

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

LOUISE LAUER and DARRELL de TEINNE,

Respondents,

v.

PIERCE COUNTY; and MIKE and SHIMA GARRISON,

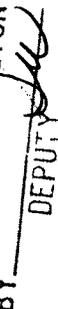
Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF
PIERCE COUNTY, STATE OF WASHINGTON
Superior Court No. 08-2-06665-2

BRIEF OF APPELLANTS GARRISON

MCGAVICK GRAVES, P.S.

GREGORY A. JACOBY
WSBA #18326
JENNIFER A. IRVINE FORBES
WSBA #26043
Attorneys for Appellants Garrison
1102 Broadway, Suite 500
Tacoma, WA 98402
Telephone (253) 627-1181
Facsimile (253) 627-2247

FILED
COURT OF APPEALS
DIVISION II
09 SEP -1 PM 2:36
STATE OF WASHINGTON
BY  DEPUTY

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
IV.	STATEMENT OF THE CASE	4
	A. Building Permit.....	5
	B. 2004 Hearing and LUPA Appeal	7
	C. Condition of Stream Running Through Site	9
	D. Fish and Wildlife Variance and 2007 Hearing	10
	E. Legislative History of Pierce County’s Shoreline Code and Critical Areas Ordinance.....	12
V.	ARGUMENT	12
	A. LUPA Generally	12
	B. The Superior Court Erred in Failing to Strike the Claim Alleged In Paragraph Eight of the Petition for Review Because the Facts Asserted in the Claim Are Not Supported by the Facts In the Record	14
	C. The Superior Court Erred in Failing to Dismiss the Petition for Review Because Respondents Failed to Establish Standing Under RCW 36.70C.060(2)	16
	D. The Superior Court Should Have Affirmed the Hearing Examiner’s Decision Because Appellant’s Application was Vested to the 1997 Pierce County Code Provisions	23
	E. Whether Appellants had Unclean Hands is Not Material to the Issue of Vesting.....	39
	F. Respondents Were Equally Estopped From Asserting that Appellants’ Application Is Not Vested	41
	G. The Superior Court Should Have Dismissed the Petition as Respondents’ Appeal Was Rendered Moot Pursuant to Washington State Supreme Court’s Decision in <u>Futurewise v. Western</u> <u>Washington Growth Management Hearings Board</u>	43
VI.	CONCLUSION	49
VII.	APPENDIX A	
VIII.	APPENDIX B	

TABLE OF AUTHORITIES

CASES

<u>Allenbach v. Tukwila</u> , 101 Wn.2d 193, 676 P.2d 473 (1984)	26,40
<u>Asche v. Bloomquist</u> , 132 Wn.App. 784, 794, 133 P.3d 475 (2006), <i>review denied</i> , 153 P.3d 195 (2007)	20,21
<u>Beach v. Board of Adjustment of Snohomish Cy.</u> , 73 Wn.2d 343, 347, 438 P.2d 617 (1968).....	34
<u>Boehm v. City of Vancouver</u> , 111 Wn.App. 711, 722, 47 P.3d 137, 144 (2002).....	33
<u>Buechel v. State Dept. of Ecology</u> , 125 Wn.2d 196, 207, 884 P.2d 910, 917 (1994).....	34
<u>Chaney v. Fetterly</u> , 100 Wn.App. 140, 147-148, 995 P.2d 1284, 1288 (2000).....	22
<u>Chaussee v. Snohomish County Council</u> , 38 Wn.App. 630, 644, 689 P.2d 1084 (1984).....	42
<u>Chelan County v. Nykreim</u> , 146 Wn.2d 904, 926, 52 P.3d 1 (2002)	18
<u>Citizens for Mount Vernon v. City of Mount Vernon</u> , 133 Wn.2d 861, 868, 947 P.2d 1208 (1997) (citing RCW 36.70C.060).....	33
<u>Davidson v. State</u> , 33 Wn. App. 783, 657 P.2d 810, <i>rev den.</i> 99 Wn.2d 1011 (1983).....	28
<u>Eastlake Community Council v. Roanoke Associates, Inc.</u> 82 Wn.2d 475, 481, 513 P.2d 36 (1973), <i>citing Hull v. Hunt</i> , 53 Wn.2d 125, 130, 331 P.2d 856 (1958).....	40
<u>Futurewise v. Western Washington Growth Management Hearings Board</u> , 164 Wn.2d 242 (2008).	3,4,43,44,45,46,47

<u>Geschwind v. Flanagan</u> , 121 Wn.2d 833, 841, 854 P.2d 1061 (1993) (<i>citing</i> <u>State v. Pike</u> , 118 Wn.2d 585, 591, 826 P.2d 152 (1992)).....	18
<u>Griffin v. Thurston County</u> , 165 Wn.2d 50, 54-55, 196 P.3d 141 (2008).....	13
<u>Habitat Watch v. Skagit County</u> , 155 Wn.2d 397, 407, 120 P.3d 56 (2005).....	13,23
<u>Hart v. Department of Social and Health Services</u> , 111 Wn.2d 445, 447, 759 P.2d 1206 (1988), <i>citing</i> , <u>Sorenson v. Bellingham</u> , 80 Wn.2d 547, 558, 496 P.2d 512 (1972).....	43
<u>Isla Verde Intern. Holdings, Inc. v. City of Camas</u> , 146 Wn.2d 740, 751, 49 P.3d 867 (2002).....	14
<u>King County v. Wash. State Boundary Review Bd.</u> , 122 Wn.2d 648, 670, 860 P.2d 1024 (1993).....	33
<u>Milestone Homes, Inc. v. City of Bonney Lake</u> , 145 Wn.App. at 118, 121, 186 P.3d 357 (2008) <i>citing</i> <u>Morin v. Johnson</u> , 49 Wn.2d at 275, 279, 300 P.2d 569 (1956).....	13
<u>Miller v. City of Bainbridge Island</u> , 111 Wn.App. 152, 162, 43 P.3d 1250 (2002).....	14
<u>Norco Constr., Inc. v. King Cy.</u> , 97 Wn.2d 680, 684, 649 P.2d 103 (1982).....	26
<u>Phillips v. King County</u> , 87 Wn.App. 468, 479-480, 943 P.2d 306 (1997), <i>aff'd</i> , 136 Wn.2d 946, 968 P.2d 871 (1998).....	22
<u>Port of Seattle v. Pollution Control Hearings Bd.</u> , 151 Wn.2d 568, 587, 90 P.3d 659 (2004).....	13
<u>Samuel's Furniture, Inc. v. State, Dept. of Ecology</u> , 147 Wn.2d 440, 463, 54 P.3d 1194 (2002).....	23
<u>Schofield v. Spokane County</u> , 96 Wn. App. 581, 586, 980 P.2d 277 (1999).....	24,40

<u>South Hollywood Hills Citizens v. King County</u> , 101 Wn.2d 68, 73, 677 P.2d 114 (1984).....	21
<u>Spice v. Pierce County</u> , 149 Wn.App. 461, 466-467, 204 P.3d 254, 256 (2009).....	13
<u>Stanzel v. City of Puyallup</u> , ___ Wn.2d ___, 209 P.3d 534, 536 (2009), <i>citing</i> <u>Abbey Rd. Group, LLC v. City of Bonney Lake</u> , 141 Wn.App. 184, 192, 167 P.3d 1213 (2007) (quoting <u>Pavlina v. City of Vancouver</u> , 122 Wn.App. 520, 525, 94 P.3d 366 (2004)), <i>review granted</i> , 163 Wn.2d 1045, 187 P.3d 750 (2008).....	13,21
<u>State ex rel. Evans v. Amusement Ass'n of Wash., Inc.</u> , 7 Wn.App. 305, 499 P.2d 906 (1972).....	43
<u>State v. Chapman</u> , 140 Wn.2d 436, 450, 998 P.2d 282 (2000) (<i>citing</i> <u>State v. Chester</u> , 133 Wn.2d 15, 21, 940 P.2d 1374 (1997))	18
<u>State ex rel. Ogden v. City of Bellevue</u> , 45 Wn.2d 492, 496, 275 P.2d 899 (1954).....	25,30
<u>State v. Johnson</u> , 104 Wn.2d 179, 181, 703 P.2d 1052 (1985).....	18
<u>Stoor v. Seattle</u> , 44 Wn.2d 405, 410, 267 P.2d 902 (1954).	42
<u>Sylvester v. Pierce County</u> , 148 Wn.App. 813, 823, 201 P.3d 381 (2009), <i>citing</i> , <u>N. Pac. Union Conference Ass'n of the Seventh Day Adventists v. Clark County</u> , 118 Wn.App. 22, 28, 74 P.3d 140 (2003)	13
<u>Talbot v. Gray</u> , 11 Wn.App. 807, 811, 525 P.2d 801 (1974), <i>review denied</i> , 85 Wn.2d 1001 (1975)	34
<u>Timberlake Christian Fellowship v. King County</u> , 114 Wn.App. 174, 180, 61 P.3d 332 (2002).....	24,41
<u>Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology</u> , 162 Wn.2d 825, 844, 175 P.3d 1050 (2008) <i>citing</i> , <u>Skamania County v. Columbia River Gorge Comm'n</u> , 144 Wn.2d 30, 26 P.3d 241 (2001)	23
<u>Victoria Tower Partnership v. City of Seattle</u> , 49 Wn.App. 755, 760, 745 P.2d 1328 (1987).....	26

<u>Ward v. Board of County Comm'rs</u> , 86 Wn.App. 266, 272, 936 P.2d 42 (1997).....	21,22,23
<u>West v. Thurston County</u> , 144 Wn.App. 573, 580, 183 P.3d 346, 350 (2008), <i>citing State v. Turner</i> , 98 Wn.2d 731, 733, 658 P.2d 658 (1983).....	43
<u>West Coast, Inc. v. Snohomish County</u> , 104 Wn.App. 735, 742, 16 P.3d 30 (2000).....	21
<u>West Main Associates v. City of Bellevue</u> , 106 Wn.2d at 47, 52, 720 P.2d 782 (1986).....	26,27,30,35
<u>Weyerhaeuser v. Pierce County</u> , 95 Wn.App. 883, 976 P.2d 1279 (1999).....	34

STATUTES

RCW 19.27.095	29,37
RCW 19.27.095(2).....	27
RCW 19.27.095(2)(a)-(d)	28
RCW 19.27.095(5)	30,36
RCW 36.70A	46
RCW 36.70A.040.....	38
RCW 36.70B	37,38
RCW 36.70B.010.....	37
RCW 36.70B.010(3)	37
RCW 36.70B.020(2)	37
RCW 36.70B.020(4).....	38
RCW 36.70B.070	37,38
RCW 36.70B.070(1).....	28,39
RCW 36.70B.070(2)	30,36,39
RCW 36.70B.070(4).....	2,3
RCW 36.70C	1,17
RCW 36.70C.020	21
RCW 36.70C.030.....	21
RCW 36.70C.040.....	22
RCW 36.70C.060	17,33
RCW 36.70C.060(2).....	2,3,16,17

RCW 36.70C.060(2)(d)	21
RCW 36.70C.070(4)	27
RCW 36.70C.070(6)	16
RCW 36.70C.120	14
RCW 36.70C.130	1,24
RCW 36.70C.130(1)	2,3
RCW 36.70C.130(1)(b)	13
RCW 90.58	12,44
RCW 90.58.030(2)(f)	48
RCW 90.58.090	25

PIERCE COUNTY CODE (PCC)

PCC 1.22.090	22,23
PCC 15	29
PCC 16.160.030	29
PCC 17C	29
PCC 18.40.020	28,29
PCC 18.160	29
PCC 18.160.070	36
PCC 18E	12,25
PCC 18E.10.010	46
PCC 18E.60.050	11,25
PCC 20	46
PCC 20.62	48

I. INTRODUCTION

Appellants, Michael and Shima Garrison, seek review of rulings issued by Pierce County Superior Court. The Superior Court rulings at issue in this appeal arise out of a land-use (hereafter “LUPA”) petition, filed by Respondents Louise Lauer and Darrell deTienne under Chapter 36.70C RCW. The LUPA petition appealed the decision of Pierce County’s Hearing Examiner granting a variance to Appellants.

The issue raised by Respondents’ LUPA petition was whether Appellants vested under the regulations that were in effect when they submitted a complete building permit application in March 2004. Respondents have never claimed that Appellants have failed in any way to meet State and County requirements for the variance; but instead offer novel theories as to why Appellants’ building permit application did not vest. Respondents’ theories on vesting effectively turn the long-standing doctrine on its head.

The Superior Court erroneously reversed the decision of the Hearing Examiner. Reversal of the Superior Court’s decision is required because Respondents failed to meet their burden of establishing error by the Hearing Examiner as required by RCW 36.70C.130. This Court

should reverse the Superior Court decision and affirm the decision of the Hearing Examiner granting Appellants' variance.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it denied Appellants' motion to strike certain assertions made by Respondents that were not supported by the record.
2. The Superior Court erred in finding that Respondents had standing under RCW 36.70C.060(2).
3. The Superior Court erred in finding that Respondents sustained their burden under RCW 36.70C.130(1) of establishing that Appellants' application was "incomplete."
4. The Superior Court erred in finding that Respondents sustained their burden under RCW 36.70C.130(1) of establishing that Appellants' application was not vested as a matter of law under RCW 36.70B.070(4).
5. The Superior Court erred in finding that Respondents sustained their burden under 36.70C.130(1) of establishing that the Hearing Examiner's finding that Appellants did not have "unclean hands" was erroneous.
6. The Superior Court erred in finding that Respondents were not equitably estopped from alleging that Appellants' application was not vested.

7. The Superior Court erred in finding that Respondents' appeal was rendered moot by the Supreme Court's decision in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242 (2008).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Superior Court erred in failing to strike claims alleged by Respondents in paragraph 8 of their LUPA petition when the facts asserted were not supported by the record?
2. Whether the Superior Court erred in finding that Respondents had standing when Respondents failed to meet their burden of establishing each of the elements of standing pursuant to RCW 36.70C.060(2)?
3. Whether the Superior Court erred in finding that Respondents sustained their burden of establishing that the Hearing Examiner erred in his determination that Appellants' application had vested when Respondents failed to present sufficient factual evidence that Appellants' application was incomplete?
4. Whether the Superior Court erred in finding that Respondents sustained their burden of establishing that Appellants' application was not vested as a matter of law under RCW 36.70B.070(4)?
5. Whether the Superior Court erred in finding that Respondents sustained their burden under 36.70C.130(1) of establishing error in the

Hearing Examiner's finding that Appellants did not have "unclean hands?"

6. Whether the Superior Court erred in finding that Respondents were not equitably estopped from alleging that Appellants' application was not vested when Respondents failed to intervene in a prior land-use dispute between the County and Appellants which resulted in a settlement agreement?

7. Whether the Superior Court erred in finding that Respondents' appeal was not moot under the Supreme Court's decision in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242 (2008)?

IV. STATEMENT OF THE CASE

Mike Garrison, a Boeing mechanic, and Shima Garrison, a U.S. Postal Service employee, thought they had acquired their dream property when they purchased a waterfront home in December 2002. AR¹ at 33. The house was somewhat neglected and the property overgrown but Appellants were confident that over time they could fix it up and make it a lovely home for their family. AR at 211-212. Sadly, Appellants have been tied up in a nightmare of litigation extending over a five year period. This

¹ Administrative Record, filed June 3, 2008.

matter in its various forms has been through two full hearings before the Pierce County Hearing Examiner, two motions for reconsideration, and two LUPA appeals to Superior Court. AR at 1, 27, 77, 103.

Because the primary issue in this case is whether Appellants' building permit application vested in March 2004, it is important for the Court to understand the history of the case that led up to the variance application that was the subject of Respondents' LUPA petition. The following facts are not in dispute.

A. BUILDING PERMIT.

At some point prior to March 2004, Appellants decided to build a new home that would be located closer to the water. Appellants filed a building permit application in March 2004 to build a single family residence on waterfront property in the Wauna area of Pierce County, just over the Purdy Bridge on Henderson Bay. AR at 35.² The entire area that is the subject of this dispute is located within 200 feet of the shoreline. AR at 111. The County issued a building permit in May 2004. RP³ at 8. No one challenged the issuance of the building permit. The County has

²Significantly, although Respondents' main focus on appeal is a collateral attack against the completeness of Appellants' building permit application, Respondents failed to enter the full application into the administrative record. Only one page from the multi-page application was submitted into the record; see AR at 263.

³Verbatim Transcript of 10/24/07 hearing before the Hearing Examiner; hereafter referred to as "Report of Proceedings" or "RP at."

never questioned whether the building permit application was a complete application and the County believes Appellants' building application is vested under the regulations that were in effect when the application was submitted in March 2004. AR at 35.

Respondents have been engaged in litigation with Appellants since 2004 and have been monitoring the activities of Appellants since 2003. AR at 78 and 302. Nevertheless, Respondents never questioned whether Appellants had submitted a complete building application until October 24, 2007, 3-1/2 years after the building permit application was filed with the County. AR at 236 – 241.

The building permit application included a site plan. AR at 263. The site plan clearly illustrates (but does not label) the drainage course that runs along the western portion of the property, as evidenced by the contour lines that plainly depict a narrow dip in the property leading to an obviously labeled culvert and bulkhead. AR at 263. By the time of the building permit application County officials were very familiar with the site. See, e.g. AR at 176-186.

Based on the County's review of the materials submitted by Appellants, the County issued a building (residential) permit to Appellants in May 2004. RP at 8. Upon receipt of their building permit, Appellants commenced to grade the site and pour a concrete foundation for the new

residence. AR at 302. Although County inspectors had visited the site and approved the pouring of the foundation, upon receipt of complaints from Respondents, the County issued a cease and desist order/stop work order dated October 24, 2004. AR at 84, 302, and 167 – 174.

B. 2004 HEARING AND LUPA APPEAL.

Appellants filed a timely appeal of the County's stop work order and a hearing was held before Hearing Examiner Causseaux in December 2004 (hereafter the "2004 Hearing").⁴ Appellants' primary argument on appeal was not that the stream did not exist but rather that it was primarily stormwater from upstream development and, pursuant to earlier plat approvals for the adjacent upstream properties, the drainage was required to be piped all the way across Appellants' property before discharging to Henderson Bay. RP at 4; AR at 44 and 90. This may ultimately have been a losing argument but it was hardly frivolous or offered in bad faith. A short plat map from 1983 depicts an existing pipe extending from the adjacent property onto Appellants' property and a County official testified that there were conflicting documents as to the need for drainage easements across Appellants' property, whether the drainage was to be

⁴ See AR at 77 – 101 for a copy of the hearing examiner's decision.

tight lined to the Bay, or whether the drainage was to flow over Respondent deTienne's property. AR at 73 and 80 – 81.

Respondents were represented by legal counsel at the 2004 Hearing and Respondents testified before the Hearing Examiner. In addition, Respondents' counsel examined and cross examined witnesses and submitted at least two written documents describing Respondents' claims and legal theories. AR at 79 and 243 – 275. Respondents never once raised the issue of whether the 2004 building permit application was complete. See AR at 77 – 101 and 243 – 275. Hearing Examiner Causseaux denied Appellants' appeal. AR at 77 – 101. His 23-page decision contains extensive findings and conclusions and yet there is no finding that the building application was incomplete or that Appellants acted in bad faith. AR at 77 – 101.

Appellants filed a timely LUPA appeal in King County Superior Court. While the LUPA appeal was pending, Appellants met on several occasions with the County and the Washington Department of Fish and Wildlife to try and find a resolution that would allow Appellants to finish building without seeking a fish and wildlife variance but the discussions were not successful. RP at 9 – 10. Ultimately, the County and Appellants entered into a stipulated dismissal upon reaching an agreement whereby, *inter alia*, Appellants agreed to seek a variance and the County would

process the variance under the regulations that were in effect in 2004 when Appellants submitted a complete building permit application. AR at 335.

C. CONDITION OF STREAM RUNNING THROUGH SITE.

It is important to recognize the nature and quality of the stream which has been the source of so much misunderstanding and litigation. The drainage course is a *non*-fish bearing stream which is fed by a combination of springs and stormwater runoff from roads, driveways, and roof drains. RP at 5 and 38. It drains a sizeable portion of the hill side adjacent to and above Appellants' property. The springs and stormwater are in an open water course north of and uphill from SR 302. The water enters an 18-inch pipe and passes under SR 302 through a culvert, and goes into a 12-inch pipe that crosses the adjacent property formerly owned and developed by Respondent deTienne. RP at 9. A second 12-inch pipe collects stormwater runoff from the roof drains and driveways associated with the development next door to Appellants. These two 12-inch pipes connect and discharge all of the upland drainage water onto Appellants' property through a 10-inch pipe. RP at 9. Stormwater has a significant effect on water volumes and velocity as seen in the photographs taken during normal and storm condition flows. AR at 230.

Previously, the water passed under SR 302 and continued as a meandering stream through the property adjacent to Appellants. However,

some years ago during the subdivision process, the County approved a plan whereby the stream was put into a pipe and allowed to discharge onto Appellants' property. Based on today's regulations, the County and the Department of Fish and Wildlife would not agree to a similar proposal from Appellants. If the stream is in a pipe, there are no applicable buffers. RP at 9 – 10.

The quality of the water in the stream is hardly pristine. An oil stain is visible on the beach where the stream discharges onto the beach in front of Appellants' bulkhead; proof that one input to the stream is stormwater runoff from nearby roads and driveways. RP at 38-39 and AR at 235. Also, the water has been sampled by the Tacoma Pierce County Health Department at the point it discharges on to Appellants' property and the samples contained high levels of fecal coliform, which are probably associated with the septic systems in the drainage area. AR at 211.

D. FISH AND WILDLIFE VARIANCE AND 2007 HEARING.

Appellants submitted an application for a fish and wildlife variance on or about July 7, 2007. AR at 50 – 71 and 233 – 234. It is the Hearing Examiner's decision on this variance application that is the subject of Respondents' LUPA petition.

A variance is required pursuant to the settlement agreement with the County because a small section of the proposed new foundation intrudes into the required 35 foot buffer. AR at 111 and 234. Neither the County nor any other person has challenged the completeness of the variance application. The criteria that Appellants were required to meet in order to obtain their variance are set forth in PCC 18E.60.050 as enacted in Pierce County Ordinance 97-84. AR at 45 – 46. Specifically, Appellants were required to demonstrate that the requested buffer modification would preserve adequate vegetation to: 1) maintain proper water temperature; 2) minimize sedimentation; and 3) provide food and cover for critical fish species. See e.g., AR at 54 – 55.

A public hearing was held on October 24, 2007 for the purpose of determining whether Appellants met the criteria for a fish and wildlife variance (hereafter the “2007 Hearing”). A fish biologist testified on behalf of Appellants and provided her expert opinion as to why the proposed buffer modifications met the criteria in PCC 18E.60.050. AR at 13-16 and 38-40; RP at 12-16 and 38-40. At the 2007 Hearing, the County testified in support of the variance. RP at 2-5. AR at 27-40 and 42-48. Neither Respondents nor any other person submitted expert testimony that challenged or contradicted the testimony of Appellants’ expert. RP at 1-43; AR 27-41. The Hearing Examiner granted Appellants’ request for

variance. AR at 28-40. Respondents' subsequent motion for reconsideration was denied. AR at 1-4.

At the 2007 Hearing, Respondents raised the issue of vesting for the *very first time* in nearly 3 years of litigation.

E. LEGISLATIVE HISTORY OF PIERCE COUNTY'S SHORELINE CODE AND CRITICAL AREAS ORDINANCE.

At the time of the 2004 building permit application, the County had in place its 1997 version of the County's Critical Areas regulations, Chapter 18E PCC. In 2005, the County updated its Critical Areas regulations, effectively altering the variance provisions that would apply to proposals such as Appellants'. Chapter 18E PCC.

On October 16, 2007, Pierce County adopted "interim regulations" to address critical areas located within the jurisdiction of the Shoreline Management Act, Chapter 90.58 RCW. Appendix A, at 2. On December 13, 2007, Department of Ecology informed the County that it was unable to accept the interim regulations, due to the "presence of certain code provisions related to critical areas." Appendix A, at 2. As a result, the County repealed the interim regulations. Appendix A, at 2. These regulations were not re-adopted until August 19, 2008. Appendix A, at 5.

V. ARGUMENT

A. LUPA - GENERALLY

The legislature intended the Land Use Petition Act (LUPA) to function as “the exclusive means of judicial review of land use decisions.”⁵ Under LUPA, the Court stands “in the shoes of the Superior Court” and limits its “review to the hearing examiner’s record.”⁶

As the party who initiated an appeal of an administrative decision, *Respondents* bear the burden of establishing that the Hearing Examiner erred.⁷ When a Court reviews an asserted error under LUPA, the Courts grant “such deference as is due the construction of a law by a local jurisdiction with expertise,” so long as that interpretation is not contrary to the statute’s plain language.⁸ “[I]n any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement.”⁹ This Court does not give deference to the *Superior Court’s* findings.¹⁰

⁵ *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005) (quoting RCW 36.70C.030(1)), and *Spice v. Pierce County*, 149 Wn.App. 461, 466-467, 204 P.3d 254, 256 (2009).

⁶ *Stanzel v. City of Puyallup*, ___ Wn.2d ___, 209 P.3d 534, 536 (2009), citing *Abbey Rd. Group, LLC v. City of Bonney Lake*, 141 Wn.App. 184, 192, 167 P.3d 1213 (2007) (quoting *Pavlina v. City of Vancouver*, 122 Wn.App. 520, 525, 94 P.3d 366 (2004)), review granted, 163 Wn.2d 1045, 187 P.3d 750 (2008).

⁷ *Sylvester v. Pierce County*, 148 Wn.App. 813, 823, 201 P.3d 381 (2009), citing, *N. Pac. Union Conference Ass'n of the Seventh Day Adventists v. Clark County*, 118 Wn.App. 22, 28, 74 P.3d 140 (2003); and *Griffin v. Thurston County*, 165 Wn.2d 50, 54-55, 196 P.3d 141 (2008).

⁸ RCW 36.70C.130(1)(b); *Sylvester, supra*, 148 Wn.App. 823; see *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004).

⁹ *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn.App. at 118, 121, 186 P.3d 357 (2008) citing *Morin v. Johnson*, 49 Wn.2d at 275, 279, 300 P.2d 569 (1956).

¹⁰ *Griffin, supra*, 165 Wn.2d at 54-55.

As will be discussed in more detail below, Respondents failed to carry their heavy burden of establishing that the Hearing Examiner's decision was erroneous and therefore the Superior Court's decision should be reversed.

B. THE SUPERIOR COURT ERRED IN FAILING TO STRIKE THE CLAIM ALLEGED IN PARAGRAPH EIGHT OF THE PETITION FOR REVIEW BECAUSE THE FACTS ASSERTED IN THE CLAIM ARE NOT SUPPORTED BY FACTS IN THE RECORD.

Absent certain exceptions, this Court's review under LUPA is limited to the record created at the hearing before the Hearing Examiner.¹¹ Lacking prior consent by the Court, it is improper for the parties to present facts that are not part of the record.¹²

In paragraph eight of the Petition for Review, CP at 2-3 Respondents assert facts which they contend demonstrate that they have standing. At the initial hearing, Appellants moved to strike the following asserted facts that were not part of the administrative record:

1. "The proposed development on the Garrison's property, as approved by the Examiner's decision, will negatively impact Respondent's property."
2. "Impacts include, but are not limited to, impacts related to development near and alteration of an existing stream that crosses Garrison's property, including erosion caused to

¹¹ RCW 36.70C.120[Emphasis Added]; *see also, Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002); *Miller v. City of Bainbridge Island*, 111 Wn.App. 152, 162, 43 P.3d 1250 (2002).

¹² RCW 36.70C.120(5).

altered surface water flow and increased turbidity in Henderson Bay [sic].”

CP at 2-3, 16-19 and 42. The Court denied the request. CP at 134-136.

Neither of the above statements of fact are supported by any evidence. AR at 1-338, CP at 14-24, and RP at 1-43. There was no testimony provided to the Hearing Examiner that Respondents’ properties would be impacted *in any way* by application of the 1997 variance criteria. CP at 16-19, RP at 1-43. Furthermore, there was no testimony provided that the proposed variance would result in “erosion” or “altered surface water flow” or “increased turbidity.” AR at 1-338, CP at 14-24, and RP¹³ at 1-43. In fact, such conclusions are in direct contraction to the only expert testimony presented to the Hearing Examiner by the County’s Biologist, Scott Sisson, and Appellants’ Biologist, Kim Schaumburg. AR at 30-31, and RP at 4-6, 12-16, and 38-40.

The only statements of fact within paragraph eight that are actually supported by the record are the statements contained within sentences one and two, which state that Respondents own the adjoining properties. CP at 2. Appellants concede that Respondents’ own the adjoining properties. Other than the first two sentences of paragraph eight and the statements identified above, the remaining assertions within paragraph eight are mere

¹³ Verbatim Transcript of 10/24/07 hearing before the Hearing Examiner, hereafter referred to a “Report of Proceedings” or “RP.”

conclusory statements of the law. CP at 2-3.

The Superior Court erred in denying Appellants' motion to strike.

C. THE SUPERIOR COURT ERRED IN FAILING TO DISMISS THE PETITION FOR REVIEW BECAUSE RESPONDENTS FAILED TO ESTABLISH STANDING UNDER RCW 36.70C.060(2).

At the initial hearing, Appellants' moved to dismiss the LUPA Petition because Respondents failed to established standing to seek review under LUPA as required under RCW 36.70C.070(6). CP at 35-38. The Superior Court summarily denied the motion to dismiss. CP at 134-136. As discussed above, Respondents have failed to establish facts that are supported by the administrative record which would be sufficient to establish standing.

More than three years after the County determined Appellants' building application was complete, Respondents initiated their first attempt to challenge that determination. To allow Respondents to proceed would completely undermine LUPA's policy of promoting finality in land use decisions. Nevertheless, even if the facts presented in the Petition for Review were actually supported by the record, the motion to dismiss should have been granted because the facts asserted by Respondents were insufficient to establish standing.

1. Respondents' Lack Standing Because They are Not Persons Who are Aggrieved or Adversely Affected.

A person who is neither an applicant nor owner of the property to which the underlying land use decision is directed must establish that he or she is “aggrieved or adversely affected” by the land use decision. RCW 36.70C.060. LUPA requires four conditions to establish that a person is “aggrieved or adversely affected.” *Each* of the four conditions must be established or the person does not have standing to bring a petition under Chapter 36.70C RCW. Specifically, LUPA provides:

(2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

(a) The land use decision has prejudiced or is likely to prejudice that person;

(b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;

(c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and

(d) Respondent has exhausted his or her administrative remedies to the extent required by law.

RCW 36.70C.060(2). [Emphasis Added].

When statutory language is plain and unambiguous, the statute's

meaning must be derived from the wording of the statute itself.¹⁴ Courts must give effect to a statute's plain meaning and should assume the Legislature meant exactly what it said.¹⁵ Courts are "obliged to give the plain language of a statute its full effect, *even when its results may seem unduly harsh.*"¹⁶

As discussed further below, Respondents' bare assertions of standing are insufficient to meet the four statutory requirements for standing and their Petition should be dismissed.

a. Respondents Do Not Have Standing Because They are Not Prejudiced or Likely to be Prejudiced by the Decision.

Respondents have failed to establish any facts that the determination that the building permit application was complete affects or impacts their property.¹⁷ To have standing to sue under LUPA, a Respondent must establish an "injury in fact" and more than just "the simple and abstract interest of the general public..."¹⁸ Respondents assert that they are "prejudiced" because: 1) they own adjacent properties, and 2) alteration to the stream on the Garrisons' [Appellants'] property will

¹⁴ *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002).

¹⁵ *Id.*

¹⁶ *Id.* quoting *State v. Johnson*, 104 Wn.2d 179, 181, 703 P.2d 1052 (1985); *State v. Chapman*, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) (citing *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997)). *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993) (citing *State v. Pike*, 118 Wn.2d 585, 591, 826 P.2d 152 (1992)). [Emphasis Added].

¹⁷ See *Nykreim, supra*, 146 Wn.2d at 934-935.

result in “altered surface water flow and increased turbidity in Henderson Bay” - an assertion that lacks any factual support as discussed above. CP at 2-3; AR 26-40; and RP 1-43. Furthermore, how these impacts result from the alleged error – application of the 1997 Critical Areas regulations rather than the 2005 regulations – is never explained. In fact, the stream that is affected by the Hearing Examiner’s decision lies solely on Appellants’ property and empties into the Bay. CP at 16-17. The surface water flow will not be altered except in compliance with the conditions that attached to the variance, the terms of which Respondents chose not to appeal. CP at 1-11, 16-17, and 22-14.

Respondents failed to establish that the Hearing Examiner’s ruling prejudiced them in some concrete and particular manner. Accordingly, Respondents did not have standing and the Petition for Review should have been dismissed.

b. Respondents Do Not Have Standing Because Their Interests are Not Among Those that the Local Jurisdiction Was Required to Consider.

As to the second element of standing, Respondents must establish their interests are within the “zone of interests” that the County was required to consider when it determined Appellants’ building permit was

¹⁸ *Nykreim, supra*, 146 Wn.2d at 934-935.

complete.¹⁹ The question is not whether the agency considered Respondents' "interests" but whether it was *required* to do so.²⁰ The test is whether the underlying ordinance or regulation "was intended to protect Respondents' interest."²¹

The determination that an application is "complete" does not involve any consideration of any person's interests other than the applicant. Either County staff compares the submittal to a pre-printed checklist and make a determination, or it occurs automatically if the government agency fails to send written notice that the application is not complete. County staff was simply not required to consider Respondents' interests when they determined in 2004 that Appellants' application was complete. Respondents failed to establish a necessary element of standing and therefore their Petition should have been dismissed.

c. Respondents Do Not Have Standing Because the Requested Relief will Not Eliminate or Redress the Prejudice Asserted by Respondents.

As discussed above, Respondents have failed to establish they are prejudiced by the Hearing Examiner's decision that the application was vested. Because they cannot establish any particular or concrete prejudice arising from the vesting of the application, there is no relief that the Court

¹⁹ *Nykreim, supra*, 146 Wn.2d at 937.

²⁰ *Asche v. Bloomquist*, 132 Wn.App. 784, 794, 133 P.3d 475 (2006), *review denied*, 153 P.3d 195 (2007).

could grant to “eliminate or redress the prejudice,” as required to establish standing. Nor did Respondents demonstrate their alleged “injury” would be redressed by application of the 2005 County regulations. Accordingly, the Petition for Review should have been dismissed.

d. Respondents Do Not Have Standing Because Respondents Have Failed to Exhaust Their Administrative Remedies.

Only “final” decisions may be appealed under the provisions of LUPA.²² A land use decision is not “final” within the meaning of LUPA nor does a petitioner have standing unless the petitioner has “exhausted his or her administrative remedies to the extent required by law.”²³ Exhaustion of administrative remedies is a prerequisite to obtaining a decision that qualifies as a decision reviewable under LUPA.²⁴ “Under the exhaustion of remedies doctrine, an agency's action *cannot be appealed* in the courts until all rights of administrative appeal have been exhausted.”²⁵ “The doctrine applies in cases where a claim is originally

²¹ *Nykreim, supra*, 146 Wn.2d at 937; and *Asche, supra*, 132 Wn.App. at 794-795.

²² RCW 36.70C.060(d); RCW 36.70C.020; and RCW 36.70C.030.

²³ RCW 36.70C.060(2)(d); *Ward v. Board of County Comm'rs*, 86 Wn.App. 266, 272, 936 P.2d 42 (1997); and *West Coast, Inc. v. Snohomish County*, 104 Wn.App. 735, 742, 16 P.3d 30 (2000) (stating that “[j]udicial review of a land use decision may not be obtained under RCW 36.70C.060(2)(d) of LUPA unless all the administrative remedies have been exhausted”).

²⁴ *Nykreim, supra*, 146 Wn.2d at 938, quoting *Ward, supra*, 86 Wn.App. at 271 (citing *South Hollywood Hills Citizens v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984)), see also *Stanzel, supra*, ___ Wn.App. at ___, 209 P.3d at 536.

²⁵ *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wash.2d 68, 73, 677 P.2d 114 (1984).

cognizable by an agency which has established mechanisms for resolving complaints by aggrieved parties and the administrative remedies can provide the relief sought.”²⁶ This rule serves to give due deference to an agency with expertise, to permit the agency to develop an adequate factual record, and to give the agency the opportunity to correct its own errors.²⁷

In this case, Respondents’ claims are a thinly disguised collateral attack on a ministerial decision that was rendered by staff in 2004. The Petition for Review’s statement of errors is focused entirely on the underlying determination that Appellants’ building permit application was complete. CP at 9-10. Administrative appeals of these types of decisions are to be heard at a hearing by the hearing examiner within fourteen (14) days of the decision.²⁸ PCC 1.22.090. Had Respondents filed an appeal of that decision (assuming they could establish standing), the Hearing Examiner would have conducted a hearing affording appropriate due process to Appellants and giving all parties an opportunity to present evidence and legal argument. PCC 1.22.090. Once the hearing examiner had reviewed the matter, the decision could have been appealed to Superior Court subject to the requirements of LUPA. RCW 36.70C.040.

²⁶ *Chaney v. Fetterly*, 100 Wn.App. 140, 147-148, 995 P.2d 1284, 1288 (2000).

²⁷ *Phillips v. King County*, 87 Wn.App. 468, 479-480, 943 P.2d 306 (1997), *aff’d*, 136 Wn.2d 946, 968 P.2d 871 (1998).

²⁸ *See, e.g., Ward, supra*, 86 Wn.App. at 273 (Wards filed appeal to County Commissioners one day after deadline set by County Code, deemed failure to timely

Respondents, however, did not appeal this action as required by PCC 1.22.090. AR at 1-338, RP at 1-43. Respondents cannot now resurrect an appeal of this 2004 decision by raising it as an improper collateral attack on an issue not before the Hearing Examiner when he reviewed Appellants' request for a variance in 2007.²⁹ Failure to timely file an appeal renders all land use decisions legal and binding, even those that might otherwise be "invalid" or "illegal."³⁰

Because Respondents failed to timely appeal the administrative determination that the application was complete, they cannot do so now. Accordingly, the Superior Court erred in failing to dismiss the LUPA Petition.

D. THE SUPERIOR COURT SHOULD HAVE AFFIRMED THE HEARING EXAMINER'S DECISION BECAUSE APPELLANTS' APPLICATION WAS VESTED TO THE 1997 PIERCE COUNTY CODE PROVISIONS.

In this appeal, Appellants ask this Court to reverse the Superior Court and affirm that Appellants' application was vested to the 1997

appeal).

²⁹ *Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology*, 162 Wn.2d 825, 844, 175 P.3d 1050 (2008) citing, *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001); *Habitat Watch, supra*, 155 Wn.2d at 410 (Footnote 7 - Collateral attack of permit extensions cannot be made in petition for revocation when 21-day appeal period was not followed); *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn.2d 440, 463, 54 P.3d 1194 (2002) (Failure to timely appeal underlying land use decision bars DOE from a collateral challenge of that decision in a shoreline appeal); and *See, e.g., Ward, supra*, 86 Wn.App. at 273 (Wards filed appeal to County Commissioners one day after deadline set by County Code, deemed failure to timely appeal).

³⁰ *Habitat Watch, supra*, 155 Wn.2d at 407; and *Nykreim, supra*, 146 Wn.2d at 932.

Pierce County Code provisions, as determined by County staff in 2004 and the Hearing Examiner in 2007. In response to Respondents' LUPA petition, the Superior Court adopted a legal argument that is not supported by any existing law, but instead would represent a major change to the vesting doctrine that is contrary to all previous legal decisions.

In Respondents' LUPA petition, they asserted that the Hearing Examiner erred in his finding that Appellants' 2004 building permit application vested their project. CP at 9-10. Under RCW 36.70C.130, Respondents must establish that the Hearing Examiner's decision was "clearly erroneous." The "clearly erroneous" test requires the Court to affirm the decision unless the "court is left with the definite and firm conviction that a mistake has been made."³¹ As noted above, Courts must give "substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulations."³²

It is undisputed in this case that Appellants submitted their building permit application on March 2004. AR at 35. It is also undisputed that in 2005, nearly one year after the building permit application was filed, the County amended its Code regarding critical areas. *See* Chapter 18E PCC.

³¹ *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999).

³² *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 180, 61 P.3d 332 (2002).

The parties agree that if Appellants' building permit vested in 2004, then the provisions of the 1997 version of PCC 18E.60.050 apply to Appellants' variance application.³³ The administrative record demonstrates that Appellants have met the criteria for a variance under the 1997 critical areas regulations, PCC 18E.60.050, and it is noteworthy that Respondents claim no error in the Hearing Examiner's determination that the proposed variance does not impact the environment as reviewed under PCC 18E.60.050. AR 26-40; and CP 1-11.

1. Vesting – Generally

Vesting is one of the most fundamental concepts of land use law. It provides legal protections for property owners to ensure that subsequently enacted regulations will not impair the project that he or she has initially applied to build. Vested rights provide certainty and fairness to property owners and guide government staff in applying the laws.³⁴

In furtherance of protecting individual property rights, the State of Washington has long-recognized the doctrine of vested rights.³⁵ Any restrictions limiting vested rights must satisfy constitutional due process

³³ Assuming, as is discussed further in Section V.G, that the Department of Ecology reviewed these provisions when they were incorporated into the County's shoreline regulations. RCW 90.58.090. For purposes of this review, however, that issue does not need to be resolved.

³⁴ Overstreet and Kirchheim: *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 Seattle U.L.Rev. 1043, 1043-1044 (2000).

³⁵ See, e.g. *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 496, 275 P.2d 899 (1954).

requirements.³⁶ “Despite the expanding power over land use exerted by all levels of government, ‘[t]he basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. amends. 5,14.’”³⁷

Under the laws of Washington, vested rights accrue when a developer files a “*sufficiently complete*” building permit application. When this occurs, the project becomes “vested” to the laws in effect at the time the application is filed.³⁸ As noted in *West Main Associates v. City of Bellevue*:

The purpose of the vesting doctrine is to allow developers to determine, or “fix,” the rules that will govern their land development. The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the “fluctuating policy” of the legislature. Persons should be able to plan their conduct with reasonable certainty of the legal consequences. Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.³⁹

As quoted above, a determination that an application is vested is simply “to allow developers to determine, or ‘fix,’ the rules that will

³⁶ *West Main Associates v. City of Bellevue*, 106 Wn.2d at 47, 52, 720 P.2d 782 (1986).

³⁷ *West Main*, *supra*, 106 Wn.2d at 50, *citing*, *Norco Constr., Inc. v. King Cy.*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982).

³⁸ *West Main*, *supra*, 106 Wn.2d at 51, *citing*, *Allenbach v. Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984). [Emphasis Added.]. *See also*, *Victoria Tower Partnership v. City of Seattle*, 49 Wn.App. 755, 760, 745 P.2d 1328 (1987).

govern their land development.”⁴⁰ A finding that a permit application is vested is not tantamount to guaranteeing a developer the ability to build. “A vested right merely establishes the ordinances to which a building permit and subsequent development must comply.”⁴¹

2. Appellants’ Application Was Vested.

Appellants submitted their building permit application in March 2004. The application met the legal requirements for a complete application and was deemed complete by operation of law sometime in April 2004. RCW 36.70C.070(4). Because Respondents failed to carry their burden of establishing the Hearing Examiner erred, the Superior Court should have affirmed the Hearing Examiner’s decision.

a. Respondents Failed to Meet their Burden of Establishing that Appellants’ Application Was Incomplete Under RCW 19.27.095(2).

RCW 19.27.095(2) establishes the minimum content requirements for completing a building permit application. Respondents failed to present any evidence at the hearing regarding Appellants’ building permit application other than a one page site plan and have not established in any way how the complete application does not meet the requirements of

³⁹ *West Main, supra*, 106 Wn.2d at 51 citing, Hagman, *The Vesting Issue: The Rights of Fetal Development vis a vis The Abortions of Public Whimsy*, 7 Env’tl L. 519, 533-34 (1977). [Internal Citations Omitted].

⁴⁰ *Id.* at, 51.

⁴¹ *Id.* at 53.

RCW 19.27.095(2)(a)-(d). AR at 1-338.⁴² The Hearing Examiner could only base his decision on the evidence presented to him at the hearing.⁴³ There was insufficient evidence for the Superior Court to conclude that the Hearing Examiner's decision was "clearly erroneous" when Respondents failed to provide a complete copy of the document that would have been necessary for such a decision.

b. Respondents Failed to Meet their Burden of Establishing that Appellants' Application Was Incomplete Under the Pierce County Code.

In their briefing to the Superior Court, Respondents made several assumptions about the lack of information provided in the building permit but have failed to establish that the County staff ever sought additional information as required under RCW 36.70B.070(1)-(2). CP 154-157. Moreover, as discussed above, Respondents' failure to present the full building permit application at the hearing before the Hearing Examiner left the Hearing Examiner with a lack of evidence that the Petitioners' application was incomplete.

i. Respondents Argument that Appellants' Application is Incomplete under PCC 18.40.020 is Misplaced.

⁴² In fact, Respondents failed to include the full building permit application in the administrative record.

⁴³ Compare *Davidson v. State*, 33 Wn. App. 783, 657 P.2d 810, *rev den.* 99 Wn.2d 1011 (1983) (When acting in judicial capacity, administrative board cannot base its finding and conclusions upon undisclosed documentary evidence).

Respondents asserted, and the Superior Court appears to have agreed, the Hearing Examiner erred in failing to find that Appellants must meet the requirements of PCC 18.40.020 for their application to be deemed “complete.” CP at 153-154. Respondents’ reliance on PCC 18.40.020 is misplaced.

Title 18 PCC relates to zoning and other development regulations. PCC 18.40.020 must be read in conjunction with Chapter 18.160 PCC which governs “vesting” under PCC Title 18. However, Appellants’ application was filed under the provisions and restrictions of Title 17C PCC, which, as noted above, governs building permits. The vesting provision in Title 18 PCC is not applicable to this case because it specifically *exempts* building permits and states that the “[v]esting of building permit applications are governed by the rules of RCW 19.27.095 and Title 15 PCC.”⁴⁴

Respondents failed to carry their burden of establishing that the Hearing Examiner erred. The Superior Court decision should be reversed.

ii. Appellants’ Application Satisfied the Requirements of the Pierce County Submittal Checklist.

⁴⁴ PCC 16.160.030. At the time Appellants’ building permit application was filed, Title 15 PCC had been recodified under Title 17C PCC.

Respondents argued to Superior Court that Appellants “failed to include information on their site plan” in accordance with the requirements of the Pierce County Submittal Checklist. CP at 154. Specifically, Respondents argued Appellants’ application was deficient because it did not identify a “stream” in its site plan. CP at 154. Respondents and the Superior Court are mistaken.

First, Respondents are employing an overly strict reading of the requirements for a complete application. It is well recognized a building permit application may be complete, even if additional information is needed to continue processing it.⁴⁵ In *State ex rel. Ogden v. City of Bellevue*, the Supreme Court found an application was vested even though it did not contain all of the information required by the City Code.⁴⁶ Furthermore, in *West Main*, the Supreme Court found that the Meydenbauer Place project was vested, despite the fact that the developers had “continued to revise and refine its design plans.”⁴⁷

While Respondents are correct that the Pierce County Submittal Checklist for Site Plans included a provision for requiring an applicant

⁴⁵ RCW 19.27.095(5); RCW 36.70B.070(2) (“A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient to continue processing even though additional information may be required or project modifications may be undertaken subsequently.”).

⁴⁶ *Ogden, supra*, 45 Wn.2d at 493-496.

⁴⁷ *West Main, supra*, 106 Wn.2d at 48.

identify “Surface Water Drainage” which includes “shorelines, wetlands, ponds, ditches and stream; they utterly failed to acknowledge that the County was well aware that that a drainage course/stream was on-site as early as April 2003. AR at 176.

Second, Appellants’ site plan did, in fact, identify the drainage ditch, which was only later deemed to be a stream, on site. AR at 263. The topographic lines on the site plan that was submitted with the 2004 application clearly indicate the location of a drainage course along the western portion of the site and the existing culvert that directed the water through a bulkhead was specifically marked. AR at 263.

Furthermore, at the time of the building permit application Appellants questioned whether this drainage course was subject to the County’s buffer requirements a stream. AR at 90. This drainage course consisted primarily of stormwater runoff from upstream development and roads, and the County had observed in an earlier letter that it may have once been tight lined all the way to Henderson Bay. AR at 81 and 184. It was only determined to be a type 4 or 5 stream following a public hearing and decision in 2005. See generally AR at 78-101. The fact that the drainage course identified in the site plan was *later* found to be a “stream” cannot undo an otherwise vested application.

Respondents' argument, if accepted by this Court, would radically restrict the vested rights doctrine. In essence, Respondents argue that a project applicant should be prepared to risk losing his or her vested rights if the government challenges an applicant's good faith understanding or interpretation of the law. Respondents' arguments are not supported by the law. Filing a permit application may, necessarily, involve a reasoned disagreement between the applicant and County staff as to the applicability of the County's particular codes. As such, "[d]emonstrating 'compliance' cannot be a threshold for invoking a process designed to assess compliance itself."⁴⁸

iii. Respondents Have Failed to Establish that Only "Outright Permitted" Permit Applications Vest at the Time of Application.

In their briefing to the Superior Court, Respondents argued the "failure to submit a variance application along with the building permit... rendered the application incomplete" and "[i]n order to vest, the project proposed in an application for building permit must be *permitted outright*. In other words, an application may only vest if the government's review of the application *is purely ministerial*." CP at 204 and 157. However, as discussed extensively above, an application may be "complete" even if

⁴⁸ Wynne, *Washington's Vested Rights Doctrine: How We Have Muddled A Simple Concept And How We Can Reclaim It*, 24 Seattle U. L. Rev. 851, 888 – 890 (2001).

additional submissions will be required to continue processing the application. *See* RCW 36.70C.070(2).

Under LUPA, parties must exhaust their administrative remedies prior to judicial review of administrative actions.⁴⁹ In order to do so, a party must raise the appropriate issues before the agency or Hearing Examiner.⁵⁰ An issue is properly raised to the administrative agency when there is more than “simply a hint or a slight reference to the issue in the record.”⁵¹ In this case, the issues properly before this Court are only those issues Respondents raised before the Hearing Examiner in their letter dated October 24, 2007. AR at 236-241. In that letter, Respondents *never* argued that building permit applications which propose projects that are not “outright” permitted do not vest upon the filing of the application. AR at 236-241. Accordingly, this issue was never properly before the Superior Court.

⁴⁹ *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997) (citing RCW 36.70C.060).

⁵⁰ *Id.* at 869 (applying to LUPA the requirement under the Administrative Procedure Act (APA) that for remedies to be exhausted issues must first be raised before the administrative agency). The court in *Citizens for Mount Vernon* applied the APA's requirement that the issue be raised to the agency notwithstanding its recognition that cases under the APA are not analogous to LUPA actions and are not directly controlling because land use public hearings do not involve the same degree of adversarial process as an administrative hearing.).

⁵¹ *Id.*; *see also, Boehm v. City of Vancouver*, 111 Wn.App. 711, 722, 47 P.3d 137, 144 (2002) (“[i]n order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record.” *Citing, King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993).).

Furthermore, even if this issue had been properly raised, Respondents' argument that a building permit application was not vested unless it proposes an "outright permitted" project, represents another radical departure from existing vesting laws and is not supported by any case law. As discussed above, the purpose behind vesting is to protect property owners from the "fluctuating policy" of the legislature. Washington's bright-line vesting laws provide direction to both staff and property owners to determine what laws apply to a particular application.

Under most local jurisdictions' land use and development codes, there are provisions for development that are not "outright permitted." These provisions include but are not limited to such things as conditional use permits, special uses, classified uses, projects requiring SEPA determinations, preliminary plats, substantial development permits, and variances. Only the simplest projects would vest under Respondents' novel theory of the law. Case law firmly establishes that a project does not have to be "outright permitted" to be vested.⁵² Respondents failed to

⁵² See, e.g., *Weyerhaeuser v. Pierce County*, 95 Wn.App 883, 976 P.2d 1279 (1999) (conditional use permit); *Beach v. Board of Adjustment of Snohomish Cy.*, 73 Wn.2d 343, 347, 438 P.2d 617 (1968) (conditional use permit); *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 207, 884 P.2d 910, 917 (1994) (variance); and *Talbot v. Gray*, 11 Wn.App. 807, 811, 525 P.2d 801 (1974), *review denied*, 85 Wn.2d 1001 (1975) (substantial development permit).

cite any case law in support of their argument to the Superior Court. CP 157 and 204.

If Respondents' reasoning was followed to its natural conclusion, then every government entity could prevent vesting by simply making all of its permits "conditional." Such a result would completely undermine the recognized vested rights established under Washington law. Any such ordinance or application procedure would be unduly oppressive upon individuals. In *West Main*, the City of Bellevue adopted just such an ordinance by defining the elements for a complete building permit application to require the applicant to obtain conditional use permits, get site plan approval, and a series of other actions before it could vest its rights by filing a building permit application. The court invalidated the ordinance because it improperly established several hurdles for *West Main* to clear before it could vest its rights.⁵³

Respondents' unusual legal theory is an inadequate basis for reversing the Hearing Examiner's decision. The Superior Court should have affirmed the Hearing Examiner's decision.

iv. Respondents Have Failed to Establish that "Substantial Modifications" Were Made to the Application.

⁵³ *West Main, supra*, 106 Wn.2d at 52-53.

In their LUPA appeal, Respondents' argued that Appellants modified their application such that it was a *requirement* that they file a "new" application under PCC 18.160.070. CP at 158. Respondents' argument is without merit. As discussed in more detail above, it is well recognized that a building permit application may be complete, even if additional information is needed to continue processing it.⁵⁴

More importantly, however, Respondents failed to establish from the record that there were *any* substantial modifications to the building permit application. AR at 1-338. In Finding No. 9 of the Hearing Examiner's Decision, the Hearing Examiner found that the application did not "change anything that was submitted in the initial building permit application." AR at 35.⁵⁵ In 2004, Appellants proposed to build a house on land that was zoned residential. AR at 144. In 2007, Appellants submitted a variance application to build a house on land zoned residential. AR at 144. The fact that a variance was necessary to

⁵⁴ RCW 19.27.095(5); RCW 36.70B.070(2) ("A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is *sufficient to continue processing even though additional information may be required* or project modifications may be undertaken subsequently."). [Emphasis Added].

⁵⁵ While Respondents "assigned error" to Finding No. 9 in their petition, they failed to present any citations to evidence within the record demonstrating error. Instead, they rely on bare conclusory statement that the subsequent submittals "resulted in substantial change" in the application. CP at 9 and 159.

complete the project did not change the basic underlying nature of the proposal.

Respondents failed to carry their burden of establishing that the Hearing Examiner erred. The Hearing Examiner's decision should have been affirmed.

c. Appellants' Application Was Deemed Complete by Operation of Law.

In 1995, the Legislature adopted Chapter 36.70B RCW, Local Project Review, which establishes the minimum requirements for processing permit applications by Counties and Cities.⁵⁶ In enacting Chapter 36.70B RCW, the Legislature recognized that the local permit process was complicated, resulting in significant burdens and expense being imposed on persons seeking permits.⁵⁷ In passing this legislation, the Legislature intended to create a uniform and consistent process.⁵⁸

While RCW 19.27.095 defines the *content* for a complete building permit application, RCW 36.70B.070 defines the *procedure* by which the local jurisdiction must process the application and issue a determination that the application is "complete" for purposes of vesting:

**36.70B.070 Project permit applications —
Determination of completeness — Notice to applicant.**

⁵⁶ RCW 36.70B.010 and 36.70B.020(2).

⁵⁷ RCW 36.70B.010(3).

⁵⁸ Laws of Washington, 1995 c 347 §§ 404 and 405.

- (1) *Within twenty-eight days* after receiving a project permit application, a local government planning pursuant to RCW 36.70A.040 shall mail or provide in person a written determination to the applicant, stating either:
 - (a) That the application is complete; or
 - (b) That the application is incomplete and what is necessary to make the application complete.

...
- (2) A project permit application is complete for purposes of this section when it *meets the procedural submission requirements* of the local government *and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently*. The determination of completeness shall not preclude the local government from requesting additional information or studies either at the time of the notice of completeness or subsequently if *new information is required or substantial changes in the proposed action occur*.

...
- (4) (a) *An application shall be deemed complete under this section if the local government does not provide a written determination to the applicant that the application is incomplete as provided in subsection (1)(b) of this section.*⁵⁹

The provisions of Chapter 36.70B RCW apply to building permit applications.⁶⁰ Under the provisions of 36.70B.070 an application is

⁵⁹ RCW 36.70B.070. [Emphasis Added].

⁶⁰ RCW 36.70B.020(4) (Defining "Project permit" or "project permit application" to include building permits).

“complete” when either 1) the local government issues a written determination to that effect, or 2) after twenty-eight days if no written determination is issued by the local government.⁶¹ Furthermore, an application may be “complete” even if additional information is needed for review.⁶²

In this case, Appellants’ application was filed in March 2004. There is nothing in the record to indicate County staff issued a written determination that the application was not complete, in fact, all evidence is to the contrary.⁶³ Therefore, Appellants’ permit application was deemed “complete” in April 2004 by operation of law, twenty-eight days after the application was filed. Because the application was complete, Appellants were vested to the regulations that were in effect as of March 2004.

E. WHETHER APPELLANTS HAD UNCLEAN HANDS IS NOT MATERIAL TO THE ISSUE OF VESTING.

The doctrine of unclean hands has no application to the facts or law of this case or any other vesting case. Washington Courts have rejected a “good faith” requirement for vesting in favor of a bright-line

⁶¹ 36.70B.070(1) and (4).

⁶² 36.70B.070(2).

⁶³ In fact, the permit was sufficiently complete that in May 2004 the County issued a building permit. RP at 8.

rule.⁶⁴ As such, the determination of whether Appellants had “unclean hands” is not a material fact to the Hearing Examiner’s decision on the issue of whether Appellants’ building permit application had vested. Because this issue has been found to be irrelevant to vesting cases, Respondents’ argument that the Hearing Examiner erred when he found that Appellants did not have “unclean hands” can only be understood as a thinly veiled attempt to prejudice the Superior Court.

Nevertheless, the Hearing Examiner’s finding was supported by the record. RCW 36.70C.130(c) establishes the standard for reviewing factual determinations. Whether the decision is supported by substantial evidence, is a question of whether there “is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.”⁶⁵ A court views “the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising *fact finding authority*.”⁶⁶ In this case, the prevailing party would be Appellants. Courts are required to give “substantial deference to

⁶⁴ *Eastlake Community Council v. Roanoke Associates, Inc.* 82 Wn.2d 475, 481, 513 P.2d 36 (1973), citing *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958) (“We prefer not to adopt a rule which forces the court to search through the moves and countermoves of parties ...”); see also, *Allenbach, supra*, 101 Wn.2d at 199 (Under the Washington vested rights doctrine, there is no need for Courts to inquire into the “good faith” of the applicant.).

⁶⁵ *Schofield, supra*, 96 Wn. App. at 586.

⁶⁶ *Id.*

both legal and factual determinations of local jurisdictions with expertise in land use regulations.”⁶⁷

In this case, there was no deception associated with Appellants’ building application. Their 2004 site plan was professionally prepared and complied with the County’s submittal requirements. AR at 132-133. While the stream may not have been clearly delineated, the channel was depicted as well as the culvert. AR at 263. Moreover, the County was well aware of the drainage course’s existence. AR at 176, 178, 180 and 184. The County’s biologist, Scott Sissons, had visited the site prior to the building permit application. AR at 176, 178, 180 and 184. Knowing full well that the County was familiar with the site, it stretches reason that any errors in Appellants’ building permit application were anything more than inadvertent mistakes – yet this is how Respondents have characterized the facts of this case.

The law does not support a good faith requirement to vest and there was substantial evidence to support the Hearing Examiner’s decision to grant the variance.

F. RESPONDENTS WERE EQUITABLY ESTOPPED FROM ASSERTING THAT APPELLANTS’ APPLICATION IS NOT VESTED.

⁶⁷ *Timberlake Christian Fellowship v. King County*, 114 Wn.App. 174, 180, 61 P.3d 332 (2002).

As discussed above, prior to the 2007 hearing that is the issue in this case, Appellants and the County were involved in another LUPA action in 2004. AR at 335. Respondents were aware of this action and chose not to intervene. In early 2007, a resolution was reached and Appellants' earlier LUPA appeal was voluntarily dismissed. AR at 335. The settlement contemplated that Appellants would seek a variance from the County's fish and wildlife habitat buffer requirements. AR at 335. Accordingly, one of the carefully bargained for terms of settlement was that the applicable buffer requirements would be those that were in effect at the time Appellants submitted a complete building application in 2004. AR at 335. This term was memorialized in an exchange of letters between Appellants' attorney and the County's deputy prosecutor. AR at 335-136.

It can not be denied that the County's decision to settle the LUPA appeal, on terms that included acknowledging Appellants' vested rights, involved a discretionary act requiring the exercise of basic judgment and expertise. Where the act is discretionary, the courts will not interfere.⁶⁸ While the Hearing Examiner had no authority to review the equitable rights of the parties, the Superior Court did retain that authority.⁶⁹

⁶⁸ *Stoor v. Seattle*, 44 Wn.2d 405, 410, 267 P.2d 902 (1954).

⁶⁹ *Chaussee v. Snohomish County Council*, 38 Wn.App. 630, 644, 689 P.2d 1084 (1984) (court is not limited to reviewing issues that were within the jurisdiction of the council or hearing examiner.).

Respondents chose not to participate in the previous LUPA action, and should not now be allowed to undermine this validly executed settlement agreement. The Court should affirm the Hearing Examiner's decision.

G. THE SUPERIOR COURT SHOULD HAVE DISMISSED THE PETITION AS RESPONDENTS' APPEAL WAS RENDERED MOOT PURSUANT TO THE WASHINGTON STATE SUPREME COURT'S DECISION IN *FUTUREWISE v. WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD*.

It is a well settled "general rule that, where only moot questions or abstract propositions are involved, ... the appeal ... should be dismissed."⁷⁰

An issue is "moot" if it cannot provide a party with effective relief.⁷¹ A change in the law may render a controversy moot when the relevant provisions are superseded rendering the decision "purely academic."⁷²

On July 31, 2008, the Washington State Supreme Court issued an unequivocal decision regarding the application of a local government's critical areas ordinances to areas that are within the jurisdiction of the

⁷⁰ *Hart v. Department of Social and Health Services*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988), citing, *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). [Alterations in Original].

⁷¹ *West v. Thurston County*, *supra*, 144 Wn.App. 573, 580, 183 P.3d 346, 350 (2008), citing *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).

⁷² *West*, *supra*, 144 Wn.App. at 580; and *State ex rel. Evans v. Amusement Ass'n of Wash., Inc.*, 7 Wn.App. 305, 499 P.2d 906 (1972) (Where gambling statutes which were in force at time injunction was issued enjoining defendants from owning, possessing and managing certain bingo-type pinball machines which were declared gambling devices had been superseded by new comprehensive statutory plan, issues raised by appeal from grant of an injunction were moot.).

State's Shoreline Management Act (SMA), Chapter 90.58 RCW.⁷³ The issue presented in *Futurewise* was whether critical areas located within the shorelines can be regulated under the Growth Management Act (GMA) as opposed to the Shoreline Management Act. The Supreme Court was emphatic in its ruling. "We hold that the legislature meant what it said. Critical areas within the jurisdiction of the [Shoreline Management Act] are governed only by the [Shoreline Management Act]."⁷⁴ Under the Supreme Court's ruling, areas within 200 feet of a shoreline are governed solely by local governments' shoreline plans and not by their critical areas ordinances.

Certain things are unchanged by the Supreme Court's decision. Local jurisdictions can update their critical areas ordinances and those regulations will apply within the shoreline areas. What is new is the effective date of those updates. The Supreme Court's decision recognizes that the GMA and the SMA have different goals, priorities and underlying policies.⁷⁵ For that reason and because the legislature adopted legislation that expressly speaks to this point,⁷⁶ changes to the critical areas regulations that affect

⁷³*Futurewise v. Western Washington Growth Management Hearings Bd*, 164 Wn.2d 242, 189 P.3d 161 (2008).

⁷⁴*Id.* at 245. [Emphasis Added].

⁷⁵*Id.*

⁷⁶ See ESHB 1933, Section 1, paragraph (3).

property within 200 feet of the shoreline can not take effect until they are processed as amendments to the shoreline regulations.

In this appeal, the *Futurewise* decision is dispositive. The *entire* area that is the subject of Appellants' variance application is within 200 feet of the shoreline and therefore subject solely to the jurisdiction of the SMA. AR at 111. As discussed below, the County's 2005 critical areas regulations have never been reviewed by Department of Ecology as part of the County's shoreline regulations, and are therefore not controlling over this application. It is therefore irrelevant whether Appellants' applications vested in 2004 or 2007, the only variance regulations that might possibly apply are those that were adopted in 1997. As a result of this decision, Appellants moved to have the petition dismissed as it was rendered moot. CP at 389-464. The Superior Court erroneously denied that motion.

1. Appellants may not have been Required to Obtain a Variance under the Shoreline Management Act.

Under the *Futurewise* decision, Appellants may not be required to comply with *any* aspect of the County's critical areas ordinance. The Supreme Court's decision makes clear that the only land use regulations that apply with 200 feet of the shoreline are those that are adopted through the Shoreline Management Program approval process.

The requirement for a variance in this case arose solely from the County's *critical areas* ordinance which was adopted pursuant to the requirement of the *Growth Management Act*, Chapter 36.70A RCW. See, e.g., PCC 18E.10.010. Since the County's shoreline management regulations do not contain *any* stream buffer requirements or variance procedure, and because the regulations have not been subject to a comprehensive update since the GMA was adopted in 1990, it is reasonable to conclude that under *Futurewise* no such buffer requirements apply.⁷⁷

Thus, under *Futurewise*, Appellants had no obligation to obtain or even pursue a variance under the County's critical areas ordinance. This would be true even if Appellants filed their application today.

2. Even if Appellants were Required to Obtain a Variance, Pierce County must Apply the Buffer and Variance Requirements that were in Place when its Shoreline Management Program was Last Updated and Approved by Department of Ecology.

⁷⁷Pierce County Code Title 20; and Appendix A, at 1. On October 16, 2007 Pierce County attempted to adopt its updated critical areas ordinance by reference into the County's shoreline plan. (Ordinance No. 2007-34s2). Those amendments were not effective until Department of Ecology (DOE) completed its review. On December 13, 2007, DOE rejected Pierce County's amendment to the shoreline regulations insofar as the amendments included provisions relating to the County's critical areas. On June 3, 2008, the County repealed the provisions of the County's 2007 Ordinance that related to the adoption of its critical areas ordinance by reference (Ordinance 2008-25). Because DOE has not completed their review, neither Ordinance 2007-34s2 nor Ordinance 2008-25 are in effect. On August 19, 2008, Pierce County Council adopted emergency Ordinance No. 2008-68. This Ordinance is not in effect until DOE completes its review. This Ordinance, if approved by DOE, will reinstate the provisions that adopted the County's critical areas ordinance by reference. There is no further legislative history. See Appendix A.

The significance of the *Futurewise* decision to this appeal is that it means this case is no longer simply about vesting. The clear import of *Futurewise* is that the stream buffer and variance regulations that apply to Appellants (and every other land use applicant) are the regulations that were in effect when the shoreline regulations were last amended by the County and approved by the Washington Department of Ecology. CP at 462.⁷⁸ Assuming for the sake of argument that the County's 1997 critical areas regulations were reviewed and approved by the Department of Ecology as part of the County's shoreline master program, it remains undisputed that the 2005 regulations have never been approved by Ecology.⁷⁹ Appendix A, at 1-5.

In this case, Respondents have argued to Superior Court that, since Appellants did not submit a "complete application" until August 9, 2007, they must comply with the critical areas requirements that were adopted in 2005. *Futurewise* holds otherwise.

⁷⁸ Appendix A. In recognition of this fact, on August 19, 2008, Pierce County Council adopted Ordinance No. 2008-68. In that Ordinance, the County recognizes that as a result of the *Futurewise* decision "that Critical Area regulations do not apply to the area of Shoreline Jurisdiction until these amendments have gone through the Department of Ecology's adoption process (WAC 173-26-201)." Pierce County Ordinance 2008-68 at 4, lines 7-9.

⁷⁹ It is unclear from the legislative history available whether the County's 1997 critical areas regulations were ever reviewed by Department of Ecology; however, for the purpose of this appeal it is unnecessary to resolve that issue.

The following facts are *undisputed*. Appellants' property is within 200 feet of the shoreline, and therefore subject to the jurisdiction of the SMA. RCW 90.58.030(2)(f) and AR at 111. Pierce County has not conducted a comprehensive update to its shoreline regulations since they were adopted in 1975. CP at 459; see Appendix A at 1. The relevant section, Chapter 20.62 PCC Residential Development, was last updated in 1988. See generally, Chapter 20.62 PCC. In 2005 the County updated its critical areas regulations; however those regulations have not been reviewed by Department of Ecology in conjunction with the County's shoreline regulations. Appendix A, at 1-5. On August 9, 2007, Appellants submitted their variance application. AR 44. On October 15, 2007 – *after* Appellants submitted their variance application – the County passed Ordinance 2007-34s2 adopting its 2005 critical areas regulations as part of its shoreline master program. Appendix B, at 5. On December 13, 2007, the County repealed Ordinance 2007-34s2 because the Department of Ecology would not approve the adoption of the critical areas regulations when not part of a comprehensive update. Appendix A, at 2.

Even under Respondents' theory of this case, Appellants' application vested no later than August 9, 2007. When reviewing the above set of facts in light of *Futurewise*, it is clear the 1997 regulations were only critical areas regulations that could possibly have been legally effective on August 9, 2007

for development within 200 feet of the shorelines. The Hearing Examiner found that Appellants satisfied the 1997 variance criteria, and those findings have never been challenged by Respondents.

Accordingly, based on *Futurewise*, Respondents' LUPA petition has been rendered moot and it should have been dismissed by the Superior Court.

VI. CONCLUSION

For the above-stated reasons, Appellants respectfully request that the Court reverse the decision of the Superior Court and affirm the decision of the Hearing Examiner.

Dated this 1st day of September 2009

Respectfully submitted,



GREGORY A. JACOBY, WSBA #18326
JENNIFER A. FORBES, WSBA #26043
Attorneys for Appellants Garrison

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2009, a true and correct copy of the foregoing document was served upon counsel of record, via the methods noted below, properly addressed as follows:

Counsel for Respondents Lauer and deTeinne:

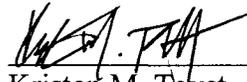
Margaret Archer	<u> X </u>	Hand Delivered
Gordon Thomas Honewell	<u> </u>	U.S. Mail (first class, postage prepaid)
1201 Pacific Ave., Ste. 2100	<u> </u>	Overnight Mail
Tacoma, WA 98402	<u> </u>	Facsimile

Counsel for Pierce County:

Jill Guernsey	<u> X </u>	Hand Delivered
Pierce County Prosecutor's Office	<u> </u>	U.S. Mail (first class, postage prepaid)
955 Tacoma Avenue S., Suite 301	<u> </u>	Overnight Mail
Tacoma, WA 98402-2160	<u> </u>	Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of September 2009.



Kristen M. Tayet

FILED
COURT OF APPEALS
DIVISION II
09 SEP - 1 PM 2:36
STATE OF WASHINGTON
BY _____
DEPUTY

1 Sponsored by: Councilmember Terry Lee
2 Requested by: Pierce County Council

File No. 399

3
4
5
6 **ORDINANCE NO. 2008-68**
7
8

9 **An Emergency Ordinance of the Pierce County Council Regarding Interim**
10 **Amendments to Title 20 of the Pierce County Code,**
11 **"Shoreline Management Use Regulations"; Readopting**
12 **Pierce County Code Section 20.20.020, "Critical Areas," as**
13 **Adopted by Ordinance No. 2007-34s2; Setting an Effective**
14 **Date; Providing a Sunset of the Interim Regulation upon the**
15 **Implementation of the Comprehensive Update to the Pierce**
16 **County Shoreline Master Program and Declaring an**
17 **Emergency.**
18

19 **Whereas**, Phase I of the Pierce County Shoreline Master Program was adopted
20 by the Board of Pierce County Commissioners on March 4, 1974, in compliance with the
21 Washington State Shoreline Management Act of 1971; and
22

23 **Whereas**, the Pierce County Shoreline Use Regulations, providing implementing
24 regulations for the goals and policies in Phase I of the Shoreline Master Program, were
25 adopted by the Board of Commissioners on April 4, 1975; and
26

27 **Whereas**, while several amendments to the Shoreline Use Regulations have
28 been adopted since its initial adoption in 1975, the County has never conducted a
29 comprehensive update to the Shoreline Master Program; and
30

31 **Whereas**, Pierce County has initiated a three-year process to complete a
32 comprehensive update to the Shoreline Master Program, with anticipated adoption by
33 the Pierce County Council in 2009, subject to subsequent review and approval by the
34 Washington State Department of Ecology; and
35



1 **Whereas**, Pierce County has become aware of developments and activities in
2 marine waters of the County relating to intertidal geoduck aquaculture and other issues
3 that are not adequately addressed in the Shoreline Use Regulations; and
4

5 **Whereas**, in order to properly address these emerging issues prior to completion
6 of the comprehensive update to the Shoreline Master Program, Pierce County adopted
7 interim regulations through Ordinance No. 2007-34s2 on October 16, 2007; and
8

9 **Whereas**, in accordance with Washington Administrative Code (WAC) 173-26-
10 120, the shoreline amendments shall not become effective until approved by the
11 Department of Ecology; and
12

13 **Whereas**, the Department of Ecology reviewed the interim regulations contained
14 within Ordinance No. 2007-34s2, and indicated in a letter dated December 13, 2007,
15 that the Department was unable to accept the regulations as a limited Shoreline Master
16 Program (SMP) amendment due to the presence of certain code provisions related to
17 critical areas; and
18

19 **Whereas**, the Pierce County Council repealed the language regarding critical
20 areas from Ordinance No 2007-34s2 as noted by the Department of Ecology through
21 adoption of Ordinance No. 2008-25 and resubmitted the interim regulations for
22 consideration as a limited SMP amendment; and
23

24 **Whereas**, Pierce County's Critical Area Regulation is based on the best available
25 science; and
26

27 **Whereas**, The County Council has always intended the Critical Areas Regulation
28 to apply to all waters in unincorporated Pierce County that are designated as Critical
29 Areas. See PCC 18E.10.050 A.; and
30

31 **Whereas**, the Washington State Supreme Court ruled in *Futurewise v. Western*
32 *Washington Growth Management Hearings Board and the City of Anacortes*;
33 Washington State Supreme Court Docket Number 80396-0 [2008 Wash. LEXIS 756]
34 (Filed July 31, 2008) that Critical Areas within the jurisdiction of the Shoreline
35 Management Act be governed only by the Shoreline Management Act; and
36



1 **Whereas**, the Washington State Supreme Court case *Futurewise v. Western*
2 *Washington Growth Management Hearings Board and the City of Anacortes* Docket
3 Number 80396-0 has significant impact to the life safety protection of the citizens of
4 Pierce County and to the environmental protections already adopted by previous
5 County Council actions as a result of the decision that Critical Area regulations do not
6 apply to the area of Shoreline Jurisdiction until those amendments have gone through
7 the Department of Ecology's adoption process (WAC 173-26-201); and

8
9 **Whereas**, the consequences of Pierce County not having the Critical Area
10 regulation apply to Shoreline areas leaves Pierce County with the potential of being out
11 of compliance with the National Flood Insurance Program (NFIP) which entitles Pierce
12 County citizens to purchase flood insurance and be eligible for Federal Flood relief
13 funding and aid; and

14
15 **Whereas**, the consequence of local governments needing to have the
16 Department of Ecology review and approved Critical Area regulations in order to be in
17 compliance with the Growth Management Act (GMA) is that the jurisdictions have the
18 potential of being out of compliance. The fiscal consequences of Pierce County being
19 out of compliance with GMA is approximately \$83,000,000 to the sales tax, liquor tax,
20 and road funds in the 2009 budget; and

21
22 **Whereas**, on August 19, 2008, the Department of Ecology informed Pierce
23 County that a Critical Area Amendment to the critical areas segment of the SPM could
24 be included in a limited amendment to the Pierce County SMP; and

25
26 **Whereas**, the Pierce County Council wishes to adopt the language referencing
27 the County's Critical Areas in the Pierce County Shoreline Management Regulations for
28 consideration as a limited SMP amendment; **Now Therefore**,

29
30 **BE IT ORDAINED by the Council of Pierce County:**

31
32 Section 1. The Pierce County Shoreline Use Regulations Title 20 are hereby
33 amended as set forth in Exhibit A, which is attached hereto and incorporated herein.

34
35 Section 2. If any provision of this Ordinance or the amendments to Title 20 are
36 found to be illegal, invalid, or unenforceable, the remaining provisions of this Ordinance
37 or the Shoreline Use Regulations shall remain in full force and effect.
38



1 **Section 3.** Pursuant to Washington Administrative Code (WAC) 173-26-120, this
2 Ordinance shall not become effective until approved by the Department of Ecology.
3 Upon receiving such approval, the effective date of the Ordinance shall be the date of
4 the Department of Ecology's letter to Pierce County approving the Shoreline
5 Management Use Regulation amendments set forth in Exhibit A.

6
7 **Section 4.** This Ordinance shall sunset upon the implementation of the
8 comprehensive update of Pierce County's Shoreline Master Program.

9
10 **Section 5.** The Council finds and declares that this Emergency Ordinance is
11 necessary for the immediate preservation of the public peace, health and safety, and
12 support of County Government and its existing institutions. This Emergency is
13 necessary because in *Futurewise v. Western Washington Growth Management*
14 *Hearings Board and the City of Anacortes*, Washington State Supreme Court Docket
15 Number 80396-0 [2008 Wash. LEXIS 756] (Filed July 31, 2008) the Court ruled that
16 critical areas in the SMP must be governed by the SMP and it is necessary to act to
17 immediately to not only protect Pierce County's environmentally sensitive shorelines
18 and well-head protection areas but to protect citizens of the County from the
19 environment (flooding, landslide, tsunami, earthquake and volcanic hazard regulations
20 contained in the County's critical areas regulations).

21
22 The Washington State Supreme Court case *Futurewise v. Western Washington*
23 *Growth Management Hearings Board and the City of Anacortes* Docket Number 80396-
24 0 has significant impact to the life safety protection of the citizens of Pierce County and
25 to the environmental protections already adopted by previous County Council actions as
26 a result of the decision that Critical Area regulations do not apply to the area of
27 Shoreline Jurisdiction until those amendments have gone through the Department of
28 Ecology's adoption process (WAC 173-26-201).

29
30 The consequences of Pierce County not having the Critical Area regulation apply
31 to Shoreline areas leaves Pierce County with the potential of being out of compliance
32 with the National Flood Insurance Program (NFIP) which entitles Pierce County citizens
33 to purchase flood insurance and be eligible for Federal Flood relief funding and aid.
34



1 The consequence of local governments needing to have the Department of
2 Ecology review and approved Critical Area regulations in order to be in compliance with
3 the Growth Management Act (GMA) is that the jurisdictions have the potential of being
4 out of compliance. The fiscal consequences of Pierce County being out of compliance
5 with GMA is approximately \$83,000,000 to the sales tax, liquor tax, and road funds in
6 the 2009 budget.

7
8 The Council hereby finds that an Emergency Exists.

9
10 PASSED this 19th day of August, 2008.

11
12 ATTEST:

PIERCE COUNTY COUNCIL

Pierce County, Washington

13
14
15 Denise D. Johnson
16
17 Denise D. Johnson
18 Clerk of the Council

Terry Lee
Terry Lee
Council Chair

19
20
21 John W. Ladenburg
22 John W. Ladenburg
23 Pierce County Executive
24 Approved _____ Vetoed _____, this
25 21 day of August,
26 2008.

27
28 Date of Publication of
29 Notice of Public Hearing: Not Applicable - Emergency

30
31 Effective Date of Ordinance. *Emergency Ordinances are effective immediately when approved by the Executive; however, this Ordinance shall not become effective until approved by the Department of Ecology pursuant to Washington Administrative Code (WAC) 173-26-120.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NEW SECTION

Chapter 20.20

INTRODUCTION TO USE ACTIVITY REGULATIONS

Sections:

20.20.010 Use Activity Regulations.

20.20.020 Critical Areas.

20.20.020 Critical Areas.

Pursuant to RCW 36.70A.480, the Master Program is required to provide a level of protection to critical areas (eg. eelgrass beds, spawning areas for herring, smelt, and sandlance) located within shorelines of the state that is at least equal to the level of protection provided to critical areas by the local government's critical area ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2). The County's standards for critical area protection are set forth in Title 18E, Development Regulations – Critical Areas, and are hereby incorporated by reference within Title 20. All shoreline use activities shall be required to comply with the provisions of Title 18E in addition to the specific standards and guidelines for each use activity set forth within Title 20.



**NOTICE OF ADOPTION
OF PIERCE COUNTY ORDINANCE NO. 2008-68**

NOTICE IS HEREBY GIVEN THAT ORDINANCE NO. 2008-68, An Emergency Ordinance of the Pierce County Council Regarding Interim Amendments to Title 20 of the Pierce County Code, "Shoreline Management Use Regulations"; Readopting Pierce County Code Section 20.20.020, "Critical Areas," as Adopted by Ordinance No. 2007-34s2; Setting an Effective Date; Providing a Sunset of the Interim Regulation upon the Implementation of the Comprehensive Update to the Pierce County Shoreline Master Program and Declaring an Emergency, HAS BEEN ADOPTED.

If you have any questions about this ordinance, please call Denise Johnson, Clerk of the Council, at (253) 798-6065.

NOTICE IS FURTHER GIVEN that copies of this entire Ordinance are filed in the Pierce County Council's Office, County-City Building, 930 Tacoma Avenue South, Room 1046, Tacoma, WA 98402, and are available Monday through Friday between the hours of 9:00 a.m. and 4:00 p.m. Copies of the Ordinance are available upon request for a charge as set by Ordinance.

Ordinance No. 2008-68 was passed by the Pierce County Council on August 19, 2008, and was signed by the Executive on August 21, 2008 at 1:10 p.m. *Emergency Ordinances are effective immediately when approved by the Executive; however, this Ordinance shall not become effective until approved by the Department of Ecology pursuant to Washington Administrative Code (WAC) 173-26-120.

Denise Johnson
Clerk of the Council

Publish: August 28, 2008

AFFIDAVIT OF PUBLICATION
STATE OF WASHINGTON
COUNTY OF PIERCE

PH 8/28/08
2008-68
13.53

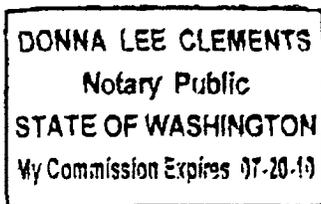
I, Susan Teskey, being first duly sworn, on oath, says that she is the legal clerk of The Puyallup Herald, a weekly newspaper, published in Tacoma, Pierce County, Washington, and of general circulation in said state, and having a weekly circulation of over 36,000 copies. That said newspaper is now and at all times hereinafter mentioned as a legal newspaper as defined by the laws of the state, duly approved by the Superior Court of Pierce County, Washington. That the advertisement, of which the attached is a printed copy as it was published in the regular issue of said newspaper, was published 1 time, commencing on the 28th day of August 2008; and ending on the 28th day of August 2008.

Ad Number S1361161300
Account #650550
PC Council

Susan Teskey
Subscribed to and sworn before me on this
28th day of August 2008

Donna Lee Clements

Notary public in and for the state of
Washington, residing in Pierce County.
1950 So. State St. WA 98411



RECEIVED

SEP 05 2008

PIERCE COUNTY COUNCIL
By: _____

PA 8128108

2008-68

13.53

**NOTICE OF ADOPTION
OF PIERCE COUNTY ORDINANCE NO. 2008-68**
NOTICE IS HEREBY GIVEN THAT ORDINANCE NO. 2008-68, An Emergency Ordinance of the Pierce County Council Regarding Interim Amendments to Title 20 of the Pierce County Code, "Shoreline Management Use Regulations": Readopting Pierce County Code Section 20.20.020, "Critical Areas," as Adopted by Ordinance No. 2007-34s2; Setting an Effective Date; Providing a Sunset of the Interim Regulation upon the Implementation of the Comprehensive Update to the Pierce County Shoreline Master Program and Declaring an Emergency, HAS BEEN ADOPTED.

If you have any questions about this ordinance, please call Denise Johnson, Clerk of the Council, at (253) 798-8065.

NOTICE IS FURTHER GIVEN that copies of this entire Ordinance are filed in the Pierce County Council's Office, County-City Building, 930 Tacoma Avenue South, Room 1046, Tacoma, WA 98402, and are available Monday through Friday between the hours of 9:00 a.m. and 4:00 p.m. Copies of the Ordinance are available upon request for a charge as set by Ordinance.

Ordinance No. 2008-68 was passed by the Pierce County Council on August 19, 2008, and was signed by the Executive on August 21, 2008 at 1:10 p.m. *Emergency Ordinances are effective immediately when approved by the Executive; however, this Ordinance shall not become effective until approved by the Department of Ecology pursuant to Washington Administrative Code (WAC) 173-26-120.

Denise Johnson
Clerk of the Council
Publish: August 28, 2008

13611613

1

8/28/2008, 11:59 AM

RECEIVED

SEP 05 2008

PIERCE COUNTY COUNCIL
By: _____

From: Patty Face
To: legals@thenewstribune.com
Date: 8/25/2008 10:16:20 AM
Subject: Ordinance No. 2008-68, Legal Notice of Adoption to be Published in Puyallup Herald on Aug 28, 2008

The Puyallup Herald:

Below is a Legal Notice of Adoption to be published in the Puyallup Herald on August 28, 2008, for Ordinance No. 2008-68.

Please provide email verification receipt.

To receive payment, please submit an original invoice and a copy, with proof of publication (an Affidavit and tear sheet in duplicate) to the Office of the Pierce County Council, 930 Tacoma Avenue South, Room 1046, Tacoma, WA 98402.

Please submit your bill and affidavit IMMEDIATELY after the last date of publication.

Thank you,

Patty Face
Deputy Clerk
Pierce County Council
(253) 798-2687

.....

**NOTICE OF ADOPTION
OF PIERCE COUNTY ORDINANCE NO. 2008-68**

NOTICE IS HEREBY GIVEN THAT ORDINANCE NO. 2008-68, An Emergency Ordinance of the Pierce County Council Regarding Interim Amendments to Title 20 of the Pierce County Code, "Shoreline Management Use Regulations"; Readopting Pierce County Code Section 20.20.020, "Critical Areas," as Adopted by Ordinance No. 2007-34s2; Setting an Effective Date; Providing a Sunset of the Interim Regulation upon the Implementation of the Comprehensive Update to the Pierce County Shoreline Master Program and Declaring an Emergency, HAS BEEN ADOPTED.

If you have any questions about this ordinance, please call Denise Johnson, Clerk of the Council, at (253) 798-6065.

NOTICE IS FURTHER GIVEN that copies of this entire Ordinance are filed in the Pierce County Council's Office, County-City Building, 930 Tacoma Avenue South, Room 1046, Tacoma, WA 98402, and are available Monday through Friday between the hours of 9:00 a.m. and 4:00 p.m. Copies of the Ordinance are available upon request for a charge as set by Ordinance.

Ordinance No. 2008-68 was passed by the Pierce County Council on August 19, 2008, and was signed by the Executive on August 21, 2008 at 1:10 p.m. *Emergency Ordinances are effective immediately when approved by the Executive; however, this Ordinance shall not become effective until approved by the Department of Ecology pursuant to Washington Administrative Code (WAC) 173-26-120.

Denise Johnson

Clerk of the Council

Publish: August 28, 2008

THE NEWS TRIBUNE

[thenewstribune.com]

P.O. Box 11000 • 1950 South State Street • Tacoma WA 98411-0008

Also serving...

- THE PENINSULA GATEWAY • THE HERALD
- THE NORTHWEST GUARDIAN
- SOUTH SOUND VALUES

Advertising Invoice and Statement

1 BILLING PERIOD 08/24/08 08/31/08		2 ADVERTISER / CLIENT NAME PC COUNCIL	
23 TOTAL AMOUNT DUE		31 UNAPPLIED AMOUNT	
		31 TERMS OF PAYMENT 10 DAYS NET	
21 CURRENT AMOUNT DUE	22 30 DAYS	80 DAYS	OVER 90 DAYS
8 BILLED ACCOUNT NAME AND ADDRESS		4 PAGE #	5 BILLING DATE
PIERCE COUNTY COUNCIL D JOHNSON/COUNTY COUNCIL OFC 930 TACOMA AVE S RM 10 TACOMA WA 98402-2105		1	08/31/08
		8 BILLED ACCOUNT NUMBER	
		650550	
		7 ADVERTISER / CLIENT NUMBER	
		650550	
		REMITTANCE AMOUNT	

RECEIVED

SEP 05 2008

PIERCE COUNTY COUNCIL
By: _____

PLEASE DETACH AND RETURN UPPER PORTION WITH YOUR REMITTANCE.

DATE	11 NEWSPAPER REFERENCE PUB SECT PGE	12 13 14	DESCRIPTION - OTHER COMMENTS / CHANGES	15 SAU SIZES 16 BILLED UNITS	17 TIMES RUN 18 RATE	19 GROSS AMOUNT	20 NET AMOUNT
08/28	S1360420700		2008-47s/2008-47sNOTI 08/21 3950	3 18.0L 2.0X 159.00L	00L	126.56	126.56✓
08/28	S1360435800		2008-47s T/2008-47s T 08/21 3950	3 18.0L 2.0X 159.00L	00L	1742.64	1742.64
08/28	S1360513600		2008-42/2008-42NOTICE 08/21 3950	74.0L 2.0X 37.00L	00L	29.45	29.45
08/28	S1360513900		2008-41/2008-41NOTICE 08/21 3950	72.0L 2.0X 36.00L	00L	28.66	28.66
08/28	S1360864600		ORD 2008-5/ORD 2008-5 08/28 3940	94.0L 2.0X 47.00L	00L	18.71	18.71✓
08/28	S1360871300		ORD 2008-5/ORD 2008-5 08/28 3940	126.0L 2.0X 63.00L	00L	25.07	25.07
08/28	S1360882700		ORD 2008-5/ORD 2008-5 08/28 3940	222.0L 2.0X 111.00L	00L	44.18	44.18
08/28	S1360944900		2008-63/2008-63NOTICE 08/28 3950	212.0L 2.0X 106.00L	00L	42.19	42.19
08/28	S1360993800		ORD 2008-5/ORD 2008-5 08/28 3940	64.0L 2.0X 32.00L	00L	12.74	12.74
08/28	S1360996900		ORD 2008-5/ORD 2008-5 08/28 3940	50.0L 2.0X 25.00L	00L	9.95	9.95
08/28	S1361047200		2008-62/2008-62NOTICE 08/28 3950	86.0L 2.0X 43.00L	00L	17.11	17.11
08/28	S1361161300		ORD 2008-5/ORD 2008-5 08/28 3940	68.0L 2.0X 34.00L	00L	13.53	13.53✓

CONTINUED NEXT PAGE

STATEMENT OF ACCOUNT AGING OF PAST DUE AMOUNTS

CURRENT NET AMOUNT DUE	22 30 DAYS	80 DAYS	90 DAYS	UNAPPLIED AMOUNT	23 TOTAL AMOUNT DUE
					2,110.79

25 ADVERTISER INFORMATION			
1 BILLING PERIOD	8 BILLED ACCOUNT NUMBER	7 ADVERTISER / CLIENT	2 ADVERTISER / CLIENT NAME
08/24/08 08/31/08	650550	650550	PC COUNCIL

THE NEWS TRIBUNE

[thenewstribune.com]
P.O. Box 11000 • 1950 South State Street
Tacoma WA 98411-0008

PHONE: 253.597.8578, 253.597.8579, 253.597.8597

FAX: 253.274.7361 Fed ID: 68-0099037

Thank you for your patronage. Payment is due upon receipt. Billing inquiries must be made within 30 days of ad expiration.

The News Tribune serves as Selling and Billing Agent for The Herald, The Northwest Guardian, South Sound Values and as Billing Agent for The Peninsula Gateway.



APPENDIX A
Page 12 of 16



2401 South 35th Street
Tacoma, Washington 98409-7460
(253) 798-7210 • FAX (253) 798-7425

SOURCE DOCUMENT

August 19, 2008

Councilmember Terry Lee, Chair
Pierce County Council
930 Tacoma Avenue S., Room 1046
Tacoma, WA 98402

Dear Councilmember Lee:

RE: SEPA for Ordinance 2008-68

I have reviewed Ordinance 2008-68 which amends Title 20 of the Pierce County Code, Shoreline Management Use Regulations. Ordinance 2008-68 amends county code to include Section 20.20.020 which was originally considered under Ordinance 2007-34s2. The State Environmental Policy Act review performed for Ordinance 2007-34s2 adequately addressed the scope of Section 20.20.020 which was considered as part of the environmental determination issued on March 8, 2007, under Application No. 589222.

No further environmental review is required for Ordinance 2008-68.

Please call me if you have any questions.

Sincerely,

Kathleen Larrabee
Resource Management Supervisor

KF:vl
F:\...\Shore\August19.doc

RECEIVED
AUG 19 2008
PIERCE COUNTY COUNCIL
By: _____



PROPOSED ORDINANCE OR RESOLUTION

DATA SHEET

Proposal No.

2008-68

To be Inserted by the Clerk of the Council

Pierce County

Direct Questions to the Clerk of the Council at (253) 798-7777.

1. Date Prepared: August 19, 2008	Signature Block	
2. Date Received by Council Clerk: 8/19/08	5. County Executive	8. Prime Sponsor(s)
3. Drafted by (Name, Dept., Phone Number) Susan Long 798-6068	6. Department Head	
4. Council Staff Contact (Name and Phone Number): Susan Long 798-6068 Mike Kruger 798-6067	7. Budget and Finance (if appropriate - see instructions)	9. Risk Management (if appropriate - see instructions)

11. <input checked="" type="checkbox"/> Effective Date Desired: asap <input checked="" type="checkbox"/> Final Hearing Date Desired: 8/19/08 <input type="checkbox"/> A Committee Hearing Date is Planned. Date: Committee Name: Explanation:	10. Assigned Deputy Prosecuting Attorney (Name and Phone Number) Pete Philley 798-4173
	12. Is This an Official Control? See Instructions. <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

13. Complete Title of Ordinance or Resolution:

An Emergency Ordinance of the Pierce County Council Regarding Interim Amendments to Title 20 of the Pierce County Code, "Shoreline Management Use Regulations"; Readopting Pierce County Code Section 20.20.020, "Critical Areas," as Adopted by Ordinance No. 2007-34s2; Setting an Effective Date; Providing a Sunset of the Interim Regulation upon the Implementation of the Comprehensive Update to the Pierce County Shoreline Master Program and Declaring an Emergency.

14. List Code Changes Proposed: 1. New Chapter/Section: 2. Amends: PCC 20.20.020 3. Repeals: 4. None Proposed: <input type="checkbox"/>	15. List Special Advertising or Posting Requirements, Include Code Citations:
--	---

16. Summary and Intent of This Legislation:

In consideration of the recent WA Supreme Court decision and in order to protect Pierce County's environmentally sensitive shorelines, this emergency ordinance would incorporate by reference the County's standards for critical area protection as set forth in Title 18E PCC, thus assuring that all shoreline use activities shall be required to comply with the provisions of Title 18E PCC in addition to the standard and guidelines for each use activity in Title 20 PCC.

What Prompted This Legislation? **Washington State Supreme Court decision (Futurewise v. WWGMHB and Anacortes, Court Docket Number 80396-0) that Critical Areas within the jurisdiction of the Shoreline Management Act be governed only by the Shoreline Management Act.**

APPENDIX "A"

Review of final amendments by Council staff: _____ Date: _____
Page 14 of 18
Clerk sent copy of Data Sheet to: Executive Drafter of Proposal

17. Source Documents: List All Materials Included as Part of the Official Record, or as Backup Information. Use Additional Pages, if Necessary.

1. **2007-34s2**
2. **2008-25**
- 3.
- 4.

- 5.
- 6.
- 7.
- 8.

18. Electronic Copy of Proposal and Exhibits Attached as:

- Floppy Disk, CD, Email to Clerk,
 in Council Directory.

Filenames:

Ord/Res: **mkruger/draftprop/2008-68**
Exhibit A: **mkruger/draftprop/2008-68**
Exhibit B:
Exhibit C:
More Filenames: **mkruger/draftprop/2008-68**
datasheet.doc

19. Electronic Copy of Interested Parties List (IPL) Attached:

- Floppy Disk, CD, Email to Clerk,
 In Council Directory.

Interested Parties List Filename(s):

20. Select Subject Area from the Drop-Down Menu Below. Click on the Field to See Entire List. To Choose a Second Subject Area, Use the Second Drop-Down List:

- None -
- None -

21. Distribution List for Sending Final Signed Copy of Proposal:

John Ladenburg, County Executive
Pierce County Library
Municipal Research and Services Center
Law Library
State Examiner
Susan Long, Code Revisor
Linda Medley, Council Legal Clerk (Ordinances amending the Code)
Council Record Book
Deb Hyde
Pete Philley
Chuck Kleeberg

Paula Ehlers, Dept. of Ecology, PO Box 47775, Olympia WA 98504-7775

22. Fiscal Note. The "totals" cells in this table are automatically calculated for you. Use whole numbers, no decimals, for dollar amounts. Use the *Comments* sections for any explanations.

This Proposal has No or De-minimus Fiscal Impact.

Comments:

EXPENDITURES	Current Year	Full Year 1	Full Year 2	Full Years (3-5) Combined	TOTALS
Program 1					
Operating Costs					\$0
Capital Costs					\$0
Total Program 1	\$0	\$0	\$0	\$0	\$0
Number of FTE positions (annual basis)					
Program 2					
Operating Costs					\$0
Capital Costs					\$0
Total Program 2	\$0	\$0	\$0	\$0	\$0
Number of FTE positions (annual basis)					
Program 3					
Operating Costs					\$0
Capital Costs					\$0
Total Program 3	\$0	\$0	\$0	\$0	\$0
Number of FTE positions (annual basis)					
TOTAL EXPENDITURES	\$0	\$0	\$0	\$0	\$0

Comments:

REVENUE SOURCES	Current Year	Full Year 1	Full Year 2	Full Years (3-5) Combined	TOTALS
1.					\$0
2.					\$0
3.					\$0
4.					\$0
TOTAL REVENUES	\$0	\$0	\$0	\$0	\$0

Comments:

Fiscal Note Prepared by:

Date Prepared:

Council Data Sheet form 04-27-06

1 Sponsored by: Councilmember Terry Lee
2 Requested by: County Executive/Planning and Land Services

File No. 399

3
4
5 **ORDINANCE NO. 2007-34s2**
6
7

8 **An Ordinance of the Pierce County Council Adopting Amendments to Title**
9 **20 of the Pierce County Code, "Shoreline Management Use**
10 **Regulations", Establishing Interim Regulatory Requirements**
11 **for Geoduck Aquacultural Operations and Other Aquaculture**
12 **Practices; Modifying Definitions and Permitted Uses; Setting**
13 **an Effective Date; Providing for the Sunset of the Interim**
14 **Requirements Upon the Implementation of the**
15 **Comprehensive Update to the Pierce County Shoreline**
16 **Master Program; and Adopting Findings of Fact.**
17

18 **Whereas**, Phase I of the Pierce County Shoreline Master Program was adopted
19 by the Board of Pierce County Commissioners on March 4, 1974, in compliance with the
20 Washington State Shoreline Management Act of 1971; and
21

22 **Whereas**, the Pierce County Shoreline Use Regulations, providing implementing
23 regulations for the goals and policies in Phase I of the Shoreline Master Program, were
24 adopted by the Board of Commissioners on April 4, 1975; and
25

26 **Whereas**, while several amendments to the Shoreline Use Regulations have
27 been adopted since its initial adoption in 1975, the County has never conducted a
28 comprehensive update to the Shoreline Master Program; and
29

30 **Whereas**, Pierce County has initiated a three-year process to complete a
31 comprehensive update to the Shoreline Master Program, with anticipated adoption by
32 the Pierce County Council in 2009, subject to subsequent review and approval by the
33 Washington State Department of Ecology; and
34



1 **Whereas**, Pierce County has become aware of developments and activities in
2 marine waters of the County relating to intertidal geoduck aquaculture; and piers, docks,
3 and related structures that are not adequately addressed in the Shoreline Use
4 Regulations; and

5
6 **Whereas**, in order to properly address emerging issues relating to aquaculture
7 and shoreline structures prior to completion of the comprehensive update to the
8 Shoreline Master Program, it is necessary to adopt interim regulations to provide for
9 consistent and predictable County review of these developments and activities; and

10
11 **Whereas**, on September 12, 2006, the Pierce County Council adopted
12 Resolution No. R2006-96, directing the Planning and Land Services Department to
13 develop recommendations regarding aquacultural practices in consultation with the
14 Washington State Department of Ecology and other appropriate agencies, and that
15 these recommendations should address the impact of aquacultural practices on water
16 quality, the nearshore environment, and general aesthetic quality of the shoreline; and

17
18 **Whereas**, also on September 12, 2006, the Pierce County Council adopted
19 Resolution No. R2006-97, directing the Planning and Land Services Department to
20 develop recommendations regarding the maximum length of saltwater docks and piers,
21 which included disincentives for single use structures and incentives for joint use
22 structures, and to evaluate and develop recommendations for floating boat lifts; and

23
24 **Whereas**, on November 8 and December 5, 2006, the Peninsula Advisory
25 Commission reviewed the proposed interim regulations for aquaculture and piers,
26 docks, and related structures, and made recommendations on December 5, 2006; and

27
28 **Whereas**, the Pierce County Planning Commission reviewed the proposed
29 interim regulations on December 12, 2006 and January 23, 2007, and made
30 recommendations on January 23, 2007; and

31
32 **Whereas**, the Responsible Official conducted an environmental review of the
33 proposed amendments to the Pierce County Development Regulations - Zoning, and
34 issued a Determination of Nonsignificance (DNS) to address amendments to the Pierce
35 County Shoreline Use Regulations Title 20, on March 8, 2007, to satisfy the
36 requirements of the State Environmental Policy Act (SEPA) ; and
37



1 **Whereas**, the comprehensive update to the Shoreline Master Program will be the
2 culmination of an intensive process that will include a multi-faceted public participation
3 process, detailed inventory and characterization of ecosystem-wide processes,
4 shoreline functions, opportunities for protection, restoration, public access, and
5 shoreline use, and development of shoreline environment designations, goals, policies,
6 regulations, restoration plan and implementation strategy; and
7

8 **Whereas**, due to the intensive review and analysis to which the comprehensive
9 update will be subject, it is appropriate that the interim regulations should sunset upon
10 the comprehensive update becoming effective; and
11

12 **Whereas**, it is the Pierce County Council's intent to have the appropriate interim
13 regulations for aquacultural practices adopted as soon as it is legally possible; and
14

15 **Whereas**, the Pierce County Council acknowledges the concerns raised by the
16 Peninsula Advisory Commission and others regarding the location and design of piers
17 and docks but believes additional evaluation is necessary prior to considering regulatory
18 changes. Accordingly, the Council desires to defer this issue to the ongoing
19 comprehensive update of the Shoreline Master Program; and
20

21 **Whereas**, the Pierce County Council finds that it is in the public interest to adopt
22 the amendments set forth; **Now Therefore**,

23
24 **BE IT ORDAINED by the Council of Pierce County:**

25
26 Section 1. The Pierce County Shoreline Use Regulations Title 20 are hereby
27 amended as set forth in Exhibit A, which is attached hereto and incorporated herein.
28

29 Section 2. Findings of Fact documenting the actions taken by the County
30 Council are hereby adopted as set forth in Exhibit B, attached hereto and incorporated
31 herein.
32

33 Section 3. If any provision of this Ordinance or the amendments to Title 20 or the
34 Zoning Atlas are found to be illegal, invalid, or unenforceable, the remaining provisions
35 of this Ordinance or the Shoreline Use Regulations shall remain in full force and effect.
36



1 Section 4. Pursuant to Washington Administrative Code (WAC) 173-26-120, this
2 Ordinance shall not become effective until approved by the Department of Ecology.
3 Upon receiving such approval, the effective date of the Ordinance shall be the date of
4 the Department of Ecology's letter to Pierce County approving the Shoreline
5 Management Use Regulation amendments set forth in Exhibit A.

6
7 Section 5. This Ordinance shall sunset upon the implementation of the
8 comprehensive update of Pierce County's Shoreline Master Program.

9
10 **PASSED** this ____ day of _____, 2007.

11
12 **ATTEST:**

PIERCE COUNTY COUNCIL
Pierce County, Washington

13
14
15
16
17 _____
18 **Denise D. Johnson**
19 Clerk of the Council

Terry Lee
Council Chair

20
21
22 _____
23 **John W. Ladenburg**
24 Pierce County Executive
25 Approved ____ Vetoed _____, this
26 _____ day of _____,
27 2007.

28 Date of Publication of
29 Notice of Public Hearing: _____

30
31 Effective Date of Ordinance: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39

Chapter 20.20

INTRODUCTION TO USE ACTIVITY REGULATIONS

Sections:

20.20.010 Use Activity Regulations.

20.20.020 Critical Areas.

20.20.010 Use Activity Regulations.

Shoreline use activities are classifications of the various types of developments or activities which can be anticipated to be carried out on or occupy shoreline locations.

The Department of Ecology final guidelines for Master Program development established 21 use activities and set minimum guidelines for managing each activity. In addition to this, Pierce County's Citizens Advisory Committee added four use activities which were felt needed in order to effectively manage the shoreline areas of Pierce County.

The use activity regulations are a means of implementing the more general policies of Phase I of the Master Program and the Shoreline Management Act.

The regulations of each use activity have been developed on the premise that all appropriate shoreline uses require some degree of control in order to minimize adverse affects to the shoreline environment and adjoining properties.

Each project which falls within the jurisdiction of the Act will be evaluated to determine its conformance with the use activity regulations as well as the goals and policies of Phase I of the Master Program.

20.20.020 Critical Areas.

Pursuant to RCW 66.04.010, the Master Program is a central element in the development of critical areas regulations, including, but not limited to, shoreline areas within shorelines of the state that exist because of the level of protection provided to critical areas by the local government's critical area ordinances adopted and thereafter amended pursuant to RCW 66.04.06(2). The County's standards for critical area protection are set forth in Title 20.20 Development Regulations - Critical Areas, and are hereby incorporated by reference within Title 20. All shoreline use activities shall be required to comply with the provisions of Title 20 in addition to the specific standards and guidelines for each use activity set forth within Title 20.



Chapter 20.24

AQUACULTURAL PRACTICES

Sections:

20.24.010 Definitions.

20.24.020 Guidelines for Reviewing Substantial Development Permits.

20.24.030 Environment Regulations - Uses Permitted.

20.24.010 Definitions.

- A. **Aquaculture.** The commercial culture and farming of food fish, shellfish, and other aquatic plants and animals in lakes, streams, inlets, estuaries, and other natural or artificial water bodies.
- B. **Aquacultural Practices.** The hatching, cultivating, planting, feeding, raising, harvesting, and processing of aquatic plants and animals, and the maintenance and construction of necessary equipment, buildings, and growing areas. Methods of aquaculture include but are not limited to fish pens, shellfish rafts, racks and longlines, seaweed floats and the culture of clams and oysters in tidal and other shoreline areas.
- C. **Water Dependent Aquaculture Uses.** All uses that cannot exist in any other location and are dependent on the water by reason of the intrinsic nature of the operation. Examples of water dependent uses include but are not limited to the following:
 - 1. Boat launch facilities.
 - 2. Fish pens.
 - 3. Shellfish and seaweed rafts and floats.
 - 4. Racks and longlines.
- D. **Water Related Aquaculture Uses.** Those uses which are not intrinsically dependent on a waterfront location to continue their operation, but whose operation in Pierce County cannot occur economically at this time without a shoreline location. Examples of water related uses include but are not limited to the following:
 - 1. Aquaculture commodities processing plants.
 - 2. Culturing facilities.
 - 3. Boat storage facilities.
- E. **Nonwater Related Aquaculture Uses.** Those uses which do not need a waterfront location to operate though easements or utility corridors for access to the water may be desired. Examples of nonwater related uses include but are not limited to the following:
 - 1. Warehouses and storage areas.
 - 2. Office buildings.
 - 3. Parking lots.

(Ord. 88-76S § 1 (part), 1988; Ord. 82-46 § 1 (part), 1984; Res. 18562-A § 1 (part), 1976; prior Code § 65.24.010)

20.24.020 ~~Standards and~~ Guidelines for Reviewing Substantial Development Permits.

The following regulations apply to aquaculture and aquaculture practices in all shoreline environments:



- 1 A. Development Guidelines. In lieu of specific standards relating to design, bulk, and use,
2 the following guidelines shall be applied to the County's reviewing authority to a site
3 specific project application for a substantial development permit in arriving at a
4 satisfactory degree of consistency with the policies and criteria set forth in this Chapter
5 and Chapter 20.30. To this end, the County may extend, restrict, or deny an application
6 to achieve said purpose.
- 7 1. The use of shoreline areas for aquaculture shall be encouraged for the production of
8 commodities for human consumption and utilization.
 - 9 2. Aquaculture development shall not cause extensive erosion or accretion along
10 adjacent shorelands.
 - 11 3. Aquacultural operations shall be conducted in a manner which precludes damage to
12 specific fragile areas and existing aquatic resources. These operations shall
13 maintain the highest possible levels of environmental quality and compatibility with
14 native flora and fauna.
 - 15 4. Aquaculture operations shall be in conformance with the most current applicable
16 local, state and federal regulations for water quality, noise, and odor and waste
17 management. Where water withdrawal is required, a water registration permit must
18 be obtained.
 - 19 5. Conflicts between the aquaculture use and the navigational access of current upland
20 residents, and intense recreational boating, commercial fishing, and other
21 commercial traffic can be minimized.
 - 22 6. Conflicts between the aquaculture use and the visual access of current upland
23 residents or the general aesthetic quality of the shoreline can be minimized.
 - 24 7. As technology expands with increasing knowledge and experience, preference shall
25 be placed on feasible structures which minimize interference with navigation or the
26 impairment of the aesthetic quality of the shoreline.
 - 27 8. A baseline study at or near the proposed aquaculture site may be required only
28 when the permit reviewing authority deems necessary.
 - 29 9. Where an aquaculture operation is proposed for a constricted body of water, a
30 flushing study may be required when the permit reviewing authority deems
31 necessary.
 - 32 10. Shoreline areas having the prerequisite qualities for aquacultural uses shall have
33 priority in order to protect Pierce County's aquacultural potential.
 - 34 11. Prior to beginning aquaculture operations, aquaculture permits must be obtained
35 from the State Department of Fisheries.
 - 36 12. The scale of aquaculture operations shall be in proportion with the surface area and
37 configuration of the affected water body.
 - 38 13. All water related and non-water related aquaculture structures may be required to be
39 landscaped to screen them from adjacent uses to the shoreline.
 - 40 14. Joint use of facilities such as boat launches and storage buildings is encouraged.
 - 41 15. Aquaculture developments are to be maintained in a safe and sound condition.
 - 42



1 **B. Specific Standards Applicable to Geoduck Aquaculture.** The following standards
2 relating to design, location, bulk, and use shall apply to geoduck aquaculture and
3 are in addition to the Development Guidelines set forth in Section 20.24.020 A.
4 Compliance with these standards must be determined by the County's reviewing
5 authority to approve a site specific project application.

6 **1. Delineation of Harvest Area and Demonstrated Right to Harvest**

7 a. Documentation of ownership or present right of possession of land and tidelands
8 proposed to be utilized for the operation shall be submitted at the time of
9 application. The documentation shall demonstrate the right to plant and harvest
10 geoducks and shall include a survey of the area to be utilized for the operation.

11 b. The boundaries of the harvest area shall be marked at all corners with marker
12 buoys for the duration of the operation in order to identify the operation
13 boundaries to the public.

14 **2. Access to Harvest Area**

15 a. Access to the operation shall be primarily from the water.

16 b. Access from the land may be allowed when a designated vehicle parking and
17 staging area is provided. The parking and staging area shall be identified as part
18 of the application, shall be located on private property, and shall be located
19 above the ordinary high water mark. Documentation of property owner consent
20 authorizing the operation to utilize the parking and staging area shall be
21 provided.

22 c. The use of vehicles and other heavy equipment on intertidal areas and beaches
23 should be avoided or minimized. The application shall describe any vehicle and
24 heavy equipment proposed to be utilized on intertidal areas and measures to be
25 taken to minimize impacts.

26 **3. Hours and Days of Operation**

27 a. Hours and days of operation shall be identified as a condition of approval for a
28 geoduck aquaculture operation and should be consistent with the management
29 practices for geoduck fisheries set forth in the State of Washington Commercial
30 Geoduck Fishery Management Plan, dated May 23, 2001.

31 b. Night and weekend seeding and harvest operations should only be permitted
32 where the operation is located 1000 feet or more from residential dwellings and
33 public park sites.

34 **4. Visual Impacts**

35 a. Permanent lighting shall not be permitted. Temporary lighting for nighttime
36 activities should be the minimum necessary for safe and efficient operations.

37 b. Tubes and netting shall be a neutral color (white, beige, gray, or black).

38 c. All tools and products of harvest activities must be removed from the site when
39 each day's harvest is completed.

40 **5. Impacts to Public Use**

41 a. Aquacultural equipment, structures, and other materials (pipes, nets) shall be
42 removed as soon as practical when young geoducks are no longer vulnerable to
43 predators.

44 b. The adjoining neighbors should be informed of upcoming harvest activities, at
45 least five days in advance.

46 c. Noise from pumps, generators, and other mechanical devices, radios, etc. should
47 be minimized and be consistent with Pierce County and State of Washington



1 noise standards. Allowable noise thresholds should consider the potential for
2 harvest noise to affect nearby residences

3 d. A 10 foot setback shall be maintained between adjoining properties and
4 aquaculture operations.

5 **6. Litter Control.**

6 a. All tubes and nets and any other equipment left on the beach shall be marked so
7 as to identify ownership. The marking or identification of equipment shall be
8 substantial enough to withstand the natural elements.

9 b. Excess and/or non-secured tubing, netting and other materials must be removed
10 from the beach prior to the next incoming tide so that all debris, nets, bands, etc.
11 are maintained and prevented from littering the waters or the beaches.

12 c. Predator exclusion nets should be designed so they do not break free and cause
13 beach littering onsite or offsite. Individual tube netting shall be employed and
14 secured with UV-resistant fasteners. Any large cover nets employed shall be
15 designed to minimize the risk to wildlife and humans. Any netting used shall be
16 tagged for identification purposes.

17 d. A tube placement and removal schedule shall be submitted to the Planning and
18 Land Services Department at least 30 days prior to public hearing for the
19 Substantial Development Permit and shall be made a condition of approval. This
20 schedule shall specify the anticipated dates for tube placement and removal. At a
21 minimum, all tubes and associated netting and net securing devices shall be
22 removed from the site no later than two years plus six months from time of
23 placement.

24 e. The applicant/property owner must obtain a bond or financial guarantee in the
25 amount of \$1,000 per tube placed, or such lesser amount determined adequate by
26 the Hearing Examiner. This is to ensure that all aquaculture equipment,
27 specifically the tubes, netting and net securing devices will be completely
28 removed from the site in accordance with the timelines set forth within the tube
29 placement and removal schedule. Failure to remove tubes, netting and net
30 securing devices within the time periods specified in the tube placement and
31 removal schedule shall result in enforcement actions pursuant to Chapter 18.140
32 Pierce County Code. In the event that it becomes necessary for Pierce County to
33 take action to physically remove the tubes, netting, or net securing devices
34 pursuant to the authority granted under Section 18.140.040 D 2, PCC, the
35 bond/financial guarantee shall be forfeited. Additionally, Pierce County shall
36 seek revocation of all approvals granted to harvest the geoduck following the
37 procedures set forth in Section 18.140.060, PCC.

38 f. Area beaches within 1/2 mile on either side of the project site should be patrolled
39 by the applicant on a schedule approved by Pierce County to retrieve debris that
40 escapes from the geoduck operation, subject to beach owner's permission to
41 enter.

42 **7. Harvest method.**

43 a. The following best management practices derived from the Best Management
44 Practices (BMP's) for Geoduck Aquaculture on State Owned Aquatic Lands in
45 Washington State developed by the Washington State Department of Natural
46 Resources should be followed during harvest.

47 b. Water pumps used for harvest should be placed on floating rafts, which are
48 anchored temporarily in water greater than -1.8 feet (MLLW) in depth. If no



submerged vegetation is present and the seabed is shallow for a long distance from the beach, the anchoring of rafts in shallower water will be allowed if the raft is likely to drift over aquatic vegetation, care should be taken in the design of the raft to prevent it from flattening vegetation if exposed at low tide.

ii) Pump intake screens should minimize potential entrainment of aquatic organisms.

iii) Harvesting only be undertaken using low pressure water jets with a nozzle inside the drum. No backflow or backwash should be allowed. The backwash controlled by the operation of the nozzle or screen should be limited to approximately 20% of the water pumped.

iv) Harvest activities should be conducted in a gentle manner. At least a minimum of 10m should be maintained from the shore. Harvesting activities should be limited to the beach movement of sediment. It is recommended that a sediment trap be installed for smaller sediment. A containment method.

20.24.030 Environment Regulations - Uses Permitted.

- A. ~~Subject to the Guidelines for Reviewing Substantial Development Permits, geoduck harvesting is permitted outright in all shoreline environments.~~
 - 1. ~~Geoduck harvesting is to be conducted in a manner consistent with RCW 75.24.100 as now or hereafter amended.~~
 - 2. ~~Information concerning these requirements can be obtained from:~~

Department of Natural Resources Marine Land Division QW-21 Olympia, WA 98504 (360) 754-1473	Department of Fisheries Shellfish Program AX-11 Olympia, WA 98504 (360) 753-6772
--	---

B. ~~Urban, Rural Residential, and Rural Environments.~~ Aquaculture operations are permitted subject to the Guidelines for Reviewing Substantial Development Permits.

~~A. Urban and Rural Residential Environments.~~ Aquaculture operations are limited to fishing, raising, breeding, and harvesting of wild and planted stocks for recreation and commercial purposes that do not involve the use of tubes, netting, or other materials placed in intertidal areas. Such Aquaculture operations that do not involve the use of tubes, netting, or other materials placed in intertidal areas will be allowed upon showing the activity will not substantially change the character of the site or adversely affect natural populations and shall be subject to the Standards and Guidelines for Reviewing Substantial Development Permits.

~~C. Rural and Conservancy Environments.~~ Aquaculture operations which do not involve the placement of land based structures are permitted subject to the ~~Standards and Guidelines for Reviewing Substantial Development Permits.~~ Aquaculture operations which involve the development of land based structures are allowed as Conditional Uses and subject to the ~~Standards and Guidelines for Reviewing Substantial Development Permits.~~

~~D. Natural Environment.~~ Aquaculture operations are limited to fishing and the harvesting of wild and planted stocks for recreation and commercial purposes. Operations which



1
2
3
4
5
6
7

do not involve ~~planting in intertidal areas~~, the placement of structures or fill in the aquatic or terrestrial environment, ~~or the use of tubes, netting, or other materials placed in intertidal areas~~ will be allowed as a Conditional Use, upon showing the activity will not substantially change the character of the site or adversely affect natural populations and shall be subject to the ~~Standards and~~ Guidelines for Reviewing Substantial Development Permits. Operations involving structural developments are prohibited.



Chapter 20.56

PIERS AND DOCKS

Sections:

20.56.010 Definitions.

20.56.020 Intent.

20.56.030 Environment Regulations - Uses Permitted.

20.56.040 General Criteria and Standards Guidelines for Reviewing Substantial Development Permits.

20.56.010 Definitions.

- A. **Dock.** A "Dock" shall mean a structure which abuts the shoreline and floats upon the water and is used as a landing or moorage place for marine transport or for recreational purposes, but does not include recreational decks, storage facilities, or other appurtenances.
- B. **Pier.** A "Pier" shall mean a structure which abuts the shoreline and is built over the water on pilings and is used as a landing or moorage place for marine transport or for recreational purposes.
- C. **Float/Float Lift.** A "Float" shall mean a structure comprised of a number of logs, boards, barrels, etc., fastened together into a platform capable of floating on water, used as a landing or moorage structure for marine transport or for swimming purposes. A "Float Lift" shall mean a structure (i.e. hydraulic boat lift or boat storage unit) designed to float on the water and have the capability of lifting a boat out of the water for storage or moorage purposes. Floats/float lifts are either attached to a pier or are anchored to the bedlands so as to allow free movement up or down with the rising or falling water levels.
- D. **Gangway.** A "Gangway" shall mean a sloping structure which provides access from a pier to a float.
- E. **Intrusion into the Water.** "Intrusion into the Water" shall mean the length of a dock or pier together with any attached structures such as a gangway and/or float measured along a perpendicular line from the ordinary high water line or lawfully established bulkhead to the most seaward projection of the structure.
- F. **Length Parallel to Shore.** "Length Parallel to Shore" shall mean the width of a pier or dock at its widest point measured parallel to the shoreline or the combined width of a pier, dock, and any attached structures such as a float at the widest point.
- G. **Fetch.** "Fetch" shall mean the horizontal distance across a body of water measured in a straight line from the most seaward point along the ordinary high water line or lawfully established bulkhead on a given stretch of shoreline to the closest point on the ordinary high water line or lawfully established bulkhead on a separate stretch of the opposite shoreline.
For the purposes of this Chapter, "Fetch" shall be determined as follows:
 - 1. Identify the parcel of land on which the subject structure is located. In the case of a joint use structure that straddles a property line, both parcels shall be considered together as one parcel.
 - 2. Identify each of the two parcel property lines that intersect the ordinary high water mark, and identify these two points of intersection.



3. Draw a straight line between the two points of intersection referred to in step 2.
4. Identify the point at which the structure meets the ordinary high water mark.
5. Draw a line, perpendicular to the line referred to in step 3, that intersects the point where the structure meets the ordinary high water mark.
6. Beginning at the point where the structure meets the ordinary high water mark, draw two 45 degree angles extending waterward, one on each side of the line drawn in step 5.
7. Beginning at the point of intersection referred to in step 5, draw a straight line to the closest point at the ordinary high water mark on any shoreline that lies within either of the two 45 degree angles and is not located on the subject parcel.
8. The fetch is the length of the straight line drawn in step 7.

H. Opposite Shore. "Opposite Shore" shall mean the area of shoreline across a body of water, from a given lot or tract of land that lies within an arc, the centerpoint of the arc being the mid point of a base line which is a straight line drawn between the point of intersection of one lot sideline with the shoreline and the intersection of the opposite side lot line with the shoreline; the length of said radius being the distance between the mid point of said line and the intersection of said radius line with the shoreline across the body of water measured perpendicular to the base line.

II. Single Use Pier or Dock. "Single Use Pier or Dock" shall mean a dock or pier including a gangway and/or float which is intended for the private noncommercial use of one individual or family.

III. Joint Use Pier or Dock. "Joint Use Pier or Dock" shall mean a pier or dock including a gangway and/or float which is intended for the private, noncommercial use of not more than by the residents of two to four waterfront building lots under separate ownership owners, where at least one boundary of whose each building lots lies within 1,000 feet of the boundary of the lot on which the joint use pier or dock is to be constructed.

IV. Community Pier or Dock. "Community Pier or Dock" shall mean a pier or dock including a gangway and/or float which is intended for use in common by lot owners or residents of a subdivision or residential planned development district.

V. Public Recreational Pier or Dock. "Public Recreational Pier or Dock" shall mean a pier or dock including a gangway and/or float either publicly or privately owned and maintained intended for use by the general public for recreational purposes, but not to include docks constructed as part of a marine development.

VI. Private Recreational Pier or Dock. "Private Recreational Pier or Dock" shall mean a pier or dock including a gangway and/or float which is owned and maintained by a private group, club, association or other organization and is intended for use by its members.

VII. Commercial-Industrial Pier or Dock. "Commercial-Industrial Pier or Dock" shall mean a pier or dock including a gangway and/or float which is intended for any commercial or industrial use other than storage or moorage of boats used for recreational purposes.

VIII. Constricted Body of Water. "Constricted Body of Water" shall mean any tidal basin having a width at the entrance which is less than half of the inner distance, measured from the entrance to the innermost shoreline.

20.56.020 Intent.

It is the intent of Pierce County to encourage the construction of joint use or community use docks and piers whenever feasible so as to lessen the number of structures projecting into the



1 water. To this end, waterfront property owners are encouraged to explore the advantages of
2 increased dock dimensions which are afforded by the construction of a joint or community use
3 structure.

4
5 **20.56.030 Environment Regulations - Uses Permitted.**

6 **A. Urban Environment.**

- 7 1. ~~Subject to the standards in Section 20.56.040, the following~~ Uses are permitted
8 outright: (The issuance of a building permit ~~and review by other agencies~~ may be
9 required.)
- 10 a. Floating type navigation aids such as channel markers.
 - 11 b. Anchor buoys limited to one per waterfront lot owner, ~~located between the side~~
12 ~~property lines extended at a right angle to the shoreline or one per 100 feet of~~
13 ~~shoreline frontage.~~
 - 14 c. One uncovered float/float lift, pier and float/float lift, or dock as an accessory use
15 and located on, or in front of the same lot, tract or parcel of land as a single
16 family dwelling.
 - 17 (1) The dock, pier or float/float lift shall be designed for swimming and/or
18 mooring/~~storing~~ pleasure craft only, for the private noncommercial use of
19 the owners, lessee or contract purchaser or the single family residence to
20 which the float or dock is accessory provided the cost or fair market value,
21 whichever is higher, does not exceed ~~\$5,000~~ 2,500.
 - 22 (2) Floats/~~float lifts~~ shall be so anchored as to allow clear passage on all sides
23 by small watercraft and shall extend at least eight inches above the water
24 surface.
 - 25 (3) ~~Floats/float lifts~~ shall have an overall area not exceeding 100 square feet.
 - 26 (4) ~~Floats/float lifts~~, piers, and docks shall be located not closer than ten feet to
27 a side property line except for docks intended for joint use.
 - 28 (5) Saltwater docks and piers shall have an intrusion into the water of not more
29 than 50 feet or only so long as to obtain a depth of eight feet, whichever is
30 less as measured at mean lower low water, except that the intrusion into
31 water of any pier or dock on saltwater shall not exceed 15 percent of the
32 fetch. Maximum length parallel to shore shall be eight feet.
 - 33 (6) Fresh water docks and piers shall have an intrusion into the water of not
34 more than 30 feet or only so long as to obtain a depth of eight feet,
35 whichever is less as measured at ordinary high water; except that the
36 intrusion into water of any dock or pier on fresh water shall not exceed 15
37 percent of the fetch. Maximum length parallel to shore shall be eight feet.
- 38 2. Uses permitted subject to the granting of a Substantial Development Permit upon a
39 finding by the appropriate County reviewing authority, of consistency with the
40 criteria and ~~standards~~ guidelines of Section 20.56.040; and subject also to the
41 granting of a building permit.
- 42 a. Uses permitted outright in subsection A.1., but which exceed the limitations set
43 forth in subsection A.1. ~~provided there are no more than two uses allowed per~~
44 ~~property;~~
 - 45 b. Joint use pier or dock, uncovered ~~provided there are no more than two uses~~
46 ~~allowed per property;~~
 - 47 c. Community pier or dock, uncovered;
 - 48 d. Recreational pier or dock, uncovered;



1
2
3
4
5
6
7
8
9

- e. Commercial and industrial pier, covered or uncovered;
- f. Navigational aids, non-floating.
- B. **Rural-Residential Environment.** Same as Urban Environment.
- C. **Rural Environment.** Same as Urban Environment.
- D. **Conservancy Environment.** Same as Urban Environment, except only water dependent and water related commercial and light industrial piers are allowed as a conditional use. ~~Piers, docks, and floats/float lifts are prohibited in marine waters.~~
- E. **Natural Environment.** Piers, docks and floats are prohibited.
- ~~F. Covered piers, docks, and floats/float lifts are prohibited in all Environment designations.~~



1
2
3
4
5
6
7
8

FIGURE 1

ILLUSTRATIONS OF MEASUREMENTS

W = Length of Parallel to Shore
L = Intrusion Into the Water

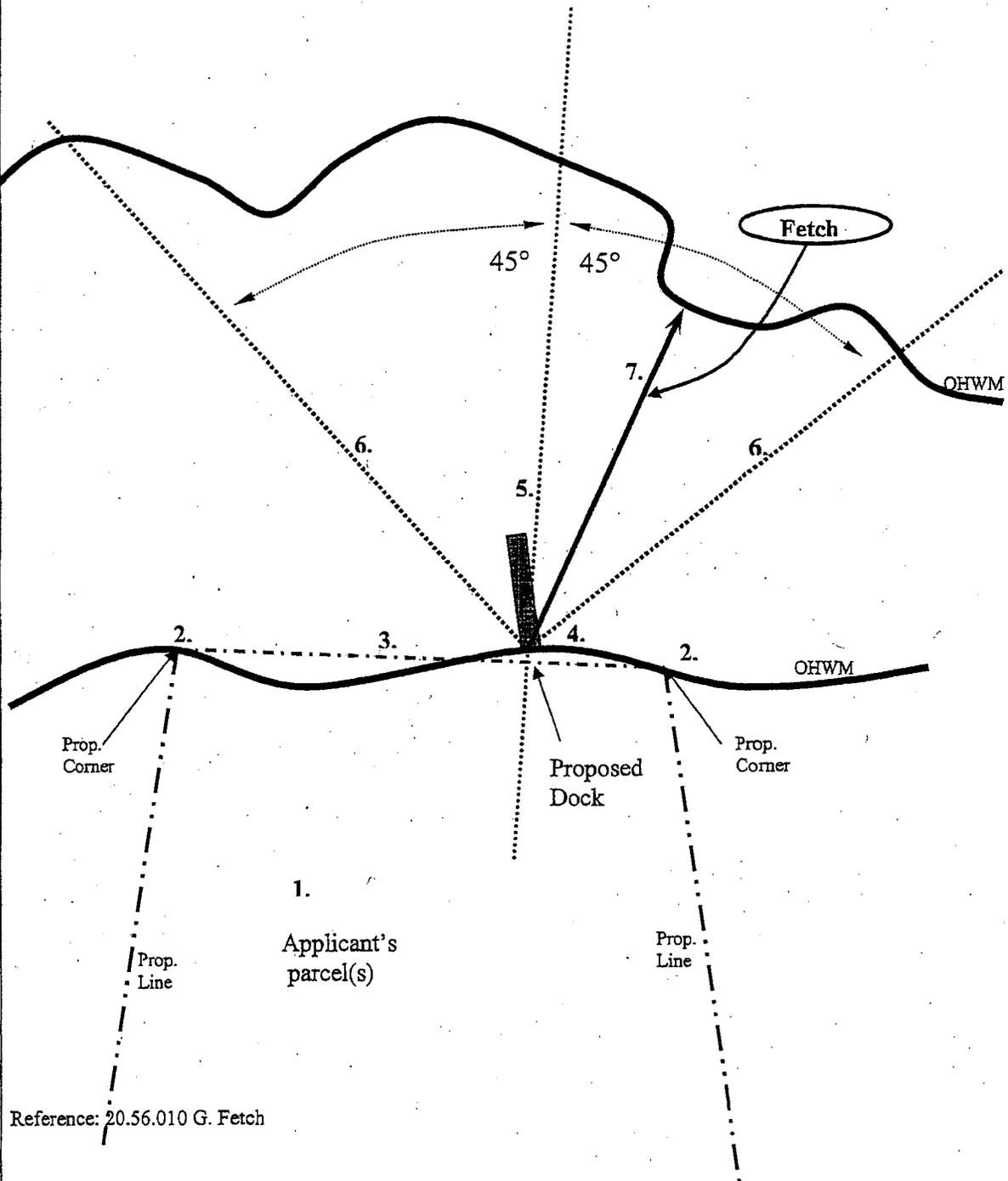
(No changes to Figure 1 are proposed.)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55

FIGURE 2

~~OPPOSITE SHORE DETERMINING FETCH~~



FINDINGS OF FACT

The Pierce County Council finds:

1. Phase I of the Pierce County Shoreline Master Program was adopted by the Board of Pierce County Commissioners on March 4, 1974 in compliance with the Washington State Shoreline Management Act of 1971.
2. The Pierce County Shoreline Use Regulations, providing implementing regulations for the goals and policies in Phase I of the Shoreline Master Program, were adopted by Board of Commissioners on April 4, 1975.
3. While several amendments to the Shoreline Use Regulations have been adopted since its initial adoption in 1975, the County has never conducted a comprehensive update to the Shoreline Master Program.
4. Pierce County has initiated a three-year process to complete a comprehensive update to the Shoreline Master Program, with anticipated adoption by the Pierce County Council in 2009, subject to subsequent review and approval by the Washington State Department of Ecology.
5. Pierce County has become aware of developments and activities in marine waters of the County relating to intertidal geoduck aquaculture and piers, docks, and related structures that are not adequately addressed in the Shoreline Use Regulations.
6. In order to properly address emerging issues relating to aquaculture and shoreline structures prior to completion of the comprehensive update to the Shoreline Master Program; it is necessary to adopt interim regulations to provide for consistent and predictable County review of these developments and activities.
7. On September 12, 2006, the Pierce County Council adopted Resolution No. R2006-96, directing the Planning and Land Services Department to develop recommendations regarding aquacultural practices in consultation with the Washington State Department of Ecology and other appropriate agencies, and that these recommendations should address the impact of aquacultural practices on water quality, the nearshore environment, and general aesthetic quality of the shoreline.
8. Also on September 12, 2006, the Pierce County Council adopted Resolution No. R2006-97, directing the Planning and Land Services Department to develop recommendations regarding the maximum length of saltwater docks and piers which included disincentives for single use structures and incentives for joint use structures, and to evaluate and develop recommendations for floating boat lifts.



- 1 9. On November 8 and December 5, 2006, the Peninsula Advisory Commission
2 reviewed the proposed interim regulations for aquaculture and piers, docks, and
3 related structures, and made recommendations on December 5, 2006.
4
- 5 10. The Pierce County Planning Commission reviewed the proposed interim
6 regulations on December 12, 2006 and January 23, 2007, and made
7 recommendations on January 23, 2007.
8
- 9 11. The Responsible Official conducted an environmental review of the proposed
10 amendments to the Pierce County Development Regulations - Zoning, and issued
11 a Determination of Nonsignificance (DNS) to address amendments to the Pierce
12 County Shoreline Use Regulations Title 20, on March 8, 2007, to satisfy the
13 requirements of the State Environmental Policy Act (SEPA).
14
- 15 12. Though described as "interim", the modifications to the Shoreline Use Regulations
16 approved through Ordinance No. 2007-34s are intended to be a component of an
17 iterative process to complete a comprehensive update of the Pierce County
18 Shoreline Master Program and Use Regulations as required by RCW 90.58.080.
19
- 20 13. The Council finds that the adoption of Ordinance No. 2007-34s is necessary to
21 address potential inconsistencies between the Shoreline Use Regulations (Title 20,
22 PCC) and the Shoreline Master Program as related to aquaculture as set forth in
23 Resolution No. R2006-96 and that delaying the addressing of these concerns to
24 the completion of the comprehensive shoreline update could result in adverse
25 impacts to the shoreline environment and the use and enjoyment of the shoreline
26 by the citizens of Pierce County.
27
- 28 14. The Council finds that the adoption of Ordinance No. 2007-34s is the minimum
29 necessary to address the issues set forth in Resolution Nos. R2006-96 and
30 R2006-97.
31

