

No. 42110-1-II  
COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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KYLE WOOD, et ux,

Appellants,

vs.

MICHAEL DERMOND, et ux., et al.

Respondents.

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

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APPELLANT'S REPLY BRIEF

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**ORIGINAL**

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## **I. INTRODUCTION**

Appellants Kyle and Tammy Wood request this court reverse the summary judgment dismissal of their claims against Mason County (“the County”). The County was not entitled to judgment as a matter of law.

## **II. ARGUMENT**

The trial court erred in dismissing all of the Woods’ claims against Mason County on summary judgment. The County was not entitled to judgment as a matter of law, and there were disputed issues of material fact on at least some of the Woods’ claims.

The Woods made two general claims of damage. First was damage from the landslide event in January, 2009, which damaged a portion of the Woods’ property, sloughing away a 7-10 foot section of their marine bluff, and permanently reducing the market value of their property. In connection with this damage, the Woods’ claimed that Mason County failed to enforce the provisions of the Landslide Hazard Section of its Resource Ordinance<sup>1</sup>, which should have required Mr. Dermond to obtain permits prior to clearing his land and to implement structural mitigation measures

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<sup>1</sup> Pertinent sections of the Mason County Resource Ordinance (“MCRO”), as well as the pertinent Enforcement section of the Mason County Code (“MCC”), are included in the appendix to this reply brief. Woods inadvertently neglected to include these sections with their opening brief.

to prevent landslides. The Woods also claimed that the landslide was caused in part by trespass by stormwater the County collects and discharges onto the Wood/Dermond properties in violation of its own Resource Ordinance. The Woods claimed that this trespass also caused waste under RCW 4.24.630.

The second category of damage is damage caused by Dermond's unauthorized installation of a catch basin and drainage system on the Wood's property just below the County culvert, including damage to a curtain drain system that protected the Woods' septic field. The Woods claimed that the County conspired with Mr. Dermond to build this drainage system without obtaining any of the permits required by law. The Woods claimed that the County was liable as a co-conspirator for the trespass and waste (under RCW 4.24.630) committed by Dermond.

The County was not entitled to judgment as a matter of law on these claims. The Public Duty Doctrine does not bar the Woods' failure to enforce claim because exceptions to the Doctrine apply. The Woods' claim of water trespass should not have been dismissed because the County did not prove its alleged easement. The Woods presented sufficient evidence of a civil conspiracy to take the issue to trial. The waste statute applies to both the water trespass and the later trespass by Dermond.

**A. The Trial Court Erred in Dismissing the Woods' Failure to Enforce Claim Because Exceptions to the Public Duty Doctrine Apply.**

Where an exception to the Public Duty Doctrine is met, the general rule of nonliability is overcome, and the local government is held as a matter of law to owe a duty of care to the plaintiff or a limited class of plaintiffs. *Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). Here, the legislative intent and failure to enforce exceptions are met. The County owed Woods a duty to enforce the requirements of the Landslide Hazard Section of the MCRO<sup>2</sup>. The County's failure to enforce was a cause of the January, 2009, landslide.

**1. Legislative intent**

The legislative intent exception applies when "a regulatory statute [or ordinance], by its terms, evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons." *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 929, 969 P.2d 75 (1998). The Landslide Hazard Section of the MCRO evidences a clear legislative intent to protect the circumscribed class of property owners adjacent to

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<sup>2</sup> Curiously, the County in its response brief repeatedly makes reference to shoreline regulations. The Woods have been consistent, at summary judgment and in their opening brief on appeal, in emphasizing their failure to enforce claim is based primarily on the Landslide Hazard Section of the County's Resource Ordinance. This court should not allow itself to be misled by the County's misstatements of the Woods' claims.

development activities in identified Landslide Hazard Zones:

The purpose of the Landslide Hazard Section is to identify areas that present potential dangers to public health and safety, to prevent the acceleration of natural geological hazards, to address off site environmental impacts, and *to minimize the risk to the property owner or adjacent property owners from development activities.*

MCRO 17.01.100 (emphasis added).

The Landslide Hazard Section meets the legislative intent exception. It evidences a clear intent to protect a circumscribed class of property owners (only those adjacent to development in a landslide zone, not all property owners in the county) from “the acceleration of natural geological hazards” caused by development activities—in other words, to protect them from landslides. The Woods are members of this circumscribed class, and they suffered precisely the harm from which the ordinance was intended to protect them. Under the legislative intent exception, the County owed Woods a duty to protect them from prohibited development activity in accordance with the Landslide Hazard Section.

The Landslide Hazard Section prohibits land clearing without a permit. MCRO 17.01.100(C)(2). For purposes of the Landslide Hazard Section, “land clearing” is defined as “the cutting or harvesting of trees or *the removing or cutting of vegetation so as to expose the soil.*” MCRO

17.01.100(D)(2)(a) (emphasis added). Dermond removed vegetation from the top of the marine bluff in a manner that exposed the soil. The County failed to take action to remedy this violation.

The County appeals to cases involving building permits to argue that the legislative intent exception simply does not apply, but these cases are off-point. In the building permit cases, the courts reasoned that building codes are enacted to secure compliance with development standards to protect the health and safety of the general public, not a circumscribed class. *E.g., Taylor v. Stevens County*, 111 Wn.2d 159, 164, 759 P.2d 447 (1988). The County attempts to expand this reasoning to reach all land use and permitting regulations, regardless of their language or legislative intent, but the County is unable to cite any authority for this unwarranted expansion.<sup>3</sup>

The Landslide Hazard Section does not merely secure compliance with standards protecting the general public. By its own terms, it was enacted to protect adjacent landowners from property damage caused by

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<sup>3</sup> The only case cited by the County to support this proposition that was not an ordinary building permit case was *Meany v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1998). In *Meany*, the plaintiff claimed the County gave him false information in the application process for a special use permit. He claimed the special relationship exception to the public duty doctrine applied. The court did not discuss legislative intent or failure to enforce, nor did it discuss whether the applicable code protected a circumscribed class.

landslides. It protects a circumscribed class from a specific danger that is faced only by that class, not by the general public.

The County also appeals to *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 871 P.2d 601 (1994), in an attempt to convince the court that any ordinance protecting “adjacent property owners” simply protects the public generally. What the County ignores is that, in *Pepper*, the ordinance at issue applied equally to all property across King County. Because it applied to all property, “adjacent property owners” would include all property owners in King County, which the court equated with the general public. In addition, the *Pepper* court noted that the King County ordinance had been changed, removing language related to property owners or abutting property, indicating the legislature did not intend to protect any particular class.

The Landslide Hazard Section of the MCRO is different, seeking to protect only those adjacent property owners in defined landslide hazard zones. This is a circumscribed class much more narrow than all property owners in the county, or the general public. The language has not been amended and clearly evidences legislative intent to protect a circumscribed class of which Woods are a part. The legislative intent exception to the Public Duty Doctrine applies. The County owed a duty to Woods, so the

County was not entitled to dismissal as a matter of law.

## **2. Failure to enforce**

The “failure to enforce” exception applies where (1) a government agent with a duty to enforce a statute or local ordinance (2) has actual knowledge of a violation, (3) fails to take corrective action, and (4) the plaintiff is within the class the ordinance intended to protect. *Smith v. City of Kelso*, 112 Wn. App. 277, 282, 48 P.3d 372 (2002); *Bailey v. Town of Forks*, 108 Wn.2d 262, 268-69, 737 P.2d 1257 (1987).

This exception applies. Stephanie Pawlawski, the County’s code enforcement officer who responded to the complaint of Dermond’s land clearing, had a duty to enforce the Landslide Hazard Section of the MCRO. On inspecting Dermond’s property, she discovered that he had removed vegetation, exposing the soil. (CP at 185.) That sort of land clearing without a permit is prohibited by the Landslide Hazard Section. MCRO 17.01.100. Instead of requiring Dermond to obtain an after-the-fact permit, as was her duty, Ms. Pawlawski merely recommended replanting with native vegetation. Had she required a permit, Dermond would have had to undertake structural mitigation actions designed to prevent landslides. The Woods are a part of the class of property owners the Landslide Hazard Section is intended to protect. As a result of Ms.

Pawlowski's failure to enforce the requirements of the Landslide Hazard Section, Woods suffered precisely the sort of damage the ordinance was designed to prevent.

- a. Ms. Pawlowski had actual knowledge of a violation creating a hazardous condition.

The County argues that Ms. Pawlowski did not have actual knowledge of a violation, but this ignores the facts that were before the court at summary judgment. It may be true that she did not recognize that there was a violation, but that is not the test that applies here.

"[K]nowledge of *facts constituting the statutory violation*, rather than knowledge of the statutory violation itself, is all that is required." *Coffel v. Clallam County*, 58 Wn. App. 517, 523, 794 P.2d 513 (1990) (citing *Honcoop v. State*, 111 Wn.2d 182, 190, 759 P.2d 1188 (1988)) (emphasis added). In fact, Ms. Pawlowski's failure to recognize the violation is part of the actionable negligence in this case. She observed where vegetation had been cleared down to exposed soil. This fact alone constitutes a violation of the ordinance, no matter what other facts she may or may not have known at the time. Ms. Pawlowski had knowledge of the facts constituting a violation, so this element of the exception is established.

The County also argues that her knowledge did not rise to the level

of knowledge of an inherently dangerous condition. It does so by misinterpreting the case law and twisting expert testimony out of context. Even if knowledge of an inherently dangerous condition is required, the County had that knowledge.

In *Pepper v. J.J. Welcome*, the court held the failure to enforce exception was not met because the only knowledge the county had was general knowledge of natural hazards in the area. In that case, unlike the present case, the county had no knowledge of any acts by the contractor that constituted a violation. *Pepper* does not stand for the proposition that an inherently hazardous condition is required, because the county did not even have knowledge of the facts constituting a violation.

Here, the County's awareness of landslide hazards does not stand alone. In combination with its knowledge of facts constituting a violation of the Landslide Hazard Section, it constitutes knowledge of an inherently dangerous condition created by Dermond's violation. The County knew that unpermitted land clearing created additional landslide hazards.

*Smith v. City of Kelso*, 112 Wn. App. 277, 48 P.3d 372 (2002), is similarly unhelpful. The court held the exception did not apply because the city did not have any knowledge of a violation. The court also held that the city was not required to investigate further. The Woods have never argued

that the County should have investigated further. The County *did* investigate, and it *did* obtain knowledge of a violation.

The County tries to convince the court that there was no hazard by twisting the testimony of David Strong. Mr. Strong testified in deposition after the landslide occurred that the slide would not threaten the Wood or Dermond residences in the next 30-60 years. (CP at 65.) He did not testify, as the County would have the court believe, that Dermond's land clearing did not create a hazardous condition. In fact, Mr. Strong's opinion was that Dermond's land clearing operations were one of the direct causes of the landslide. (CP at 278.) It is difficult to understand how the condition of the slope after the slide has already taken place has anything to do with whether the County knew of an inherently hazardous condition at the time of its failure to enforce in 2007. Dermond's land clearing created a heightened landslide hazard threatening both properties. The County knew of the facts constituting a violation and it knew that violation would increase the hazard of a landslide.

In addition, the "actual knowledge" element is a question of fact. *Waite v. Whatcom County*, 54 Wn. App. 682, 686, 775 P.2d 967 (1989). To the extent the facts known by Ms. Pawlawski are disputed, summary judgment dismissal was improper.

- b. Ms. Pawlawski had a mandatory duty to take specific action.

The failure to enforce exception applies when a government agent has a mandatory duty to take specific action to correct a statutory violation. *Smith v. City of Kelso*, 112 Wn. App. at 282. “Such a duty does not exist if the government agent has broad discretion about whether and how to act.” *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52, 58 (2004).

The County focuses on “specific action” and looks for a formulaic provision in the form of “when you see X you must do Y,” but this is not the analysis the courts have used. Rather, the courts look at the ordinance as a whole to determine whether a response is mandatory or discretionary. *See, e.g., Halleran*, 123 Wn. App. at 714; *Smith*, 112 Wn. App. at 282; *McKasson v. State*, 55 Wn. App. 18, 25, 776 P.2d 971 (1989) (no mandatory duty where the regulations are “replete with ‘mays’ and broad discretion is vested in the director).

The Landslide Hazard Section is enforced by the planning department in accordance with MCC 15.13. MCRO 17.01.200 (“The Director is charged with enforcement of the provisions of this Chapter.”). The MCC enforcement section notes that activities conducted without a permit when a permit was required are continuing violations and current

permits are required. MCC 15.13.020. The regulations do not vest any discretion in the planning department or its director as to whether or not to enforce the regulations. There is no discretion as to whether or not to require an after-the-fact permit. The County's own enforcement officers understand that they have a mandatory duty to require such permits when they discover a violation. (CP at 193, 200.) Ms. Pawlowski, having discovered facts constituting a violation of the Landslide Hazard Section, had a mandatory duty to require Dermond to obtain an after-the-fact permit for his land clearing. She failed to do so. The elements of the failure to enforce exception to the Public Duty Doctrine are met. The County owed a duty to Woods. Summary judgment dismissal of the Woods' failure to enforce claim was improper.

**3. The County's failure to enforce was a cause of the landslide.**

The County argues that even if it had properly enforced its ordinances, that enforcement would not have prevented the landslide, but in doing so it fails to understand the provisions of its own ordinance. The Landslide Hazard Section requires, as part of a land clearing permit, compliance with a Geotechnical Report containing specifications for structural and other mitigation designed "to protect the slope from erosion,

landslides, and harmful construction methods.” This is much more than just planting ground cover.

If the County had required Dermond to obtain and comply with such a permit, as required by the ordinance, Dermond would have been required to implement measures to prevent landslides, such as drainage systems to draw ground and surface waters away from the slope—systems which Mr. Strong testified he would have expected to find on the Dermond property but did not (CP at 277). Mr. Strong offered his opinion that Dermond’s land clearing, in combination with poor stormwater management, was the cause of the landslide. (CP at 278.) If the County had required full compliance with the ordinance, the landslide could have been prevented. To the extent the causes of the landslide were still disputed, summary judgment on causation was improper.

**B. The Trial Court Erred in Dismissing the Woods’ Trespass by Water Claim.**

The Woods claimed that the water collected by the County in its roadside ditches and discharged onto their property by way of the culvert trespassed on their land and caused the landslide. The Common Enemy Rule and its exceptions set the legal standard for an actionable water trespass claim. Under that standard, the County owed a duty of care in

managing its stormwater. The County claims a prescriptive easement, but failed to prove the alleged easement. Even if there was an easement, the County still trespassed by exceeding the scope of the easement.

**1. The Common Enemy Rule and its exceptions establish the County owed a duty of care in managing its stormwater.**

Two exceptions to the general rule of nonliability for water apply in this case. Under the “channel and discharge” exception, an uphill landowner (such as the County, owner of the Bloomfield Road right-of-way, including drainage ditches and the culvert) cannot lawfully collect water in an artificial channel and then discharge it upon adjoining lands in quantities greater than the natural flow. *Borden v. City of Olympia*, 113 Wn. App. 359, 367, 53 P.3d 1020 (2002). That is exactly what the County has done here.

Under the “due care” exception, a landowner is liable for failure to exercise “such care as to avoid unnecessary damage to the property of adjacent owners.” *Id.* Normal negligence principles apply. *Id.* at 368-69. The Public Duty Doctrine cannot shield the County from this duty because stormwater management is a proprietary function, for which the County owes the same duty of care as a private individual engaged in the same activity. *See Id.* at 371.

The Woods' have an actionable claim for water trespass. The County, as an uphill landowner, channeled and discharged its stormwater onto the Wood/Dermond properties in amounts greater than the natural flow. The County also failed to take due care to prevent unnecessary damage to the property of others. The County had a duty to construct its drainage "in such a manner as not to overflow onto the property of others." *Harkoff v. Whatcom County*, 40 Wn.2d 147, 151, 241 P.2d 932 (1952). The ditch below the culvert was insufficient to capture the water from even a normal flow. (CP at 146, 243.) Even knowing the danger of discharging stormwater at the top of a Landslide Hazard Zone<sup>4</sup>, the County allowed its culvert to continue to do just that.

**2. The County did not prove its alleged easement.**

A public nuisance can never ripen into a prescriptive easement. RCW 7.48.190; *City of Benton City v. Adrian*, 50 Wn. App. 330, 336-37, 748 P.2d 679 (1988). The County's discharge of water at the top of a hazardous slope was a public nuisance, so no matter how long, how

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<sup>4</sup> The Landslide Hazard Section provides: "If drainage must be discharged from the top of a Landslide Hazard Area to below its toe, it shall be collected above the top and directed to below the toe by tight line drain and provided with an energy dissipating device at the toe." It is interesting that the County, in trying to avoid the exceptions to the Public Duty Doctrine, argues that the ordinance imposes duties only on landowners, but at the same time does not, in its proprietary function as a landowner, comply with the requirements of its own ordinance.

openly, or how adverse the County's use was, it could never ripen into an easement.

Public nuisance is determined on a case-by-case basis, depending on the reasonableness or unreasonableness of making the use complained of in the particular place and in the manner and under the circumstances of the case. *Shields v. Spokane Sch. Dist. No. 81*, 31 Wn.2d 247, 257, 196 P.2d 352 (1948). Nuisance includes an act that endangers the comfort, repose, health and safety of others or renders persons insecure in the use of property. RCW 7.48.120. A *public* nuisance is one that affects the rights of an entire neighborhood, though the extent of damage may be unequal. RCW 7.48.130.

The discharge of stormwater at the top of a landslide hazard area, explicitly prohibited by the County's own ordinance because it increases the risk of landslides, is unreasonable. It endangers the comfort and safety of owners of the properties on which the water is discharged. It renders the entire neighborhood insecure in the use of their property. As demonstrated by Dr. Kilpatrick, a stigma attaches to the entire neighborhood as the result of the landslide because of a perceived threat of other geological activity in the same area. (CP at 314-20.) The property of the entire neighborhood is devalued. In addition, the water flows untreated into Totten Inlet, carrying

runoff from Bloomfield Road into the bay, where it could cause harm to the abundant shellfish farming operations in the area.

The County complains that Woods did not plead a public nuisance claim, but that was not necessary. A plaintiff is only required to plead its cause of action and need not anticipate or counter defenses that may or may not be raised in a defendant's answer. *Procter & Gamble Co. v. King County*, 9 Wn.2d 655, 659-60, 115 P.2d 962 (1941). The Woods made a trespass claim. The County defended that claim with the affirmative defense of prescriptive easement. Public nuisance is a legal theory that would negate the County's affirmative defense. The Woods are entitled to raise it, not to seek affirmative relief for nuisance—which they don't—but to defeat the County's affirmative defense to their original trespass claim. There is nothing improper about Woods' public nuisance argument.

The County discounts the applicability of *Elves v. King County*, 49 Wn.2d 201, 299 P.2d 206 (1956). *Elves* stands for the proposition that a nuisance directly impacting only one property can still be a *public* nuisance. In *Elves*, the nuisance was stormwater containing human and animal excreta being dumped on a single property. The court found it a sufficient menace to the community to constitute a public, rather than a private nuisance. Similarly, here, the County's discharge of stormwater at

the top of a landslide hazard area, though it only directly affects the Wood/Dermond properties, is a menace to the entire community. It increases the risk of landslides on the Wood/Dermond property, which devalues the land in the entire neighborhood. It also threatens to pollute the bay and the tidelands of the State, a public resource. It is a nuisance that affects the entire community and thus can never ripen into a prescriptive easement.

**3. Even if there was an easement, the County trespassed by exceeding the scope of the easement.**

Trespass occurs on the misuse or overburdening of an easement. *Sanders v. City of Seattle*, 160 Wn.2d 198, 215, 156 P.3d 874 (2007). Negligent misuse of an easement resulting in unnecessary damage to the underlying servient estate is actionable. *Berryman v. E. Hoquiam Boom & Logging Co.*, 68 Wash. 657, 660, 124 P. 130 (1912). Also, under the due care exception to the common enemy rule, the County had a duty to avoid unnecessary damage to the property of others, including damage to the underlying servient estate. *Borden*, 113 Wn. App. at 367.

The County should have taken care to prevent landslide damage occasioned by its discharge of water. It enacted the Landslide Hazard Section of the MCRO, so surely it knew of the inherent danger in

discharging water at the top of a landslide hazard area. Nevertheless, it continued to operate its drainage ditches and culvert in a manner that channeled and discharged water greater than the natural flow at the top of that hazardous slope. The County took no steps to prevent the flow that caused the landslide in 2009, in breach of its duty. This failure constitutes a negligent misuse of the easement and caused unnecessary damage to the underlying servient estate. This is an actionable trespass. The trial court should not have dismissed the Woods' trespass claim on summary judgment. To the extent the causes of the landslide remained in dispute, there was a dispute of material fact that also made summary judgment improper.

C. **The Trial Court Erred in Dismissing the Woods' Civil Conspiracy Claim Because There Was Sufficient Evidence to Take That Claim to Trial.**

The Woods' opening brief sets forth the facts supporting their conspiracy claim. On summary judgment, all reasonable inferences from those facts must be drawn in a light favorable to Woods. Those facts and inferences are sufficient to carry Woods' claim beyond summary judgment.

After the hazard created by Dermond's land clearing and the county's stormwater manifested itself through the landslide in January,

2009, Dermond and the County agreed to help each other to eliminate the water problem by constructing a catch basin and drainage system below the County's culvert. The County agreed to waive all application and permit requirements, saving Dermond large amounts of time and money. With such a drainage system in place, the County knew its water would no longer be a threat to the properties or its road, saving it from future liability. The County's actions in waiving permit requirements without so much as seeing the type of preliminary plans that would allow it to make a determination of what types of permits should have been required are entirely inconsistent with a lawful purpose. If the County's purpose were to do things by the book, Mr. Borden would have required and reviewed preliminary plans and would have discovered that multiple permits were required for the project. In the process, Dermond and the County would likely have discovered that the proposed catch basin location was actually on the Woods' land.

The County attempts to escape by citing *Wilson v. State*, 84 Wn. App. 332, 929 P.2d 448 (1996) for the proposition that the underlying acts in a conspiracy claim must be actionable. *Wilson* does not stand for that proposition. In any event, the underlying acts in Woods' conspiracy claim are the actionable trespass and waste committed by Dermond. The

County's waiver of permit requirements was simply the unlawful means by which Dermond and the County achieved their purpose of constructing the unauthorized catch basin on Woods' land.

The County argues that Woods should have challenged the County's waiver of permits through a LUPA appeal, but LUPA is entirely irrelevant here. LUPA applies to decisions on the public record made on applications for land use decisions. There is nothing in the record in this case that indicates Dermond made an application, or that the County made a decision on the public record. Dermond invited Mr. Borden to his property to discuss their mutual water problem. Mr. Borden orally approved the project and waived all permit requirements. There was no decision on the public record for Woods to appeal. LUPA simply does not apply.

**D. The Trial Court Erred in Dismissing the Woods' Claims for Statutory Waste Under RCW 4.24.630.**

The waste statute, RCW 4.24.630, provides treble damages for special classes of trespass. It requires a physical presence on the land; an intentional act causing injury to land or property on the land; and the defendant must have known or had reason to know that he lacked authorization to commit the act. RCW 4.24.630; *Clipse v. Michels*

*Pipeline Constr., Inc.*, 154 Wn. App. 573, 225 P.3d 492 (2010); *Colwell v. Etzell*, 119 Wn. App. 432, 81 P.3d 895 (2003); *Borden*, 113 Wn. App. 359. Physical presence is satisfied when the defendant causes another person or thing to enter the land of another. *See Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 243-46, 23 P.3d 520 (2001).

**1. The waste statute applies to the County's trespass by water.**

The County was present on the land through the instrumentality of its stormwater, which it caused to enter the Wood/Dermond properties.

The County intentionally discharged its water onto the Wood/Dermond properties. A person is deemed to intend any results substantially certain to result from his intentional acts. A reasonable person with the knowledge and skill of the County would have known that a landslide was substantially certain to result from the prohibited discharge of channeled stormwater at the top of a landslide hazard area. The County should be deemed to have intended not only the discharge, but the resulting injury to the land.

Based on the legal duties owed by the County and the prohibition of the discharge in its own ordinance, the County knew or should have

known that its discharge was unauthorized.

The elements of the waste statute are met as to the County's discharge of stormwater and the resulting landslide damage. The trial court should not have dismissed the Woods' statutory waste claim on summary judgment. To the extent the causes of the landslide were still disputed, there was also a dispute of material fact making summary judgment improper.

**2. The waste statute applies to Dermond's trespass in building the drainage system.**

The County is liable for Dermond's trespass and waste as a co-conspirator. In determining whether the waste statute applies here, it is Dermond's acts and knowledge that are relevant.

Dermond was physically present on the Woods' land when he built the catch basin below the County culvert.

Dermond intentionally constructed the catch basin, excavating the Woods' land and damaging a curtain drain that protected Woods' septic field in the process. Even if the catch basin and drainage system confer some benefit on Woods, its construction was unauthorized. Its unauthorized presence is damage to Woods' property rights. Dermond also intentionally damaged the curtain drain on Woods' land.

Dermond knew or had reason to know that the catch basin location was not on his own land. He had seen the location of stakes marking the property corners when he purchased the land. He was advised by a County employee that the location was probably not in the County's right of way. Dermond was put on adequate notice that he should have made inquiry to determine whose land the catch basin location was on. He did not do so. Similar statutes, such as timber trespass, punish this sort of failure to make proper inquiry as to property boundaries. The waste statute should be the same. Dermond had reason to know that he was not authorized to construct the catch basin on Woods' land.

As a co-conspirator in the drainage project, the County is equally liable for Dermond's wrongful acts, including statutory waste. The trial court erred in dismissing this claim on summary judgment.

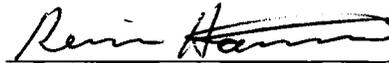
### **III. CONCLUSION**

The trial court erred in dismissing the Woods' claims on summary judgment. The County was not entitled to judgment as a matter of law, and some claims involved disputes of material fact that made summary judgment improper. The County owed Woods a duty to enforce the requirements of its Resource Ordinance on Dermond. The County trespassed on Woods' land by way of its improperly channeled

stormwater. The water and the County's failure to require Dermond to implement structural mediation measures caused the January, 2009, landslide that damaged the Woods' property. The County's trespass also caused waste under RCW 4.24.630. The County also conspired with Dermond to build a catch basin and drainage system, trespassing on Woods' land, improperly waiving all permit requirements. The County is liable as a co-conspirator for Dermond's trespass and waste. The trial court erred in dismissing the Woods' claims, and this court should reverse.

Respectfully Submitted this 21<sup>ST</sup> day of October, 2011.

CUSHMAN LAW OFFICES, P.S.



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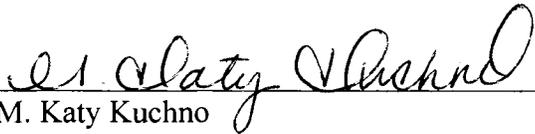
Jon E. Cushman, WSBA #16547  
Kevin Hochhalter, WSBA #43124  
Attorneys for Kyle and Tammy Wood

**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the State of Washington, that on October 21, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402 253-593-2806	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
copy:	Mark R. Johnsen Karr Tuttle Campbell 1201 Third Avenue, Suite 2900 Seattle, WA 98101-3028	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail

DATED this 21<sup>st</sup> day of August, 2011 in Olympia, Washington.

  
 M. Katy Kuchno  
 Paralegal to Jon E. Cushman  
 & Kevin Hochhalter

11 OCT 21 PM 14:20  
 STATE OF WASHINGTON  
 BY \_\_\_\_\_  
 REPLY

# APPENDIX

# MASON COUNTY RESOURCE ORDINANCE

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# MASON COUNTY RESOURCE ORDINANCE

## 17.01.010 AUTHORITY

This Chapter shall be known as the Mason County Resource Ordinance and is hereby adopted under the authority of Chapters 36.32, 36.70, 36.70A, 39.34, 58.17, 76.09, 84.33, 84.34, and 90.58 RCW. It shall become effective as provided by law.

## 17.01.020 PURPOSE

The purpose of the Resource Ordinance is to protect Mason County's natural resource lands and critical areas while the County develops its comprehensive plan and associated regulations. The regulations established in this Chapter, adopted by Ordinance No. 77-93, seek to:

Establish uniform processes to be used by Mason County for the review of land use and development proposals within critical areas and resource lands.

Conserve resource lands for productive economic use by identifying and designating resource lands where the principal and preferred land use is commercial resource management, and by protecting the same from incompatible land uses.

Protect the identified critical areas in their natural functions, along with air and water quality, to sustain the County's quality of life.

Encourage creative development techniques and land use practices which will help to accomplish these goals.

This ordinance fulfills the goals of the State Growth Management Act (RCW 36.70A et al) and the State Environment Policy Act (RCW 43.21).

## 17.01.040 ESTABLISHMENT OF DESIGNATED LANDS

### A. DESIGNATION AUTHORITY

Under authority of 36.70 and 36.70A RCW, portions of Mason County are hereby designated as critical areas and/or resource lands as are necessary to protect the natural environment, protect public and private property, maintain and enhance natural resource based industries, and enhance the health, safety and welfare of the public.

### B. SCOPE OF AUTHORITY

1. Within the designated resource lands and critical areas established by this Chapter, all buildings or structures which shall be erected, reconstructed, altered, enlarged or relocated; all lots or parcels which shall be created, used or developed; all grading or land clearing which shall be engaged in, and all other land uses, shall be in compliance with this Chapter. All development and uses which are not "Permit Required", or "Conditional Uses" must meet the terms of this Chapter, and any applicable regulations listed in Section 17.01.050. This Chapter establishes standards and review processes for all proposed uses which shall be followed prior to commencement of those uses.
2. Areas in Mason County in one or more critical areas or resource lands, may be subject to regulations pursuant to this Chapter. When an area is designated under more than one critical area or resource land, all applicable sections of this Chapter shall be met; provided any and all permit processing shall occur concurrently. In case of conflict, the more protective provision shall prevail.

C. BOUNDARIES OF DESIGNATED LANDS

1. Designated resource lands and critical areas are bounded and defined, in part, as shown on the following official maps of Mason County, which together with all explanatory materials contained thereon, are hereby made a part of this Chapter. These maps will automatically be updated as new data becomes available.
  - a. "Mason County Long-Term Commercial Forest and Inholdings as shown on the Development Areas Map 1"
  - b. "Water Type Reference Maps of Mason County", Washington Department of Natural Resources.
  - c. "Mason County Soil Survey Map", United States Department of Agriculture; Series 1951, No. 9.
  - d. "Mason County Critical Aquifer Recharge Areas Map"
  - e. "The Flood Insurance Study for Mason County", U.S. Federal Emergency Management Agency
  - f. "National Wetlands Inventory", U.S. Fish and Wildlife Service, and all Mason County Maps referencing wetlands.
  - g. The approximate location and extent of critical fish and wildlife habitat areas as displayed in the Washington Department of Fish and Wildlife's (WDFW) Priority Habitat and Species (PHS) Program database.
  - h. Kelp and eelgrass beds, identified by the Department of Natural Resources Aquatic Lands Division and the Department of Ecology, including but not limited to locations of kelp and eelgrass beds compiled in the Puget Sound Environmental Atlas.
  - i. Herring and smelt spawning times and locations outlined in WAC 220-110-240 through 220-110-260 and the Puget Sound Environmental Atlas.
  - j. Other maps adopted in specific sections of the Resource Ordinance.

Each map shall state the source or sources of scientific and other methodologies used in the determination of boundaries, and all maps shall be individually stored and available for review at the Mason County Department of Community Development, except for the Priority Habitat and Species Program data, which is available to the public from the WDFW.

2. The actual presence or absence of lands which meet the designation criteria for a specific critical area or resource land shall govern the treatment of a specific development proposal. When classification criteria contain both map references and non-map criteria to be reviewed on-site, the non-map criteria shall take precedence. When, through project review, lands or waters are discovered which are required by the text of this Chapter to be designated in another classification than that shown on the map, the text designation shall take precedence over mapping, and any development therein or thereon shall comply with this Chapter. The property owner or the County may initiate a reclassification procedure pursuant to Section 17.01.130 of this Chapter, wherein any official map shall also be amended to conform to the redesignation.
3. Interpretation of Boundaries

The following rules shall be used to determine the precise location of any designation boundary shown on any official critical area or resource land map of Mason County:

- a. Boundaries shown as following or approximately following the limits of any city shall be construed as following such limits.
- b. Boundaries shown as following or approximately following roads or streets shall be construed to follow the centerline of such roads or streets.
- c. Boundaries which follow or approximately follow platted lot lines or assessor's parcel boundary lines shall be construed as following such lines.
- d. Boundaries shown as following or approximately following section lines, half-section lines, or quarter-section lines shall be construed as following such lines.
- e. Boundaries shown as following or approximately following shorelines of any lakes or Puget Sound shall be construed to follow the ordinary high water lines of such bodies of water, and, in the event of change in the ordinary high water line, shall be construed as moving with the actual ordinary high water line.
- f. Boundaries shown as following or approximately following the centerline of streams, rivers, or other continuously flowing water courses shall be construed as following the channel centerline of such water courses taken midway between the ordinary high water marks of such channel, and, in the event of a natural change in the location of such streams, rivers, or other water courses, the designation boundary shall be construed as moving with the channel centerline.
- g. Boundaries shown as separated from, and parallel or approximately parallel with, any of the features listed in paragraphs a through f above shall be construed to be parallel with such features and at such distances therefrom as are shown on the map.

#### 4. Interpretation of Parcel Sizes

The following rules shall be used to interpret parcel or property sizes for determinations in classifications, designations, and regulations of this Chapter:

- a. Parcels legally described as 1/256th of a section shall be equivalent to 2.5 acres (1.08 hectares).
- b. Parcels legally described as 1/128th of a section shall be equivalent to 5 acres (2.15 hectares).
- c. Parcels legally described as 1/64th of a section shall be equivalent to 10 acres (4.03 hectares).
- d. Parcels legally described as 1/32nd of a section shall be equivalent to 20 acres (8.06 hectares).
- e. Parcels legally described as 1/16th of a section shall be equivalent to 40 acres (16.12 hectares).
- f. Parcels legally described as 1/8th of a section shall be equivalent to 80 acres (32.24 hectares).
- g. Property legally described as 1 section shall be equivalent to 640 acres (257.92 hectares).

#### 5. Preferential Right To Manage Resources - "Right to Forestry", "Right to Farm", "Right to Mine"

##### Description of Preferential Rights

- a. No resource use or any of its component activities shall be or become a nuisance, private

or public, by any changed conditions in or about the locality thereof after the same has been in operation for more than five years, when such operation was not a nuisance at the time the operation began; provided that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such operation or its component activities, and the property owner follows the standards of this Chapter.

- b. A resource operation shall not be found to be a public or private nuisance if the operation conforms to local, state, and federal law and best management practices.
- c. A farm or forest operation shall not be restricted to time of day or days of the week, but shall be conducted according to best management practices pursuant to State law.
- d. A farm or forest operation shall be free from excessive or arbitrary regulation.

## **17.01.050 RELATIONSHIP TO OTHER REGULATIONS**

### **A. GENERAL PROVISION**

No permit granted pursuant to this Chapter shall remove an applicant's obligation to comply in all respects with the applicable provisions of any other Federal, State, or local law or regulation, including, but not limited to, the acquisition of any other required permit or approval.

### **B. STATE ENVIRONMENTAL POLICY ACT**

This Chapter is a officially adopted land use policy of Mason County and shall be a basis for analyzing development proposals pursuant to 43.21c RCW. The areas described on adopted critical area maps, pursuant to Section 17.01.040.C.1, are declared sensitive areas under provisions of WAC 197-11-908.

### **C. MASON COUNTY POLICIES AND REGULATIONS**

- 1. The following adopted County policies and regulations shall be enforced consistent with the terms of this Chapter:

- a. Uniform Building Code
- b. Uniform Fire Code
- c. Mason County Health Code
- d. Mason County Environmental Policy Ordinance
- e. Mason County Mobile Home and Recreational Vehicle Ordinance
- f. Mason County 6-year Transportation Improvement Program
- g. Title 16, Mason County Subdivision Ordinance including Large Lot Requirements
- h. Parking Standards Ordinance
- i. Other adopted ordinances by Mason County

Where this Chapter is found inconsistent with any of the above documents, the more applicable terms shall prevail. All county application forms, review procedures, or standards that are inconsistent with this Chapter shall be amended within three months of adoption of this Chapter; except where to do so would require approval by State authorities, or extended local public review, in which case, no time limit is established.

- 2. Responsibilities of Mason County Departments of Building, Health and Public Works.

For all development applications under the purview of the Mason County Building Official, Health Director, and/or Public Works Director, and in the course of their respective standard site inspection programs, a site inspection shall be performed to determine whether the site has lands, waters or shorelands that are likely to meet the designation criteria for one or more County Resource Lands or

Critical Areas. If a site is found likely to contain such lands, the Building Official, Health Director and/or Public Works Director shall notify the Director of Community Development of that interpretation and any permit under their authority shall not be approved until:

- a. The Director of Community Development finds that the site does not contain any lands, shorelands, or waters subject to regulations under this Chapter; or
- b. The Director of Community Development finds that the site does contain lands, shorelands, or waters subject to regulations under this Chapter and the proposed development is in compliance with all regulatory and procedural requirements of this Chapter.

D. SHORELINE MASTER PROGRAM AND FLOOD DAMAGE PREVENTION REGULATIONS

All policies and regulations of this Chapter are compatible and consistent with the following adopted County policies and regulations:

1. Mason County Flood Damage Prevention Ordinance (MCFDPO)
2. Mason County Shoreline Master Program (MCSMP)

While there are no inherent conflicts between this Chapter and the MCFDPO, and the MCSMP, there may be sections that overlap as in the case of Section 17.01.100 Landslide Hazard Areas. Where such Sections overlap, the more applicable policy or regulation between either of the above documents and this Chapter shall prevail.

All activities and developments that are subject to approval under provisions of this Chapter that also require approval of the MCFDPO, shall be processed under provisions of the MCFDPO and shall meet all the standards of this Chapter. Granting of approval of the MCFDPO shall constitute compliance with this Chapter.

All activities and developments that are subject to approval under provisions of this Chapter that also require approval of the MCSMP, shall be processed concurrently with provisions of the MCSMP and shall meet all the requirements of this Chapter.

## 17.01.100 LANDSLIDE HAZARD AREAS

The purpose of the Landslide Hazard Section is to identify areas that present potential dangers to public health and safety, to prevent the acceleration of natural geological hazards, to address off site environmental impacts, and to minimize the risk to the property owner or adjacent property owners from development activities.

Except for the exceptions listed below, development in or near landslide hazard areas requires a permit and the professional preparation of a geotechnical report or geological assessment to determine under what conditions the development may proceed at a reasonable risk. All development applications are reviewed to determine if they are likely to be in or near a landslide hazard area.

- Landslide hazard areas in Mason County are defined in A.
- The designation of landslide hazard areas is done in B.
- Activities exempt from these requirements are described in C.1. and others are listed in section 17.01.130 of the Resource Ordinance.
- Activities requiring permits are described in C.2.
- Standard requirements for certain activities are contained in D.
- When a geotechnical report or geological assessment is required is determined in E 1 and 2.
- The standards for a geotechnical report and geological assessment are contained in E. 3, 4, 5, and 6.
- The general review standard for approval of a permit is in E.7.
- Notice of the risks inherent in development in a landslide hazard area is required for the applicant and future property owners in F.

### A. CLASSIFICATION

1. The following shall be classified as Landslide Hazard Areas:
  - a. Areas with any indications of earth movement such as debris slides, earthflows, slumps and rock falls (see figure F.100).
  - b. Areas with artificial oversteepened or unengineered slopes, i.e. cuts or fills.
  - c. Areas with slopes containing soft or potentially liquefiable soils.
  - d. Areas oversteepened or otherwise unstable as a result of stream incision, stream bank erosion, and undercutting by wave action.
  - e. Slopes greater than 15% (8.5 degrees) and having the following:
    - i. Hillsides intersecting geologic contacts with a relatively permeable sediment overlying a relatively impermeable sediment or bedrock (e.g. sand overlying clay); and
    - ii. Springs or groundwater seepage.
  - f. Any area with a slope of forty percent or steeper and with a vertical relief of ten or more feet except areas composed of consolidated rock. A slope is delineated by establishing its toe and top and measured by averaging the inclination over at least ten feet of vertical relief.
2. The following information may be used as a guide by the County to indicate areas that have a higher likelihood of meeting the classification criteria above:
  - a. The areas identified on the Mason County Soil Survey Map as having slopes greater than 15%.
  - b. The areas identified on the Coastal Zone Atlas, Volume 9, of Mason County, Washington as:

- I. Unstable - "U"
  - ii. Unstable Old Slides - "UOS"
  - iii. Unstable Recent Slides - "URS"
  - iv. Intermediate Slopes - "I"
  - v. Modified Slopes - "M"
- c. The areas identified as Class 2, 3, 4, or 5 of the maps: "Relative Slope Stability of the Southern Hood Canal Area, Washington", by M. Smith and R.J. Carson, Washington State Department of Natural Resources, Division of Earth Resources, 1977; "The Geological Map of North Central Mason County, Washington", by R.J. Carson, 1976, U.S. Geologic Survey OFR 76-2;
  - d. Areas mapped as landslide deposits (Map Unit QIs) on the: Geologic map of the Longbranch 7.5-minute quadrangle, Thurston, Pierce, and Mason Counties, Washington, by R. L. Logan, T. J. Walsh, and Michael Polenz. 1 sheet, scale 1:24,000, 2003; Geologic map of the Squaxin Island 7.5-minute quadrangle, Mason and Thurston Counties, Washington, by R. L. Logan, Michael Polenz, T. J. Walsh, and H. W. Schasse. 1 sheet, scale 1:24,000, 2003; Geologic map of the Shelton 7.5-minute quadrangle, Mason and Thurston Counties, Washington, by H. W. Schasse, R. L. Logan, Michael Polenz, and T. J. Walsh. 1 sheet, scale 1:24,000, 2003; and Geologic map of the Summit Lake 7.5-minute quadrangle, Thurston and Mason Counties, Washington, by R. L. Logan and T. J. Walsh. 42 x 36 in. color sheet, scale 1:24,000, 2004.

**B. DESIGNATION**

- 1. Lands of Mason County classified as Landslide Hazard Areas are hereby designated, under RCW 36.70A.060 and RCW 36.70A.170, as critical areas requiring immediate protection from incompatible land uses.
- 2. Upon an application for development on either mapped or unmapped lands, the Director shall determine if a potential landslide hazard exists on a particular site based on:
  - a. Information supplied by the applicant in the form of a geotechnical report or geological assessment,
  - b. Actual physical observation of the site,
  - c. Existing County Hazard Area maps identified in subsection A, or
  - d. Other means determined to be appropriate.

**C. LAND USES**

- 1. Exempt Uses
  - a. The growing and harvesting of timber, forest products and associated management activities in accordance with the Washington Forest Practices Act of 1974, as amended, and regulations adopted pursuant thereto; including, but not limited to, road construction and maintenance; aerial operations; applications of fertilizers and pesticides; helispots; and other uses specific to growing and harvesting timber forest products and management activities, except those Forest Practices designated as "Class IV -General Forest Practices" under the authority of the "Washington State Forest Practices Act Rules and Regulations", WAC 222-16-030;
  - b. Those activities and uses conducted pursuant to the Washington State Surface Mining Act, RCW 78.44 and its Rules and Regulations, where State law specifically exempts local authority;
  - c. Existing and ongoing agriculture, aquaculture, floriculture, horticulture, general

farming, dairy operating under best management practices (BMP) of the Washington State Department of Ecology's Storm Water, Water Quality, Hazardous Waste, Wetland, and Solid Waste Program and BMP from the Departments of Health, Agriculture, Transportation, and State Conservation District Office.

2. Permit Required Uses

Permits are required for all new construction, grading, land clearing, and other uses subject to Section 17.01.050, and any Class IV Conversion Permit pursuant to the State Forest Practices Act which involves conversion to a Permit Required Use, and are within a Landslide Hazard Area or its buffer. Permit Required Use in or within 300 feet of a landslide hazard areas requires a Special Report, see Section 17.01.100.E.

D. DEVELOPMENT STANDARDS

Any land use on Landslide Hazard Areas or their buffers shall conform to the following standards:

1. Grading

- a. No grading shall be performed in landslide hazard areas prior to obtaining a grading permit subject to approval, by the Director, based on recommendations contained in the geotechnical report with slope stability, drainage, erosion control and grading recommendations.
- b. Clearing during grading shall be limited to the area of the approved development.
- c. No fill, dead vegetation (slash/stumps), or other foreign material shall be placed within a Landslide Hazard Area or its associated buffers; with the exception of engineered compacted fill for construction of buttresses for landslide stabilization which shall be in accordance with recommendations specified in a Geotechnical Report.

2. Land Clearing

- a. Within this section, "Land Clearing" is defined as the cutting or harvesting of trees or the removing or cutting of vegetation so as to expose the soil and which is not otherwise exempt from this section.
- b. Land Clearing in Landslide Hazard Areas or their buffers is permitted when it is consistent with the recommendation and plans contained in the Geotechnical Report and development approval.
- c. If there is no Geotechnical Report for the site, land clearing is not permitted: however removal of danger trees, selected removal for viewing purposes of trees less than 6 inches dbh (diameter at breast height) and trimming or pruning of existing trees and vegetation is allowed with the qualifications cited herein. Danger trees shall be identified with the recommendation of a member of the Association of Consulting Foresters of America, an arborist certified by the International Society of Arboriculture, or with the recommendation of a person qualified to prepare a geotechnical report if removing trees for slope stabilization purposes. Removal of trees less than 6 inches dbh shall be limited to less than 2 percent of the total number of trees of that size or larger in the hazard area. Removal of multiple trees in a concentrated area, i.e. within a distance of 25 feet of each other, shall be accompanied by replacement by deep rooting native

shrubs or other vegetation that serve similar moisture and erosion protective functions to that provided by the removed trees. Trimming and pruning shall be accomplished in accordance with pruning standards of the International Society of Arboriculture, as published in "ANSI A300-95" or subsequent updated versions in order to minimize the potential for long term damage to the trees.

- d. Removal of selected trees and ground cover is allowed without a permit for the purpose of surveying and geotechnical exploration activities that do not involve grading, provided that re-vegetation of the disturbed areas occurs immediately afterward.
- e. Land clearing for which a permit has been obtained shall not be allowed during the wet season, i.e. from October 15 through May 1, unless special provisions for wet season erosion and landslide protection have been addressed in the Geotechnical Report and approved by the Director.

### 3. Drainage

- a. Surface drainage, including downspouts and runoff from paved or unpaved surfaces up slope, shall not be directed onto or within 50 feet above or onto the face of a Landslide Hazard Area or its associated buffer. If drainage must be discharged from the top of a Landslide Hazard Area to below its toe, it shall be collected above the top and directed to below the toe by tight line drain and provided with an energy dissipating device at the toe.
- b. Stormwater retention and detention systems, including percolation systems utilizing buried pipe or French drain, are prohibited unless a licensed civil engineer certifies appropriate mitigation measures.
- c. Erosion shall be controlled as provided in the Mason County Stormwater Management Ordinance and in accordance with the recommendations provided in any geotechnical report or geological assessment prepared for the site.

### 4. Sewage Collection/Treatment Systems

Sewage collection and treatment systems shall be located outside of the Landslide Hazard Areas and associated buffers, unless an approved geotechnical report specifies appropriate mitigation measures. See Section 17.01.100.E.

### 5. Subdivision Design and Lot Size

For the purpose of determining lot sizes under Title 16 of the Mason County Code, and other county regulatory requirements, the Director shall review available information and required Geotechnical Reports or Geological Assessments under Section 17.01.100.E, and make a decision on a case-by-case basis based on the reports. To avoid impacts to anadromous fisheries and fish habitat, land divisions, (short plats, subdivisions, and large lot divisions) shall not be approved unless:

- a. No improvements or construction shall be within fish and wildlife habitat conservation areas, wetlands, or their buffers, provided that necessary water or wetland crossings or encroachments approved pursuant to other sections of the Mason County Resource Ordinance or other county regulations may be permitted for roads and utilities.
- b. All lots must have designated building areas on which structures may be safely located without the requirement for bulkheading, bank protection or other

structures that encroach on fish and wildlife habitat conservation areas, wetlands, or their buffers. Future buildings are to be limited to such designated areas.

The number, size, or configuration of lots may be changed as a condition of approval to meet this requirement.

6. Buffers

- a. A 50 foot (15.25 meter) buffer of undisturbed, natural vegetation is required around the Landslide Hazard Area or as recommended by the geotechnical engineer.
- b. Based on the results of the Geotechnical Report or Geological Assessment, the Director may increase the buffer.
- c. An application may be made to reduce the buffer for the purpose of constructing a single family residence on a lot existing or vested by December 6, 1996. Notice of application for the reduction of the buffer shall be made as provided in Section 15.07.010 of the Mason County Development Code (which specifies how notice is sent to adjacent property owners and posted on the site). The Director shall approve such a reduction only on finding that the approval is conditioned as necessary to be consistent with the recommendations contained within the Geotechnical Report or Geological Assessment (described in Sections 17.01.100.E.) and on finding that impacts to anadromous fish or their habitat or to fish and wildlife habitat conservation areas shall be avoided or mitigated as detailed in an approved Habitat Management Plan (described in Section 17.01.110.)

7. Bulkheads and Bank Protection

Bulkheads and bank protections, along with related fill, constructed for landslide stabilization measures approved under the Shoreline Master Program or the Fish and Wildlife Habitat Conservation Area regulations, shall be consistent with recommendations specified in a Geotechnical Report.

8. Residential Densities and Floor Area Ratios

The landslide hazard area and its buffer shall be counted in calculating the number of dwelling units (determined by the size of the site and residential density allowed) or the area of non-residential building (determined by the size of the site and the floor area ratio allowed) that may be built on the site; provided that:

- a. the development is outside of the landslide hazard area or its buffer, and
- b. the development is able to comply with all county regulations without encroaching on the landslide hazard area or its buffer.

Clustering of residential development away from landslide hazard area and its buffer may receive a density bonus if performed meeting the design requirements contained in Chapter 16.22, Mason County Code.

E. SPECIAL REPORTS

1. Applicability

Every application for development within a Landslide Hazard Area or its buffer or within 250 feet of the buffer (that is – within 300 feet of the landslide hazard area) shall meet the standards of Section 17.01.100.D and shall require a professionally prepared special report:

either a Geological Assessment or a Geotechnical Report, or both. The intent of the Geological Assessment is to confirm that the proposed development is outside of the landslide hazard area and its associated buffers and setbacks. The intent of the Geotechnical Report is to specify how the hazards are to be mitigated when development is proposed within the landslide hazard area itself or its buffers or setbacks. The type of report that is required is specified below:

- Category a. Development proposed within 300 feet of areas slopes greater than 40 percent (21.8 degrees) will require a Geotechnical Report.
- Category b. Development proposed within 200 feet of areas with any visible signs of earth movement such as debris slides, earthflows, slumps and rockfalls, or areas of previously mapped or recorded landslides will require a Geotechnical Report. If the proposed development is 200 feet or more from these areas, but not more than 300 feet from them, then a Geological Assessment is required and a Geotechnical Report may be required based on findings of the assessment.
- Category c. Development proposed within 100 feet of areas of oversteepened or otherwise potentially unstable slopes as a result of stream incision, stream bank erosion, and undercutting by wave action will require a Geotechnical Report. If the proposed development is 100 feet or more from these areas, but not more than 300 feet from them, then a Geological Assessment is required and a Geotechnical Report may be required based on findings of the assessment.
- Category d. Development proposed within 300 feet of areas with slopes between 15 percent (8.5 degrees) and 40 percent (21.8 degrees) will require a Geological Assessment, and may further require a Geotechnical Report upon analysis of the following factors by the Director:
  - (1) Lot size and use;
  - (2) Overall height of slope and maximum any planned cut or fill (requires a grading plan from the applicant);
  - (3) Soil types and history of sliding in the vicinity;
  - (4) Groundwater conditions, including depth to water and quantity of surface seepage;
  - (5) Approximate depth to hard or dense competent soil, e.g. glacial till or outwash sand;
  - (6) Impervious surfaces and drainage schemes (requires development/grading plan from the applicant);
  - (7) Wastewater treatment (requires on-site sewage disposal system approval from Mason County Department of Health);
  - (8) Potential off-site impacts, including adjacent properties, roadways, etc. (requires environmental statement from the applicant, dependant on scope of project).

## 2. Waiver of Geotechnical Report

The Director may waive the requirement for the Geotechnical Report for Category c and d sites upon a written finding in the Geological Assessment that the potential for landslide activity is low and that the proposed development would not cause significant adverse impacts, or that there is adequate geological information available on the area proposed for development to determine the impacts of the proposed development and appropriate mitigating measures.

## 3. Qualifications of Preparer

The Geologic Assessment shall be prepared at the discretion of the Director by either a licensed civil engineer with specialized knowledge of geotechnical/geological engineering or a licensed geologist or engineering geologist with special knowledge of the local conditions. The Geotechnical Report shall be prepared at the discretion of the Director by a licensed civil engineer with specialized knowledge of geotechnical/geological engineering or a licensed engineering geologist. The preparer shall be licensed in the State of Washington.

#### 4. Content of the Geological Assessment

A Geological Assessment shall include but not be limited to the following:

- (1) A discussion of geologic conditions in the general vicinity of the proposed development, with geologic unit designation consistent with terminology used in the Coastal Zone Atlas (Washington Department of Natural Resources, 1980) or in applicable U.S. Geologic Survey maps (e.g. Geological Map of North Central Mason County, by R.J. Carson, 1976, U.S. Geologic Survey OFR 76-2). Also to be used as applicable are: Geologic map of the Longbranch 7.5-minute quadrangle, Thurston, Pierce, and Mason Counties, Washington, by R. L. Logan, T. J. Walsh, and Michael Polenz. 1 sheet, scale 1:24,000, 2003; Geologic map of the Squaxin Island 7.5-minute quadrangle, Mason and Thurston Counties, Washington, by R. L. Logan, Michael Polenz, T. J. Walsh, and H. W. Schasse. 1 sheet, scale 1:24,000, 2003; Geologic map of the Shelton 7.5-minute quadrangle, Mason and Thurston Counties, Washington, by H. W. Schasse, R. L. Logan, Michael Polenz, and T. J. Walsh. 1 sheet, scale 1:24,000, 2003; and the Geologic map of the Summit Lake 7.5-minute quadrangle, Thurston and Mason Counties, Washington, by R. L. Logan and T. J. Walsh. 42 x 36 in. color sheet, scale 1:24,000, 2004. Use of Soil Conservation Service soil layer terminology is considered inappropriate for this assessment.
- (2) A discussion of the ground water conditions at the site, including the estimated depth to water and the quantity of surface seepage and the upslope geomorphology and location of upland waterbodies and wetlands.
- (3) The approximate depth to hard or dense competent soil, e.g. glacial till or outwash sand.
- (4) A discussion of any geomorphic expression of past slope instability (presence of hummocky ground or ground cracks, terraced topography indicative of landslide block movement, bowed or arched trees indicating downslope movement, etc.).
- (5) A discussion of the history of landslide activity in the vicinity, as available in the Coastal Zone Atlas, the map of "Relative Slope Stability of the Southern Hood Canal Area, Washington" by M. Smith and R.J. Carson, 1977; Geologic map of the Longbranch 7.5-minute quadrangle, Thurston, Pierce, and Mason Counties, Washington, by R. L. Logan, T. J. Walsh, and Michael Polenz. 1 sheet, scale 1:24,000, 2003; Geologic map of the Squaxin Island 7.5-minute quadrangle, Mason and Thurston Counties, Washington, by R. L. Logan, Michael Polenz, T. J. Walsh, and H. W. Schasse. 1 sheet, scale 1:24,000, 2003; Geologic map of the Shelton 7.5-minute quadrangle, Mason and Thurston Counties, Washington, by H. W. Schasse, R. L. Logan, Michael Polenz, and T. J. Walsh. 1 sheet, scale 1:24,000, 2003; and the Geologic map of the Summit Lake 7.5-minute quadrangle, Thurston and Mason Counties, Washington, by R. L. Logan and T. J. Walsh. 42 x 36 in. color sheet, scale 1:24,000, 2004; and the landslide records on file with the Mason County Department of Community Development.
- (6) An opinion on whether the proposed development is within the landslide hazard area or its associated buffer or setback.
- (7) A recommendation by the preparer whether a Geotechnical Report should be required to further evaluate site conditions and the proposed development of the subject property.
- (8) If the presence of a hazard is determined within 300 feet of the proposed development, then the area of the proposed development, the boundaries of the hazard, and associated buffers and setbacks shall be delineated (top, both sides, and toe) on a geologic map/ site

map.

- (9) A site map drawn to scale showing the property boundaries, scale, north arrow, and the location and nature of existing and proposed development on the site.

## 5. Content of a Geotechnical Report

A Geotechnical Report shall include but not be limited to the following:

- (1) A discussion of general geologic conditions, specific soil types, ground water conditions, the upslope geomorphology and location of upland waterbodies and wetlands, and history of landslide activity in the vicinity.
- (2) A site plan which identifies the important development and geologic features.
- (3) Locations and logs of exploratory holes or probes.
- (4) The area of the proposed development, the boundaries of the hazard, and associated buffers and setbacks shall be delineated (top, both sides, and toe) on a geologic map of the site.
- (5) A minimum of one cross section at a scale which adequately depicts the subsurface profile, and which incorporates the details of proposed grade changes.
- (6) A description and results of slope stability analyses performed for both static and seismic loading conditions. Analysis should examine worst case failures. The analysis should include the Simplified Bishop's Method of Circles. The minimum static safety factor is 1.5, the minimum seismic safety factor is 1.1, and the quasi-static analysis coefficients should be a value of 0.15.
- (7) Appropriate restrictions on placement of drainage features, septic drain fields and compacted fills and footings, including recommended buffers and setbacks from the landslide hazard areas.
- (8) Recommendations for the preparation of a detailed clearing and grading plan which specifically identifies vegetation to be removed, a schedule for vegetation removal and replanting, and the method of vegetation removal.
- (9) Recommendations for the preparation of a detailed temporary erosion control plan which identifies the specific mitigating measures to be implemented during construction to protect the slope from erosion, landslides and harmful construction methods.
- (10) An analysis of both on-site and off-site impacts of the proposed development.
- (11) Specifications of final development conditions such as, vegetative management, drainage, erosion control, and buffer widths.
- (12) Recommendations for the preparation of structural mitigation or details of other proposed mitigation.
- (13) A site map drawn to scale showing the property boundaries, scale, north arrow, and the location and nature of existing and proposed development on the site.

## 6. Applicable Standards

Geological Assessments and Geotechnical Reports shall be prepared using terminology, descriptions, evaluation methods and mitigation approaches that reflect the current standard of care for practitioners in the field of geologic hazards. Professionals performing geological assessments and geotechnical reports should consider information in, but not limited to the following publications and sources: Turner, A.K. and Schuster, R.L. (1996; "Landslides, Investigation and Mitigation", Transportation Research Board Special Report 247, National Academy Press, Washington DC.) for classification, analysis and conceptual mitigation of landslides; Washington Department of Ecology (1993; "Slope Stabilization and Erosion Control Using Vegetation, A Manual of Practice For Coastal Property Owners", Publication No. 93-30, Olympia, WA; and "Vegetation Management: A Guide For Puget Sound Bluff Property Owners", Publication No. 93-31, Olympia, WA) for vegetation management and its use in slope stabilization and erosion protection; and Washington Department of Ecology (1995; "Surface Water and Groundwater on Coastal Bluffs", Publication No. 95-107, Olympia, WA) for water and drainage management and its use in slope stabilization and erosion protection.

## 7. Administrative Determination

Any area in which the Geotechnical report or geological assessment indicates the presence of landslide hazards shall not be subjected to development unless the report demonstrates conclusively that the risks posed by the landslide hazards can be mitigated through geotechnical design recommendations, and that the development meets all standards in Section 17.01.100.D. Hazards must be mitigated in such a manner as to prevent harm to property and public health and safety, and to assure no significant adverse environmental impact. Impacts to anadromous fish or their habitat or to fish and wildlife habitat conservation areas shall be avoided or mitigated as detailed in an approved Habitat Management Plan, as described in Section 17.01.110. The Director may submit either the Geologic Assessment or the Geotechnical Report to an outside agency with geotechnical expertise or to a geotechnical consultant for third party peer review prior to issuing a ruling on the project.

F. APPLICANT HOLD HARMLESS STATEMENT

The property owner shall be required to acknowledge in writing the risks inherent in developing in a geologic hazard area, to accept the responsibility of any adverse affects which may occur to the subject property or other properties as a result of the development, and to agree to convey the knowledge of this risk to persons purchasing the site by filing the notice on the property title.

FIGURE: F 100

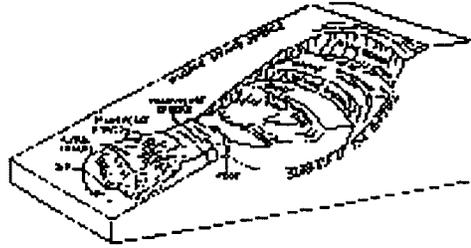
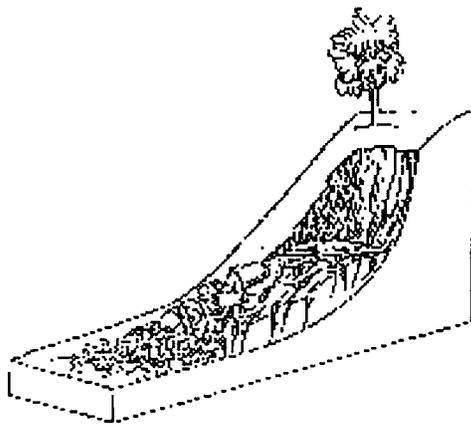
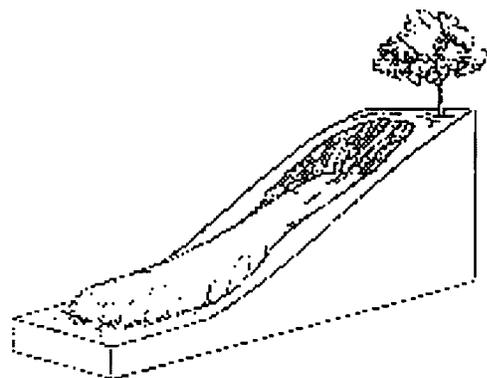


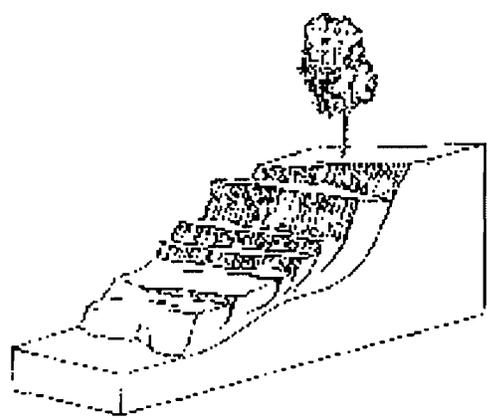
Diagram of parts of a hillside (from Odell, 1952)



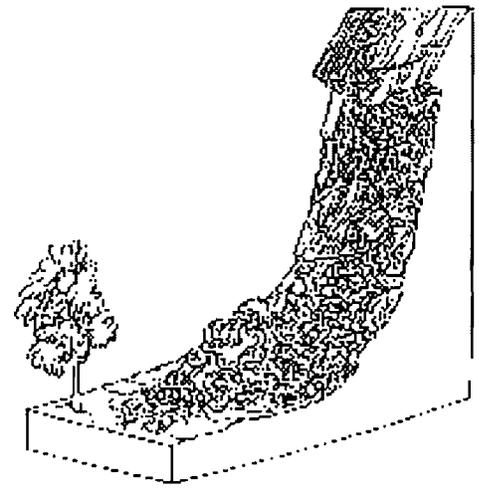
**Soils 4122:** Fragmental or broken masses of soil and E. For debris soil mass dominates by sitting on a surface level indicates the debris.



**Soils 4123:** Relatively uniform that slope downwards in a series similar to a steep field.



**Soils 4124:** Coherent or intact masses that have developed by relative slip on soil mass that indicate as well as penetrate the traditional surface.



**Soils 4125:** Mass that has been pushed or pulled through the air.

**B. ENFORCEMENT**

The County shall have authority to enforce this Section consistent with all provisions of Section 17.01.200.

**17.01.180 APPEALS**

**A. ADMINISTRATIVE INTERPRETATIONS**

1. Administrative decisions of the Director of Community Development shall be final and conclusive, unless a written statement of appeal is filed using the appeal procedures contained in Mason County Development Code Chapter 15.11. Appeals. Said statement shall set forth any alleged errors and/or the basis for appeal and shall be accompanied by a fee in an amount as set by resolution of the Board; provided, that such appeal fee shall not be charged to a department of the County or to other than the first appellant.
2. The timely filing of an appeal shall stay the effective date of the decision until such time as the appeal is heard and decided or is withdrawn. The burden of proof regarding modification or reversal shall rest with the appellant.

**B. DESIGNATIONS**

1. Within 15 calendar days following application for a land development permit pursuant to this Chapter, the Director of Community Development shall make a determination as to whether a designated resource land or critical area is affected by said proposed development. Such designation shall be final and conclusive unless a written statement of appeal is filed using the appeal procedures contained in Development Code Chapter 15.11. Appeals. Said statement shall set forth any alleged errors and/or the basis for appeal and shall be accompanied by a fee as approved by resolution of the Board; provided, that such appeal fee shall not be charged to a department of the County or to other than the first appellant.
2. Appeals of designations shall be processed using the appeal procedures contained in Development Code Chapter 15.11. Appeals.

**17.01.190 JUDICIAL REVIEW**

The action of the Hearing Examiner shall be final and conclusive unless an appeal is filed pursuant Title 15 Development Code Chapter 15.11.

**17.01.200 ENFORCEMENT**

The Director is charged with enforcement of the provisions of this Chapter. Enforcement procedures are set forth in Title 15 Development Code Chapter 15.13 Enforcement.

Mason County, Washington, Code of Ordinances >> Title 15 - DEVELOPMENT CODE >> Chapter 15.13 - ENFORCEMENT >>

## Chapter 15.13 - ENFORCEMENT

### Sections:

- 15.13.005 - Severability.
- 15.13.010 - Enforcing official—Authority.
- 15.13.020 - Penalty.
- 15.13.030 - Application.
- 15.13.035 - Warning notice.
- 15.13.040 - Notice of civil violation.
- 15.13.045 - Hearing before the hearings examiner.
- 15.13.050 - Civil fines.
- 15.13.055 - Cost recovery.
- 15.13.060 - Abatement.
- 15.13.070 - Review of approved permits.
- 15.13.075 - Revocation or modification of permits and approvals.

### 15.13.005 - Severability.

This title shall be governed by the laws of the state of Washington. In the event that any portion or section of this title be declared invalid or unconstitutional by a court of competent jurisdiction, the remainder of the title shall not be affected and shall remain in full force and effect.

*(Ord. 179-02 Attach B (part), 2002; Ord. 142-02 Attach B (part), 2002; Ord. 88-02 Attach B (part), 2002; Ord. 116-01 Attach A (part), 2001; Ord. 129-00 Attach A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996)*

### 15.13.010 - Enforcing official—Authority.

- (a) The review authority shall be responsible for enforcing those codes and ordinances to which this title applies, and may adopt administrative rules to meet that responsibility. The review authority may delegate enforcement responsibility, as appropriate. An employee of one review authority department may commence an enforcement action of violations of codes and regulations of other departments.
- (b) Inspections. The purpose of these inspection procedures are to ensure that a property owner's rights are not violated.

When it is necessary to make an inspection to enforce the provisions of this chapter, or when the director has reasonable cause to believe that a violation has been or is being committed, the director or his duly authorized inspector may enter the premises, or building at reasonable times to inspect or to perform any duties imposed by this chapter, provided that if such premises or building be occupied that credentials be presented to the occupant and entry requested. If such premises or building be unoccupied, the director shall first make reasonable effort to locate the owner or other person having charge or control of the premises or building and request entry. If entry is refused, the director shall have recourse to remedies provided by law to secure entry.

*(Ord. 32-04 Attach B (part), 2004; Ord. 179-02 Attach B (part), 2002; Ord. 142-02 Attach B (part), 2002; Ord. 88-02 Attach B (part), 2002; Ord. 116-01 Attach A (part), 2001; Ord. 129-00 Attach A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996)*

### 15.13.020 - Penalty.

- (a) Nonconforming structures and other non-conforming land modifications shall be a continuing violation. Every day of violation shall be a separate violation. It shall be a violation to own, use, control, maintain, or possess a portion of any premises which has been constructed, equipped, maintained, controlled, or used in violation of any of the applicable provisions, MCC Section 15.03.005, in this title. Structures or activities which were made or conducted without a permit, when a permit was required at the time of first action, do not vest and require current permits. Any person, firm, or corporation who violates or who solicits, aids, or attempts a violation are accountable under this chapter and are subject to the penalty provision as well as the hearing examiner process.

- (b) Compliance with the requirements of those codes and regulations listed under MCC Section 15.03.005 shall be mandatory, and violations of those codes are within the purview of this chapter.
- (c) Any private party who intentionally, recklessly, or negligently violates any of the applicable codes, regulations and ordinances is guilty of a misdemeanor. This includes, but is not limited to, a violation of notice and order, a violation of notice of civil violation, a violation of a warning notice, a violation of a stop work order, violation of a do not occupy order, and failure to comply with orders of the hearings examiner. Any person convicted of a misdemeanor under this section shall be punished by a fine of not more than five hundred dollars, or by imprisonment not to exceed ninety days, or by both, unless otherwise required by state laws. Each such person is guilty of a separate offense for each and every day during any portion of which any violation of any of the applicable provisions is committed, continued, permitted, or aided by any such person.
- (d) Notwithstanding the provisions of any other code, the review authority is authorized to issue civil infractions for violations of any provision of any code or regulation listed under Section 15.03.005. The enforcement officer may issue a civil infraction ticket of up to two hundred fifty dollars for the first violation and up to five hundred dollars for the second and subsequent violations. Second and subsequent violations refer to any violation of any provision of Section 15.03.005 within two years of the first violation. A violator is: (1) one who owns the property and knows the violation is occurring, and fails to take action to abate it; (2) one who causes the violation to occur or solicits, commissions, requests, or aids the violation; (3) one who has a virtual exclusive right to possess the land, as in a tenant, equitable title owner, or trust beneficiary, and who aids, abets, commissions, solicits, requests, or knowingly allows a violation to occur on the land; or (4) to the maximum extent allowed under Washington law, any company whose employee or employees violates any provision of Title 15. Proof in district court shall be by a preponderance of the evidence. To the extent that there is no conflict with this regulation, all such civil infractions under this regulation shall be governed by the standards and procedures set forth in Revised Code of Washington 7.80 (Civil Infractions). Each day of the violation shall be considered a separate offense.

*(Ord 179-02 Attach B (part). 2002: Ord. 142-02 Attach B (part). 2002: Ord. 88-02 Attach B (part). 2002 Ord. 116-01 Attach A (part). 2001: Ord. 129-00 Attach A § 2 (part). 2000: Res. 79-78 (part). 1998 Res. 136-96 (part) 1996)*

#### 15.13.030 - Application.

- (a) Actions under this chapter may be taken in any order deemed necessary or desirable by the review authority to achieve the purpose of this chapter or of the development code.
- (b) Proof of a violation of a development permit shall constitute prima facie evidence that the violation is that of the applicant and/or owner of the property upon which the violation exists. An enforcement action under this chapter against the owner and/or applicant shall not relieve or prevent enforcement under this chapter or other ordinance against any other responsible person, which, to the extent allowed by state law, includes an officer or agent of a business or nonprofit organization who, while violating the applicable provisions, is acting on behalf of, or in representation of, the organization.
- (c) Where property has been subjected to an activity in violation of this chapter, the county may bring an action against the owner of such land or the operator who performed the violation. In addition, in the event of intentional or knowing violation of this chapter, the hearing examiner may, upon the county's request, deny authorization of any permit or development approval on said property for a period up to ten years from the date of unauthorized clearing or grading. While a case is pending before the hearing examiner, the county shall not authorize or grant any permit or approval of development on the property.
- (d) Nothing in this chapter shall be construed to prevent the application of other procedures, penalties or remedies as provided in the applicable code or ordinance.

*(Ord 32-04 Attach B (part). 2004: Ord 179-02 Attach B (part). 2002: Ord. 142-02 Attach B (part) 2002 Ord 88-02 Attach B (part). 2002 Ord. 116-01 Attach A (part). 2001: Ord. 129-00 Attach A § 2 (part). 2000 Res. 79-78 (part). 1998 Res. 136-96 (part). 1996)*

#### 15.13.035 - Warning notice.

Prior to other enforcement action, and at the option of the review authority, a warning notice may be issued. This notification is to inform parties of practices which constitute or will constitute a violation of the development code or other development regulation as incorporated by reference and may specify corrective action. This warning notice may be sent by certified/registered mail, posted on site or delivered by other means. The parties shall respond to the county within twenty days of the postmark, posting on site, or delivery of the notice.

*(Ord 179-02 Attach B (part). 2002: Ord. 142-02 Attach B (part) 2002: Ord. 88-02 Attach B (part). 2002 Ord. 116-01 Attach A (part) 2001: Ord. 129-00 Attach A § 2 (part). 2000 Res. 79-78 (part) 1998 Res. 136-96 (part) 1996)*

#### 15.13.040 - Notice of civil violation.

- (a) **Authority.** A notice of civil violation may be issued and served upon a person if any activity by or at the direction of that person is, has been, or may be taken in violation of the applicable codes under Section 15.03.005. A landowner, tenant, or contractor may each be held separately and joint and severally responsible for violations of the applicable codes and regulations.
- (b) **Notice.** A notice of civil violation shall be deemed served and shall be effective when posted at the location of the violation and/or delivered to any person at the location and/or mailed first class to the owner or other person having responsibility for the location and not returned.
- (c) **Content.** A notice of civil violation shall set forth:
  - (1) The name and address of the person to whom it is directed;
  - (2) The location and specific description of the violation;
  - (3) A notice that the order is effective immediately upon posting at the site and/or receipt by the person to whom it is directed;
  - (4) An order that the violation immediately cease, or that the potential violation be avoided;
  - (5) An order that the person stop work until correction and/or remediation of the violation as specified in the order;
  - (6) A specific description of the actions required to correct, remedy, or avoid the violation, including a time limit to complete such actions;
  - (7) A notice that failure to comply with the regulatory order may result in further enforcement actions, including civil fines and criminal penalties;
  - (8) A notice of the date, time and place of appearance before the hearing examiner as provided in Section 15.13.045
- (d) **Remedial Action.** The review authority may require any action reasonably calculated to correct or abate the violation, including but not limited to replacement, repair, supplementation, revegetation, or restoration.

*(Ord 179-02 Attach B (part). 2002: Ord. 142-02 Attach. B (part). 2002: Ord. 88-02 Attach. B (part). 2002: Ord. 116-01 Attach. A (part). 2001: Ord. 129-00 Attach. A § 2 (part). 2000: Res. 79-78 (part). 1998: Res. 136-96 (part). 1996)*

#### 15.13.045 - Hearing before the hearings examiner.

- (a) A person to whom a notice of a civil violation is issued will be scheduled to appear before the hearings examiner after the notice of civil violation is issued. Extensions may be granted at the discretion of the appropriate review authority.
- (b) **Correction of Violation.** The hearing will be canceled if the applicable review authority determines that the required corrective action has been completed or is on schedule for completion as set by the review authority at least forty-eight hours prior to the scheduled hearing.
- (c) **Procedure.** The hearings examiner shall conduct a hearing on the civil violation pursuant to the rules of procedure of the hearings examiner. The applicable review authority and the person to whom the notice of civil violation was directed may participate as parties in the hearing and each party may call witnesses. The county shall have the burden of proof to demonstrate by a preponderance of evidence that a violation has occurred or imminently may occur and that the required corrective action will correct the violation. A hearing examiner's order may prohibit future action, and violations of that order may lead to penalties under this title. The determination of the applicable review authority shall be accorded substantial weight by the hearings examiner in determining the reasonableness of the required corrective action.
- (d) **Decisions of the Hearings Examiner.**
  - (1) The hearings examiner shall determine whether the county has established by a preponderance of the evidence that a violation has occurred and that the required correction will correct the violations and shall affirm, vacate, or modify the county's decisions regarding the alleged violation and/or the required corrective action, with or without written conditions.
  - (2) The hearing examiner shall issue an order to the person responsible for the violation which contains the following information:
    - (A) The decision regarding the alleged violation including findings of fact and conclusions based thereon in support of the decision;
    - (B) The required corrective action;
    - (C) The date and time by which the correction must be completed;
    - (D) The civil fines assessed based on the criteria in subsection (d)(3) of this section;
    - (E) The date and time by which the correction must be completed.
  - (3) Civil fines assessed by the hearing examiner shall be in accordance with the civil fine in Section 15.13.050
    - (A) The hearing examiner shall have the following options in assessing civil fines:
      - (i) Assess was issued and thereafter; or
      - (ii)

- Assess civil fines beginning on the correction date set by the applicable review authority or alternate correction date set by the hearings examiner and thereafter; or
- (iii) Assess less than the established civil fine set forth in Section 15.13.050 based on the criteria of subsection (d)(3)(B) of this section; or
  - (iv) Assess no civil fines.
- (B) In determining the civil fine assessment, the hearing examiner shall consider the following factors:
- (i) Whether the person responded to staff attempts to contact the person and cooperated with efforts to correct the violation;
  - (ii) Whether the person failed to appear at the hearing;
  - (iii) Whether the violation was a repeat violation or if the person has previously violated the applicable codes, regulations, and ordinances;
  - (iv) Whether the person showed due diligence and/or substantial progress in correcting the violation;
  - (v) Whether a genuine code interpretation issue exists; and
  - (vi) Any other relevant factors.
- (C) The hearing examiner may double the civil fine schedule if the violation was a repeat violation or the person has previous violations of the applicable codes, regulations, or ordinances. In determining the amount of the civil fine for repeat violations the hearing examiner shall consider the factors set forth in subsection (d)(3)(B) of this section.
- (4) Notice of Decision. Upon receipt of the hearing examiner's decision, the review authority shall send by first class mail and by certified mail return receipt requested a copy of the decision to the person to whom the notice of a civil violation was issued. The decision of the hearing examiner shall be rendered within ten working days of the hearing.
- (e) Failure to Appear. If the person to whom the notice of civil violation was issued fails to appear at the scheduled hearing, the hearing examiner will enter a default order with findings pursuant to subsection (d)(2) of this section and assess the appropriate civil fine pursuant to subsection (d)(3) of this section. The county will enforce the hearing examiner's order and any civil fine from that person.
- (f) Appeal to Superior Court. See Section 15.11.040 Judicial Appeal.  
*(Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996)*

#### 15.13.050 - Civil fines.

- (a) Authority. A person who violates any provision of the development code, or who fails to obtain any necessary permit, who fails to comply with the conditions of a permit, or who fails to comply with a notice of civil violation shall be subject to a civil fine.
- (b) Amount. The civil fine assessed shall not exceed one thousand dollars for each violation, except where the hearings examiner is authorized under this chapter to double the fine. Each separate day, event, action or occurrence shall constitute a separate violation.
- (c) Notice. A civil fine shall be imposed by an order of the hearings examiner, and shall be effective when served or posted as set forth in Section 15.13.040(b).
- (d) Collection.
  - (1) Civil fines shall be immediately due and payable upon issuance and receipt of order of the hearings examiner. The review authority may issue a stop work order until such fine is paid.
  - (2) If remission or appeal of the fine is sought, the fine shall be due and payable upon issuance of a final decision.
  - (3) If a fine remains unpaid thirty days after it becomes due and payable, the review authority may take actions necessary to recover the fine. Civil fines shall be paid into the county's general fund unless otherwise provided by ordinance. The review authority, in its discretion, may determine that assessments in amounts of five hundred dollars or more shall be payable in not to exceed three equal annual installments. The payments shall bear interest equal to that charged on delinquent taxes under RCW 84.56.020. Such an account in good standing shall not be considered as delinquent unpaid fines as provided in subsection (d)(4) of this section.
  - (4) Unpaid fines shall be assessed against the property and be recorded on the assessment roll, and thereafter said assessment shall constitute a special assessment against and a lien upon the property, provided that fines in excess of the assessed value shall be a personal obligation of the property owner, and fines assessed against persons who are not the property owner shall be personal obligations of those persons.
- (e) Immediately upon its being placed on the assessment roll, the assessment shall be deemed to be complete, the several amounts assessed shall be payable, and the assessments shall be liens

against the lots or parcels of land assessed, respectively. The lien shall be subordinate to all existing special assessment liens previously imposed upon the same property and shall be paramount to all other liens except for state, county and property taxes with which it shall be upon a parity. The lien shall continue until the assessment and all interest due and payable thereon are paid.

- (f) All such assessments remaining unpaid after thirty days from the date of recording on the assessment roll shall become delinquent and shall bear interest at such rates and in such manner as provided for in RCW 84.56.020, as now or hereafter amended, for delinquent taxes.
- (g) If the county assessor and the county treasurer assess property and collect taxes for this jurisdiction, a certified copy of the assessment shall be filed with the county treasurer. The descriptions of the parcels reported shall be those used for the same parcels on the county assessor's map books for the current year.
- (h) The amount of the assessment lien shall be billed annually by the treasurer's office on the date of the assessment lien until paid and shall be subject to the same penalties and procedure and sale in case of delinquency as provided for ordinary property taxes. All laws applicable to the levy, collection and enforcement of property taxes shall be applicable to such assessment. Notwithstanding the previous provisions, the foreclosure process and sale process may be commenced within a year of the creation of a lien when the review authority or the hearing examiner make a written request to the treasurer's office to commence the process.

*(Ord. 80-03 Attach. B (part), 2003; Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).*

#### 15.13.055 - Cost recovery.

- (a) Authority. Notwithstanding any other code provision, a person who violates any provision of any code or regulation under MCC Section 15.03.005, or who fails to obtain any necessary permit, or who fails to comply with a notice of civil violation shall be subject to enforcement, hearings examiner, and abatement costs. Costs in year 2002 shall be fifty-two dollars and thirty cents per hour for any employee of Mason County, except that department heads and managers, elected officials, and deputy prosecutor time shall be seventy-five dollars per hour. For every year after 2002, the rate may be adjusted according to the Consumer Price Index.
- (b) Amount. The review authority shall keep an itemized account of the time spent by employees of the county in the enforcement or abatement of any code or any regulation under Section 15.03.005. The review authority may request costs be ordered by the hearings examiner. The hearing examiner may order costs.
- (c) Notice. Upon completion of the work for which cost recovery is proposed, the review authority shall provide notice by certified mail return receipt requested to the property owner or other person on whose behalf the costs were incurred.
- (d) Collection. Costs may be collected as provided in MCC Section 15.13.050(d) through (h) inclusive.
- (e) Civil fines and funds collected shall be deposited as provided in the respective county regulation or, if no other provision is made, shall be deposited in the general fund of the county. However, departmental directors may, in their discretion, direct that costs be placed in a special abatement fund. If the director decides to close the fund, the remaining fund balance shall revert back to the general fund.

*(Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).*

#### 15.13.060 - Abatement.

- (a) The review authority may abate the violation if corrective work is not commenced or completed within the time specified in a notice of civil violation.
- (b) If any required work is not commenced or completed within the time specified, the review authority may proceed to abate the violation and cause the work to be done and charge the costs thereof as a lien against the property and any other property owned by the person in violation and as a personal obligation of any person in violation.

*(Ord. 32-04 Attach. B (part), 2004; Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1996; Res. 136-96 (part), 1996).*

#### 15.13.070 - Review of approved permits.

- (a) Review. Any approval or permit issued under the authority of the development code may be reviewed for compliance with the requirements of the development code, or to determine if the action is creating a nuisance or hazard, has been abandoned, or the approval or permit was obtained by fraud or deception.

- (b) Review Authority Investigation. Upon receipt of information indicating the need for, or upon receiving a request for review of permit or approval, the review authority shall investigate the matter and take one or more of the following actions:
- (1) Notify the property owner or permit holder of the investigation;
  - (2) Issue a notice of civil violation and/or civil fine and/or recommend revocation or modification of the permit or approval;
  - (3) Refer the matter to the county prosecutor;
  - (4) Revoke or modify the permit or approval, if so authorized in the applicable code or ordinance; and/or
  - (5) Refer the matter to the hearing examiner with a recommendation for action.

*(Ord. 32-04 Attach. B (part) 2004; Ord. 179-02 Attach. B (part). 2002; Ord. 142-02 Attach. B (part). 2002; Ord. 88-02 Attach. B (part). 2002; Ord. 116-01 Attach. A (part). 2001; Ord. 129-00 Attach. A § 2 (part). 2000; Res. 79-78 (part) 1998; Res. 136-96 (part). 1996)*

#### 15.13.075 - Revocation or modification of permits and approvals.

[[Handled by appropriate departments]]

- (a) Upon receiving a review authority's recommendation for revocation or modification of a permit or approval, the hearing examiner shall review the matter at a public hearing, subject to the notice of public hearing requirements (Section 15.07.030). Upon a finding that the activity does not comply with the conditions of approval or the provisions of the development code, or creates a nuisance or hazard, the hearing examiner may delete, modify or impose such conditions on the permit or approval it deems sufficient to remedy the deficiencies. If the hearing examiner find no reasonable conditions which would remedy the deficiencies, the permit or approval shall be revoked and the activity allowed by the permit or approval shall cease.
- (b) Building Permits. The building official, not the hearing examiner has the authority to revoke or modify building permits.
- (c) If a permit is not acted on within three years of authorization, the permit is automatically revoked.
- (d) Reapplication. If a permit or approval is revoked for fraud or deception, no similar application shall be accepted for a period of one year from the date of final action and appeal, if any. If a permit or approval is revoked for any other reason, another application may be submitted subject to all of the requirements of the development code.

*(Ord. 32-04 Attach. B (part). 2004)*