, 2009.

/s/ ROBERT A. LEWIS

Judge Robert A. Lewis



Property Line

Creek

Culvert to be removed

Area for proposed new bottomless culvert crossing

Culverts to be removed

Culvert

All the house, shop, gravel where the truck is parked and the curved east portion of the driveway are to be removed.

Imperious Liner to be removed

Leser Point Road - Private

Concrete rip rap in this section

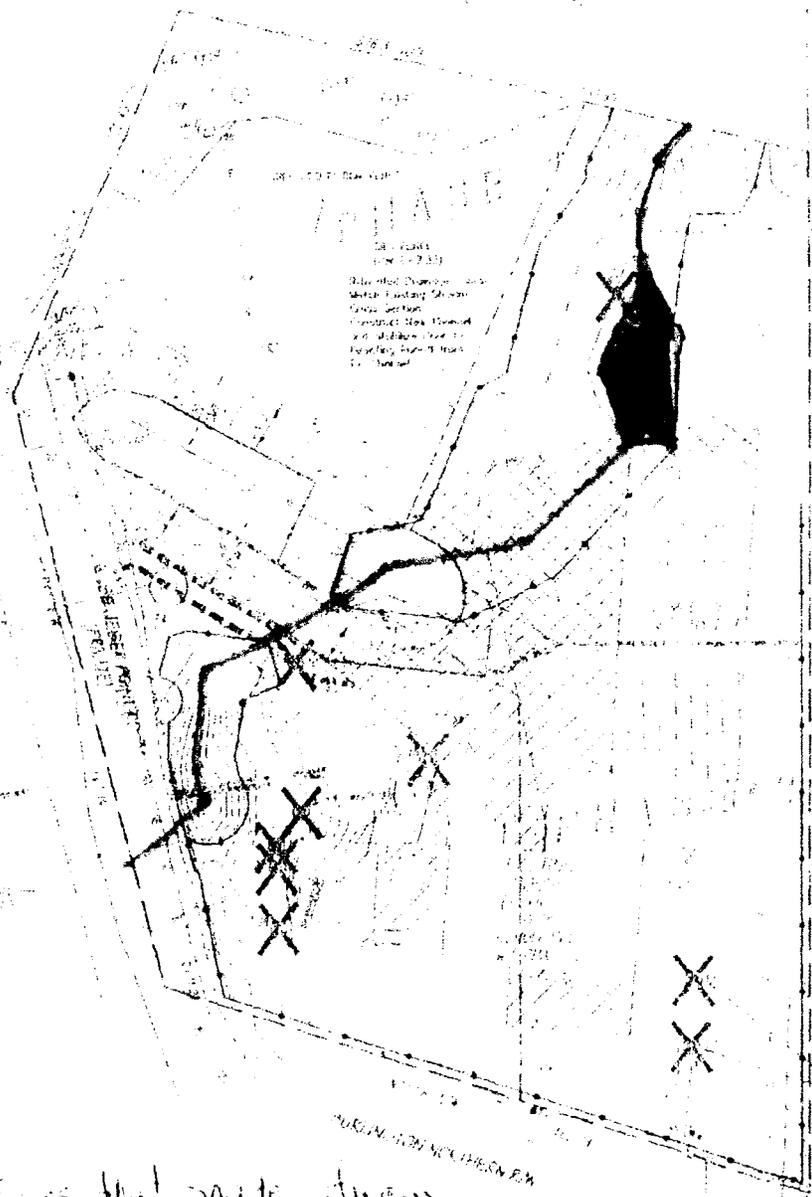
Culvert - off site - eventually discharges to Columbia River - no surface connection

Sheet 4
of Exh. 21

ITEM	STRUCTURE		ADJUSTMENT		TOTAL STRUCTURE NEW CONSTRUCTION LOADING STAKE
	DOT	SPR	DOT	SPR	
DISEGMENT	25	200	10	10	
ADJUSTMENT	10				
CONSTRUCTION		20		20	
TOTAL	35	220	10	30	400

NOTE: Material and grading will take place before grading and to include the drainage system.

11.250 (11.250) (11.250)



11.250 (11.250) (11.250)

11.250 (11.250) (11.250)

11.250 (11.250) (11.250)

* Trees that make stream that are to be removed

11.250 (11.250) (11.250)

1 **CERTIFICATION OF SERVICE**

2 I hereby certify that I served the foregoing Appellants' Reply Brief upon the following listed
3 attorneys on the date noted below:

4 Steve C. Morasch, WSBA #22651 Attorney for Respondents Monroe
700 Washington St Ste 701
Vancouver, WA 98660-3338
5 smorasch@schwabe.com

6 Linda A. Marousek, WSBA #12045 Attorney for Respondent City of Vancouver
7 VANCOUVER CITY ATTORNEY'S OFFICE
P.O. Box 1995
8 210 E. 13th Street
Vancouver, WA 98668
9 Linda.Marousek@ci.vancouver.wa.us

10 by the following indicated method or methods:

- 11 by **mailing** a full, true and correct copy thereof in a sealed, first-class postage-prepaid
12 envelope, addressed to Linda Marousek, and Steve C. Morasch, as shown above the last-
13 known office address of the attorneys, and deposited with the United States Postal Service
14 at Vancouver, Washington, on the date set forth below.
- 15 by hand delivery on Linda Marousek and Steve C. Morasch at the addresses above listed.
- 16 by sending a full, true and correct copy thereof via **overnight courier** in a sealed, prepaid
17 envelope, addressed to the attorney as shown above, the last-known office address of the
18 attorney, on the date set forth below.
- 19 by **faxing** a full, true and correct copy thereof to the attorney at the fax number shown above,
20 which is the last-known fax number for the attorney's office, on the date set forth below. The
21 receiving fax machine was operating at the time of service and the transmission was properly
22 completed, according to the attached confirmation report.
- 23 by sending a full, true and correct copy thereof via **e-mail on July 13, 2010**, to the attorneys
24 at the attorneys' last-known office e-mail address listed above on the date set forth below.

25 DATED this 13th day of July, 2010.

26 
27 DIANE M. KARPINSKI
28 Legal Assistant to
John S. Karpinski,
Attorney for Appellants

Julian Crt App Cert of Service Replyg Brief.071310.wpd

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