

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.

RESPONSE BRIEF OF CITY OF SPOKANE VALLEY

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I. INTRODUCTION

In 2009 and 2010, the City of Spokane Valley (the “City”) considered applications by Coyote Rock, LLC (“Coyote Rock”); for exemptions under the Shoreline Management Act (chapter 90.58 RCW) (the “SMA”) from having to obtain Substantial Development Permits (“SDP”) for two docks adjacent to two single family lots located on the Spokane River. The requests had already been subject to extensive environmental and regulatory review, including approval from the Washington State Department of Fish and Wildlife, the review of an Environmental Checklist and subsequent issuance of a Mitigated Determination of Non-Significance (“MDNS”) pursuant to the State Environmental Protection Act (“SEPA”), and obtaining a floodplain permit. After reviewing the requests under both the SMA and the City’s Shoreline Management Program (“SMP”), the City granted, with conditions, the SDP exemptions.

The placement of these single-family residential docks on the shoreline in question was properly found to be exempt pursuant to RCW 90.58.030(3)(e)(vii), negating the need for a SDP.

The actions of the City in granting these exemptions were lawful and consistent with both its own ordinances and applicable State law and supported by substantial evidence. The Superior Court decision was not in error and should be affirmed.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Findings of Fact 4-6 and Conclusions of Law 1-4 were not in error. The Superior Court properly found that there was no basis for reversing the SMA SDP exemptions issued by the City.

III. COUNTERSTATEMENT OF ISSUES

1. Are the docks at issue intended for the private non-commercial use of the property owner thus meeting the criteria set forth in RCW 90.58.030(3)(e)(vii)?
2. Did the City properly consider the policies of the SMA and the requirement of the City's SMP when issuing the exemptions?

IV. COUNTERSTATEMENT OF THE CASE

The facts and procedural history set forth in Coyote Rock's Opening Brief are stipulated to and incorporated by this reference.

Coyote Rock is the owner of the two parcels in question for which the exemptions were sought and granted. The lots are part of a subdivision originally approved in 1908, long before the SMA or the City's SMP was adopted. (CP 101). The lots were also subject to a series of Boundary Line Adjustments approved by the City in 2006. (CP 101-2). The lots were also within an area for which a SDP (the "Grading SDP") was issued by the City's Hearing Examiner in June of 2007 which permitted grading and other site improvements within 200 feet of the Spokane River and imposed conditions on future dock applications. (CP 101-135).

The applications for exemption at issue have been subject to extensive environmental and regulatory review, including requiring Coyote Rock to submit a Joint Aquatic Resources Permit Application ("JARPA") to the Department of Fish and Wildlife and obtaining a

Hydraulic Project Approval (“HPA”) (AR 100007-9, 100038-51, 100107-110, 000002-6, 000033-45); requiring submission of an Environmental Checklist pursuant to SEPA and obtaining a MDNS (AR 100028-37, 100118-119, 100122-100128, 000007, 000010, 000016-32); requiring submission of a Floodplain Development Application and receipt of approval from the Floodplain Administrator (AR100010, 1000012-13, 100142-44, 100148, 100154, 100163-64, 100183-85, 100188-192, 00050-54, 000080-86). The prior Hearing Examiner decision granting the Grading SDP also expressly discussed and conditioned the placement of future docks on the lots in question and the exemptions were granted giving consideration to such condition requirements. (CP 134).

The docks measure eight feet by twenty feet and are to be secured to the shore with metal poles. There were determined to be designed for the use of the owners of the adjacent single family homes, and the value of the docks was found to be less than the statutory limit. (AR 000013-15, 100072-74). There is no evidence in the record that Coyote Rock intended to use the docks in a commercial fashion.

In its Statement of the Case, the Department of Ecology (the “DOE”) asserts that a number of facts support the DOE’s contention that the construction of these two docks or some unidentified future docks would result in a detrimental impact and a cumulative detrimental impact to the shoreline of the Spokane River. It further contends that such impact is sufficient to warrant denial of the exemptions in question. The City contends that the citations to the record offered by the DOE do not support the facts asserted and are at best speculation, general statements not applicable to the docks at issues or simply statement of opinion by parties

opposed to this action. The substance of these assertions and citations is discussed in detail in Section V(E), *infra*.

The docks in question were found by the City to be exempt pursuant to the provisions of RCW 90.58.030(3)(e)(vii) from the requirement to obtain a SDP, and further that granting the exemptions was consistent with the SMA and the City's SMP. Both exemptions were then appealed to superior court pursuant to chapter 36.70C RCW by the DOE, the Spokane Riverkeeper, Spokane Chapter of Trout Unlimited and the Lands Council. The two appeals were then consolidated. The trial court upheld the decision of the City and denied the appeal. This appeal followed.

V. AUTHORITY AND ARGUMENT

A. Standard of Review

This is a LUPA appeal initially filed pursuant to chapter 36.70C RCW. The DOE bears the burden to establish that the bases for appeal have been met. *First Pioneer Trading Co. Inc. v. Pierce County*, 146 Wn. App. 606, 613, 191 P.3d 928 (2008). On appeal of a LUPA decision, an appellate court stands in the same position as the superior court. *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Specifically the DOE asserts that two provisions provide a basis for their appeal:

RCW 36.70C.130(1)(b): The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

and

RCW 36.70C.130(1)(d): The land use decision is a clearly erroneous application of the law to the facts.

In determining whether or not either of these standards has been met, local jurisdictions with expertise in land use decisions are afforded an appropriate level of deference in interpretations of law under LUPA. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 412, 120 P.3d 56 (2005).

Additionally, the clearly erroneous standard requires that the reviewing Court has a definite and firm conviction that a mistake has been made. *Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 133, 159 P.3d 1 (2007).

The DOE has failed to meet this burden for either of their assignments of error.

B. The Exemptions Were Properly Granted

DOE asserts that Coyote Rock, the applicant for the exemptions and owner of the property in question, is not “the owner, lessee, or contract purchaser of single and multiple family residences,” as required by RCW 90.58.030(3)(e)(vii). DOE apparently contends that because Coyote Rock intends to resell the property it somehow falls outside of the meaning of the word “owner.” DOE cites as authority for this interpretation three primary sources: (1) general rules of statutory construction, (2) an argument that this interpretation is supported by the use of the word “the” instead of “a” or “an” prior to the word “owner” and (3) the case of *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

Campbell & Gwinn is clearly distinguishable. In that case a developer sought permits to drill 20 wells on individual lots of a

subdivision. The lots had already been created. The State contended that the application for 20 permits was a single project for which one exempt withdrawal was available under RCW 90.44.050. RCW 90.44.050 states in pertinent part:

Except however, ... for a single or group domestic uses in an amount not exceeding five thousand gallons a day, ... is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter.... Emphasis added.

The Court, in determining that a single exemption applied to the entire development, stated as follows:

RCW 90.44.050 plainly says that the exemption applies provided 5,000 gpd or less is used for domestic purposes. That is true, the statute provides, whether the use is to be a single use or group uses. That is, whether or not the use is a single use, by a single home, or a group use, by several homes or a multiunit residence, the exemption remains at one 5,000 gpd limit, according to the plain language of the statute. The developer of a subdivision is, necessarily, planning for adequate water for group uses, rather than a single use, and accordingly is entitled to only one 5,000 gpd exemption for the project.

Campbell & Gwinn, 146 Wn.2d at 12.

The language of the statute being interpreted and the underlying facts in *Campbell & Gwinn* are completely dissimilar to those at hand. There is no language in RCW 90.58.030(3)(e)(vii) to suggest that a developer-owner is to be treated any differently than an occupier-owner. In fact, the “plain meaning” approach adopted by the court in *Campbell & Gwinn*, suggesting this statute should be read together with related statutes to

determine legislative intent, is helpful in determining what an “owner” is under RCW 90.58.030(3)(e)(vii).

Both the SMA and chapter 173-27 WAC, which implements the SMA, specifically require, in circumstances distinguishable from those before the Court, that an applicant be an “owner-occupier” as the DOE suggests is necessary in the case at hand. The exemption for a permit to construct a single family home, set forth in RCW 90.58.030(3)(e)(vi), includes the requirement for applicants that the structure be, “*for his own use or for the use of his or her family.*” The WAC provision implementing this statutory provision (WAC 173-27-040(2)(h)) repeats this same language.

RCW 90.50.030(3)(e)(vii) contains no such language. DOE’s reliance upon RCW 90.50.030(3)(e)(vi) and *Lux Homes LLC v. Dep’t of Ecology*, Shorelines Hearings Board (SHB) No. 04-025, Finding of Fact, Conclusions of Law and Order (CL 6), (Aug. 1, 2005) and *Kates v. City of Seattle*, 44 Wn. App. 754, 760, 723 P. 2d 493 (1986) is clearly not appropriate when the language that it relies upon as support in RCW 90.50.030(3)(e)(vi) is significantly different from that in issue in RCW 90.58.030(3)(e)(vii). If the legislature had intended a similar result, it would have used the same language in both subsections.

Further, the use of the word “the” in RCW 90.58.030(3)(e)(vii) may connote that the dock be for the “private noncommercial use of the owner”, but it certainly does not suggest that the owner may not be a developer, speculator or simply a property owner who wishes to sell his or her home. In determining whether a proposal fits within the referenced exemption, the identity or character of the property owner is not

determinative. The intended use of the docks is determinative. RCW 90.58.030(3)(e)(vii).

Finally, what the DOE proposes is contrary to the rules of interpretation set forth in its Opening Brief. The meaning of RCW 90.58.030(3)(e)(vii) and the pertinent provisions cited are “clear” and the court “must give effect to that plain meaning.” *State v. J.M.* 144 Wn.2d 472, 480, 280 P3d 720 (2001) (“*A statute that is clear on its face is not subject to judicial construction*”). The developer in this case is the owner. The dock is designed to be used by the owner of the single family structure. As such, the decision of the trial court upholding these exemptions should be affirmed.

C. The Exemptions are Consistent with the Policies of the SMA and SMP

The City agrees that an exempt proposal must be consistent with the policies of the SMA (RCW 90.58.020) and the provisions of the City’s SMP. It should also be noted that the courts have recognized that if a project meets the requirements for an exemption under the SMA and is consistent with the policy of the SMA and the applicable SMP, the issuance is a ministerial act and, “*If...the contemplated development is consistent, the permit must issue.*” *Putman v. Carroll*, 13 Wn. App. 201, 205, 534 P.2d 132 (1975). Here, the City determined, after extensive review, that the proposal was consistent with the SMA and SMP. (AR 000013-15, 100072-74).

The City is also cognizant that the SMA recognizes the priority of single-family homes and their appurtenant structures, including docks, over other uses. See RCW 90.58.020 wherein it states:

...Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority to single family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvement facilitating public access to shorelines of the state.... Emphasis added.

More than sufficient evidence is found in the record to support a finding of consistency with the SMA and SMP.

Both exemption applications were subject to environmental review. An Environmental Checklist was submitted, circulated, commented upon and reviewed by City staff. A MDNS was issued and not appealed. Coyote Rock was required to file a JARPA with the Department of Fish and Wildlife and receive an HPA. The applicant was further required to apply for and receive a floodplain permit pursuant to the SVMC 21.30.070(A) and the directives of the Federal Emergency Management Agency. (See citation previously set forth on Respondents Reply Brief page 2 &3).

Finally, City staff analyzed the applications in light of the policies set forth in RCW 90.58.020 and the SMP, including a review of the Protection Guidelines required by the Hearing Examiner's Decision for the Grading SDP. (AR 000062-71 and 100172-100182). The City then concluded that, with specific mitigation measures, including the protection of the 75-foot shoreline set-back from the ordinary high water mark and a specific plan for use within this setback, the dock proposals were consistent with both the SMA policies and provisions of the SMP.

While the DOE is correct that docks are prohibited in certain circumstances in the Pastoral Environments and joint use docks are encouraged in the Rural Environments in the applicable SMP, the docks in

question are permitted by the language of the SMP, and were contemplated and are consistent with the provisions of the underlying Hearing Examiner's decision concerning these two lots referenced above.

The City is further aware of the admonition set forth in WAC 173-26-186 "*Governing principles of the guidelines*," which, though pertaining to the development of a SMP by a municipality, are nonetheless instructive. WAC 173-26-186 states in pertinent part:

(5) The policy goals of the act, implemented by the planning policies of master programs, may not be achievable by development regulation alone. Planning policies should be pursued through the regulation of development of private property only to an extent that is consistent with all relevant constitutional and other legal limitations (where applicable, statutory limitations such as those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property. Local government should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights....

While the DOE may view this dispute as an opportunity to advance its own objectives with respect to the use of the shoreline of the Spokane River and may feel relatively insulated from any risk in doing so, the City is bound by a number of often competing directives and consequently, must carefully, and only upon a sound and lawful foundation, restrict the use of a private party's property. Such a basis does not exist in the case at hand.

D. DOE's Authority to the Contrary is in Error

The DOE contends that the SMA requires the consideration of cumulative impacts in this case and further that the analysis completed by

the City failed to adequately address this issue. In support of this contention the DOE relies upon a number of cases, all of which concern the issuance of a SDP and are substantially dissimilar to the facts before the Court.

For example, in *Hayes v. Yount*, 87 Wn.2d 280, 287-8, 552 P.2d 1038 (1976), a SDP was sought to fill 93 acres of wetland in the Snohomish River Basin. The permit authorized the “*operation of a solid waste landfill and marine industrial area.*” *Id.* There is no valid basis to compare the scope of the project in *Hayes* to the exemption for the 8-foot by 20-foot docks at issue in the case at hand.

The DOE also relies on *Skagit County v. Dep’t of Ecology*, 93 Wn.2d 742, 613 P.2d 115 (1980), where a requested SDP allowed the placement of dredge spoils on 4 acres of land adjacent to a waterway. In *Skagit County*, there was significant evidence presented that granting the permit would set a “*detrimental precedent, resulting in overwhelmingly adverse cumulative impact.*” *Id.* There is no such evidence in this case.

Also, see *Beuchel v. Dep’t of Ecology*, 125 Wn.2d 196, 210, 884 P.2d 910 (1994), where a landowner made application for a variance to allow the construction of a home on Hood Canal. The lot he proposed to build on was slightly less than the size of the proposed structure and waterward of the required 15-foot setback from the high water mark. In fact, much of the lot was underwater during high tides. The Court found that the Board in *Beuchel* properly considered the cumulative effect of allowing the construction of residences prohibited by existing zoning regulations with no setback from the high water line in denying the permit. Here the only act that would occur within the setback is the placement of the docks in question and an unimproved path to the same.

In *Bellevue Farm Owners Ass'n v. State of Washington Shorelines Hearing Board*, 100 Wn. App. 341, 997 P.2d 380 (2000), the court affirmed the Board's denial of a substantial development permit to construct a 345-foot dock over partly public tidal mudflats, where the probable negative impact of additional similar docks was only one of many factors supporting denial of the permit. The distinction is apparent.

In *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 202 P.3d 334 (2009), the court upheld an amendment to the city's shoreline master program which limited dock and pier development. The validity of such an amendment is not at issue here. The applicable SMP allows docks such as those at issue to be constructed.

See also *McCauley v. Mason County* SHB NO. 06-033 (June 15, 2007), where the Shoreline Hearings Board denied a SDP for a dock. The facts are significantly dissimilar to those at hand. In this case no SDP is being sought, an exemption was granted. The proposed structure was a 4 by 40-foot fixed pier, with a 4 by 40-foot aluminum ramp leading to an 8 by 25-foot long float. An 8 by 20-foot float then would be attached at right angles to the first float, forming an "L." Float stops and stub pilings would be installed. There was also evidence, in the record, that Hood Canal suffered from poor water quality and dissolved oxygen levels, had degraded habitat and was a habitat for a number of salmon species listed as threatened species. There was direct evidence that the construction and presence of this structure would adversely impact the fish and the habitat. Again no such evidence exists in the record under consideration. (See Section E infra).

The DOE further cites to *TG Dynamics Group v. San Juan County*, SHB 08-030 (May 26, 2009), as support that docks creating a porcupine

effect are discouraged. That decision involved the construction of a pier-ramp float on waterfront property in San Juan County. The dock was to serve four newly created lots. The only reference to the “porcupine effect” is as follows:

We find that the proposed joint use agreement, which will bind any future owners in perpetuity and prevent any individual docks within the plat, furthers the County’s goals of encouraging joint use and avoiding the porcupine effect in new waterfront subdivisions.

Id.

The Shoreline Master Program of San Juan County and compliance with its terms is not at issue in the matter at hand. Although the City’s SMP encourages joint-use docks, there is no reference to a prohibition on residential docks which may or may not create a “porcupine effect.” Indeed, the docks in question are permitted under the SMP.

Speculation of cumulative impacts, as asserted by the DOE, is inappropriate when the local master program authorizes individual docks for individual lots and where joint-use docks are encouraged, not required, as the City’s SMP does here. See *May v. Robertson*, 153 Wn. App. 57, 87, 218 P.3d 211 (2009, as corrected March 23, 2010). In *May*, the court overturned the denial of a joint-use SDP by the Shoreline Hearing Board. The master program at issue allowed individual docks for individual lots and encourage joint-use docks.

The DOE further relies upon specific WAC provisions written to guide a local municipality when drafting or amending its SMP (chapter 173-26 WAC) in support of its argument that the review that occurred here was deficient. Specifically, the DOE cites to WAC 173-26-201(3)(d)(iii), WAC 173-26-186(8)(d) and WAC 173-26-231(3)(b). These provisions are

found under the heading of “*Guidelines*” as part of chapter 173-26 WAC. The purpose and scope of these particular provisions is set forth in WAC 173-26-171, which states in pertinent part:

(1) **Authority.** *RCW 90.58.090 authorizes and directs the department to adopt “guidelines consistent with RCW 90.58.020, containing the elements specified in RCW 90.58.100” for development of local master programs for regulation of the uses of “shorelines” and “shorelines of statewide significance.” RCW 90.58.200 authorizes the department and local governments “to adopt such rules as are necessary and appropriate to carry out the provisions of” the Shoreline Management Act.*

(2) **Purpose.** *The general purpose of the guidelines is to implement the “cooperative program of Shoreline Management Act between local government and the state.” Local government shall have the primary responsibility for initiating the planning required by the Shoreline Management Act and “administering the regulatory program consistent with the policy and provisions” of the act. “The department shall act primarily in a supportive and review capacity with an emphasis on providing assistance to local government and insuring compliance with the policy and provisions” of the act. RCW 90.58.050.*

In keeping with the relationship between state and local governments prescribed by the act, the guidelines have three specific purposes: To assist local governments in developing master programs; to serve as standards for the regulation of shoreline development in the absence of a master program along with the policy and provisions of the act and, to be used along with the policy of RCW 90.58.020, as criteria for state review of local master programs under RCW 90.58.090.

See also WAC 173-26-171(3)(c) which states:

(c) *The guidelines do not regulate development on shorelines of the state in counties and cities where approved master programs are in effect. In local jurisdictions without approved master programs, development on the shorelines of*

the state must be consistent with the policy of RCW 90.58.020 and the applicable guidelines under RCW 90.58.140.
Emphasis added in all sections.

The City adopted the Spokane County Shoreline Management Program as its SMP upon its incorporation in 2003. It is an approved master program. See CP 324-398, see also SVMC 21.50.010. The provisions cited by the DOE only govern the review and amendment to the City's SMP. Only if the City did not have an SMP would the provisions cited regulate development. It is WAC 173-27 that concerns compliance with SMA statutory requirements and the city contends that its process and approval was consistent with that chapter.

E. The DOE's Factual Basis for its Appeal is Not Substantive.

The DOE relies upon extensive factual citations for support of its appeal. However, the evidence cited fails to provide any substantive evidence of lack of compliance with the policies of the SMA or the provisions of the SMP.

1. The DOE cites as factual support the City's Shoreline Inventory Report (the "Draft Inventory Report") dated April 5, 2010. (CP 436-524). This report is part of the City's ongoing Shoreline Master Program Update. It was not accepted by the City until after the applications for the exemptions were made (November 4, 2009, and January 22, 2010, respectively). (AR 000023, 100028). An application is to be reviewed pursuant to the regulations in place at the time the application is made. See *Portage Bay-Roanoke Park Cmty Council v. Shoreline Hearings Board*, 92 Wn.2d 1, 6-7, 593 P.2d 151 (1979); *Samson*, 149 Wn. App. at 39. This document has no regulatory effect on

the docks at issue and should not have been, and properly was not, considered when reviewing the exemption applications.

Even if the Draft Inventory Report were to be considered, it does not contain any substantive evidence of impacts that would be inconsistent with the policies of the SMA, or of cumulative adverse impacts. Statements contained within the Draft Inventory Report are relied upon by the DOE to suggest that the development as a whole, will “*alter current shoreline conditions,*” (CP 487); that docks will, “*require a higher level of analysis,*” (CP 489); and that there may exist a “*conflict between fish and wildlife habitat conservation, water quality and recreation....*” (CP 513). The document also indicates that “*such a balance can be achieved with fairly simple riparian vegetation enhancements.*” (CP 513). At no place in the document in question is a cumulative detrimental impact resulting from the specific docks in question identified.

Further, the Draft Inventory Report does not preclude these docks or the use of the shoreline by owners of the single family lots. It specifically concludes that:

The City should 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. Such a balance between development and restoration can be achieved with fairly simple riparian vegetation enhancements but proposals must include monitoring requirement to ensure follow-through and maintenance.

CP 513.

2. The DOE also relies upon a 2001 “White Paper,” a compilation of resources that studies the impact of structures on salmonid

(CP 540-638), in support of its contention that cumulative impacts have not been addressed or properly conditioned by the City. However, this report is not a study of the shoreline adjacent to the Coyote Rock development, or even the Spokane River. It is not a study of small floating docks similar to the ones for which these exemptions were granted or a study of the impact of such docks. In fact, many portions of the document indicated that such impacts are speculative, “difficult to prove” or “uncertain.” As a whole, the White Paper has no relationship to the docks proposed and exempted. There is no analysis of the impact of these docks, whether 2 or 30, on the ecology or environmental health of the Spokane River. It is certainly not clear and convincing evidence of any inconsistencies with the SMA or the SMP.

3. The DOE contends the cumulative effects are not speculative because “*the docks at issue in this case are not isolated, but are part of a larger plan of development to install docks on the 30 waterfront lots in the Coyote Rock subdivision. (CP 4, 16-17, 539).*” Opening Brief of the DOE, 22. The record, however, cited in support of this proposition consists of unsubstantiated statements from the DOE, text from speculative newspaper articles and an unsupported general promotional statement regarding available house plans and lots.

CP 4 is part of the DOE’s Petition for Review of Local Land Use Decision. At Statement of Facts 7, the DOE stated the following: “*In meetings between Ecology and the City, Ecology has been informed that Coyote Rock, LLC, intends to install docks on all 30 of the waterfront lots in this subdivision.*”

CP 16-17 is an email from Cathy Cochrane that appears to contain the text from an article in the Inlander. The article quotes the developer and even speculates as to what he was thinking.

CP 539 is a promotional brochure and is not probative of any specific future action to construct docks.

None of the above are clear or convincing evidence of anything, certainly not the certainty that two or thirty docks will be built at this location in the future.

Further, the issue is whether there will be adverse cumulative impacts, not whether or not additional docks will be built. With regard to adverse impacts, the DOE states:

[a]ccording to the scientific literature, and the City's own shoreline inventory, construction of 30 docks at this location and the development associated with those docks, will negatively impact the ecological functions of the Spokane River, and will likely result in negative impacts to views, navigation and recreational use of the River as well. See CP 164 (describing 30 access paths and multiple docks as a "worst case scenario"); CP 489, 513 (noting potential for adverse cumulative impacts of shoreline development may affect fish abundance and species richness); City Record at 81, 84 (reporting citizen concerns that the river will become "congested.").

Opening Brief of DOE, 22.

CP 164 is a letter from Karin Divens, PHS/GMA Biologist, which states that community access or community docks would "eliminate for the worst case scenario of 30 access paths and multiple docks associated with the residences. The placement of access paths and the increased use of the shoreline area may lead to other site problems and increased habitat loss in the future." The biologist herself phrases the effects as something

that “may” occur. Additionally, this was not a study or analysis of potential adverse impacts, rather it was a letter submitting comments for consideration regarding the proposed development.

The DOE ignores the fact that no other applications have been made for docks on any of the other 28 lots or that if any such application was made, the applicant would be required, as the applicant in the instant case was required, to complete a JARPA and obtain an HPA from the Department of Fish and Wildlife; obtain a floodplain permit, complete the SEPA process and obtain a certificate of exemption from the City. Such process would also, as it has here, require the DOE’s participation. Any such application will also be evaluated pursuant to the laws and ordinances that exist at the time the application is made. To conclude, based upon the evidence cited above, that such applications will be both made and granted is pure speculation and cannot be relied upon. See *May*, 153 Wn. App. at 87.

4. The DOE further suggests that these particular exemptions run afoul of the protections put in place as part of the Hearing Examiner’s approval of the Grading SDP which required a 75-foot buffer between the developments and the Spokane River. Specifically, the DOE states: “In order to be effective, this 75-foot buffer must be absolutely undisturbed and undeveloped.” (See Opening Brief of Appellant, at page 5). The actual citations relied upon for this statement of “fact” are as follows:

a. CP 22: This is a letter to Micki Harnois, a planner for the City of Spokane Valley, from an employee at the DOE. This letter does not contain the quoted language.

b. CP 221: This is another letter from the DOE commenting on an MDNS regarding the request for the Grading SDP to grade 40-45 acres of land for the development of a maximum of 275 dwelling

units consisting of single family residences and apartments. Neither the MDNS nor the Hearing Examiner's decision approving the Grading SDP was appealed by the DOE or any other person or entity. Both events predated the exemptions at issue by more than 3 years. This comment was considered by the Hearing Examiner when the Grading SDP was approved and conditions were put in place.

c. The DOE also asserts that CP 434 supports its contention that: "the intent of the buffer was 'to maintain in perpetuity the natural character and ecology of the shoreline in this relatively undisturbed reach of the Spokane River.'" CP 434 is, in fact, a part of the decision of the Hearing Examiner which expressly, in certain circumstances, permits single family residential docks such as those at issue. The Hearing Examiner's decision also stated:

52. Any property owner, currently or in the future, that wishes to install boats docks along the Spokane River must meet with the City of Spokane Valley Community Development Department, DOW and Washington State Department of Fish and Wildlife prior to application submittal and approval. The intent of this condition is to reduce the number and impacts of docks along this reach of the shoreline. Only minimal low impact access ways and docks will be approved.

(CP 134).

That is exactly what happened. The applications for the exemptions were filed with the City, and the DOE and Department of Fish and Wildlife were advised of such applications and provided input to the decision. (AR 000002-7, 100015-16, 100085-86, 100107-111). A plan for the use of this 75-foot buffer was developed and made part of the record (Environmental Protection Guidelines) (AR 000062-71 and 100172-

100182), the Department of Fish and Wildlife issued an HPA (AR 000002-5 and 100107-110), and the City granted the exemptions. (AR 000013-15 and 100072-74).

All parties are aware that care must be taken to protect the existing shoreline. The Hearing Examiner, in conditioning the Grading SDP that preceded these applications, stated: “*Only low impact access ways and docks will be approved.*” (CP 134). With respect to the two applications at issue that is what occurred. The need for caution and the desire on the part of the agency officials to preserve the shoreline is not evidence of any immediate and cumulative detrimental impact to that shoreline.

5. Finally, DOE cites to a citizen’s statement regarding a concern that the river would become congested. Clearly, this is not based on anything that would constitute clear and convincing evidence that cumulative effects would result due to this project. The trial court was correct in concluding that cumulative impacts were speculative. (CP 747).

VI. CONCLUSION

At issue are two exemptions issued by the City allowing the property owner to proceed without having to obtain a SDP and build two 8 by 20-foot docks along the shoreline of the Spokane River. The exemptions were not lightly approved. The owner had to obtain approval from the Department of Fish and Wildlife and receive an HPA, complete the environmental process and obtain a MDNS, obtain a flood plain permit and the City had to ensure the applications were consistent with both the City’s SMP and the SMA. The requests also had to be analyzed within the context of RCW 90.58.030(3)(e)(vii). The record clearly indicates that all necessary requirements were met. The docks are for the use of the owner of the adjacent property as required by RCW 90.58.030(3)(e)(vii). They

were not for a commercial purpose. The review of the potential impact of the docks on the shoreline and environment was studied and the exemptions and MDNS were properly conditioned based upon consideration of the City's SMP and the SMA. The Superior Court did not err in concluding that the DOE has failed to meet its burden under RCW 36.70C.130 and its decision should be affirmed.

RESPECTFULLY SUBMITTED this 24 day of June, 2011.

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