

NO. 296750

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

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STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

v.

CITY OF SPOKANE VALLEY AND COYOTE ROCK, LLC

Respondents.

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RESPONSE BRIEF OF RESPONDENT COYOTE ROCK, LLC

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## **I. INTRODUCTION.**

Coyote Rock, LLC (hereafter “Coyote Rock”) owns two riparian lots on the Spokane River in the City of Spokane Valley (hereafter “City”). The lots were first platted in 1908. Coyote Rock made application to the City for “Substantial Development Exemptions” under the Shoreline Management Act (SMA) with respect to both lots. Coyote Rock sought approval to locate separate *de minimis* docks (six foot by twenty foot in size) on each of the lots, to be constructed off site and secured by steel posts secured by a handheld post driver.

The City determined that Coyote Rock had satisfied the requirements for an exemption under the SMA (RCW 90.58.030(3)(e)(vii)) and otherwise complied with the City’s Shoreline Master Program (SMP). The City conditioned its approval on Coyote Rock’s satisfaction of numerous other requirements.<sup>1</sup> Apparently, because Coyote Rock owned 28 other riparian lots, also deriving from the same 1908 plat, the Department of Ecology (DOE) sought judicial review of the City’s decisions to approve the two

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<sup>1</sup> The City required that Coyote Rock comply with floodplain regulations, obtain an administrative determination of no significant environmental impact, obtain HPA permits from the Washington Department of Fish & Wildlife (WDFW), ensure the protection of any archeological impacts, and minimally impact a 75 foot setback buffer from the Spokane River.

docks at issue.

On appeal before the Superior Court, pursuant to the Land Use Petition Act (LUPA), DOE argued that somebody, at some unknown date and time, might make application for docks on some of the other 28 riparian lots, and that hypothetical possibility should constitute a basis for reversing the City's decision to approve the two docks for which the two applications were actually filed. The Superior Court determined that the City had acted properly, in law and in fact, and dismissed DOE's appeal with prejudice. This Court should affirm that decision.

## **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 in law or in fact for reversing the Shoreline Management Act (SMA) "Substantial Development Permit Exemptions" issued to Respondent Coyote Rock, LLC by Respondent City of Spokane Valley.

## **III. COUNTER-STATEMENT OF ISSUES.**

1. Do the two (2) docks at issue meet the criteria set forth in RCW 90.58.030(3)(e)(vii)?
2. Are the "Substantial Development Exemptions" issued Coyote

Rock by the City compliant with the SMA and the City's Shoreline Master Program (SMP)?

#### **IV. COUNTER-STATEMENT OF THE CASE.**

##### **A. Procedural Background.**

DOE initiated the first of two appeals under the Land Use Petition Act (LUPA), RCW 36.70C, by filing a "Petition for Review of Local Land Use Decision" (assigned Spokane County Case No. 10-2-01926-4). CP 1-22. That Petition sought review of a "Shoreline Management Act Substantial Development Permit Exemption" issued to Coyote Rock by the City of Spokane Valley (the "City"). *Id.* The decision of the City that formed the basis for the first appeal was in response to Coyote Rock's request for approval to locate a *de minimis* non-commercial dock on the waters of the Spokane River abutting Lot 23 as described further herein. *Id.*

DOE thereafter filed a second appeal from a SMA "Substantial Development Permit Exemption" issued to Coyote Rock. CP. 46-63. That exemption pertained to a similar request for approval of a *de minimis* dock in the waters of the Spokane River abutting Lot 9. Both appeals were subsequently consolidated. CP 677-680.

Following briefing and argument, the Superior Court entered its

“Findings of Fact, Conclusions of Law, and Order.” CP 746-749. The Court made the following findings of fact:

- (4) The docks in question are clearly intended for the private, non-commercial use of the adjoining properties, respectively as is set forth in RCW 90.58.030(3)(e)(vii).
- (5) Evidence of cumulative impacts on the shoreline, from the docks in question, is speculative and not supported by the record.

CP 747-748. The Court made the following conclusions of law:

- (2) The Land Use Decisions are supported by evidence that is substantial when viewed in light of the whole record before the Court.
- (3) The Land Use Decisions are not a clearly erroneous application of the law to the facts.

Id. DOE has timely appealed from the Superior Court’s decision. CP 750-755.

**B. Factual Background.**

**1. Appeal No. 1 (Case No. 2010-02-1926-4).**

The real property to which DOE’s first appeal pertained is located at 11501 East Coyote Rock Drive, Spokane Valley, Washington. City Record at 1.<sup>2</sup> The property is identified as Lot 23. Id. Lot 23 is owned by Coyote

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<sup>2</sup> The administrative record filed by Respondent City of Spokane Valley on August 13, 2010 shall be referred to herein as “City

Rock and constitutes riparian property on a portion of the Spokane River. Lot 23 is subject to the terms of the City of Spokane Valley's Shoreline Master Program (SMP).

Lot 23 constitutes a portion of property originally platted in Spokane County in 1908. CP 401. The original Plat, known as "Grandview Acres," divided a portion of property lying between the Spokane River and Trent Avenue (SR 290). Id. The Plat of 1908 created some twenty-five (25) riparian lots on the Spokane River, as well as other lots. Id.

In 2006, with the approval of the City, some of the boundaries of the same lots legally divided in 1908 were changed, so as to result in the present configuration. Id. As a result, Coyote Rock now owns thirty (30) riparian lots along the Spokane River. Id. Lot 23 is one of those lots.

On October 29, 2009, the City, through its Planning Division Manager, advised Coyote Rock of the requirements regarding docks on the relevant portion of the Spokane River. Those requirements included the following:

- (1) Compliance with the City's Shoreline Master Program;

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Record." The pages in said record are numbered "100001" through "100193." For the sake of convenience, references herein shall be to the page number cited exclusive of the introductory three numbers ("100").

- (2) The issuance of a Hydraulic Permit Approval (HPA) from the Washington State Department of Fish and Wildlife (WDFW);
- (3) Satisfaction of Floodplain Management requirements; and
- (4) Compliance with the State Environmental Policy Act (“SEPA”).

City Record at 98-99.

As to requirement number one, compliance with the Shoreline Master Program, the City advised Coyote Rock that docks costing less than \$10,000.00 would be exempt from the requirement of a “Shoreline Substantial Development Permit” (SDP). Id. As to the second requirement, the issuance of an HPA, the City advised Coyote Rock to initiate the process by completing a Joint Aquatic Resources Permit Application (JARPA) form for submittal to both the City and the State Department of Fish and Wildlife. Id. As to the third requirement, satisfying the Floodplain Management requirements, the City directed Coyote Rock to file submittals with the appropriate agency. Id. As to the fourth requirement, compliance with SEPA, the City advised Coyote Rock of the necessity to complete an environmental checklist. Id.

On November 16, 2009, the JARPA application was completed and submitted, as directed by the City, to initiate the HPA process. City Record

at 38-51. The subject JARPA application included the following information:

- (1) Lot 23 was designated “Pastoral;”
- (2) The requested dock would cost less than \$10,000.00; and
- (3) The requested dock was exempt from compliance with the SMA in that it did not constitute “substantial development” as provided for in RCW 90.58.030(3)(e)(vii).

City Record at 38-51. At the same time, an “Environmental Checklist” was completed to facilitate compliance with SEPA. City Record at 28-37.

On December 1, 2009, the City routed the SEPA Checklist to multiple governmental entities and agencies, including DOE and WDFW. City Record at 130. In addition, the City routed the completed JARPA application with the completed SEPA Checklist to the same entities and agencies. Id. As to both the JARPA and the SEPA, the City requested that the entities and agencies to whom the notice had been directed, including DOE, respond by mail, fax, or e-mail, no later than December 15, 2009. Id.

On December 25, 2009, having received no objection from DOE or any other party as to the SEPA, the City issued its “Notice of Mitigated Determination of Non-Significance (“MDNS”).” City Record at 127. The MDNS determined that the requested dock would not create a significant

adverse impact on the environment, based upon the conditions associated therewith, but that a Floodplain permit would be required. Id. Any party desiring to appeal the “Notice of Mitigated Determination of Non-Significance” was directed to do so within fourteen (14) calendar days. Id. No appeal was filed by any party, including DOE. Id.

On January 12, 2010, the City again advised Respondent of the necessity to satisfy Floodplain Management requirements. City Record at 10-11. Respondent promptly completed the application (“Floodplain Development Application”), and submitted the same as requested. City Record at 188-193.

On January 20, 2010, WDFW issued its HPA. City Record at 107-110. The HPA approved the requested dock for Lot 23. Id.

On April 21, 2010, the City issued its SMA “Substantial Development Permit Exemption” to Coyote Rock for the proposed dock on Lot 23. City Record at 72-74. The City determined in part as follows:

- (1) The cost of the dock was less than \$10,000.00;
- (2) The applicant owned a qualifying riparian legal parcel;
- (3) The exemption applied under the SMA;
- (4) The requested dock was consistent with the policies of the SMA;
- (5) The requested dock was consistent with the policies of the Shoreline Master Program; and
- (6) The permit was conditioned upon the issuance of the

HPA (already issued) and the Floodplain permit.

Id.

At no point in time prior to the issuance of the “Substantial Development Permit Exemption” did DOE object to Coyote Rock’s request based on some “cumulative effect” theory. On May 4, 2010, DOE wrote the City, asserting for the first time that the proposed dock should be disallowed based on some claim of “cumulative effect.” City Record at 85-86. DOE also claimed that the SMA exemption did not apply in the Pastoral environment; that only the ultimate owner of the property could submit the application (not Coyote Rock); and that the Pastoral environment precluded all docks (even docks adjacent to lots that were created prior to the adoption of the SMA). Id.

On May 12, 2010, DOE initiated the first appeal by filing its Petition in Spokane County Case No. 10-2-01926-4. CP 1-22. The dock is now in place.

**2. Appeal No. 2 (Case No. 2010-02-03124-8).**

The real property to which the second appeal pertains is located at 11029 E. Coyote Rock Drive, Spokane Valley, Washington. City Record 2

at 10.<sup>3</sup> The property is owned by Coyote Rock, constitutes riparian property, and is referred to herein as “Lot 9.”

Like Lot 23, Lot 9 is subject to the terms of the City’s SMP. Like Lot 23, Lot 9 was originally created by the 1908 “Grandview Acres” plat. CP 270.

Coyote Rock made application for approval to locate a pre-constructed modular private floating dock in the waters abutting Lot 9. City Record 2, p. 16. As with the application for Lot 23, the application for Lot 9 included a completed “Flood Plain Development Application,” a “Joint Aquatic Resources Permit Application,” and an SMA “Substantial Development Permit Exemption” application. City Record 2, pp. 16, 33-43, 80-85.

On May 21, 2010, the City issued its “Mitigated Determination of Non-significance (MDNS).” City Record 2 at pp. 16-17. The MDNS determined as follows:

- (1) The City has determined that Coyote Rock’s proposal for a dock adjacent to Lot 9 does not have a probable significant adverse impact on the environment.

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<sup>3</sup> The administrative record filed by Respondent City of Spokane Valley in Appeal No. 2 (Spokane County Case No. 10-2-03124-8) is referred to herein by the acronym “City Record 2.”

- (2) No disturbance was to occur within the 75 foot wide shoreline setback from the ordinary high water mark of the Spokane River with DOE and City approval.
- (3) A floodplain permit would be required as a condition of the MDNS.

Id. No. party, including DOE, took any appeal from the MDNS.

On July 2, 2010, WDFW issued Coyote Rock the requested HPA so as to authorize the placement of the requested dock in the waters adjacent to Lot 9. City Record 2 at pp. 2-4. On July 7, 2010, the City issued its SMA “Substantial Development Permit Exemption.” City Record 2 at 12-15. As to the same, the City concluded:

- (1) A floodplain permit would be required;
- (2) The dock was exempt pursuant to WAC 173-27-040 as the same did not, by statutory definition, constitute substantial development;
- (3) The cost of the dock would be less than \$10,000; and
- (4) Coyote Rock would be required to obtain a HPA and to satisfy the requirements of SEPA.

Id. DOE thereafter filed a Petition for Review. CP 46-63. The dock was subsequently installed.

**V. AUTHORITY AND ARGUMENT.**

**A. Standard of Review.**

Pursuant to the Land Use Petition Act (LUPA), DOE filed separate judicial appeals (later consolidated) from the City's issuance to Coyote Rock of two (2) "Substantial Development Exemptions" under the SMA. The Superior Court concurred that the City's action was supported in law and fact.

DOE now brings this appeal, from the Superior Court's decision, asserting the following grounds for relief under RCW 36.70C.130(1):

- (b) [t]he 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-

- (d) [t]he land use decision is a clearly erroneous application of the law to the facts....

See RCW 36.70C.130(1).

In this appeal, the Court stands in the shoes of the Superior Court and reviews the administrative record for factual or legal error under the statutory standards. HJS Development, Inc. v. Pierce County, 148 Wash.2d 451, 468, 61 P.3d 1141 (2003).

Review under RCW 36.70C.130(b) (erroneous interpretation of the

law) presents a legal question that this Court reviews *de novo*. Review under RCW 36.70C.130(d) (clearly erroneous application of the law to the facts) requires that this Court, as a condition of granting relief, reach a “definite and firm conviction” that a mistake has been committed. Quality Rock Products, Inc. v. Thurston County, 139 Wash. App. 125, 133, 159 P.3d 1 (2007).

In conducting its review, this Court should give deference to the City’s interpretation of the Substantial Development Exemption claimed under the SMA and the City’s interpretation of the interrelationship between the same with its own SMP. Local jurisdictions with expertise in land use decisions are to be afforded an appropriate level of deference in interpretations of law under LUPA. Habitat Watch v. Skagit County, 155 Wash.2d 397, 412 120 P.3d 56 (2005).

**B. Applicable Legal Authorities.**

**1. The Shoreline Management Act.**

The Shoreline Management Act (SMA) is codified at RCW 90.58. Section 90.58.030(e) defines “substantial development” to include “any development which materially interferes with the normal public use or shorelines of the State.” Specifically exempted from the definition of “substantial development” is the following:

Construction of a dock ... designed for pleasure craft only, for the private non-commercial use of the owner, lessee, or contract purchaser of single and multiple family residences. This exception applies if ... (B) in fresh waters, the fair market value of the dock does not exceed \$10,000....

See RCW 90.58.030(3)(e)(vii). This statutory exemption is referred to herein as the “Substantial Development Exemption.”

Development shall not be undertaken on the shorelines of the state unless it is consistent with the policies of the SMA and the local agency’s applicable master program. See RCW 90.58.140(1). In the present context, the SMA makes the following policy statement clear:

Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures....

RCW 90.58.020.

WAC173-27-040 is consistent with the foregoing. It specifically defines as “developments exempt from substantial development permit requirements” the following:

Construction of a dock, including a community dock, designed for pleasure craft only, for the private non-commercial use of the owners, lessee, or contract purchaser of a single family and multiple-family residences. A dock is a landing and moorage facilities for watercraft and does NOT include recreation decks, storage facilities or other appurtenances. This exception applies if ...:

- (ii) In fresh waters, the fair market value of the dock does not exceed \$10,000, but of subsequent construction having a fair market value exceeding \$2,500 occurs within five years of completion of the prior construction, the subsequent construction shall be considered substantial development for purposes of this chapter.

See WAC 173-27-040(2)(h)(ii).

## **2. The City's Shoreline Master Program.**

The SMA obligates local governments to develop shoreline master programs. See RCW 90.58.080(1). Such a master program becomes effective upon approval by DOE. See RCW 90.58.090(1). Once approved, a municipal shoreline master program becomes state regulation. Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022 (1988). Adoption or approval of a shoreline master program is equivalent to promulgation of an administrative rule. Harvey v. Board of County Commissioners, 90 Wash. 2d 473, 584 P.2d 391 (1978).

The City has adopted a Shoreline Master Program (SMP), which has been approved by DOE and, accordingly, is vested with deference as the equivalent of a state regulation. The City's SMP is included at CP 324-398.

## **3. Applicable Provisions of the City's SMP.**

The SMP divides the classification of areas under City management

to the following:

- (1) Pastoral;
- (2) Conservancy;
- (3) Rural; and
- (4) Urban.

CP 342-343. The Coyote Rock lots at issue (Lots 23 and 9) are classified “Pastoral” on the city designation map.

The SMP provides that the “piers and docks” are not permitted in the Pastoral designation. CP 358. As for “Rural Areas,” piers and docks are allowed. Id. There is, however, a qualifying limitation as to the “Pastoral” classification when dealing with subdivisions or plats that both contain shoreline area and Specifically, “in determining the management area designation for a specific location or property,” if that property is currently designated Pastoral on the city map, then for purposes of the SMP it shall be considered “Rural” if it is encompassed by a subdivision or plat that received approval prior to December 31, 1974. CP 363. The Coyote Rock lots were created by the Grandview Acres plat, which became final in 1908. Hence, for purposes of the SMP, the subject lots are designated “Rural” regardless of the designation on any other City map.

**C. Legal Authorities That Do Not Apply.**

To the extent that DOE seeks to challenge provisions contained in the

City's SMP, those challenges must fail. This is not a proceeding to judicially review the propriety of the SMP or any provision contained therein. An action to challenge a Shoreline Master Program must be brought in Thurston County. Harvey v. Board of County Commissioners, 90 Wash. 2d 473 (1978). Further, DOE approved the City's SMP, pursuant to RCW 90.58.090(1), thereby resting the SMP with the effect of state regulation. Orion Corp. v. State, 109 Wash. 2d 621, cert. denied, 486 U.S. 1022 (1987).

To the extent that DOE relies upon WAC 173-26-186, those arguments are equally unavailing. The cited WAC provision apply to "guide the development of the planning policies and regulatory provisions of master programs, and provide direction to the Department (DOE) in reviewing and approving master programs." The City's SMP has been approved by DOE, presumably with deference to the principles enunciated in WAC 173-26-186. These would include the fact that any approved SMP (including the one at issue) should vest the local government with "reasonable discretion to balance the various policy goals of this chapter, in light of other relevant local, state, and federal regulatory and non-regulatory programs...." See WAC 173-26-186(9).

**D. The City Correctly Determined That the Two Proposed Docks Were Exempt Under the SMA.**

**1. The Applicable Exemption.**

The “Substantial Development Exemption” at issue authorizes:

[c]onstruction of a dock ... designed for pleasure craft only, for the private non-commercial use of the owner, lessee, or contract purchaser of single and multiple family residences....

See RCW 90.58.030(3)(e)(vii).

**2. The Language of the Exemption is Plainly Aimed at Precluding Commercial Use of the Dock Itself.**

In interpreting exemption, the Court is to first look at the plain language of the statute itself. If the meaning of the statute is clear on its face, then the Court must give effect to that plain meaning. State v. J.M., 144 Wash.2d 472, 480, 28 P.3d 720 (2001). Only if the language is ambiguous may the Court resort to interpretive aids. Cockle v. Dept. of Labor and Industries, 142 Wash.2d 801, 808, 16 P.3d 583 (2001).

DOE argues that Coyote Rock, as the applicant under the SMA, “has no intention of using the docks at issue here.” See DOE’s Opening Brief at p. 15. DOE argues that ownership of the lot and the residence to be constructed is insufficient. According to DOE, the exemption can only apply if the dock is intended to be used by the owner of the property (Coyote Rock),

with no intention of resale. DOE's position is the result of a tortured reading of an otherwise unambiguous statute.

The "Substantial Development Exemption" applies to docks "designed for pleasure craft only" and for "the private non-commercial use" of the owner, lessee, or contract purchaser. Clearly, based upon the plain language of the statute itself, it is the use of the exempted encroachment, rather than the status of the owner, that controls. The plain meanings of "pleasure craft" and "non-commercial" are dispositive. Yet, DOE apparently suggests, with no supporting authority, that the only party qualified to avail itself of the exemption is a natural person who might ultimately moor their boat at, sunbathe on, or fish from the dock.

The exemption is equally applicable to any owner, whether a corporation, limited liability company, or individual, as well as any lessee or contract purchaser. The only limitation is that the owner, lessee, or contract purchaser can't use the dock for commercial purposes. It is the "commercial" use of the dock itself that results in the loss of the exemption. It doesn't mean that an entity or individual who owns a legal lot that qualifies for the exemption, and who then puts a dock in the waters adjacent to that lot, with the expectation of selling the lot, has somehow used the dock in a

commercial manner or that the party purchasing the lot must somehow reapply or remove the dock. DOE's argument to the contrary is simply unsupported.

DOE attempts to characterize an otherwise unambiguous statute as ambiguous by attempting to unilaterally divine the legislative intent.

According to DOE:

The intent of the exemption is to allow someone who owns, leases, or is in the process of purchasing a home, to construct a dock on the lot for his own use or the use of his family without going through the permit process that would be applicable to a substantial development permit. This intent is not served by applying the exemption to developers who are constructing multiple docks for resale, because developers presumably have the time, means, and ability to file permit applications and proceed through the full permit process....

See DOE Opening Brief at p. 17. The problem with DOE's position is twofold. First, the statute is unambiguous, so questions of intent are irrelevant. See, e.g., Cockle v. Dept. of Labor and Industries, 142 Wash.2d at 808. Second, there is no authority cited for the interpretation proffered by DOE. It was created out of whole cloth.

The Court should not lose sight of the fact that the lots at issue were created over a hundred years ago. They simply happened to be owned, at this point, by one entity. If they were owned by 30 different people, would those

parties be unable to individually avail themselves of the “Substantial Development Exemption” at issue? Moreover, we have two applications for docks under consideration. There are no other applications filed. Whether an application might be filed on another lot someday by someone is of no moment to the two at issue, as they fall squarely within the exemption.

**3. The Authorities Relied Upon by DOE are Inapposite.**

In support of its contention that the Substantial Development Exemption does not apply to the two docks at issue, DOE cites Dept. of Ecology v. Campbell & Gwinn, 146 Wash.2d 1, 43 P.3d 4 (2002). According to DOE, based upon Campbell & Gwinn, “the [C]ourt should hold that the developer here is limited to one dock exemption only, not an unlimited number.” See DOE’s Opening Brief at p. 18. Aside from the fact that we are only dealing with two docks here, and that no other applications have been prepared or submitted, the fact remains that the holding in Campbell & Gwinn has absolutely nothing to do with the Substantial Development Exemption at bar.

In Campbell & Gwinn, the issue before the Court was whether a developer of a subdivision could make multiple applications for individual wells on each of the lots in the development. Different rules applied to the

request in that case. Specifically, there was an exemption available for ground water withdrawals for domestic uses of 5,000 gallons per day or less. The question was whether or not a series of individual wells, each drawing less than 5,000 gallons per day, would still qualify for the exemption if made by one person. The distinction between that exemption (which did not arise under the SMA) and the exemption at issue, among other things, is the fact that there was authority, in Campbell & Gwinn, for the proposition that the exemption “does not apply to a group of wells constructed as part of a single development” if the aggregate withdrawal would exceed 5,000 gallons per day. Campbell & Gwinn, 146 Wash.2d at 6.

The Superior Court in Campbell & Gwinn determined that the 20 wells constituted “multiple withdrawals,” and not “a single withdrawal,” and therefore found that the exception to the exemption did not apply. On appeal, the Court reversed, finding that the developer’s status as the applicant on all well applications allowed for the aggregation of the same. The fundamental distinction between that case and the case at bar is that there was controlling authority that multiple wells could be considered as a singular withdrawal, and therefore non-exempt, if made as part of one development request. Further, there were actually 20 applications filed in that case. Not only is

there no similar rule applicable to the SMA Substantial Development Exemption at bar, there are only two applications for two docks on 30 separate legal lots that have existed for over 100 years.

Second, DOE argues that Coyote Rock, as the “developer” of the lots, can’t qualify for the Substantial Development Exemption based upon “similar” language in RCW 90.58.030(3)(e)(vi). The cited section provides for an exemption from the SMA for:

[c]onstruction on shorelands by an owner, lessee, or contract purchaser of a single family residence for his own use or the use of his or her family, which residence does not exceed a height of thirty-five feet above average grade level and which meets all requirements of the state agency or local government....

See RCW 90.58.030(3)(e)(vi) (emphasis added). In reality, the quoted language of the “single family residence” exemption, as compared to the exemption at issue, actually supports Coyote Rock’s argument.

The “single family residence” exemption specifically requires that the “single family residence” be for the owners “own use or for the use of his or her family.” That is to be distinguished from the uses authorized by the exemption at bar, which require only that the dock be used “for the private non-commercial use of the owner....” It doesn’t have to be “for his own use,” as with a single family residence. In fact, “the private non-commercial use”

of the dock, as authorized by the exemption at issue, isn't limited to natural individuals. It can and should include an entity that seeks approval for a dock that won't be used for commercial purposes and is designed for pleasure craft.<sup>4</sup>

**E. This Court Should Reject the Arguments Advanced by DOE as to “Cumulative Effects.”**

**1. DOE’s Argument Regarding Cumulative Effects is Based in Large Part Upon Inapplicable Authorities.**

The City’s SMP was approved in 2003. The City’s SMP was approved by DOE. Consequently, the SMP is tantamount to state regulation. See, e.g., Orion Corp. v. State, 109 Wash. 2d 621, cert denied, 486 U.S. 1022 (1988).

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<sup>4</sup> Against this background, it is curious how DOE can claim that exemptions such as the one at bar “do not receive the same level of review as permits and they have a higher potential for error.” See DOE’s Opening Brief at p. 14. The docks at issue were conditioned upon (1) compliance with flood plain regulations; (2) an administrative determination of no significant environmental impact; (3) a seventy-five (75) foot set back that could not be infringed upon absent the prior written consent of the City; (4) a process to protect any archeological impacts that could potentially arise; and (5) the issuance of an HPA permit from WDFW. Apparently, DOE contends that a six by twenty foot dock, constructed off site and secured by four pilings driven by a handheld post driver, should be subject to an even higher level of inquiry or added conditions. Given what was actually required of Coyote Rock, and what was satisfied, it is hard to imagine what those conditions could be.

Notwithstanding the foregoing, the Petitioners rely primarily upon various guidelines published in WAC 173-26, including the following:

The principles that regulation of development shall achieve no net loss of ecological function requires that master program policies and regulations address the cumulative impacts on shoreline ecological functions that would result from future shoreline development and uses that are reasonably foreseeable from proposed master programs.

See WAC 173-26-201(3)(d)(iii). The Petitioners' reliance upon WAC 173-26 as the *sine qua non* for a "cumulative impact analysis" fails for several reasons.

First, the guidelines included in WAC 173-26 do not regulate development where master programs are in effect. See WAC 173-26-171(3)(c) ("The guidelines do not regulate development on shorelines of the state in counties and cities where approved master programs are in effect."). As noted, the City has an approved SMP, which was also approved by DOE as well.

Second, the provisions contained in WAC 173-26, as cited by the DOE, became effective in January of 2004, after the City's SMP had been adopted and approved.

Third, even though the cited provisions of WAC 173-26 are inapplicable to the analysis at bar, the citations thereto by DOE are not

balanced as a whole. WAC 173-26-186(9) vests local governments, under approved SMPs, with “reasonable discretion to balance the various policy goals of this chapter....”

Fourth, the law requires that deference be given to the City’s interpretation of its own SMP, and the balancing provisions contained therein. See RCW 36.70C.130 (providing for “such deference as is due the construction of a law by a local jurisdiction with expertise”).

Simply put, at the end of the day, the City made a reasoned balancing of competing interests as authorized under the City’s SMP and the SMA. The evidence that was before the City of any “cumulative impact” or adverse effects from the same was negligible. What was before the City were applications for two docks exempt under the SMA. There was no evidence, let alone substantial evidence, cited by DOE so as to support the conclusion, under a substantial evidence standard, that the City erred. The Superior Court, after extensive briefing and argument, concurred. DOE has shown no reason why a different result should be reached on appeal.

**2. DOE Incorrectly Contends That the SMA Exemption Afforded Coyote Rock Should be Disregarded Based Upon a Cumulative Impact Analysis.**

The inapplicability of WAC 173-26 to the facts at bar was addressed

above. In addition, DOE argues that SMA policy, further developed through case law, provides that a cumulative impact analysis should “trump” the SMA exemption for the *de minimis* single family docks. This argument should be rejected.

First, it is important to note that there is no evidence, substantial or otherwise, of any adverse impact from either of these docks. That should end the inquiry. If not, then the Court should consider that there is no evidence, whether substantial or otherwise, to support the proposition that these two docks, combined with applications for docks that may or may not be made, would create some adverse environmental or ecological impact.

The only evidence at bar consists of the following. It includes MDNS determinations under SEPA that neither dock presents any adverse environmental impact. Those determinations are final, no appeal having been taken from the same. The only other evidence in the record was introduced by augmentation upon motion of DOE. That evidence consists of a “White Paper” and a draft SMP inventory. CP 525-537, 541-638. There is no substantiality to either document so as to support the proposition that these docks evidence any discernible or palpable environmental impact. Whether or not the cumulative impact analysis as urged by DOE can “trump” the clear

and specific SMA exemption is an issue that need not be reached as the evidence doesn't support the requested determination anyway.

Even if the “evidence” relied upon by DOE is deemed substantial, for purposes of compliance with DOE’s burden under the LUPA, the case law does not support the position now urged by DOE. Put another way, there is no case cited by Petitioners that supports the proposition that the clear and specific statutory exemption at issue should not apply. In Hayes v. Yount, 87 Wash. 2d 280 (1976), the applicant requested a substantial development permit to fill 93 acres of wetland in the Snohomish River basin. The requested permit was for the operation of a solid waste landfill and marine industrial area. See also Skagit County v. Dept. of Ecology, 93 Wash. 2d 742, 613 P.2d 115 (1980) (involving a requested substantial development permit for the placement of dredge spoils on four acres of land adjacent to a waterway). Those cases dealt with what was characterized as an “overwhelmingly adverse cumulative impact” under a substantial development permit. By definition, the permits requested here are not substantial. There was no exemption available to either of the requesting parties in Hayes or Skagit County. To equate a *de minimis* single family dock, at a cost of less than \$10,000, to a 4 or 93 acre fill or dredge project is

not warranted.

It is disingenuous for DOE to claim that the City, in interpreting its own SMP, failed to give any consideration to the effects of docks at this location. The City conditioned the approvals on:

- (1) Compliance with floodplain regulations;
- (2) An administrative determination of no significant environmental impact;
- (3) An HPA permit from Fish and Game;
- (4) A 75 foot setback that could not be infringed upon absent the prior written consent of the City; and
- (5) A process to protect any archaeological impacts that could potentially arise.

These were all requirements imposed upon what is otherwise a *de minimis* single family dock costing less than \$10,000. To say that the City did not give due consideration to cumulative effects or other potential impacts is unsupported by the record.

Moreover, the present circumstances are wholly distinguishable from those at bar in Beuchel v. Dept. of Ecology, 125 Wash. 2d 196, 884 P.2d 910 (1994). In Beuchel, a land owner made application for a variance to allow for the construction of a residence waterward of the required 15 foot setback from the OHWM. Consideration was given to the cumulative effect of allowing the construction of residences prohibited by existing zoning regulations with no setback from the OHWM. The applications at issue here

are entirely compliant with applicable rules and regulations, under both the SMP and the SMA. The applicants aren't asking for preferential treatment or a variance, such as the applicant in Beuchel. They are only asking for that which the law provides them.

The case most applicable is Robertson v. May, 153 Wash. App. 57, 218 P.3d 211 (2009). In that case, the Court found the evidence of cumulative impacts to constitute "speculation." Robertson v. May, 153 Wash. App. at 94, fn. 31. Such is the case here. There may be a claim that more docks will be sought, but the environmental or ecological harm ascribed to the same has not been shown by any evidence, whether substantial or not. The Supreme Court concurred and DOE has shown no cogent reason that this Court should hold to the contrary.

### **3. The "Cumulative Impacts" Urged by DOE are Speculative at Best.**

DOE argues, "One of the most serious impacts of constructing 30 docks at this location lies in constructing access through the 75 foot shoreline buffer to the water." See DOE's Opening Brief at pp. 22-23. According to DOE, "Such access trails would, at a minimum, result in fragmentation of the buffer that would destroy much of its habitat value." Id. Aside from the fact that there's no evidence of 30 applications for docks, DOE's claim about

fragmentation through access through the 75 foot buffer area is curious.

In support of its claim that access through the buffer would create some environmental calamity, DOE cites, among other things, the position of WDFW. CP 222-223. According to WDFW, “what a 75 [foot] riparian buffer must mean is that this 75-foot area (with the exception of allowable access and use, upon approval from the City, the Department of Ecology, and WDFW), is absolutely off limits to development or impacts for development.” *Id.* WDFW was concerned that homes would be constructed within the 75 foot buffer, but recognized that the riparian owner needed to ensure access to the water through the buffer area. In fact, WDFW was the same party that approved the issuance of the two HPAs for the two lots at issue. Obviously, if WDFW, as an agency with primary oversight over the buffer, thought that the two docks and accesses to the same would create a situation of any environmental significance, they would not have issued the HPAs.

Additionally, DOE’s position on appeal, as before the Superior Court, with respect to “cumulative impacts” is simply not grounded in fact. DOE states, “The docks at issue in this case are not isolated, but are part of a larger plan of development to install 30 docks on the 30 waterfront lots in the

Coyote Rock Subdivision.” See DOE’s Opening Brief at p. 22. Two applications have been filed. They are both at issue. What has DOE cited as supporting authority for its conclusory suppositions? It has cited the allegations contained in its own Petition for Review, an e-mail from a reporter to its counsel, and an illegible map of some undetermined date and authorship. Are we to consider this “substantial” for purposes of reaching the conclusion that these two docks, *de minimis* in nature, and otherwise compliant with all applicable rules and restrictions, should somehow be denied? This is the precise result foreclosed by the Court in Robertson v. May, 153 Wash. App. 57, 218 P.3d 211 (2009). Simply put, there is no evidence. If additional docks are sought some day, they should be evaluated based upon their merits under the rules in effect at that point in time. However, the prospect that somebody someday somewhere might apply for a dock somewhere down the river is really of no moment to the propriety of these two encroachments.

**F. DOE’s Remaining Arguments Should be Rejected.**

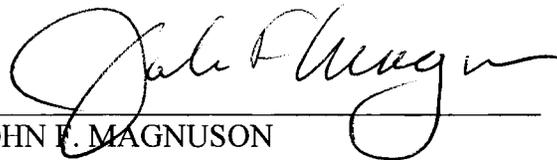
DOE closes its brief by arguing that the City, at a minimum, should have required joint use docks or trails. DOE makes this contention based upon the assumption that there will be 30 docks along this expanse of the

river. How can two docks on two private parcels of property, created over 100 years ago, otherwise compliant with all restrictions, be required to share the docks when they aren't even adjacent. Where is the authority for the proposition advanced by DOE? If the exemption is satisfied, how can additional conditions be placed upon the approval if there is no lawful authority supporting the same?

**VI. CONCLUSION.**

For the reasons stated above, Respondent Coyote Rock respectfully requests that this Court affirm the "Findings of Fact, Conclusions of Law and Order" of the Superior Court, in full and in total.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of June, 2011.



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