

NO. 49467-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**PACIFIC COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT**

Appellant

v.

DANIEL DRISCOLL, dba OYSTERVILLE SEA FARMS

Respondent

BRIEF OF RESPONDENT

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1. BACKGROUND AND SUMMARY OF FACTS

This matter originates from an appeal by Respondent Driscoll dba Oysterville Sea Farms (OSF) of Pacific County's infraction issued in June 2014 by Tim Crose, Assistant Director for the Department of Community Development, for allegedly violating Pacific County's zoning and shoreline regulations for having nonconforming buildings, selling specific products which the County stated were not "grandfathered products" and allowing on-site consumption of food at his OSF seafood market (CP 287-301). The same Tim Crose who issued the infraction to OSF in 2014 for alleged zoning and shoreline violations, had previously, in 2011, told Mr. Driscoll: "You are located in an Urban Shoreline Environment, Commercial Use is Permitted...." AR Ex. 33.

OSF, through its owner Dan Driscoll and his parents before him, has been operating a retail seafood market in Oysterville since 1973 (6/15/15 RP¹ 260). The seafood market pre-dates both the Shoreline Management Act, which was first adopted by Pacific County in 1974 (AR² Ex. 7), and the zoning of the Oysterville area in Pacific County, which did not happen until 1981 (AR

¹ RP – Report of Proceedings is the reference to the District Court Proceedings.
VR – Verbatim Report is the reference to the Superior Court Proceedings.

² Reference to the Administrative Record (AR) is to a 3-ring binder of Exhibits originally submitted with OSF's first brief (8/18/14) to the District Court wherein the documents were accepted and re-numbered 1 – 35 by the District Court. The notebook was transferred on appeal to Superior Court, and is now in the possession of this Court.

Ex. 28). The retail market and the pier on which OSF is located is part of an historic oyster cannery (6/15/15 RP at 287-288), used today for oyster processing and OSF's retail seafood market. The retail market and other buildings and the pier itself are amenities which have for many decades offered, and still offer, opportunities for the public to physically access an historic waterfront site and enjoy the Willapa Bay view.

Respondent had been making significant financial investments, all with County approval, to maintain the exterior structures (see AR Ex. 12 for one example). Contrary to Appellant's uncited mis-statement (Appellant Brief at 4), neither the retail store nor the deck or any other structures have been newly constructed, nor has there been any expansion of the footprint.

Respondent has, however, expended significant funds to upgrade the retail seafood market with a commercial-grade kitchen, for the purpose of offering on-site consumption of more types of food. These kitchen upgrades were done with County permits and approvals, and were also food service upgrades and other modifications that the County required OSF to make (6/15/16 RP at 235-239, 259-261; AR Ex. 11, 14-20, 23-24). The County's infraction notice claiming that sales of certain inventory and food items are violations is incongruent with the permits and approvals previously granted by the County.

The District Court, in its first "Decision on Nonconforming Use" issued 2/25/15 (copy at Appellant Appendix 4), found that the Defendant had

grandfathered rights for his seafood market. The District Court's rationale was that the retail market, as a whole, was the "use." The County had argued that each item for sale in the store constituted a separate use, and underwent an inconsistent and incomprehensible examination of whether each particular inventory item should be considered grandfathered or not (refer to 2014 Infraction (CP 287) referencing 2012 letter (CP 297) and to the District Court's Findings #46-#49 in its 2/25/15 Decision on Nonconforming Use at p. 9 therein (Appellant Appendix 4).

The District Court bypassed the County's item-by-item scrutiny, to instead correctly determine that the grandfathered use is the seafood market as a whole. See the District Court's Conclusions #56 - #59 in its 2/25/15 Decision on Nonconforming Use at pp.10-11 therein (Appellant Appendix 4). The District Court also analyzed the facts in this case to the local regulations and prevailing case law, and determined that OSF did not impermissibly expand the seafood market use (see District Court Findings #7 - #15 its 2/25/15 Decision on Nonconforming Use at pp. 3-4 therein, at Appellant Appendix 4), except for alcohol sales and indoor seating as stated in its subsequent 9/17/15 Decision, CP 7-14).

The District Court in its second 9/17/15 "Court's Decision" reiterated that because of OSF's nonconforming use rights, Defendant could continue his seafood market business as he was conducting it,

including selling the types of items that were being sold, with the exception of alcoholic beverages (CP 13-14). Further, OSF could also continue to offer outdoor seating but disallowed indoor seating, and the on-site food consumption was limited to the outdoor seating area (CP 13). Thus, the District Court found the Defendant did commit the Infraction at Count 1 for having had indoor seating, and did commit the Infraction Count 2 for selling and serving beer and wine [even though the County had approved the liquor license, see CP 304-315]. The District Court ruled that indoor seating and alcoholic beverage sales were violations, and ordered a \$150 fine for each Count of the infraction, for a total of \$300 (CP 14).

Pacific County appealed to Superior Court, citing specifically the District Court's second 9/17/15 decision and 10/14/15 decision denying reconsideration thereof (CP 19-21). OSF cross-appealed (CP 22-24) as to the counts from the 9/17/15 Decision on which the District Court found that OSF committed the infraction (i.e., beer & wine sales and indoor seating). The Superior Court, upon OSF's motion for dismissal (CP 25-51) and applying Pacific County Ordinance 165 (CP 32-49), dismissed the County's appeal as not permitted under the County's regulations at Ordinance 165 (CP 43; 1/13/16 VR at 17-18). An Agreed Order of Dismissal was entered (CP 334-335). Despite the dismissal, however,

Pacific County still interjected argument to the Superior Court (6/29/16 VR at 20-21) regarding issues that were not on appeal concerning OSF's grandfathered rights established by the District Court's earlier 2/25/15 Decision on Nonconforming Use.

As to OSF's cross-appeal, the Superior Court, after reviewing the record and having received briefing and argument from both Parties, determined that OSF had not committed any of the alleged counts in the infraction (CP 1-4).

Through its Motion for Discretionary Review, Pacific County appealed the Superior Court's decision to this Court, but as is evident in its Motion and Opening Brief, has greatly broadened the issues, including asking this Court to rule on issues from the County's original appeal to the Superior Court which appeal was dismissed in its entirety (Appellant's Issue 2), as well as seeking a ruling from this Court to overrule Pacific County's local legislative processes, including where the County has opted, under RCW 7.80.010(5), to have violations of land use ordinances heard and decided under an infraction system before a court of limited jurisdiction, instead of the LUPA process (Appellant's Issue 3).

2. SUMMARY OF ARGUMENT

It is on the limited issues of indoor seating and beer & wine sales that Defendant appealed the District Court's second (9/17/15) Decision to the Superior Court (CP 22-24). Under Pacific County's regulations at Ordinance 165, Section 4 (CP 43), appeals from a District Court's decision on the infraction are limited. The Defendant can, as he did here, appeal a decision finding he committed the infraction (e.g., a "guilty" verdict), but there was nothing for the Plaintiff to appeal, because under Pacific County's own local regulations, a Plaintiff cannot appeal an infraction decision which determines the Defendant did not commit the infraction (1/13/16 VR at 13-14, 17-18; CP 26-27, 43). Despite that prohibition, the County still attempted to appeal Defendant's "not guilty" verdict (CP 19-21), after which Defendant filed a cross-appeal (CP 22-24) on the infraction counts for which he had been found "guilty," and moved to dismiss Plaintiff's appeal in its entirety (CP 25-51). Defendant OSF's motion was heard by the Superior Court (see 1/13/16 VR), who ruled in Defendant's favor (1/13/16 VR at 17-18) and an Agreed Order of Dismissal was subsequently entered (CP 334-336).

Because the District Court in its first Decision found that the Defendant did not commit the counts of the infraction relating to inventory items for sale (except alcohol), and did not commit the counts of the

infraction pertaining to on-site consumption of food in the outdoor seating area (see District Court's 2/25/15 Decision at Appellant Appendix 4); and because under County Ord. 165, §4 (CP 43) the Plaintiff was not permitted to appeal a Defendant's "not guilty" judgment; that left only Defendant's appeal of the counts on which it was found guilty (indoor seating and beer/wine sales) as the only issues on appeal that could be made. Consequently, the issues, narrowed to indoor seating and alcohol sales, were the only issues that were before the Superior Court to decide.

Under Pacific County's regulations, appeals of infractions, including infractions asserting violations of land use codes, do not undergo the Land Use Appeals Act (LUPA) procedure that is more common to many other jurisdictions. Pacific County has chosen instead, under its Ordinance 165 (CP 32-49) as allowed by RCW 7.80.010(5), to specifically govern land use violations as infractions to be heard and decided by a local district court, as a court of limited jurisdiction (CP 32, et seq.), which in this case was the Pacific County South District Court. This issue was before both the Superior Court (CP 25-26) as well as briefed and argued to the District Court (10/17/14 RP at 15-23).

In the duties conferred to the District Court through Pacific County Ordinance 165, the Pacific County South District Court had full authority to consider any of Defendant's defenses against the infraction, including

that his seafood market and activities related thereto were vested nonconforming use rights. In particular, Pacific County's zoning Ordinance 162 allows for the continuation of "any" pre-existing use and contains no sunset clause as long as the use or activity is continuous (Ord. 162 at §26, ¶G (AR Ex. 22 at p. 203 therein)). Pacific County's shoreline regulations also allow for the continuation of nonconforming uses (SMP at §26 (AR Ex. 9 at pp. 93-94)); however, because the OSF fish market and abutting deck are in an urban shoreline, these commercial uses are the type of uses that are allowed, indeed encouraged, under the SMP (CP 357-362). As evident throughout the hearing proceedings and resulting decisions, both the District Court and the Superior Court considered the facts as they pertained to OSF's nonconforming use rights as allowed through Pacific County's governing regulations.

Contrary to Appellant's assertions, the Superior Court did not engage in de novo review of facts. The Superior Court, as it was required to do under RALJ9.1, confined its review to evidence in the record, and legal analysis of this evidence to examine whether the District Court had committed any errors of law with regard to the issues before it on appeal. After making that analysis, the Superior Court determined OSF had not committed any counts of the infraction, thus reversing the District Court's prohibition on indoor seating and beer & wine sales.

Although Appellant asserts in its Issue 1 that the Superior Court exceeded its authority in engaging in de novo review of facts, it has failed to explain how, and failed to identify any evidence to support its claim. The Superior Court's Findings simply memorialize existing evidence in the record. Moreover, despite Appellant's claim of impermissible de novo review by the Superior Court, that is exactly what Appellant is asking this Court to do now. Just as the Superior Court is, under RALJ 9.1, required to accept the lower court's Findings supported by substantial evidence and is limited to reviewing errors of law, so is this Court's review similarly limited under RALJ 9.1.

The Appellant, through its Issue 2 regarding estoppel, is essentially asking this Court to reopen the matter from the inception of the case to rule on issues that were not on appeal. The District Court's 2/25/15 "Decision on Nonconforming Use" which made numerous Findings to support OSF's grandfathered use rights was not a decision on appeal (in fact, it has to be referenced as "Appellant's Appendix 4" since it is not in the Clerks Papers because it was not a decision that had been appealed). Further, through Appellant's LUPA-related Issue 3, the County is asking this Court to rule on legislative issues that also were not appealed, and greatly exceed scope of anything that could be appealable.

3. RESPONSE TO APPELLANT'S ISSUE NO. 1

Appellant's Assignment of Error 1: The Superior court erred when it engaged in a de novo review of the facts and reversed the district court's finding that the infractions were committed, contrary to the superior court's role to review the legal sufficiency of the facts in a RALJ appeal.

Appellant's Issue 1: Is the proper role of the RALJ court to engage in a de novo review of the facts or to review the record for legal sufficiency of facts and conclusions?

Respondent's Restatement of Issue 1: Did the Superior Court, in reviewing a decision of a court of limited jurisdiction, properly review the facts in evidence and testimony in the record to analyze the relevant law, as applied to the facts, to determine if the lower court erred? **Yes.**

Appellant asserts, incorrectly, that the Superior Court/RALJ Court engaged in de novo review of the facts, and assigns error to ten findings: Nos. 4, 8, 9, 10, 11, 13, 22, 23, 24, 25 (Appellant Br. at 1) contained in the Superior Court's July 17, 2016 ruling (CP 1-4). It is Appellant who is in error. The Superior/RALJ Court reviewed the applicable regulations; the exhibits, testimony and arguments made during the hearings through briefing and transcripts; and then reviewed the lower court's Findings to determine if the evidence supports the Court's decision, or if the District Court made errors of laws concerning the issues on appeal. See *State v. Weber*, 159 Wn. App. 779, 786, 247 P.3d 782 (2011). Numerous exhibits and much briefing and argument had been submitted to both the District and Superior Courts, which was in turn was reviewed analyzed by the Superior Court. The Superior Court's resulting Findings summarize

existing evidence in the Record which was reviewed and analyzed with the law. Responses to Appellant's allegations are as follows:

3.1 Response to Alleged Error in Finding #4

Even though Appellant alleged error with Finding #4, it did not identify how it believes the Superior Court engaged in de novo review of facts related to Finding #4. Appellant will address the issue, however, as it is necessary to explain where in the record the shoreline designation and zoning information is found. Finding #4 states:

The record does not support the trial court's decision that the defendant's alleged violations occurred in the Conservancy Zone, and is clearly erroneous. In addition, the parties stipulated to the residential zone.

As explained in the record (CP 359-362), the boundary between the urban and conservancy environments is the line of mean higher high tides (MHH), which is determined from averaging 18.6 years of high tides (AR 9 at p. 5 therein), where everything landward of that line is Urban, and everything waterward of that line is Conservancy (see SMP map in AR 7)³. A surveyor marked the surveyed mean higher high water line on a map exhibit (6/15/15 RP at 294-305; AR Ex. 1), which shows the OSF market and abutting deck used for the outdoor seating is located entirely

³ Pacific County is in the process of revising its Shoreline Master Program, but that process is not complete. At all times relevant hereto, the SMP at AR Ex. 9 is the relevant regulation.

landward of the MHH, and thus in the Urban Shoreline. In fact, almost the whole historic cannery site (with the exception of the pier going out into the Bay), is on the landward side of the MHH and also in the Urban Shoreline. Therefore, the Conservancy Shoreline is not applicable to the seafood market, and Defendant cannot be found to have committed a violation of a shoreline designation in which OSF is not even located.

3.2 Response to Alleged Errors in Findings #8, #9, #10, #11 (Appellant Brief at 15-16)

Appellant apparently disagrees with the Superior Court's references to the OSF property as an urban shoreline environment or high intensity commercial activity and references to allowable uses therein. As discussed in Paragraph 3.1 above, OSF has an urban shoreline designation for the entirety of the seafood market building and outdoor seating. It is also a fact that not only the OSF seafood market, but also OSF's other commercial buildings and activities have existed at the site for decades. The Superior Court's Findings are referencing facts in evidence.

As to Findings #10 and #11, Appellant has missed the point of the Superior Court's analysis. These Findings (and Finding #7) refer to the Pacific County Shoreline Master Program's preference of citing commercial uses in existing buildings and existing developed areas.

Again, the Superior Court is referencing evidence in the Record and the relevant law:

SECTION 3 – INTRODUCTION TO POLICIES AND REGULATIONS

...

13. Urban Environment
 - a. Prioritize the preservation or expansion of existing high-intensity commercial or industrial waterfront centers over the creation of new high intensity industrial or commercial sites.
 - b. Site industrial or urban development in areas without severe biophysical limitations.
 - c. Prioritize “water-dependent”, “water-related” and “water-enjoyment” uses over other waterfront uses.
 - d. Ensure that developments within the Urban environment are compatible with uses and activities in adjacent (including aquatic) environments.

AR Ex. 9 – SMP at p. 19 therein.

Thus, even if OSF were to physically expand (which it did not, nor has plans to do so), because it is located in an already existing developed area, that existing built-out area is a preferred location for commercial uses, instead of breaking new ground elsewhere. Similarly, any intensification of the use is also preferred to be conducted in an existing facility, rather than bringing new uses to a new area. The Superior Court’s analysis is not de novo review; it is a proper analysis of the law to the facts. The Superior Court reviewed the County’s shoreline regulations and determined, correctly, that under Pacific County’s SMP there is a

prioritization to site commercial uses in urban shorelines, especially on existing developed areas, such as the historic cannery.

3.3 Response to Alleged Errors in Findings #12, #17
(Appellant Brief at 14, 17)

Appellant appears to also disagree with Findings #12 and #17, although did not identify them as errors or issue on appeal. Finding #12 states: “There is no prohibition in the SMP for the sale of beer and wine in commercial activities.” Finding #17 states: “The sale of beer and wine is nowhere specifically prohibited in Ordinance Number 162.”

Appellant complains that Finding #12 is irrelevant and Finding #17 is illogical, but misses the point of the Findings and the incremental steps, including the post-hearing briefing, that got to these Findings. First, the 6/18/14 Infraction specifically (although erroneously) identified the sale of beer and wine as “unallowable” under both shoreline and zoning regulations (CP 287) (and despite the fact that the County approved the liquor licenses CP 304-315). In the County’s Amended Notice of Infraction (CP 327-329), Count I(b) asserts Driscoll committed a “Violation” by having “commercial activities” in the residential district; Count II(b) asserts Driscoll committed a “Violation” of the SMP in the Urban Environment without a permit. Note that in the Amended Notice, there is no description of any of the alleged violations! Therefore, the

logical analysis is to review the Amended Notice in conjunction with the original Infraction notice, which stated beer/wine sales are “unallowable.”

The Superior Court next sought to analyze the law with the facts by asking the parties for post-hearing briefing to identify if there was any prohibition in either the shoreline or zoning regulations governing the property which would over-ride the nonconforming use exception, to outright prohibit alcohol sales as unallowable without exception (6/29/16 VR at 28-19). Indeed, it was Appellant’s counsel who specifically asked the Court to allow this supplementation (6/29/16 VR at 12, lines 20-22).

OSF’s post-hearing reply brief explained there was no superseding prohibition against alcohol sales in either the SMP or zoning code (CP 357-386). The County’s post-hearing briefing (CP 337-356) merely recited (again) the standard uses and prohibitions but without any analysis of the nonconforming use exceptions enabled under the SMP and Ord. 162. Thus, the Superior Court properly entered Findings #12 and #17.

3.4 Response to Alleged Error in Finding #13
(Appellant Brief at 15, 17)

Appellant asserts error with Finding #13 but makes no salient argument for why it is in error. Finding #13 states: “The Court must look at all zoning regulations in an effort to give effect to the interest and purpose of the regulations.” Appellant complains that the Court cited to

no legal source for this statement, then states: “[o]ne does not look to the SMP to determine whether the zoning code was violated, nor vice versa.” Appellant’s statement misses the fact that County issued infractions alleging both shoreline and zoning violations, and consequently some of the Superior Court’s Findings specifically address shoreline regulations, and others, such as Finding #13, address zoning regulations. It is a given that the Court must look at all the applicable zoning regulations, and must not do what the County has done by picking certain parts while ignoring others. For example, the County points to the prohibiting sections of the regulations, while ignoring the sections that allow nonconforming uses to continue as exceptions to the standard regulations. Through Finding #13, the Superior Court has appropriately made that analysis of fact to the law.

3.5 Response to Alleged Errors in Findings #15, #20, #21 (Appellant Brief at 14-15, 17)

Appellant also complains that Findings #15 and #20 are irrelevant and complains that Finding #21 does not include the Residential zone (although Appellant has not identified these Findings to be Errors or Issues). Findings #15 and #20 merely cite to the Zoning Ordinance 162 statement that retail and wholesale seafood sales are allowed as accessory uses in the aquaculture sub district, and Finding #21 cites to the

aquaculture section that states uses not allowed as permitted or accessory, or similar uses, are prohibited (CP 3).

It was Pacific County who made the allegation that the subject site is in the aquaculture sub district (see Footnote 4 below). The original infraction notice states that Driscoll was committing “unauthorized commercial uses ... without a shoreline permit” (CP 299) and “conducting commercial activities not listed as a permitted, accessory, or conditional use.” (CP 300.) In the Amended Notice of Infraction version (CP 327-329), Count I(a) asserts a “Violation” in the Aquaculture⁴ District, but provides neither a description of what the alleged violation is, nor a citation to the specific section of Ord. 162 allegedly violated.

The Superior Court therefore performed the logical analysis by reviewing the Amended Notice in conjunction with the original Infraction

⁴ OSF has repeatedly briefed the fact that no portion of the site, indeed no part of Oysterville, has been in the Aquaculture zoning District since 2005. Pacific County made a significant amendment in 2005 to delete much of the lands that were previously in the Aquaculture District. See discussion at CP 357-359 and exhibits at AR Ex. 13. The governing Ord. 162 (AR Ex. 22 at p. 66 therein) provides a basic legal and geographical description of the lands now contained in the Aquaculture District. Comparing this description to a section/township/range map (AR Ex. 13) (or using the geographical descriptions for those who are, or should be, familiar with the area), it is easy to see that OSF and miles of surrounding lands are not included in the current Aquaculture District. While it could be pertinent to know that the Aquaculture district allows retail seafood sales as an accessory use in a zone in which OSF had been located until 2005, Defendant cannot be found to have violated any provision of the Aquaculture District, because OSF is no longer in that zoning district.

(see discussion below in Paragraph 3.7, regarding Finding #19), which resulted in Findings #15, #20, and #21. In terms of responding to the County's allegations and arguments, these are fully relevant Findings. As discussed in Footnote 4: Defendant cannot be found to have violated any provision of the Aquaculture District since OSF is not even in that zoning district (CP 357-359).

3.6 Response to Alleged Error in Finding #18
(Appellant Brief at 15-16)

Appellant seems to disagree with Finding #18, although again does not identify it as an Error or Issue on appeal. Finding #18 states that the Pacific County SMP regulates the OSF buildings as nonconforming uses. This is true (see SMP provisions for nonconforming uses and structures at AR Ex. 9, at pp. 93-94 therein). Pacific County's June 2014 infraction cited building setback violations (CP 299). So while the OSF buildings do not meet current shoreline setback regulations⁵, the buildings existed long before the regulations were created, and thus are allowed to continue to exist as nonconforming structures and uses (SMP § 26 – AR 9 at 93-94).

There is nothing in the Pacific County's SMP that requires the buildings to be moved or torn down, and it would be a travesty to destroy

⁵ The infraction erroneously asserts a 100-ft setback (CP 287), but the Urban Shoreline requires only a 10-foot setback (SMP §7.D.3.a – AR Ex. 9 at p. 44 therein). Also, setback exceptions are commonly, and by necessity, made for piers.

this historic oyster cannery which is on the National Register (10/17/14 RP at 47, 51). In fact, one of the Shoreline Master Program policies is to support historic preservation (which necessarily entails nonconforming structures): “Identify, protect, preserve, and restore important archaeological, historical, and cultural sites located in shorelands.” SMP at §3.7 (AR Ex. 9 at p. 16 therein). In examining the SMP, the Superior Court was properly performing its analysis of the facts to the law, as it is required to do under RALJ 9.1.

3.7 Response to Alleged Error in Finding #19
(Appellant Brief at 14-15)

Although Appellant did not assign error to Finding #19, the County states that Finding #19 is irrelevant because it is citing to the June 2014 violation notice, not the Amended Notice of Infraction (CP 327-329). As has become evident through the discussion above, the Amended Notice by itself is nonsensical. It fails to describe any actual alleged violation, and it fails to cite any specific regulation that was allegedly violated. All it states is that Mr. Driscoll committed some undescribed violation of some unidentified section of regulations for the residential zone or for the aquaculture district, or for the conservancy shoreline or the urban shoreline. Without the accompanying infraction citations, explanatory letter, photographs and other enclosures that were mailed to

Mr. Driscoll in June of 2014 (CP 287-300), there would not be even any clue as to what he was being charged with.

OSF explained in briefing to the Superior Court that it accepted the Amended Notice of Infraction in the context of the original citation materials that had already been served (CP 330-331). The Superior Court also noted the lack of specificity in the amended citation (6/29/16 VR at 5). The Superior Court properly analyzed the facts to the law in Finding #19 through its references and inferences to the original infraction notice.

3.8 Response to Alleged Errors in Findings #22 - #25
(Appellant's Brief at 17-19)

These Findings state:

22. Based on the above it is clearly the intent of Ordinance 162 and the SMP to encourage the continued commercial use of existing properties such as the historic Oysterville Cannery, including the intensification of uses so long as consistent with other environmental and health regulations and not detrimental to the aquatic environments.
23. Use of the Oysterville Sea Farms Cannery for a seafood market, deli, and/or the sale of beer and wine with or without indoor seating does not violate the spirit, intent, or specific prohibitions of Pacific County Zoning regulations under either the SMP or Ordinance Number 162. The intensification of commercial uses at the Oysterville Sea Farm Cannery is encouraged and there is no evidence, since all activities occur on the existing cannery structure, that harm will befall the environment by such intensification. The impact on the environment from operation of a deli or seafood market is nil whether one, or five or fifty people

patronize the business since the only use made of the aquatic environment is to view it from the protected perch upon the cannery.

24. The Pacific County Zoning regulations implicitly recognize the importance of pre-existing commercial uses of historic properties and that continued maintenance and existence of these historic properties and uses depends upon commercial viability, which includes adapting, or intensifying usage to meet changing times.
25. In short, the decision of the District Court limiting commercial uses of the Oysterville Cannery in such a detailed manner is inconsistent with the intent and language of Ordinance Number 162 and the SMP.

These are the Findings made after the Superior Court completed its analysis of the law with the facts and evidence. While Appellant states the Superior Court engaged in de novo review in making these Findings, it fails to identify how or give any credible examples⁶. A large notebook of exhibits was used and cited by the District Court, transmitted upon appeal to the Superior Court, and is now in the possession of this Court. At Exhibit 9 in that 3-ring binder is a copy of the Pacific County SMP and at

⁶ Instead, Appellant engages in absurd conjecture by suggesting the Superior Court's decision will lead to a Red Lobster in Oysterville (Appellant Brief at 19). First, OSF is a sole proprietor operation who wants to keep it unique and local, but no matter who might own OSF in the future, it won't change the fact that its Oysterville location is far away from everything else and could never draw the population necessary for a franchise restaurant, and in any case, it would entail a significant land use approval process by a Hearing Examiner to review such a project. But more to the point, the actual issues on appeal concern only the indoor seating and beer & wine sales in OSF's seafood market.

Exhibit 22 is the entirety of Pacific County Zoning Ordinance 162. A significant amount of testimony before the District Court was transcribed (see full transcripts or page reduction versions at CP 94-143, 178-210, 262-271). There was also substantial briefing before the District Court transmitted to the Superior Court⁷. The Superior Court stated: “Believe it or not, I read everything that was sent to me.” 6/29/16 VR at 2.

The limited issues on appeal before the Superior Court come from Respondent’s appeal of the District Court’s second (9/17/15) Decision (CP 7-14), on OSF’s grandfathered rights to have indoor seating and alcoholic beverage sales in the seafood market. In analyzing whether the District Court was in error in its Decision, the Superior Court reviewed these narrow appeal issues within the larger context of all the facts and evidence before the District Court.

As discussed by the District Court in its Findings, it was not persuaded by the County’s assertion that each item for sale was a new use. Rather, the “use” and “activity” was the entirety of the fish market. See District Court Findings #46 - #48 in its 2/25/15 Decision on Nonconforming Use at p. 9 therein (Appellant Appendix 4). The District

⁷ If this Court wishes to review the briefing to the District Court, Respondent submitted a complete set, attached as Appendices 11 – 32 (bate-stamped pp. 00220-00608) to its Response to Motion for Discretionary Review, filed with this Court on 10/3/16.

Court also was not persuaded by the alleged environmental impacts that the County stated OSF would supposedly cause from offering a variety of seafood and non-seafood items for sale (6/15/15 RP at 353-355). The District Court further stated in its Finding #49: “This intensified use – the variation in retail product inventory – has not had a significant effect on the neighborhood or surrounding environment.” 2/25/15 Decision on Nonconforming Use (Appellant’s Appendix 4 at p. 9).

Additionally Pacific County’s Zoning Ordinance 162 has minimal limitation on nonconforming uses: “G. ... *Any nonconforming use or activity* that exists on the effective date of this Ordinance shall be ‘grandfathered.’” AR Ex. 22, at 204 (emphasis added). As discussed by the District Court in its Decisions, the “use or activity” is the seafood market as a whole. Thus, Ord. 162 allows the entirety of the use to continue as grandfathered. The Superior Court’s Findings #22 - #25 accepted and incorporated the District Court’s Findings, including the Findings from the District Court’s 2/25/15 Decision on Nonconforming Use, thereby appropriately analyzing the full Record against the District Court’s 9/17/15 decision on appeal.

The County put nothing in the record and made no coherent legal argument before either the District Court or the Superior Court to identify how OSF’s limited intensification of its nonconforming use – all contained

within its existing footprint, would cause any adverse impact or violate the grandfathering provisions in the County's SMP or zoning regulations. As identified in the record, Pacific County made a blanket residential zoning of Oysterville in 1981 even though the entire OSF site is a commercial use and has never been used for anything other than commercial and is not near any residences (10/17/14 RP at 94-95; CP 362-363).

Findings #22, #24, and #25 mirror the District Court's Findings and Decision precisely. It is Finding #23 where the Superior Court, after reviewing the record, and after applying an analysis of law to the same facts that had been before the District Court, correctly determined that the sale of beer & wine, and the inclusion of indoor seating, fit within the parameters of an allowable intensification of OSF's seafood market.

4. RESPONSE TO APPELLANT'S ISSUE NO. 2

Appellant's Assignment of Error 2: The district court erred when it determined the county was collaterally estopped from enforcing land use regulations.

Appellant's Issue 2: Is a municipality collaterally estopped from enforcing its zoning codes by the actions or inactions of employees who were applying its health and building codes?

Respondent's Restatement of Issue 2: Did the District Court rule that the County was collaterally estopped and base its decision on that ruling, rather than mentioning the point in dicta criticizing the regulatory behavior of the County? **No.** May the Court of Appeals in hearing an appeal of a RALJ Court decision, consider issues that were not on appeal before the underlying District Court because the governing ordinance prohibited appeal of those issues? **No.**

Alternatively, does the evidence demonstrate the District Court committed an error of law with regard to estoppel? **No.**

4.1 County's Appeal was Not Allowed by its Ordinance

Appellant has chosen misleading wording in framing its Issue 2. Through its collateral⁸ estoppel issue in Error/Issue 2 (Appellant Brief at 19-23), the County is impermissibly attempting to bring underlying issues to this Court which were not even on appeal. Pacific County's Ordinance 165, which governs appeals of infractions, does not authorize a Plaintiff to appeal a decision that the Defendant did not commit the infraction. This was briefed to the Superior Court and discussed before the Superior Court on Defendant's Motion to Dismiss (CP 25-30, 32, 34, 37-38, 43, 64-67) argued on January 13, 2016:

[A]s far as the infraction is concerned, I think ordinance 167 [sic], section 4 is very clear which – when it limits the plaintiff's right to appeal a decision that in effect abates, discontinues or determines a case other than judgment that the defendant has not committed an infraction. And the Court specifically found that defendant did not commit those two infractions. I don't think the State [sic] has any basis to appeal it under ordinance 167 [sic] section 4. And I'm going to grant the motion of the defendant to dismiss this appeal.

1/13/16 VR at 17-18.

⁸ We believe Appellant is misusing the legal term, since "collateral estoppel" simply does not apply in this case.

Thus, it was only OSF's cross appeal of the remaining issues on which it was found guilty of the infraction that was before the Superior Court.

Pacific County Ordinance 165 governs appeals of decisions by the court of limited jurisdiction after contested infraction hearings. The portion of Ordinance 165 identifying what is appealable states:

SECTION 4 – APPEALS

- A. Review by the Superior Court of a District Court Judgment Pertaining to This Ordinance
 - 1. Judgments That Are Appealable. A defendant may appeal a judgment entered in District Court after a contested hearing if the court finds that the defendant committed an infraction. *The plaintiff may appeal a decision which in effect abates, discontinues, or determines the case **other than by a judgment that the defendant has not committed an infraction.*** No other orders or judgments pertaining to a Notice of Infraction are appealable by either party.

Pacific County Ordinance No. 165, Section 4, Part A, Paragraph 1 (emphasis added) CP 43.

The District Court's decision that the County wants this Court to review (Appellant's Brief at 19) concerns portions of the infraction that the Defendant was found to have not committed by virtue of his grandfathered rights (e.g, may operate a small seafood deli, sell incidental non-seafood products, have outdoor seating with on-site food consumption). Where the Defendant was found to have not committed the

infraction, then the matter is not appealable by the Plaintiff, which in our case also means it was not an issue before the Superior Court. Appellant is essentially asking this Court to take de novo review of the District Court's rulings. It is only the issues from OSF's cross appeal that the Superior Court made rulings on, which in turn are the only issues before this Court.

The County has chosen to implement a quasi-criminal infraction process for land use regulations of this type. By choosing this process, the County has subjected itself to the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. Under this Clause, it is well settled that when judgment is upon an acquittal the government cannot seek to have it reversed on appeal. *U.S. v. Sanges*, 144 U.S. 310 (1892); *Ball v. U.S.*, 163 U.S. 662, 671 (1896). The County, recognizing this limitation, has incorporated it into its ordinance. However, unhappy with the effect of the limitation, it sought (wrongly and unsuccessfully) to appeal the Respondent's acquittal by the District Court to the Superior Court and again attempts the same (with equal error) here.

Further, before the Appellant's estoppel issue can be reviewed, Appellant first needs to identify how the Superior Court erred in applying Pacific County Ordinance 165 in dismissing Appellant's appeal (CP 19-21; 1/13/16 VR), and needs to make that argument despite the fact that

Appellant *agreed* to an order dismissing its appeal (CP 334-335). Under RAP 2.5(a), this issue is improperly waived on appeal because, by entering an Agreed Order on point, the County has failed to preserve, and has waived, any objection it had. This amounts to an issue on which there was no objection below being raised for the first time on appeal. Such issues are properly raised on appeal only if (1) they are matters of subject-matter jurisdiction, (2) they involve a total failure of factual proof rather than a legal argument or issue, or (3) they are a manifestation of error resulting in a violation of a Constitutional right. The District Court's dicta on collateral estoppel are none of these things.

4.2 District Court's Decisions Did Not Rely on Estoppel

Even if this Court could take de novo review of District Court rulings that were not on appeal to the Superior Court, it is important to note that the District Court did not form the basis of either of its two Decisions on estoppel. One need only review the District Court's 2/25/15 "Decision on Nonconforming Use" (Appellant's Appendix 4 – excerpt quoted below) to see that none of the 55 Findings, 8 Conclusions, or anything else in that Decision identify they are founded upon an estoppel theory. So, regardless of the testimony and numerous exhibits putting into evidence the County's requirements, over the course of almost 15 years (from 1998-2012), for OSF's kitchen and other facility upgrades, and

other permits and approvals upon which OSF relied (6/15/15 RP at 237-238, 259-261, 277-278, 281-282; AR Ex. 10, 11, 14, 15, 16, 17, 18, 19, 20, 23, 33), estoppel was not stated as the basis of the District Court's decision approving OSF's nonconforming use rights to continue to operate and intensify.

In the District Court's second decision (CP 7, et seq.), the Court again did not rely on an estoppel theory, and to the contrary, found that OSF had committed certain counts of the Infraction for having indoor seating and alcohol sales (CP 8-9) (which counts were overturned by the Superior Court, who determined they were encompassed within OSF's nonconforming use rights).

Appellant's estoppel issue to this Court is apparently derived from dicta in the District Court's second decision dated 9/17/15 (CP 7, et seq.), in which the District Court Judge summarized the significant information from the Record showing a long history of OSF's reliance upon requests and approvals issued by Pacific County (CP 10-12). However, it is actually the District Court's first decision, 2/25/15 "Decision on Nonconforming Use" (copy at Appellant Appendix 4) which had previously concluded that OSF had nonconforming rights for reasons that did not include estoppel:

CONCLUSIONS OF LAW

56. OSF's retail and wholesale sales of fresh seafood products, including oysters, clams, fish, and other seafood items generally found within a seafood sales store is an authorized non-conforming use. Any variation in the inventory of these seafood items is merely a permitted intensification of the retail/wholesale seafood business, which is an authorized non-conforming use.
57. Assuming that OSF's retail/wholesale seafood business does not conform to the currently applicable land use regulations, the "use" that the County's land use regulations seek to prohibit in this area is retail establishments generally, rather than the selling of particular products. See *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 242 P.2d 505 (1952) ("The ultimate purpose of zoning ordinances is to confine certain classes of buildings and uses to certain localities.").
58. For this reason, the Department cannot scrutinize every individual items offered for sale in OSF's retail store. It is the overall character of the retail/wholesale seafood business that must be maintained in order to continue as a nonconforming use. The Department cannot issue infractions against OSF alleging that every new item OSF offers for sale is an unlawful extension of the allowable non-conforming retail/wholesale seafood store. If the character of OSF's established retail/wholesale seafood business largely changes – for example, if it becomes a grocery store or a retail clothing store – then the Department's contention that the character and nature of the nonconforming use has changed would be much more credible. Indeed, if the character of the business were to change to such a large extent, then the County would likely be able to demonstrate that OSF abandoned its allowable non-conforming use and that no retail business is allowed on the premises.

59. Thus, OSF's retail sales of non-seafood items generally found within a seafood sales store and related products is also merely an intensification of the retail/wholesale seafood business, which is an authorized non-conforming use.
60. In addition, OSF's food preparation is a permitted non-conforming use to the extent that it involves the sale of oysters on the half shell for immediate consumption in an informal manner, outside the traditional restaurant-style serving methods.
61. The absence of any further evidence regarding other types of foods that retail/wholesale seafood markets traditionally or typically offer informally for immediate consumption prevents the court from concluding that the sale of any other food for immediate consumption is simply an intensification of the non-conforming use. Therefore, the sale of other food for immediate consumption (other than oysters on the half shell) is an unlawful nonconforming use.
62. OSF's on-site food preparation constitutes an unlawful expansion of the allowable non-conforming use to the extent that it involves providing food for formal consumption on the premises and offering outside seating.
63. Furthermore, OSF's sale of alcohol for consumption on the premises constitutes an unlawful expansion of the allowable non-conforming use.

ORDER

64. As to Counts I and II as applied to the issue of inventory in OSF's retail store, the defendant did not commit the infraction.
65. As to Counts I and II as applied to the sale of oysters on the half shell for immediate consumption in an informal manner, the defendant did not commit the infraction.

66. However, as to Count I and II as applied to the operation of the restaurant, the Court reserves the issue whether the defendant committed the infraction. The issue is reserved pending further testimony and argument regarding the other issues raised by the parties, including waiver and express or implied consent.

67. In addition, at the next scheduled hearing, the Court will accept further evidence regarding the types of foods that retail/wholesale seafood markets traditionally or typically offer informally for immediate consumption and may, depending on the proffered evidence, may reconsider Finding of Fact ¶ 52 and Conclusion of Law ¶ 61.

2/25/15 District Court's "Decision on Nonconforming Use" (Appellant Appendix 4).

After the 6/15/15 hearing, the District Court's ruling on the infractions that Defendant committed was narrowed, yet the new Findings again do not reference estoppel (in fact, these last Findings indicate a rejection of the estoppel theory):

Therefore, the Court finds that the Defendant has committed the infraction as alleged in Count One as it pertains to the sale of wine and spirits. The Court also finds the Defendant committed the infraction as alleged in Count Two by operating a food establishment with indoor seating without a valid permit and manufacturing cereal on the premises. For each count, the Court imposes a fine of \$150.00 for a total of \$300.00 payable in 30 days.

9/17/15 District Court's "Court Decision" (CP 14).

Appellant's briefing to this Court impermissibly jumps directly to the issues it had originally tried to appeal to the Superior Court (CP 19-21),

but which were dismissed (CP 334-336). See Appellant Brief at pp. 19-23, where, with the use of misleading wording: “the county was collaterally estopped from enforcing land use regulations,” Appellant is asking this Court to take what amounts to de novo review of the District Court’s first Decision on Nonconforming Use, on issues which the Defendant was found to have not committed the infraction, and thus are not on appeal.

Appellant cites to *Kramarevsky v. Dep’t of Soc. & Health Servs.*, 122 Wn.2d 738, 863 P.2d 535 (1993) (Appellant Brief at 22), although it is not clear how it applies here. The Pacific County South District Court identified no reliance upon, or default to, collateral estoppel in any of its 55 Findings, or 8 Conclusions (quoted above) in its Decision on Nonconforming Use, or in the Findings in the final paragraph of its 9/17/15 Decision (CP 14). The Superior Court’s decision (CP 1-4) as to the appeal of the District Court’s 9/17/15 Decision similarly identified no reliance upon or default to estoppel (collateral or otherwise) in overturning the District Court’s decision on the infraction counts relating to indoor seating and beer & wine sales.

5. RESPONSE TO APPELLANT'S ISSUE 3

Appellant's Assignment of Error 3: The district court erred when it allowed Mr. Driscoll to raise previously resolved land use issues in an infraction hearing.

Appellant's Issue 3: Under what circumstances may a respondent use a land use defense in an infraction hearing?

Respondent's Restatement of Issue 3: Is a jurisdiction that, pursuant to RCW 7.80.010(5) enacted its own civil infraction system to enforce land use violations, required to use that process to enforce its ordinances in a court of limited jurisdiction, instead of the LUPA process under Chapter 36.70C RCW? **Yes.**

The County has tried several times to argue that the Land Use Appeals Act (LUPA) applies in this case, and Mr. Driscoll should have appealed a 2012 cease & desist letter under LUPA, even though Pacific County's own adopted procedure uses an infraction system, pursuant to the authority under RCW 7.80.010(5) (see local legislative Finding at CP 32, quoted below), which prevents appealing the matter under the LUPA process per RCW 36.70C.020(2)(c), and even though that 2012 cease & desist letter does not meet the definition of a "land use decision" as that term is defined in the LUPA statute, at RCW 36.70C.020(2).

The 5/21/12 cease & desist letter (CP 295-298) had not undergone any investigation or proof. The letter was the beginning of a process, not the conclusion of an appeal. It was not a final "resolution" of anything, and there was no process to contest it in advance of the County issuing an

infraction. As a point of clarification, the letter states: “[I]f OSF has not ceased the sales of proscribed items by May 31, 2012, Pacific County will have no choice but to proceed with legal action. A Notice of Infraction Ticket can be written” (CP 297). The County did exactly that by proceeding with legal action and issuing OSF an infraction ticket (CP 299-300, and Amended Infraction (CP 327-329). Once issued, OSF contested the infraction to District Court, in the manner specified in Ord. 165 for a contested hearing (CP 37-40).

Appeals of civil infraction tickets, including infractions of land use ordinances, go to a court of limited jurisdiction in Pacific County, as specified through County Ordinance 165 (CP 32, et seq.). Although Appellant asserts (without citation) that judicial authority for land use decisions, and in particular the authority to consider the defense of grandfathering, should be beyond a District Court’s authority (Appellant’s Brief at 28), it is nonetheless a fact that Pacific County, through Ordinance 165, deliberately (indeed, emphatically!), granted authority to the District Court to review and rule on land use violations, which necessarily entails review of all defenses against the infraction:

A. Legislative Finding

The Board of County Commissioners finds that it is *imperative* for Pacific County *to enforce properly its Zoning ... regulations*. The Board also finds that it is in

the *best interest of Pacific County to adopt its own civil infraction system* as authorized by RCW 7.80.010(5).

...

D. Designation of Civil Infractions

Violations of the Pacific County Shoreline Master Program and Pacific County Ordinance Nos. 147, 151, 156, 162, 163, and 167 or any amendments to these regulations, among other things constitute civil infractions. Such infractions shall be adjudicated according to the provisions contained in this Ordinance.

...

C. Venue

... *an infraction case shall be brought in the district court* that serves the district in which the alleged infraction occurred.

Ord. 165 (CP 32, 34, 37) (emphasis added).

The County's May 21, 2012 cease & desist letter (CP 295-298) identifying Allowed and Not Allowed products for sale at OSF is not a "land use decision" under the LUPA definition at RCW 36.70C.020(2) because RCW 36.70C.020(2)(c) specifically excludes from the definition of "land use decision" any local jurisdiction enforcement process that uses courts of limited jurisdiction. The entirety of this LUPA jurisdictional issue was fully briefed and argued before both the District and Superior Courts (10/17/14 RP at 11-38; CP 68-69).

Although Appellant has attempted to analyze several LUPA cases, it still misunderstands the legal concepts and continues to recycle its same arguments by stating that OSF needed to have appealed the 2012 letter because it was a "final opinion" (Appellant Brief at 27). As discussed

above, the 2012 letter does not meet the LUPA definition for a final determination land use decision under 36.70C.020(2) and thus would not be appealable directly to Superior Court under LUPA Chapter 36.70C RCW even if Pacific County had not implemented Ordinance 165 (10/17/14 RP at 16-28).

Appellant cites to *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009) which discussed Tacoma's use of the civil infraction system under Chapter 7.80 RCW, instead of LUPA, to enforce its Minimum Building and Structures Code (MBSC). Like Tacoma, Pacific County has enacted its own system for appealing notices of infractions. Pacific County's Ordinance 165 includes an additional contested infraction hearing process (Ord. 165 at CP 37-40) with a further appeal to Superior Court (Ord. 165 at CP 43-44). The Parties availed themselves of these procedures under Ordinance 165.

Pacific County's cease & desist letter specifically stated that an infraction would be issued and a fine would be imposed if OSF did not cease sales of the items alleged as not allowed (CP 297). Pacific County's infraction system at Ordinance 165 has enacted a full process for hearings and appeals. Under the holdings in *Post*:

... LUPA does not authorize petitions on the subject of ordinances that must be enforced ‘in a court of limited jurisdiction’, former RCW 36.70C.020(1)(c) [now at 36.70C.020(2)(c)], we must determine whether the MBSC is such an ordinance. We hold that it is.⁵ The MBSC provides for the issuance of notice of violation letters and the assessment and collection of civil penalties. These actions are elements of what chapter 7.80 RCW calls ‘a system of civil infractions.... Infraction jurisdiction resides exclusively in the district and municipal courts, i.e., courts of limited jurisdiction. RCW 7.80.010(1)-(4), .050(5).”

⁵Accordingly, it is not necessary to decide whether Tacoma’s actions were ‘land use decisions’ within the meaning of LUPA. *See* former RCW 36.70C.020(1)(a)-(b).

Post v. City of Tacoma, 167 Wn.2d 300, 310-312, 217 P.3d 1179 (2009).

In contrast to these holdings in *Post, Id.*, Appellant still argues that OSF should have made a LUPA appeal in response to the County’s 2012 letter, despite the fact that the County was asserting civil violations and plainly stated that an infraction would be issued (and indeed was issued) and a fine would be imposed (CP 297). Because Pacific County uses a civil infraction system to enforce its regulations, including the SMP and Zoning Ordinance 162, OSF could not have appealed the cease & desist letter under LUPA. Appellant’s LUPA jurisdiction argument fails under *Post, Id.*

Appellant next cites to *Johnson v. City of Seattle*, 184 Wn. App. 8, 335 P.3d 1027 (2014), and in addition to entirely exceeding the scope of County’s Issue 3, the Appellant misinterprets the Court’s discussion of

facts specific to that case and to the Seattle code (Appellant Brief at 29). In *Johnson*, because of provisions specific to the Seattle Code, the decision-maker (Hearing Examiner) was prevented from hearing Mr. Johnson's grandfathering defense, after which Division One determined that Mr. Johnson "was prevented from asserting a valid defense. He was thus denied a meaningful opportunity to be heard." *Id.* at 22. The thread to weave between the *Johnson* case and the instant matter is that Pacific County's infraction system correctly offers the opportunity for a citizen's defense of grandfathering to be heard.

In Appellant's next analogy from *Johnson*, the County implies that Mr. Driscoll should have requested a stay from the court infraction proceeding so that Pacific County Department of Community Development could first establish his nonconforming use rights (Appellant Brief at 29). No, definitely not. Pacific County, through its then Community Development Director had already [erroneously] stated: "As far as I know, no one is grandfathered when it comes to zoning...." AR Ex. 2. Appellant's suggestion that the same department who issued the infraction should also decide the pivotal issue of the infraction (i.e., the grandfathering defense) is not only irrational, but is the direct opposite of Court's due process holdings in *Johnson, supra*. In any event, Pacific

County's procedures under Ordinance 165, require contested infractions to undergo a separate review by the District Court.

Appellant concludes its legal analysis by stating: "District courts should not be the forum in which land use decisions are made. The legislature stated firmly that the superior court has the sole jurisdiction..." Again, the Pacific County Board of Commissioners, through Ordinance 165, has unequivocally empowered the District Court with deciding land use violation matters under both the SMP and Ordinance 162 that come before it as civil infractions. As to the superior court having the "sole jurisdiction," such jurisdiction only applies to appeals of "land use decisions" which meet the specific definition at RCW 36.70C.020(2).

Despite Appellant's lament about the District Court having too much authority, Appellant has not identified how it believes it would have received any different decision had the Superior Court initially reviewed the matter instead. OSF would have made the same Affidavit of Prejudice (Appellant Appendix 10), meaning the case would have likely gone before the same Superior Court judge as the one who heard OSF's cross-appeal.

6. SUMMARY AND CONCLUSION

6.1 Superior/RALJ Court did Not Conduct De Novo Review

The Superior Court made a thorough review of the substantial record of exhibits, local regulations, transcripts, and briefing before the District Court, and then memorialized this examination of record evidence as “Findings.” In making the analysis of law to the facts concerning the two items on appeal (indoor seating and beer & wine sales) to determine if the lower court make an error of law, the Superior Court reviewed the examination that had been conducted by the District Court in determining Respondent’s nonconforming use rights. The Superior Court, however, in analyzing Pacific County’s shoreline and zoning provisions, correctly concluded that OSF’s indoor seating and beer & wine sales were encompassed within its permissible grandfathered rights to operate a retail seafood market.

6.2 No Court Relied on an Estoppel Theory to Determine Respondent’s Grandfathered Rights

The only issues on appeal before the Superior Court were whether OSF’s indoor seating and beer & wine sales can continue as legal nonconforming uses. Appellant has misworded the issue before this Court as one of collateral estoppel, as a “hook” to obtain review of matters that were not even on appeal.

There is nothing in the District Court's first decision, "Decision on Nonconforming Use" that discussed, found or concluded that any of Respondent's nonconforming use rights were established under an estoppel theory. A reading of all 64 paragraphs of the "Decision on Nonconforming Use" will confirm this fact.

The District Court's second decision "Court's Decision" relayed, through dicta, the years of permitting and approvals that Defendant had undertook to maintain the viability of his retail seafood market and comply with the County's requirements to install a commercial kitchen in the retail seafood market, and make other upgrades. In the District Court's second decision, it essentially rejected any argument that the County was estopped from prohibiting indoor seating and alcoholic beverage sales.

The Superior Court overruled the District Court's decision on the indoor seating and beer/wine sales, but not under an estoppel theory. Instead the Superior Court reviewed these two remaining issues through the same lens that the District Court had used to determine OSF's other nonconforming use rights, and in analyzing the law to the facts, concluded that indoor seating and beer & wine sales are properly included in OSF's grandfathered retail seafood market.

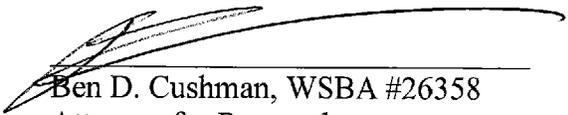
**6.3 Pacific County Must Use its Enacted Civil
Infraction System for Land Use Violations.
LUPA is Not an Option**

Appellant asserts that Respondent should have appealed an earlier cease and desist letter under the LUPA provisions. However, that letter, aside from clearly not being a “land use decision” as defined by RCW 36.70C.020(2), specifically referenced an infraction system. Through local legislation as Ordinance 165, Pacific County deliberately made a legislative finding that it was adopting its own civil infraction system as authorized by RCW 7.80.010(5) and granted authority to the District Court to hear and decide land use violations. The District Court’s review would necessarily encompass hearing defenses against the infraction, including, as was the case here, a grandfathered rights defense.

RCW 36.70C.020(2)(c) prevents a LUPA appeal when a civil infraction system has been adopted. Respondent can only appeal the alleged land use violation through the appeal process that is available, which in this case is Pacific County’s civil infraction system. No LUPA appeal was possible.

SUBMITTED this 8th day of May, 2017.

CUSHMAN LAW OFFICES, P.S.


Ben D. Cushman, WSBA #26358
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on the date signed below, I caused the foregoing document to be e-filed with this Court, and served upon Respondent's attorney in the manner indicated below.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 8 day of May, 2017, in Olympia, Washington.



Doreen Milward

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Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

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