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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 296750

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

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

v.

CITY OF SPOKANE VALLEY AND COYOTE ROCK, LLC,

Respondents.

**REPLY BRIEF OF APPELLANT STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY**

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I. INTRODUCTION

In its Opening Brief, the State of Washington, Department of Ecology (Ecology) argued that the City of Spokane Valley (City) erroneously issued the dock exemptions involved here because (1) the statutory exemption for residential docks in the Shoreline Management Act (SMA) does not apply to these docks; and (2) the City failed to condition the exemptions to address the cumulative impacts that are likely to result from the construction of numerous docks at this location.

In their response briefs, the City and Coyote Rock defend the exemptions on the basis that they “received extensive environmental review” and that the cumulative impacts associated with construction of 30 docks at this location are “speculative.” With regard to the applicability of the exemption, the City and Coyote Rock argue that the exemption applies because Coyote Rock is the owner of the lots where the docks were built.

The City and Coyote Rock’s contentions are unsupportable under the law and should be rejected. For the exemption to apply, Coyote Rock must not only be the owner of the lots in question, but the docks must also be intended for use by that owner, which they are not. Furthermore, the City and Coyote Rock’s contention that cumulative impacts are speculative ignores the facts and the science in the record. Neither the

City nor Coyote Rock has ever denied that the developer intends to construct 30 docks at this location. Nor does the City or Coyote Rock dispute the scientific evidence that docks have significant adverse cumulative impacts. By failing to address these impacts, the City authorized development that is inconsistent with the Shoreline Management Act and its own local master program. The exemptions should be reversed.

II. AUTHORITY AND ARGUMENT

A. The Dock Exemption In The Shoreline Management Act Does Not Apply To Speculative Docks Built For Resale

The right to build a residential dock is not at issue in this case. What is at issue is whether a developer proposing to build 30 docks as part of a residential development may do so without obtaining a substantial development permit under the SMA.

The dock exemption in the SMA applies only to docks “designed for pleasure craft only, for the private non-commercial use of the owner, lessee, or contract purchaser of single and multiple family residences.” RCW 90.58.030(3)(e)(vii). As Ecology explained in its Opening Brief at pages 13–19, based on the plain language of this exemption and the overriding purpose of the SMA to prevent piecemeal development, the exemption does not include speculative docks built for resale.

Speculative docks are not designed or built for use by the current owner of the associated residences. They are designed and intended for use by some future owner who is not “the owner, lessee or contract purchaser” as of the date the exemption is issued. In addition, exempting speculative docks from the requirement to obtain a substantial development permit undermines the purposes of the SMA because it encourages the installation of more docks than would be the case if construction were left to the choice of individual homeowners.

In addressing this issue, the City and Coyote Rock focus on the fact that Coyote Rock is the owner of the lots associated with the docks. *See* Response Brief of City of Spokane Valley (City’s Response Brief) at 7–8. However, ownership of the adjacent lots is not sufficient to make the dock exemption applicable. To fall within the exemption in RCW 90.58.030(3)(e)(vii), the docks must be designed and intended for use by the owner seeking to apply the exemption, i.e., by Coyote Rock. Because Coyote Rock has no intention of using these docks, the exemption does not apply.

The City and Coyote Rock also argue that differences in language between the dock exemption in RCW 90.58.030(3)(e)(vii) and the single family residence exemption in RCW 90.58.030(3)(e)(vi) support their interpretation that the dock exemption applies to speculative docks. City’s

Response Brief at 7; Response Brief of Respondent Coyote Rock, LLC (Coyote Rock's Response Brief) at 23. As Ecology pointed out in its Opening Brief at pages 18–19, the Shorelines Hearings Board (Board) and the courts have interpreted the single family residence exemption to be inapplicable to speculative homes built for resale. *Lux Homes, LLC v. Dep't of Ecology*, Shorelines Hearings Board (SHB) No. 04-025, Findings of Fact, Conclusions of Law, and Order (CL 6) (Aug. 1, 2005); *Kates v. City of Seattle*, 44 Wn. App. 754, 760, 723 P.2d 493 (1986). While it is true that the language of these two exemptions is not identical, they are in fact so similar that the same interpretation should apply to both.

Both exemptions require that the home or dock be for use by “the owner, lessee, or contract purchaser.” The single family residence exemption requires that construction be “for his own use or the use of his or her family” but the same limitation arises from the language of the dock exemption because that exemption requires the dock to be “designed for pleasure craft only, for the private non-commercial use of the owner, lessee, or contract purchaser.” The term “the owner” in this phrase refers to the current owner, not a future one. If the legislature had intended the

exemption to apply to future owners, it would have used the term “any” owner.¹

The City and Coyote Rock also seek to distinguish this case from *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002), cited in Ecology’s Opening Brief at pages 16–18. While it is true that there are factual differences between this case and *Campbell & Gwinn*, the rationale underlying *Campbell & Gwinn* nevertheless applies here. For example, as argued in Ecology’s Opening Brief at page 18, the court in *Campbell & Gwinn* was concerned that interpreting the groundwater exemption in that case to allow developers to claim multiple exemptions would lead to a vast expansion of unpermitted groundwater use to the detriment of the public interest. This same concern exists here.

If the City and Coyote Rock are correct in their interpretation of the exemption, a developer could construct as many docks as he wished, on as many lots as he wished, without ever obtaining a substantial development permit under the SMA. The number of docks so constructed could be in the hundreds in a large waterfront subdivision. Such a result is inconsistent with the SMA’s requirement that substantial developments be reviewed in a public permit process for consistency with the SMA and the

¹ This, in fact, is how Coyote Rock interprets the exemption in its Response Brief at page 19, where it argues that the exemption applies to “any owner.” Coyote Rock’s interpretation is overly broad and unsupported by the statutory language.

local master program. Construction of numerous speculative docks for resale without a substantial development permit undermines the fundamental purpose of the SMA to avoid piecemeal and uncoordinated development. See RCW 90.58.020 (“unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest . . .”). The exemptions should be reversed.

B. The City Erroneously Failed To Condition The Exemptions To Address Cumulative Impacts

Even if the exemption did apply here, the City failed to properly condition the exemptions to address cumulative effects. The two docks at issue here are not isolated, but are part of a larger pattern of development on all 30 waterfront lots in the Coyote Rock subdivision. See Ecology’s Opening Brief at 22.

The SMA has required since its inception in 1972 that adverse cumulative impacts of development be avoided or mitigated. *Hayes v. Yount*, 87 Wn.2d 280, 287–88, 552 P.2d 1038 (1976) (citing cases); *Skagit Cy. v. Dep’t of Ecology*, 93 Wn.2d 742, 750, 613 P.2d 115 (1980); *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 210, 884 P.2d 910 (1994); *Bellevue Farm Owner’s Assoc. v. Shorelines Hearings Bd.*, 100 Wn. App. 341, 361–62, 997 P.2d 380 (2000).

The City and Coyote Rock do not dispute that adverse cumulative impacts must be addressed. Instead, they claim that such impacts are speculative in this case. *See* City's Response Brief at 15–21; Coyote Rock's Response Brief at 30. First, the City and Coyote Rock contend there is no evidence that 30 docks will actually be built. Second, they claim that even if 30 docks are built, there is no evidence they will have adverse cumulative effects. Both of these arguments are without merit.

1. Thirty docks are reasonably foreseeable.

In evaluating claims of cumulative impact, the Shorelines Hearings Board reviews, among other things, the land use pattern in the area and whether there are other similarly situated lots where future development of the kind at issue is likely to occur. *Fladseth v. Mason Cy.*, SHB No. 05-026, Findings of Fact, Conclusions of Law and Order (CL 15) (May 1, 2007) (“potential for future build out of the relevant subject area is an important, albeit not determinative, consideration”); *Rech v. San Juan Cy.*, SHB No. 07-035, Findings of Fact, Conclusions of Law and Final Order (CL 18) (June 12, 2008). The supreme court has affirmed that this type of review is appropriate. *Hayes v. Yount*, 87 Wn.2d at 291 (whether a particular development will serve as a precedent depends on the similarities and differences between the lots in that area).

Here, all 30 of the lots within the Coyote Rock subdivision are similarly situated. They are close together, located along the same reach of river, have similar access to the river, and are part of the same subdivision. *See* CP 86–89, 488–489. There is no evidence that dock construction is physically or legally precluded on any of the lots. Thus, if individual docks are permitted on the two lots at issue here, it is reasonable to conclude that docks will be built on the remaining lots as well. *See Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 56–57, 202 P.3d 334 (2009) (dock construction may be predicted based on review of parcel data, extent of dock construction elsewhere, and other factors).

This evidence alone is sufficient to support a finding that construction of 30 docks in this location is reasonably foreseeable, but there is more. The evidence here goes beyond the similarity of the lots at issue, and includes evidence of an actual intent by the developer to install docks on all 30 lots. *See* Ecology’s Opening Brief at 24. Neither the City nor Coyote Rock has ever denied this intent. The City attempts in its Response Brief at page 17 to downplay this evidence as “speculation” about the developer’s intent, or mere marketing information, but in fact there is nothing speculative about it. The developer has stated that he intends to build docks on each lot and he depicts each lot with a dock on

his website. CP 16–17, 539. Given these facts, the City erred in failing to consider that 30 docks likely will be built.

2. Thirty docks likely will have significant adverse impacts.

Similarly, the scientific evidence in the record demonstrates that the construction of 30 docks at this location likely will have significant adverse effects on the ecological, aesthetic, and recreational functions of the shoreline. CP 556–571, 582, 592, 597, 608. The City’s inventory agrees that these effects are likely to occur at Coyote Rock. CP 489, 513. In particular, shore zone alterations are likely as a result of the construction of the docks and the trails necessary to access them. Furthermore, neither of the exemption approvals issued by the City here contains adequate conditions to address these impacts.

In responding to this point, the City and Coyote Rock argue that there is no site-specific evidence of direct impacts arising from the particular docks at issue here. City’s Response Brief at 12, 16–17; Coyote Rock’s Response Brief at 27. The City and Coyote Rock contend that, because there is no site specific evidence of direct impacts, there is no evidence of cumulative impacts either. These arguments are erroneous and should be rejected.

Ecology did present site specific evidence of impact in this case. That evidence is contained in the draft shoreline inventory prepared by the City, which documents the likely impacts of dock construction at this site. CP 489, 513. These impacts include loss of shoreline vegetation, petroleum pollution, and bank erosion. CP 513. The inventory explicitly states that “[r]esidential growth in the Coyote Rock development area will likely further degrade a historically disturbed shoreline area due to increased shoreline access pressure.” CP 513. The inventory also specifically mentions “cumulative impacts to the shoreline plant communities and habitats” arising from dock construction. CP 489. Although the City argues that the inventory was only a draft at the time it issued the exemptions, the City does not deny its accuracy.²

Ecology also submitted in this proceeding the best science currently available regarding the impacts of docks in freshwater. CP 542–638. Although this evidence is not specific to this particular reach of the Spokane River or these specific docks, it summarizes the results of numerous studies done on docks throughout Washington and the Pacific

²Indeed, the City itself relies on the inventory in its Response Brief at page 16. The City claims it complied with the inventory’s suggestion that it “take care to evaluate all shoreline development proposals to ensure that they include compensatory habitat improvements so that migration corridor and shoreline habitat functions are maintained.” CP 513. In fact, the City did not do this. The City required mitigation for construction of the access trails, but it did not ensure that migration corridor and shoreline habitat functions are maintained. Instead, the City would allow the buffer to be fragmented and its habitat values lost through construction of 30 individual access trails and docks.

Northwest. *E.g.*, CP 567–570, 578. The impacts documented in the scientific literature include shore-zone habitat changes, shading and ambient light changes, water flow pattern and energy disruption, and physical/chemical environmental disruption. CP 582, 592, 597. From this evidence, the only rational conclusion one can draw is that the impacts documented in the studies are likely to occur at this location as well. *See Samson*, 149 Wn. App. at 56 (cumulative impacts may be predicted using general scientific literature).

As Ecology pointed out in its Opening Brief at pages 22–23, one of the most serious impacts of dock construction at a particular location is the removal of riparian vegetation and other shoreline alterations associated with the dock. CP 567–568. This type of impact here is not speculative, it is virtually certain to occur given the City’s approval of an access plan allowing just that type of impact on each lot. City Record at 172–182 (allowing 8 foot wide access trail and associated structures through the buffer to the docks).³ Moreover, this impact exists regardless of the fact that the docks here are relatively small, as Coyote Rock emphasizes in its Response Brief at pages 27–29.

If the City claims that more analysis is necessary, it should have obtained that information from Coyote Rock during the application

³ The City Record was submitted to the court without clerk’s numbers per RAP 9.7(c).

process. The burden was on Coyote Rock in its application to demonstrate the consistency of its proposed development with the SMA and the local master program. *Buechel*, 125 Wn.2d at 205. Further, Coyote Rock was required to include in its application all aspects of the proposed development, not just piecemeal components. *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 850–51, 509 P.2d 390 (1973).

The City cannot rely on its failure to obtain information from the applicant to justify its decision to allow the docks. The City cannot blind itself to the full scope of the project or the full scope of impacts and then insist from that vantage point that it had no basis on which to deny or condition the applications. The City was obligated to obtain whatever information was necessary to evaluate the full scope of Coyote Rock's proposal. If the City claims that a further site specific analysis is required, it should have obtained that information from the applicant, as Ecology pointed out in its comments on the second application. City Record at 86.⁴

In addition, the City and Coyote Rock misconstrue the applicable standard on which mitigation or avoidance of cumulative impacts must be based. Ecology is not required in this proceeding to demonstrate that

⁴ In this regard, the City appears to misunderstand its role under the SMA. The City states in its Response Brief at page 10 that it "must carefully, and only upon a sound and lawful foundation, restrict the use of a private party's property." As noted above, the SMA places the burden on the project proponent to demonstrate the consistency of his proposal with the Act and the local master program. The City appears instead to have put the burden on itself to demonstrate inconsistency.

cumulative impacts have already occurred. Cumulative impacts by their very nature occur incrementally over time. Such impacts cannot be observed before construction but must be predicted based either on modeling done for that purpose or based on reasonable inferences drawn from comparable sites and the available scientific evidence. *See Samson*, 149 Wn. App. at 56–58. A local government cannot wait until such impacts actually occur at the site to take action because by then the damage is done. *See Fladseth*, SHB No. 05-026 at CL 16 (“The Board has long been cautious about the placement of numerous docks in an incremental fashion.”).

For these reasons, Ecology’s guidelines require local governments to address cumulative impacts that are “reasonably foreseeable.” WAC 173-26-201(3)(d)(iii).⁵ Here, there is no question that (1) 30 docks are reasonably foreseeable at this location, given the similarity of the lots at issue and the developer’s stated intention to construct docks on each riverfront lot; and (2) adverse impacts from the construction of 30 docks at this location are also reasonably foreseeable, based on the scientific literature documenting such impacts. Therefore, the City was required to

⁵ The City and Coyote Rock assert that Ecology’s guidelines are not relevant here because they apply only to master program development. City’s Response Brief at 14; Coyote Rock’s Response Brief at 17. The guidelines, however, are relevant—even if they are not directly applicable—because they represent Ecology’s best interpretation of what the SMA requires in regard to cumulative impacts. *See* WAC 173-26-186(2) (guidelines reflect policy goals of the Act).

include conditions in its exemption approvals to avoid or mitigate cumulative impacts.

3. The City's environmental review was inadequate.

In support of their arguments, both the City and Coyote Rock erroneously allege that the dock proposals here received “extensive environmental and regulatory review.” *See* City’s Response Brief at 1, 9; Coyote Rock’s Response Brief at 24 n.4. In reality, the City’s review was cursory at best. Although Coyote Rock did prepare checklists for each dock pursuant to the State Environmental Policy Act (SEPA), the checklists (1) did not analyze the 30 docks contemplated for the development and (2) provided virtually no information about the impacts of the docks. City Record at 28–37. The checklists stated that no vegetation would be removed as a result of the dock installation but, in fact, significant amounts of vegetation were disturbed when the first dock was installed. City Record at 4, 55, 111–115. Nor did the checklists reveal the extent of impacts that would occur from the construction of associated access trails to the docks. *See* City Record at 129 (comment from Department of Fish and Wildlife (WDFW) noting that no information was provided regarding development of the buffer); City Record at 86 (comment from Ecology that “the real impact from docks in this location is in developing access through the shoreline buffer to access

the dock The cumulative effects of locating 30 individual docks and access on this reach of river will result in complete degradation of the shoreline and should be reviewed and quantified prior to any dock authorization.”).

From these barebones checklists, the City prepared Mitigated Determinations of Nonsignificance (MDNS). *E.g.*, City Record at 118–119. The City therefore did not require an Environmental Impact Statement. As discussed above, the City also did not require an analysis of the impacts of 30 docks at this location. The two MDNSs contain virtually no information about the impacts of the docks nor do they contain any conditions to address impacts, other than a general requirement not to disturb the 75 foot riparian buffer.⁶ These MDNSs, regardless of whether they were appealed or not, are not binding for purposes of the SMA and they do not preclude either Ecology or the court from requiring additional conditions necessary to address cumulative impacts and/or ensure consistency with the SMA and the local master program. *Bellevue Farm Owners Assoc.*, 100 Wn. App. at 351–55.

In the same vein, the City and Coyote Rock note that the docks received hydraulic project approval from the WDFW. The WDFW,

⁶ At the same time that the City included this no-disturbance condition in the MDNS, the City authorized disturbance of the buffer by allowing individual access trails through the buffer to the docks. In effect, the City rendered the condition in the MDNS meaningless.

however, did not consider cumulative impacts in issuing these approvals. *Spokane Riverkeeper v. Dep't of Fish and Wildlife*, Pollution Control Hearings Board (PCHB) No. 10-097, Order on Motions for Summary Judgment at 4 (June 28, 2011). The WDFW approvals are themselves under appeal for just that reason. *Id.* Thus, the WDFW approvals are not dispositive of this issue.

4. Thirty docks at this location are inconsistent with the SMA and the local master program.

As Ecology pointed out in its Opening Brief at pages 25–26, construction of 30 docks at this location is inconsistent with the SMA's policies applicable to shorelines of statewide significance and it is inconsistent with the policies of the City's own master program for the Pastoral Environment. The Pastoral Environment is supposed to be reserved for passive or diffuse recreation and open space. CP 343, 364. Allowing 30 docks, however, is a high intensity level of use. CP 513. Similarly, the policies applicable to shorelines of statewide significance like the Spokane River require that uses be preferred that, among other things: (1) recognize and protect the statewide interest over the local interest; (2) preserve the natural character of the shoreline; (3) result in long term over short term benefit; and (4) protect the resources and

ecology of the shoreline. RCW 90.58.020. The construction of 30 docks at this location does not accomplish these goals.

The construction of 30 docks and access trails at this location also is inconsistent with the conditions of the City's approval of the Coyote Rock subdivision. A key condition of that approval was maintenance of a 75 foot buffer adjacent to the river. CP 433–434. Another key condition was that “[o]nly minimal low impact access ways and docks will be approved.” CP 434. The stated intent of these conditions was to “maintain in perpetuity the natural character and ecology of the shoreline” and “reduce the number and impact of docks.” CP 434.

Although the City claims in its Response Brief at pages 20–21 that it abided by these conditions, in fact it clearly did not. It did nothing to reduce the number of docks. Nor did it include conditions sufficient to preserve the natural character of the shoreline. Instead, the City approved individual docks for two of the lots and approved plans that would allow an 8 foot wide access trail through the buffer to each dock. CP 172–182. Nowhere does the City explain how these approvals will not serve as precedents for the other lots nor does the City explain how, if 30 docks are constructed, the 75 foot buffer will continue to serve its purpose of preserving the natural character of the shoreline. Instead, the City simply

asserts, without supporting evidence or argument, and contrary to the scientific literature in the record, that adverse impacts will not occur.

According to the scientific literature, cumulative impacts from dock construction must be avoided or mitigated if aquatic habitats are to be maintained. CP 556, 568, 612, 636. In addition, cumulative impacts must be avoided or mitigated if the aesthetic, recreational, and navigational values of this stretch of the Spokane River are to be protected. The City could have accomplished these goals by requiring joint use docks or joint use access trails in the Coyote Rock subdivision, as its own master program policies encourage. CP 384 (City of Spokane Valley Shoreline Master Program §18.3.2 and §18.4.2). The exemptions should be reversed.

III. CONCLUSION

For the reasons stated above, the court should reverse the exemptions issued by the City allowing dock construction on the Spokane River and the exemptions should be denied. In the alternative, the court

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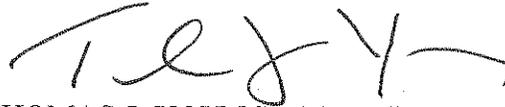
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should remand the exemptions with instructions to include joint use or other conditions to avoid cumulative impacts.

RESPECTFULLY SUBMITTED this 22 day of July, 2011.

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A handwritten signature in black ink, appearing to read 'T. Young', written over the printed name of Thomas J. Young.

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