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## A. ARGUMENT

The Defendants in their briefs are essentially asking this Appellate Court to issue a building permit that legalizes an illegal private structure built on the public waters of Washington State that is expressly forbidden in statute.<sup>1</sup>

### 1. Local Ordinance Cannot Limit State Law

Plaintiff has asked for Mandamus relief under RCW 90.58 not Clallam County Code. The Defendant Prosecutor's references to Clallam County Code in his brief are moot because they cannot limit or deplete the strength of the RCW.

"... THE ATTORNEY GENERAL OR THE ATTORNEY FOR THE LOCAL GOVERNMENT **SHALL** BRING SUCH INJUNCTIVE, DECLARATORY, OR OTHER ACTIONS AS ARE NECESSARY TO ENSURE THAT NO USES ARE MADE OF THE SHORELINES OF THE STATE IN **CONFLICT** WITH THE PROVISIONS AND **PROGRAMS** OF THIS CHAPTER ... "  
RCW 90.58.210-1

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<sup>1</sup> "Uses which are specifically prohibited by the master program may not be authorized ..." (WAC 173-27-160.4) "Where permitted, boathouses shall have sloped roofs with a minimum pitch of 3:1" Clallam County Shoreline Master Program 5.18-C-1d. see Appendix for a copy of this Master Program.

The RCW "**Program**" referred to and applicable here is the Clallam County Shoreline Master Program<sup>2</sup>. The "**Conflict**" is the private deck and privacy screen structure Anderson built atop his boathouse prohibited by the Program.<sup>3</sup>

"THIS CHAPTER IS EXEMPTED FROM THE RULE OF STRICT CONSTRUCTION, AND IT SHALL BE LIBERALLY CONSTRUED TO GIVE FULL EFFECT TO THE OBJECTIVES AND PURPOSES FOR WHICH IT WAS ENACTED." RCW 90.58.900 <sup>4</sup>

The objective of RCW 90.58 is protect the public waters of Washington State from misuse by private party violators like Defendant Anderson and to do so broadly, not narrowly as the Prosecutor is arguing in his Brief.

## **2. "Shall" means "Shall" not "May"**

The Defendant Prosecutor argues that the word "Shall" in RCW 90.58.210 can somehow can be interpreted by a local County Judge to mean "May" but He provides no alternative

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<sup>2</sup> RCW 90.58.140(3) "The local government shall establish a program, consistent with rules adopted by the department ..."

<sup>3</sup> Clallam County SMP 5.18(C)(1)(d.) "Where permitted, boathouses shall have sloped roofs with a minimum pitch of 3:1 (horizontal to vertical)"

<sup>4</sup> Cited in similar shoreline cases; Hunt v. Anderson and Ecology v. Pacesetter

interpretation in RCW to support this argument, only moot references to Clallam County Code. On the other hand, the Plaintiff has provided numerous examples of case law wherein "Shall" imparts a duty and a mandate.<sup>5</sup> The appellate court has seen this movie before and it ends the same way every time and it has always ruled that "Shall" means "Shall".

For example the Supreme court wrote this about "Shall" :

>>> "SHALL" imposed a mandatory, jurisdictional requirement" ... "it is well settled that the word "SHALL" in a statute is presumptively imperative and operates to create a duty." <<< *Erection v. L & I 121 Wn.2d at 518*

Judge Rohrer's Order dated Sept. 19, 2014 avoided the Plaintiff's citations to RCW 90.58.210, refusing to rule on it. Obediently following the Defendant's lawyer's lead, Judge Rohrer wrote "The Clallam County Code uses non-mandatory language (i.e. 'may') ..." with no mention, of RCW 90.58.210.<sup>6</sup>

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<sup>5</sup> *Eyman v. McGhee*, 173 Wn. App. 684 851 2013 ("Shall" is a mandate); *Erection Co. v. Department of Labor and Industries* Wn.2d 513 518 1993 ("Shall" mandate); *Crown Cascade v. O'Neal* 100 Wn.2d 256 261 1983 ("Shall" creates a duty)

<sup>6</sup> See Memorandum Opinion and Order Dated Sept, 19, 2015 CPL 13 thru 14

The Defendant Prosecutor seizes on 3 words in RCW 90.58.210(1) "... as are necessary ..." to help assist in his goal to rewrite the law changing the word "shall" to mean "may".<sup>7</sup> RCW 90.58.210(1)'s active verb is **ensure**; "... to **ensure** no uses are made ...". Prosecutor has done nothing to "ensure no uses are made ..." as the law directs him to do. Leveling a boathouse roof to build a private deck on public waters is expressly in conflict with RCW 90.58<sup>8</sup> and Clallam County's Shoreline Master Program, which is a required component of RCW 90.58.<sup>9</sup>

"... TO BE AUTHORIZED, ALL USES AND DEVELOPMENTS MUST BE CONSISTENT WITH THE POLICIES AND PROVISIONS OF THE APPLICABLE MASTER PROGRAM AND THE SHORELINE MANAGEMENT ACT." WAC 173-27-040(1b)<sup>10</sup>

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<sup>7</sup> See Defendant Clallam County Reply Brief Page 12 1st Paragraph

<sup>8</sup> RCW 90.58.030(3)(1) "Development means ... driving of piling ..."; RCW 90.58.140(1) "A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter ... and the applicable guidelines, rules, or master program." Clallam County's Shoreline Master Program 5.18(C)(1)(d) "Where permitted, boathouses shall have sloped roofs with a minimum pitch of 3:1 (horizontal to vertical)"

<sup>9</sup> RCW 90.58.140(3) "The local government shall establish a program, consistent with rules adopted by the department ..."

<sup>10</sup> See also RCW 90.58.140(1) "A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter, and ... the applicable guidelines, rules, or master program."

Defendant's private recreational deck built on public waters is expressly excluded:

"A DOCK IS A LANDING AND MOORAGE FACILITY FOR WATERCRAFT AND DOES NOT INCLUDE RECREATIONAL DECKS, ..."  
WAC 173-27-040(2)(h)

## **2. No Adequate Remedy Available to the Plaintiff**

Plaintiff did not miss his timely opportunity to file for a Warrant of Abatement, but rather, Judge Rohrer missed his opportunity to issue a Warrant of Abatement that would have spared the Prosecutor this Writ of Mandamus claim. Judge Rohrer denied the Plaintiff had access to a Warrant of Abatement claim<sup>11</sup> even though The Statute of Limitations never applies to Warrants of Abatement.<sup>12</sup>

## **3. Plaintiff Has a Statutory & Constitutional Property Right**

The Plaintiff has a Statutory and Constitutional property right to a view of the lake unobstructed by Anderson's illegal

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<sup>11</sup> Rohrer's Order Granting Summary Judgment to Defendant Anderson, " ... all claims brought ... are hereby dismissed with prejudice." CLP 10 page 2 Line 24

<sup>12</sup> RCW 7.48.190 "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."

and un-permitted structure based on expectation of entitlement derived from the existing codes in effect at the time he purchased his property. The Plaintiff has never looked in the direction of Common Law as the Defendant Anderson alleges in his Reply Brief.<sup>13</sup> In *Asche v. Bloomquist* the court wrote:

"A property right is protected by the United States Constitution when an individual has a reasonable expectation of entitlement deriving from existing rules that stem from an independent source such as state law." *Asche v. Bloomquist* 132 Wn.App 784, 481

The Supreme Court was specific in it's writings in *Hunt v. Anderson* when referencing *Ecology v. Pacesetter*:

"These cases find a reduction of property values and refined master programs which protect both views and private property rights." *Hunt v. Anderson*, 635 P.2d 156, 441

The Supreme Court identified that violations of RCW 90.58 and zoning codes can create property damages by writing this:

"Conclusion of Law No. 9 states: If one house sits far ahead of the others, then for that one

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<sup>13</sup> See Defendant Anderson's Reply Brief Pg 26 "Common Law Claim for Loss of View"

person's financial benefit, he would be allowed to cause a drastic invasion into the aesthetics of the neighborhood and a tremendous financial loss to all his neighbors." Ecology V. Pacesetter 89 Wn.2d 203, 208 (1977) 571 P.2d 196.

The zoning code in this case is Clallam County's Shoreline Master Program 5.18-C-1d, which the Department of Ecology adopted and revised in accordance with the directives of the Shoreline Management Act, RCW 90.58.<sup>14</sup> Defendant was prohibited from building on the public waters a roof top private deck in 2008, and privacy screen structure atop his boathouse in 2012.<sup>15</sup> <sup>16</sup> A permit in this case is not a "formality" but indeed is impossible to acquire through Exemption, Variance or Conditional Use.

**"USES WHICH ARE SPECIFICALLY  
PROHIBITED BY THE MASTER PROGRAM  
MAY NOT BE AUTHORIZED ..."  
(WAC 173-27-160.4)**

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<sup>14</sup> Appendix, Shoreline Master Program, Depart. of Ecology created 1976, revised 1992

<sup>15</sup> Clallam County SMP 5.18-C-1.d "... boathouses shall have sloped roofs with a minimum pitch of 3:1 (horizontal to vertical)" see Appendix for copy of the SMP

<sup>16</sup> RCW 90.58.140(1) Development Permits "A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, rules, or master program." CCC 35.01.040(2) Permit Requirements "Any development regulated by this Chapter requires one of the following types of permit approvals prior to site preparation or construction of said activity."

When the Plaintiff acquired his property in the Spring of 2012 he had a reasonable expectation of entitlement that the Shoreline Master Program would prevent Defendant Anderson from building an illegal screen structure with the only purpose being to block his valuable view of the lake in the summer of 2012<sup>17</sup> . If the leveled deck Anderson built in 2008 was illegal then expanding the deck's use with an illegal privacy screen structure in 2012 without permit was also illegal.

#### **4. No Exemption Applies to the Defendant**

Contrary to the Defendant Anderson's argument in his brief<sup>18</sup> , an exemption to a substantial development permit does not exempt the Defendant from acquiring any permit.<sup>19</sup> The law requires a permit for all Development on the Shorelines.<sup>20</sup>

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<sup>17</sup> Stuart McColl's Declaration in Support of Plaintiff's 2nd Response, CLP # 221 "The privacy windscreen ... was built and installed during the summer of 2012."

<sup>18</sup> See Defendant's Anderson's Reply Brief this Appellate Court Pg 4 last paragraph "Mr. Anderson understood that the \$10,000 exemption was the exemption amount ..."

<sup>19</sup> CCC 35.01.040 (2) Permit Requirements "Any development regulated by this Chapter requires one of the following types of permit approvals prior to site preparation or construction of said activity: Substantial Development Permit, Conditional Use, Variance, Exemption to substantial development permit.

<sup>20</sup> RCW 90.58.030 (3)(a) Definitions "Development means a use consisting of the construction or exterior alteration of structures ... driving of piling ..." RCW 90.58.140 (1) "A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter .. CCC 35.01.020 (8) Definition "... development means a use consisting of the construction or exterior alteration of structures; ... driving of piling ..." CCC 35.01.040 (2) "Permit Requirements. Any development regulated by this chapter requires one of the following types of permit approvals ... (including) ... Exemption to the substantial development permit."

"Any person undertaking development within the Shorelines of the State which is not a substantial development, variance or conditional use must apply to the Department of Community Development for a statement of exemption from the Shoreline Management Act substantial development permit requirements." CCC 35.01.050

Even so, Defendant couldn't apply for exemption because the project wasn't consistent with the Shoreline Master Program.<sup>21</sup>

Finally, the Defendant tries to seek cover under a kooky "damage" story about a storm. In his Brief to this court He inaccurately reports the Defendant's own sworn Declaration.<sup>22</sup>

<sup>23</sup> Whether there was a storm in 2006, 2007, or any storm at all ... the Defendant never claims his own boat house was actually damaged, only that the water level may have changed.

Nonetheless, WAC 173-27-040(2)(b) expressly forbids using a "damage/repair" claim to expand or change a structure as

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<sup>21</sup> WAC 173-27-040(1)(b) "... To be authorized, all uses and developments must be consistent with the policies and provisions of the applicable master program and Shoreline Management Act."

<sup>22</sup> See Defendant's Response Brief, Pg 3, mid page "In 2007, a severe storm hit the lake."

<sup>23</sup> See Defendant's Declaration CP203 actually reads "In 2006 or 2007, a severe storm ..."

Anderson did.<sup>24</sup> Anderson admits leveling the boathouse roof<sup>25</sup> and expanding the footprint of the structure while never describing any lawful reason for not seeking a permit.<sup>26</sup>

## **5. Defendant's Rooftop Deck is Statutorily Forbidden in the Shoreline Master Program**

Defendant's boathouse rooftop deck as built in 2008 is un-permit able and expressly forbidden in the Shoreline Master Program 5.18-C-1d "... boathouses shall have a sloped roof with minimum pitch 3:1 (horizontal to vertical)" . See Appendix.

## **6. Warrant of Abatement is Expressly Not Subject to the Statute of Limitations**

RCW 7.48.190 clearly calls out "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." The violations are on the public waters. RCW 7.48.190 expressly allows an action for Warrant of Abatement to proceed at any time thereby invalidating the Defendant's

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<sup>24</sup> WAC 173-27-040(2)(b) ' "Normal Repair" means to restore a development to a state comparable to its original condition, including by not limited to size, shape, configuration, location, and external appearance.'

<sup>25</sup> CPL 18 Anderson's 1st Requests for Admissions "In 2008 you leveled your boathouse roof and added 6 feet onto the south end of the boathouse ..." answered "Admit".

<sup>26</sup> CPL 20 Anderson's 1st Requests for Admissions "You never acquired a permit to do any work on your dock or the shorelines of Lake Sutherland after 2000." answered "Admit".

claim through RCW 4.16.130<sup>27</sup> which he wishes would apply a Statute of Limitations, but can not.

## **7. Damages Claim of the Un-Permitted Structure Within the 2 Year Statute of Limitations**

Defendant Anderson admits in his Reply Brief that damages are within the 2 year Statute of Limitations at they apply from the Defendant's deck top privacy screen structure<sup>28</sup>; and this is the only claim for damages the Plaintiff has maintained. Plaintiff through his Declaration reported the un-permitted structure was built in the Summer of 2012<sup>29</sup> ... and the Defendant admitted his un-permitted privacy screen structure blocked the Plaintiff's view of the lake.<sup>30</sup> (see pictures in Appendix Exhibit 2 & 3 showing blocked view)

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<sup>27</sup> See Defendant Anderson's Reply Brief pg 16, mid page "Since there is no specific statute of limitations governing a nuisance claim in Washington."

<sup>28</sup> Defendant Anderson's Reply Brief Page 19 "... the only two items that arguably originated within the 2 year limitation period."

<sup>29</sup> See Plaintiff's Declaration in Support of Plaintiff's 2nd Response, CPL #221, pg 1, ln 20 "The privacy windscreen built on top of the boathouse in question shown in Exhibit F was built and installed during the summer of 2012." See Exhibits E-5 & F-6 attached to the Appellant's Opening Brief in Appendix

<sup>30</sup> CPL 21 Anderson's 1st Requests for Admissions "The documents attached as Exhibit E compared to Exhibit F shows the bamboo privacy screen blocked the Plaintiff's Westerly lake view." answered "Admit".

## **8. Damages to the Plaintiff Under CCC 35**

Plaintiff requested Damages under CCC 35.01.130(3) which allows damages for any violation of CCC Chapter 35, including building on the shorelines without a permit.<sup>31</sup> Defendant blocked the Plaintiff's view resulting in damages.

### **B. Conclusion**

Q: Why didn't the Defendant Anderson just pull a permit in order to avoid all of this legal wrangling and expense ?

A: Because the structures he wanted to build are illegal. Like most criminals, he chose the illegal (in this case unpermitted) route because he was greedy and wanted something the law prohibits him from having.

The Defendants' lawyers succeeded in confusing and intimidating a new judge with less than 1 year of experience. Judge Rohrer wasn't even on the Superior Court bench when the action was filed in June 2013. They skillfully led and guided Judge Rohrer to his mistaken conclusions and Orders.

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<sup>31</sup> CCC 35.01.130(3) "Private persons shall have the right to bring suit for damages under this subsection on their own behalf ..."

Please overturn all of Judge Rohrer's orders and return this case to the Superior Court to be properly adjudicated with these specific instructions:

1. If the Superior Court refuses to issue a Warrant of Abatement then Mandamus in this case is the only legal remedy available to the Plaintiff.

2. That "Shall" means "Shall" in this case in reference to RCW 90.58.210(1) and the State Legislature offered no alternative interpretation in RCW.

3. That no Statute of Limitation applies to a Nuisance or Warrant of Abatement as RCW 7.48.190 calls out, and the unpermitted leveled out roof deck built by the Defendant Anderson in 2008 would qualify as a nuisance in law.

4. That the Plaintiff is allowed in law to proceed forward with a damage claim given the Plaintiff's expectation that Defendant Anderson would not violate Shoreline Master Program and Shoreline Codes Chapter 35 in the summer of 2012.

Respectfully Submitted 26 day of March, 2015.

  
Stuart McColl, Plaintiff Pro Se

# CLALLAM COUNTY SHORELINE MASTER PROGRAM

Prepared by The

CLALLAM COUNTY  
SHORELINE ADVISORY COMMITTEE

With Assistance from the

CLALLAM COUNTY DEPT. OF COMMUNITY DEVELOPMENT  
PLANNING DIVISION

## ADOPTED:

By Clallam County Board of Commissioners: ~~June 30, 1976~~  
By Washington State Department of Ecology: ~~August 5, 1976~~

## REVISED:

By Washington State Department of Ecology:

November 16, 1976

~~August 10, 1979~~

January 4, 1983

March 27, 1984

January 27, 1986

June 3, 1986

March 1, 1988

~~October 31, 1989~~

June 16, 1992

Appendix Exhibit 1  
Shoreline Master Program

## 5.18 PIERS, DOCKS, FLOATS, MOORING BUOYS AND BOATHOUSES

### A. DEFINITION

1. Piers are fixed structures in or floating upon water bodies to provide moorage for marine transport, air or water craft, or for recreational activities.
2. Docks are fixed platform structures in or floating upon water bodies to provide moorage for pleasure craft or landings for water dependent recreation.
3. Floats are floating structures which are moored, anchored or otherwise secured in the water and which are not connected to the shoreline.
4. Mooring buoys are anchored devised in water bodies.
5. Boathouses are structures with roof, sides or end walls, built on shore or off shore for storage of water craft or float planes.

### B. POLICIES

1. Open pile piers should be encouraged where shore trolling is important, where there is significant littoral drift and where scenic values will not be impaired.
2. The use of floating docks should be encouraged in those areas where scenic values will not be impaired.
3. Piers and docks should be located, designed and maintained so that transport and water circulation are not significantly affected.
4. Community use piers and docks should be given preference over single use structures. In new, major waterfront residential developments, only community use structures should be authorized.
5. Mooring buoys should be adequately anchored, using no greater scope than necessary.
6. Boathouses are not preferred uses of the shoreline and their location should be restricted to those areas where intensive urban-type development is currently located.

### C. REGULATIONS

1. General
  - a. In new, waterfront residential developments of five or more lots, only community-use piers, docks and floats shall be authorized.
  - b. Joint-use piers shall be preferred for commercial and industrial developments which are in close proximity to one another.
  - c. In areas of significant littoral drift, single pile design piers shall be required.
  - d. Where permitted, boathouses shall have sloped roofs with a minimum pitch of 3:1 (horizontal to vertical).
  - e. Where applicable, utility lines on pier and docks shall be installed attached to, or underneath, the planking.

Exhibit E - Admissions  
Exhibit 2 - Appendix





Exhibit F - Admissions

Exhibit 3 - Appendix

FILED  
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DIVISION II

2015 MAR 30 PM 1:36

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

IN THE APPELLATE COURT OF WASHINGTON  
IN AND FOR THE COUNTY OF CLALLAM

STUART F. MCCOLL, Appellant,  
Plaintiff,

vs.

GEOFFREY A. ANDERSON, Respondent,

ADMINISTRATOR of the CLALLAM  
COUNTY DEPARTMENT OF COMMUNITY  
DEVELOPMENT, Currently Sheila Miller,  
Respondent

PROSECUTOR of CLALLAM COUNTY,  
Currently Will Payne, Respondent

Defendants.

Case No. 46728-3-II

Clallam County Case No.  
13-2-00571-1

Proof of Service by Mail

TO: Mark Johnsen, Atty for Clallam County

On this day I deposited in the U.S. Mail a properly stamped and addressed envelope to:

KTC atty for Clallam County  
701 5th Avenue, Suite 3300  
Seattle, WA 98104

Containing 1 copies each of: Appellant's Reply Brief "AMENDED", Letter to David Ponzoha

I declare under penalty of perjury under the laws of the State of WA that the foregoing is true and correct, that I am at least 18 years old, and a resident of WA State, Executed at Sequim, WA this 27 day of Mar, 2015.

x Janet McColl Janet McColl

PROOF OF SERVICE

Page 1 of 1

STUART MCCOLL  
1038 Hooker Road  
Sequim, Washington 98382  
(360) 582-0202 FAX (360) 683-3636

1  
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3  
4  
5 **IN THE APPELLATE COURT OF WASHINGTON**  
6 **IN AND FOR THE COUNTY OF CLALLAM**  
7

8 STUART F. MCCOLL, Appellant,  
9 Plaintiff,

10 vs.

11 GEOFFREY A. ANDERSON, Respondent,  
12 ADMINISTRATOR of the CLALLAM  
13 COUNTY DEPARTMENT OF COMMUNITY  
14 DEVELOPMENT, Currently She'la Miller,  
15 Respondent  
16 PROSECUTOR of CLALLAM COUNTY,  
17 Currently Will Payne, Respondent  
18 Defendants.

**Case No. 46728-3-II**

**Clallam County Case No.  
13-2-00571-1**

**Proof of Service by Mail**

18 TO: Dave Johnson, Atty for Anderson

19 On this day I deposited in the U.S. Mail a properly stamped and addressed envelope to:

20 Johnson, Rutz, Tassie atty for Anderson  
21 804 South Oak  
22 Port Angeles, WA 98362

23 Containing 1 copies each of: Appellant's Reply Brief "AMENDED", Letter to David Ponzoha

24 I declare under penalty of perjury under the laws of the State of WA that the foregoing is true and correct, that I  
25 am at least 18 years old, and a resident of WA State, Executed at Sequim, WA this 27 day of March 2015.

26 x Janet McColl Janet McColl

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