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No. 90115-5
(Court of Appeals No. 41557-7-II)

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HAL MOORE and MELANIE MOORE; and
LESTER KRUEGER and BETTY KRUEGER,

Respondents/Cross-Petitioners,

v.

STEVE'S OUTBOARD SERVICE, and
STEVEN LOVE and MARY LOU LOVE,

Petitioners.

**SUPPLEMENTAL BRIEF OF RESPONDENTS
MOORE AND KRUEGER**

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 ORIGINAL

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I. INTRODUCTION

This Court should affirm the remand for bench trial of the Moores' and Kruegers' (collectively "Moores") nuisance *per se* claim. The Court of Appeals correctly held that to establish such a claim requires showing that the Loves' use of property violates the law and interferes with others' use and enjoyment of private property. Opinion 21.¹ Moreover, the Moores proved the interference element and obtained unchallenged findings of interference. *See* Supplemental Findings of Fact and Conclusions of Law, FF 17, 22, 23, 25, 29, 30 and CL 16.1 and 16.3 (Supplemental Clerks Papers "SCP" 241-43). Interference, therefore, is a verity on appeal. *Harris v. Urell*, 133 Wn. App. 130, 137, 135 P.3d 530(2006), *rev. denied*, 160 Wn.2d 1012, 161 P.3d 1026 (2007). After the trial court improperly interjected a balancing of the reasonableness of the Loves' use into the nuisance *per se* analysis, the trial court failed to resolve whether the Loves' operation of an engine repair shop violates applicable laws. The remand correctly returns this issue to the trial court.

To avoid remand, the Loves argue that nuisance *per se* claims permit a trial court to balance the reasonableness of the use even where the use violates the law. This is wrong. No precedent supports this formulation of a nuisance *per se* claim. If the legislature already has established duties and obligations that the defendant allegedly has breached, it is not for the trial court to determine that the illegal use is "reasonable." Instead, a party alleging nuisance *per se* who establishes

¹ Appendix A-1.

that a defendant's use of property violates the law need only additionally show interference. This Court should not adopt the Loves' new formulation of nuisance *per se* that permits a trial court to "excuse" a defendant's use in violation of law. This would improperly circumscribe nuisance *per se* claims, conflict with RCW 7.48.120, and undermine existing laws regulating use of shoreline property.

The Moores alleged and introduced evidence to show that the Loves' use of their property for a boat motor repair business violates the Shoreline Management Act's ("SMA") mandatory permit requirements in addition to the local noise code and terms of a highway right-of-way permit. *See* RCW 90.58.140(1), (2); Mason County Code ("MCC") MCC § 7.04.032; MCC § 7.16.005; MCC § 7.16.040.²

Because the trial court determined that the Loves' use was "reasonable," it disregarded whether the Loves operated in compliance with the SMA and local law. On remand, the parties will address whether state law requires a shoreline permit and whether the Loves' operations are consistent with noise regulations and the terms of their highway permit. Where the Moores have established interference, the answer to the legality question on remand will control the outcome of the nuisance *per se* claim. This is consistent with Washington jurisprudence including the

² *See* Appendix A-2. A local government is legally obligated to administer its shoreline regulatory program consistent with the SMA. RCW 90.58.050. Compliance with the SMA may not be excused by a local municipality. *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 943, 230 P.3d 1074 (2012). Thus, "enforcement discretion" is not a factor in this case as to the requirement to obtain a shoreline use permit or approval.

preeminent decision *Tiegs v. Watts*, 135 Wn.2d 1, 14-15, 954 P.2d 877 (1998) (“*Tiegs*”). See also *State v. Boren*, 42 Wn.2d 155, 163, 253 P.2d 939 (1953); *Gill v. LDI*, 19 F.Supp.2d 1188, 1198-99 (W.D. Wash. 1998). It is also consistent with RCW 7.48.120.

II. COUNTER-STATEMENT OF ISSUES

1. Whether the Court of Appeals’ decision is consistent with Washington law with respect to the elements required to establish a claim of private nuisance *per se*, which are: (1) the defendant’s use violates an applicable law; and (2) such violation interferes with the plaintiff’s use or enjoyment of property?
2. Whether the Court of Appeals correctly remanded the issue of nuisance *per se* to the trial court where the lower court failed to determine the legality of the Loves’ operation of an unpermitted business under state and local law?
3. Whether the time limitation for filing a Land Use Petition Act (“LUPA”) appeal is inapplicable because (a) Mason County’s dismissal of a citizen complaint concerning the Loves’ engine shop does not constitute a “land use decision,” (b) the County did not designate any of its actions as appealable final decisions under LUPA, and (c) the nuisance *per se* claim does not depend on the validity of any land use decision?
4. Whether the Court of Appeals correctly reduced the attorney fees awarded at trial because the award combined fees for separate cases in separate courts that could be segregated and correctly denied attorney fees on appeal where the Loves are not a prevailing party under the SMA because the Moores and Kruegers did not appeal the denial of damages under the SMA?

III. COUNTER-STATEMENT OF CASE

The Moores sought injunctive relief to redress the disruptive impacts of an adjacent, unpermitted engine shop in their Hood Canal residential neighborhood. CP 120-128. Their claims put at issue whether

the startling engine revving, fumes, smoke and dangerous intrusion of traffic into the right-of-way interfered with the use and enjoyment of their properties, and whether the engine shop is a lawful, permitted use. CP 120-128. The use intensified after 2004 to up to 199 days of operation per year. CP 115-16. Per Mason County Code, Respondents property is “Class A ADNA—Lands where human beings reside and sleep. According to MCC § 9.36.120(3) the emanation of “frequent, repetitive or continuous sounds ...in connection with the starting, operation, repair, rebuild or testing of any...internal combustion engage...” is prohibited if it interferes with the peace, comfort or repose of the community.

The Loves originally applied for a shoreline permit at the County’s direction in 1994, but withdrew the application after the County issued building permits for a residential building in the location of an old carport and for a residential building described as a “storage shed/pumphouse.”³

³ In 1994, Mr. Love sought shoreline permits to build a 30-foot by 45-foot metal building repair shop at his home “to provide for boat motor repair shop.” **Exs.1-2.** (Loves’ Supplemental Designation of Clerks Papers, filed on March 29, 2011, consist of Exhibits 1-27 from the June 3-4, 2010 trial; the Superior Court Clerk did not assign separate Clerk’s Papers designations for the exhibits). References to “RP” mean “Verbatim Report of Proceedings.” Love’s application for a Shoreline Substantial Development Permit (“SSDP”) and a Shoreline Conditional Use Permit (“CUP”) stated that the reason for the proposal was “to enlarge existing business due to safety and need for more space.” **Ex.1.** Love knew he needed a CUP to operate a commercial business. **RP 361:15-23.** Love withdrew his shoreline permit application after the Kruegers and Moores objected that the expansion of his engine repair business would be incompatible with the residential character of the neighborhood. **Ex.3; RP 362; 377; 378:1-2.** No shoreline permit or other permits have ever been obtained to conduct the Love business. **RP 390; 84:7-13, 17-22.** After withdrawal of his shoreline permit application, Love stated that he intended “... to continue to explore, with our neighbors, a more feasible plan that might more adequately address their concerns” **Ex.3.** Yet, the business has enlarged over the years. **RP 15:1-11.** Impacts associated with the business have “gotten worse” over time. **RP 26; 44:18-25; 79:4-15 (Krueger); RP 105:13 (Moore).**

The trial court denied the injunctive relief, and the Moores appealed. CP 15-18; CP 4-9. The Court of Appeals determined the record was insufficient for review. *Order Staying Appeal and Remanding to Trial Court* (“Remand Order”), April 6, 2012.⁴ It stayed the appeal and remanded for additional fact-finding on “whether SOS operates lawfully, including its compliance with the Shoreline Management Act (ch. 90.58 RCW), the Mason County Code, and any other relevant law.” *Id.*

Following additional briefing and argument at the trial court, it entered Amended and Supplemental Findings of Fact. CP 207-244; CP 197-206. The trial court agreed that “Mason County mistakenly determined that shoreline permits had been issued” for the building in which the SOS engine shop operations take place (Amended and Supplemental Findings of Fact and Conclusions of Law, FF 86 (SCP 241-43)). It made no finding or conclusion, however, that the business had ever been reviewed by Mason County for consistency with SMA requirements. Nor did the trial court find or conclude that a shoreline permit was not required for the SOS engine shop. The trial court determined that it did not matter whether the SOS engine shop operates in violation of the SMA since the use was “reasonable,” and declined to make any ruling on the issue. See CL 31 (SCP 241-43).

The case returned to the Court of Appeals. On January 28, 2014, the Court issued an Unpublished Decision which affirmed in part the trial

⁴ Appendix A-3.

court's ruling, but reversed and remanded on the issue of nuisance *per se*. Opinion 30. It also reversed the trial court's award of attorney fees. Opinion 29. The Court determined the trial court committed reversible error of law by applying a reasonableness balancing test to a nuisance *per se* claim. Opinion 22-24.

The Loves petitioned this Court for further review.

IV. ARGUMENT

A. **The Court of Appeals Correctly Recognized the Elements and Proper Analysis of a Nuisance *Per Se* Claim When It Remanded the Claim**

The Court of Appeals correctly analyzed the nuisance *per se* claim under existing Washington law. Remand of the claim was proper. The Loves fail to support their argument that existing precedent supports the trial court's determination that even if the Loves' use of their property violated the law, because the trial court determined under a balancing test that the use was "reasonable," no nuisance *per se* claim could succeed. No case recognizes application of a balancing test examining the conduct in violation of the law for nuisance *per se*. Such an analysis would be inconsistent with existing precedent and with RCW 7.48.120. The Loves' proffered formulation of the law is incorrect. Where a defendant's use of property violates existing law, parties asserting a nuisance *per se* need only show further that the illegal use interferes with their use and enjoyment of their own property.

1. The Court of Appeals Decision Correctly Sets Forth the Elements of a Private Nuisance *Per Se* Claim.

The Court of Appeals' ruling does not *extend* Washington's nuisance *per se* jurisprudence; it correctly applies it. The Loves assert that the Court of Appeals imposed a new, expanded standard for nuisance *per se*.⁵ But the Court's opinion is consistent with RCW 7.48.120. The Loves seek a decision that shrinks nuisance *per se*. The Loves' concept of nuisance *per se* conflicts with RCW 7.48.120 and existing precedent. The remand of the nuisance *per se* claim for trial is not extraordinary; it is a straightforward application of existing law to the facts of this case.

The Loves seek to show that: (1) only statutorily enumerated *public* nuisances may constitute nuisances *per se*; (2) a plaintiff must show damage or injury, in addition to annoyance or interference with enjoyment of property to establish nuisance *per se*; and (3) judicial balancing of rights and showing of "unreasonableness" on the part of the defendant is required for nuisance *per se*. Each of these assertions is contrary to Washington law.

First, Title 7.48 RCW conflicts with the Loves' arguments. This statute creates the key elements of an unlawful nuisance and interference with the enjoyment of life and property. RCW 7.48.010 broadly defines an actionable nuisance as:

⁵ The statute governing evidence, RCW 5.40.050, comports with the two-part test for nuisance *per se* in that it states that, except with respect to certain statutory violations, violation of a law does not prove negligence *per se* by itself. The Court of Appeals ruling is consistent with this provision.

..., or *whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property*, is a nuisance and the subject of an action for damages and other and further relief.

(Emphasis added). RCW 7.48.020 provides that persons that may sue for nuisance include “any person whose property is, or whose patrons or employees are, injuriously affected *or whose personal enjoyment is lessened by the nuisance.*” (Emphasis added).

RCW 7.48.120 also defines nuisance as:

Nuisance consists in *unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others*, offends decency,

(Emphasis added). By definition nuisance is any unlawful act (or omission of the performance of a duty) which “annoys, injures or endangers the comfort, repose, health or safety of others.” The statute does not limit the type of law that suffices to demonstrate unlawfulness. Rather, the “nuisance” of the violation, i.e. its injuriousness, indecency or offensiveness, is established through the evidence of interference. The Loves improperly attempt to restrict the showing of unlawfulness, asserting that only certain types of law qualify. This finds no support in Title 7.48 RCW. The statute does not limit actions for private nuisance *per se* to violations of any specific type of law, such as pollution laws. The Loves cite no authority to support their limited view of “unlawful acts” that satisfy RCW 7.48.120.

The Loves improperly attempt to use the Legislature's establishment of *public* nuisances in RCW 7.48.140 to limit the types of illegal uses that satisfy RCW 7.48.120. This also finds no support in the statute. The Moores' claim is one for *private* nuisance. Every nuisance not included in the definition of "public nuisance" in RCW 7.48.130 is private. *See* RCW 7.48.150. Thus, RCW 7.48.140 does not restrict private nuisance *per se* claims as the Loves argue.

Washington courts have broadly defined a nuisance *per se* as an "act, thing, omission or use of property which of itself is a nuisance and hence is not permissible or excusable under any circumstance." *Tiegs*, 135 Wn.2d at 13; *State ex rel. Bradford v. Stubblefield*, 36 Wn.2d 664, 671, 220 P.2d 305 (1950); *see also State v. Boren*, 42 Wn.2d 155, 163, 253 P.2d 939 (1953). No court decision establishes that nuisance *per se* claims are limited to violations of pollution control laws.⁶

The Washington Water Pollution Control Act at issue in *Tiegs v. Watts*, like the Shoreline Management Act here, does not contain any specific provision that states violation of the law is defined as a nuisance. In *Tiegs*, the jury was instructed regarding the definition of nuisance in RCW 7.48.010 and the prohibition in the Water Pollution Control Act

⁶ Petitioners appear to elevate the importance of pollution control laws over the broad public policies and requirements of the SMA, without any legal support. Moreover, the SMA's goals include protection of shorelines from the impacts of unpermitted and uncoordinated development, including pollution. *See* RCW 90.58.020. A shoreline permit application invokes SEPA review and requires a determination of consistency with the local Critical Areas Ordinance plus allows public comment and participation. Protection of the aquatic environment and aquatic life are important public policies.

against pollution of the waters of the state, as well as the public policy of the Act in considering the nuisance per se claim. 135 Wn.2d at 10-11.

In this case, compliance with the SMA similarly is intended to protect shorelines from pollution resulting from unpermitted and uncoordinated development, among other things. RCW 90.58.020 (“Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area ...”). See *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 39-40, 202 P.3d 334 (2009) (SMA requires protection of the natural character of the shoreline); accord *Nisqually Delta Ass’n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985). Even if the Court scrutinized the law allegedly violated here to compare it to the law violated in *Tiegs* – which the statute does not require – the SMA is similar and qualifies to support a nuisance *per se* claim.

Petitioners would have the Court ignore the foundational purposes and policy of the SMA, and construe the Act as a mere formality that can be “excused” by a local municipality.⁷ The goals and objectives of the SMA are severely compromised if parties fail to comply with shoreline permit requirements. *Department of Ecology v. City of Spokane Valley*,

⁷ Violation of the SMA’s permit requirements is never permissible or excusable; it is mandatory. RCW 90.58.140(1), (2); MCC § 7.04.032; MCC § 7.16.005; MCC § 7.16.040; see also RCW 90.58.050; *Citizens for Rational Shoreline Planning*, 155 Wn. App. at 943 (a governmental entity cannot waive shoreline permitting requirements). *E.g.*, *Tiegs*, 135 Wn.2d at 14 (that government ignores a nuisance is not a defense).

167 Wn.App. 952, 962-63, 275 P.3d 367 (2012). An owner's failure to apply for a permit deprives surrounding property owners the opportunity to participate in the public process associated with permitting to ensure that any potential impacts of the proposal are mitigated or avoided. *Id.*⁸

This matter is unlike the sale of cars on a Sunday which violated a 1924 statute because: (1) the sale of cars on other days was permissible; and, significantly, (2) the plaintiff did not establish any interference with his enjoyment or use of property. *See Motor Car Dealers Assoc. of Seattle v. Fred S. Haines Co.*, 128 Wash. 267, 273-74, 222 P. 611 (1924). The *Fred S. Haines Co.* decision does not support the Loves' attempt to circumscribe the types of law under which a violation can establish a nuisance *per se*. It is the second part of the required showing – interference with use and enjoyment – that ensures that inconsequential violations of the law do not support nuisance *per se* claims.

2. The Moores and Kruegers Need Not Show “Injury” to Support the Nuisance *Per Se* Claim; the Court of Appeals is Correct that Interference with Use and Enjoyment is Sufficient.

Nuisance *per se* may be established by a showing of annoyance or interference with property use and enjoyment, *or* by a showing of injury or

⁸ Because the Loves failed to comply with the shoreline permitting process, the Moores and other interested persons were denied the opportunity to participate in the SMA public process. MCC § 15.09.055(f) (Type III Shoreline Master Program). The process would have required Love to address noise, storm water, parking, access, critical areas and habitat, ADA, fire and environmental concerns, among others. Mitigation measures were never considered to minimize the impacts of Petitioners' disruptive business on the Respondents' residential waterfront properties or on the shoreline environment, including critical areas located within the shorelines. MCC Chapter 7.16.040 (Shoreline Master Program, Commercial Development).

damage. See RCW 7.48.010; RCW 7.48.020; RCW 7.48.120. Where annoyance and/or interference with use or enjoyment of property is established, as here, a plaintiff need not also establish “injury” or “damages.” *Tiegs*, 135 Wn.2d at 13; *Tiegs v. Boise Cascade*, 83 Wn. App. 411, 418, 922 P.2d 115 (1996). The possible showings are in the disjunctive. The Loves’ argument that the Moores must show “injury” is contrary to the controlling statute and precedent.

The trial court found that the Loves’ business operations interfered with the Moores’ use and enjoyment of their land. Thus, the second element of a nuisance *per se* claim, interference, has been established. *Harris*, 133 Wn. App. at 137.

3. A Balancing of Rights and/or a Determination of the Reasonableness of the Loves’ Business Operations is Not Required if a Violation of Applicable Laws and Interference with Plaintiff’s Use or Enjoyment is Established.

Under Washington law, when a party supports a nuisance *per se* claim by demonstrating an illegal use, the trial court does not balance the “reasonableness” of the use. This would undermine the preexisting laws establishing that the use is illegal. This Court should reject the Loves’ argument that, notwithstanding that a use or conduct by the defendant is illegal, the trial court can excuse the illegality by weighing the reasonableness of the defendant’s conduct.

The *Tiegs* decision does not stand for the contrary, explaining:

When a statute or a local ordinance [declares] conduct ... illegal, without ... label[ing it] as a nuisance, it will be considered a nuisance as a matter of law only if that conduct interferes with others' use and enjoyment of their lands....

Tiegs v. Boise Cascade, 83 Wn. App. at 418, quoting 8 Thompson on Real Property, Thomas Edition § 67.03(a)(1), at 94-95 (David A. Thomas ed., 1994). Judicial weighing of the reasonableness of the use is unnecessary because the legislature or local government already has established the illegality and “struck the balance in favor of the innocent party.” *Id.* at 418 (citing *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (Utah 1982)).

The Loves seek to undermine this reasoning and subvert the role of existing laws in the nuisance *per se* analysis. This Court should reject the attempt to make new law that would circumscribe nuisance *per se* claims.

The Loves attempt to distinguish *Tiegs v. Boise Cascade* and *Branch* by alleging that violation of the SMA is not a “listed” nuisance (under the list of public nuisances in RCW 7.48.140), and thus cannot be a nuisance *per se*. As discussed *infra*, the statutory definitions of nuisance are broad; any nuisance not defined as a public nuisance is a private nuisance. RCW 7.48.150.

4. Remand to the Trial Court for a Determination of the Legality of the Loves' Operations is Required for Resolution of the Private Nuisance *Per Se* Claim.

The trial court repeatedly side-stepped the requirement to make a ruling on the legality of the Loves' engine repair shop business, which is the first element of a nuisance *per se* claim. The Opinion properly

remands the matter for such a determination because the trial court failed to enter findings or conclusions on the first element of the claim, whether the Loves operate their business in compliance with applicable laws and/or permits.⁹ See *Tiegs v. Watts*, 135 Wn.2d at 13; *Tiegs v. Boise Cascade*, 83 Wn. App. at 413-15; *Miotke v. City of Spokane*, 101 Wn.2d 307, 309, 678 P.2d 803 (1984).

Following the first remand from the Court of Appeals, the trial court determined that “*Mason County mistakenly determined that shoreline permits had been issued*,” for the building in which the SOS engine shop operations take place (Amended and Supplemental Findings of Fact and Conclusions of Law, FF 86 (SCP 241-43) (emphasis added)). The Loves did not appeal this determination, either, so it is a verity on appeal. *Harris*, 133 Wn. App. at 137.

This Court should agree with the Court of Appeals that the trial court erred in ruling that whether the Loves had proper permits was irrelevant to the nuisance *per se* claim. See Opinion 22-23. See also CL 31 (SCP 241-43). The question of whether the Loves are conducting their business in compliance with applicable laws and permits must be resolved by the trier of fact under Washington nuisance *per se* law.

The Loves claim that Mason County “approved” a cottage industry when it failed to take enforcement action against the Loves via a Case

⁹ The remand for trial of the nuisance *per se* claim has no connection to the denial of the Moores and Kruegers’ motion to admit additional evidence. The Court of Appeals’ decision to affirm that ruling does not undermine the remand and is irrelevant.

Activity Listing (Ex.7). This contention is simply wrong. While the County may enjoy *enforcement* discretion, it does not have *permitting* discretion to waive requirements for a conditional use and/or substantial shoreline permit. RCW 90.58.140(1), (2); MCC § 7.04.032; MCC § 7.16.005; MCC § 7.16.040. The plain terms of the Case Activity Listing are clear; Mason County did not state that no permit is required for the business.

The Loves make several blatant misstatements: (1) “no permit is needed to operate a business;” and (2) “County did determine that SOS could continue to operate on the Love's property as is.” Petition 8-9. As accurately noted by the Court of Appeals, “Mason County requires cottage industries to obtain conditional use permits, and thus whether SOS is a ‘cottage industry’ does not resolve the legality of the Loves’ commercial use of their property for SOS.” Opinion 29, citing MCC § 17.03.021; MCC § 17.050). Remand is the appropriate course.

B. LUPA Does Not Apply to Bar the Nuisance *Per Se* Claim Because Mason County Issued No Relevant Land Use Decision and the Nuisance *Per Se* Claim Does Not Require Reversal of any Land Use Decision.

The Court of Appeals properly rejected the Loves’ argument that the Land Use Petition Act 36.70C RCW (“LUPA”) prevented pursuit of the nuisance *per se* claim. Contrary to the Loves’ position, no Washington court has ever ruled that a municipality’s decision **not** to take code enforcement action constitutes a “land use approval.” If this were the case, every telephone call or email from or to a building or planning

department could be construed as triggering the LUPA appeal period, which would flood courts with unnecessary appeals of low-level or preliminary decisions. LUPA does not apply here.

Summary dismissal of a code enforcement action does not constitute approval of the engine repair use under the Mason County Code. Because no land use decision was issued, the Moores were not required to file an “appeal” to preserve their nuisance claims. *See Grundy v. Thurston County*, 155 Wn.2d 1, 5, 7-8, 117 P.3d 1089 (2005).¹⁰

Mason County did not make an administrative determination e. g. an official code interpretation that SOS could legally continue to operate without shoreline permits. MCC § 15.03.020 (“Upon request or as determined necessary, the review authority shall interpret the meaning or application of the provisions of such titles and issue a written administrative interpretation within thirty days”). In fact, no application was made by any party for review of issues related to shoreline permits for the Loves, pursuant to MCC § 15.03.015.

The County summarily dismissed a code complaint for lack of evidence. Opinion 20. The decision was not made by the County’s “body or officer with the highest level of authority to make the determination, including those with authority to hear appeals.” *See RCW 36.70C.010(2)*.

Application for a shoreline permit is a Type III (quasi-judicial) process. MCC § 15.03.015(c)(3)(C); MCC § 15.03.030(10); MCC

¹⁰ Petitioners did not argue laches below. Thus, the issue cannot be raised for the first time on appeal. RAP 2.5(a); *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

§ 15.09.055. Any final decision is issued by the County Hearing Examiner and must set forth procedures for administrative appeal. MCC

§ 15.07.050. There is no evidence in the record that any shoreline permit application was processed by the County for the Loves' repair shop business that could be appealed. In this regard, Petitioners failed to rebut the Respondents' evidence that County records did not show a shoreline permit was issued and they failed to produce a permit. *See State v. N.M.K.*, 129 Wn. App. 155, 162, 118 P.3d 368 (2005)(Evidence Rule ("ER") 803(a)(10) allows admission of evidence that an event or matter was *not* recorded in public records to show that it did not occur or did not exist); ER 803(a)(7)(allowing admission of evidence that a matter is not included in business records kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter); Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, 409-10 (2005). *See Also, United States v. Keplinger*, 776 F.2d 678, 689-90 (7th Cir. 1985).

The Loves' bald assertion that no conditional use permit was required because the business is a "home industry" (Petition 9) is contrary to the determination of the trial court that SOS operates as a "cottage industry," which finding was unchallenged by Petitioners. CP 116. Mason County requires cottage industries to obtain shoreline conditional use permits. MCC § 17.03.021; MCC § 17.50.040. Importantly, a shoreline conditional use permit cannot be issued by a municipality without

approval from the Department of Ecology. RCW 90.58.140(10). Ecology conducts substantive review on conditional use permits and variances to check for compliance with the policies and procedural requirements of the local SMP. *Id.* Ecology is the repository of all locally approved and denied shoreline permits for the entire state. RCW 90.58.140(6). The Loves only presented speculation that their engine repair shop use in the shoreline environment was somehow approved by Mason County (let alone the Department of Ecology). *See Johnson v. Aluminum Precision Prods., Inc.*, 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006) (mere speculation and conjecture will not sustain a finding); *Rogers Potato Service, LLC v. Countrywide Potato, LLC*, 119 Wn. App. 815, 820, 79 P.3d 1163 (2003) (a finding cannot be supported by speculation or conjecture). The Case Activity Listing does not resolve the legality of the Loves' commercial engine repair shop.¹¹

Finally, the Loves have failed to show that the nuisance *per se* claim depends on the validity of any land use decision. *See Grundy*, 155 Wn.2d at 1, 8, 10. This Court, like the Court of Appeals, should reject the Loves' arguments under LUPA.

C. The Fee Rulings Were Correct Because the Fees Awarded by the Trial Court Under the SMA Improperly Included Fees for Other Claims and Lawsuits That Should and Could Have Been

¹¹ The Case Activity Listing does not address the claims that the Loves' business operations are a nuisance *per se* because they violate the Mason County noise ordinance and the terms of a Washington State Department of Transportation highway permit issued to the Loves. Thus, no LUPA appeal would be required to "preserve" such claims, either.

Segregated, and Because the Moores Did Not Appeal Rejection of their SMA Claim.

This Court should not alter the Court of Appeals' decision regarding attorney fees. First, the Court of Appeals properly reversed part of the trial court's fee award, rejecting the Loves' argument that the \$2,000 that attorney Finlay charged for defending the Loves in a district court criminal court case regarding their dock and jet ski float was "too integrated" with the present civil litigation for separation.¹² Opinion 28 ("It is well settled that courts may decline to segregate fees for unsuccessful *claims* when such *claims* are too intertwined to reasonably separate. However, no authority states that courts may combine the fees for *separate cases* in *separate courts* on this basis") (citing *Dice v. City of Montesano*, 131 Wn. App. 675, 690, 128 P.3d 1253 (2006)). This was correct.

The Court's ruling is consistent with *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now* (C.L.E.A.N.), 119 Wn.App. 665, 690, 82 P.3d 1199 (2004) ("If attorney fees are recoverable for only some of a party's claims, the award must properly reflect segregation of the time spent on issues for which fees are authorized from time spent on other issues. This is true even if the claims overlap or are interrelated"). Fees billed for the WDFW citation must be separated from those incurred defending the nuisance claims. *Hensley v. Eckerhart*, 461 U.S. 424, 435,

¹² The citation issued by the Department of Fish and Wildlife for a dock extension was issued by the State, based on different facts and legal theories, and not an issue in the nuisance lawsuit.

103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (segregation required for different claims based upon different facts and legal theories).

Second, concerning the denial of attorney fees on appeal, the Loves assert that the Moores did, in fact, appeal dismissal of the SMA claim for damages. The Moores did not. The pleadings speak for themselves. CP 15-18; CP 4-9. As confirmed in *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 86-87, 510 P.2d 1140 (1973), the SMA does not authorize attorney fees to a plaintiff that did not prevail on his SMA claim, even though he prevailed on a related claim in the same case. On appeal the question of compliance with the SMA relates solely to the Moore's nuisance *per se* claim. Attorney fees are only awardable under the SMA when damages for a direct claim of violation of the Act are sought. RCW 90.58.230. That is not the case here. This Court should not disturb the decision concerning attorney fees.

V. CONCLUSION

This Court should affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 9th day of August, 2014.

By 
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2014, I caused the original and one copy of the document to which this certificate is attached to be delivered for filing via email to:

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State of Washington Supreme Court
Email: Supreme@courts.wa.gov

I further certify that on this 8th day of August, 2014, I caused a copy of the document to which this certificate is attached to be delivered to the following via email and priority mail:

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(360) 462-1779, fax
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Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 8th day of August, 2014.



Karen L. Hall
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Karen Kimzey
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To: OFFICE RECEPTIONIST, CLERK
Cc: christy@ddrlaw.com; Dennis D. Reynolds Law Office
Subject: Filing by Attachment to Email: Case No. 90115-5, Moore and Krueger v. Steve's Outboard and Love

Dear Clerk:
Case No. 90115-5
Moore and Krueger v. Steve's Outboard and Love

Attached for filing is Supplemental Brief of Respondents Moore and Krueger. Appendix was overnight mailed to you yesterday.

Karen Hall, Legal Assistant
Dennis D. Reynolds Law Office
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To: karen@ddrlaw.com
Subject:



Dennis D. Reynolds Law Office

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August 7, 2014

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Washington State Supreme Court

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AUG - 8 2014

Ronald R. Carpenter
Clerk

Re: *Moore and Krueger v. Steve's Outboard Service, et al.*
Supreme Court No. 90115-5

Dear Clerk:

Enclosed please find the Appendix to Respondents' Supplemental Brief. The Brief will be filed with you on August 8, 2014 via email. The Appendix is being sent FedEx overnight mail because of the large number of pages. Thank you.

Very truly yours,

DENNIS D. REYNOLDS LAW OFFICE

Dennis Reynolds

Enclosure

DDR/klh

Received
Washington State Supreme Court

AUG - 8 2014

Ronald R. Carpenter
Clerk

APPENDIX
TO RESPONDENTS' SUPPLEMENTAL BRIEF

MOORE AND KRUEGER V. STEVE'S OUTBOARD, ET AL.

No. 90115-5

(Court of Appeals No. 41557-7-II)

- A-1 Court of Appeals, Div. II, Case No. 41557-7-II, Unpublished Opinion.
- A-2 Ordinances:
- A-2-1: MCC Chapter 7.04.032
- A-2-2: MCC Chapter 7.16.000, 7.16.040
- A-2-3: MCC Chapter 15.03.015, .020 and .030
- A-2-4: MCC Chapter 15.07.050
- A-2-5: MCC Chapter 15.09.055
- A-2-6: MCC Chapter 17.03.021
- A-2-7: MCC Chapter 17.50.040
- A-3 Court of Appeals, Div. II, Case No. 41557-7-II, Order Staying Appeal and Remanding to Trial Court

APPENDIX A-1

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HAL MOORE and MELANIE MOORE,
husband and wife; and LESTER KRUEGER
and BETTY KRUEGER, husband and wife,

Appellants,

v.

STEVE'S OUTBOARD SERVICE, a
sole proprietorship operating in Washington;
STEVEN LOVE and MARY LOU LOVE,
husband and wife and the marital property
together composed; and MASON COUNTY,

Respondents.

No. 41557-7-II

Consolidated with

No. 44377-5-II

UNPUBLISHED OPINION

WORSWICK, C.J. — In this consolidated appeal, Hal and Melanie Moore and Lester and Betty Krueger (collectively, the Moores) appeal two trial court orders that (1) dismissed their claims against Steven and Mary Lou Love and Steve's Outboard Service (SOS), (2) awarded attorney fees to the Loves, and (3) refused to consider additional evidence after we remanded the Moores' first appeal to the trial court to enter more complete findings of fact and conclusions of law. The Moores had sued SOS and the Loves, asserting claims of nuisance in fact, nuisance per se, and violations of the Shoreline Management Act (SMA).¹ The Moores now argue that the trial court erred by (1) refusing to consider additional evidence after remand, (2) entering findings of fact unsupported by substantial evidence, (3) concluding that the Moores showed no nuisance in fact, (4) concluding that the Moores showed no nuisance per se, and (5) granting

¹ Chapter 90.58 RCW.

attorney fees. We reverse the trial court's dismissal of the Moores' nuisance per se claim and its attorney fee award and remand for further proceedings. We affirm the trial court's dismissal of the Moores' other claims.

FACTS

Steve's Outboard Service (SOS) is an outboard motor repair sole proprietorship that Steven Love and Mary Lou Love have owned since 1994, and that Steven² has operated from their home along State Route (SR) 106, on the south shore of Hood Canal in Mason County. In 2006, the Moores sued SOS and the Loves, alleging that SOS's operations constituted a nuisance and a violation of the Shoreline Management Act.³

A. *The Moores' Case at Trial*

The Moores presented two witnesses during this bench trial: Betty Krueger and Melanie Moore.

1. *Betty Krueger*

Krueger testified that SOS affected her by generating smoke, fumes, and noise from revving engines. Krueger testified that smoke and fumes from SOS reached her property. She also testified that SOS caused traffic safety hazards because customers and delivery vehicles used the SR 106 right-of-way, although she admitted that no serious accidents had occurred on

² For purposes of clarity, we refer to Hal and Melanie Moore and Lester and Betty Krueger collectively as "the Moores." We refer to Steven Love and Mary Lou Love as "the Loves." We refer to individuals by their first names when referring to them individually. We intend no disrespect.

³ The Moores also sued Mason County for failure to enforce the SMA against SOS. But the trial court dismissed the Moores' claim against Mason County on summary judgment. The Moores assign no error to this dismissal.

SR 106. Krueger testified that SOS made periodic noise when revving boat engines, and operating a tractor with a beeping device to bring boats onto the Loves' property. Krueger also testified that she no longer used a patio on the side of her house that faced SR 106 because of the noise SOS generated. Krueger admitted that her caretaker frequently used a gas powered leaf blower and pressure washer that made noise. Krueger testified that SOS's customers and delivery trucks used the SR 106 right-of-way, potentially impeding traffic and causing safety concerns.

The Moores submitted photographs showing several plumes or hazes of smoke, purportedly from SOS. Krueger testified that she saw such smoke in the spring, summer, and fall, and that she periodically smelled exhaust fumes from the smoke. She further testified that she was not seeking damages, but only wanted SOS's operation stopped.

2. Melanie Moore

Melanie Moore owned a home on SR 106, across the street from the Loves' property, where she lived during the summer. Although Moore provided testimony regarding the frequency and volume of the noise that SOS produced; the trial court found that this testimony was not credible, and we defer to that determination of credibility.

Moore testified that although she had heard the beeping of SOS's tractor, Steven had since disengaged the beeper. Moore testified that on windless summer days she could see smoke and smell fumes SOS generated. Moore testified that smoke and fumes occasionally presented a problem on her property.

Moore testified to many concerns she had regarding SOS's use of SR 106 and this roadside. And she testified that she wanted only to prevent SOS from operating out of the Loves' property.

3. *Evidence Regarding Permitting*

Because the Moores claimed nuisance per se, they submitted documentary evidence regarding various permits that Steven may or may not have obtained. This included a shoreline permit application that Steven filed in 1994 to build a 30-by 45-foot metal building on his property, a letter from Steven withdrawing this application, and a letter from Mason County acknowledging Steven's withdrawal letter. The Moores also submitted building permit applications filed in 1994 that requested permits to replace a carport and to remodel a storage shed.

The Moores submitted a report from Mason County entitled "Case Activity Listing." Ex. 7. The Case Activity Listing listed the permits that Mason County employees believed the county had granted to Steven over the years, and briefly described those permits. This Case Activity Listing showed that the County received and investigated a complaint about SOS's operation in 2003. Additionally, the Case Activity Listing stated that Mason County had previously granted Steven two building permits for a single metal shop. However, Steven had withdrawn his metal shop permit applications while they were pending.

The Case Activity Listing also stated that subsequent to granting the metal shop building permits, Mason County granted Steven both a 1994 carport permit and a permit for Steven to build an addition to the storage shed. Mason County granted these two permits for private use under the old Uniform Building Code.

The Case Activity Listing stated that the carport permit revealed that the carport had replaced another structure. However, because Mason County had not granted the two older metal shop permits, it could not find physical copies of these permits. Nonetheless, Mason County assumed that the planner who had reviewed the carport permit application approved the carport permit on grounds that the structure was of equal or lesser intensity than the permitted metal shop it had replaced. The Case Activity Listing stated that SOS could continue operating as an existing cottage industry, because SOS's operation had not substantially changed since its start in 1994.

B. *The Loves' Case at Trial*

1. *The Loves' Neighbors*

The Loves presented the testimony of three neighbors who lived near the Loves' property: James David, William Jacobs, and Elliot Gordon.

David testified that he generally did not use the SR 106 side of his property due to the road noise. He testified that SOS only ran engines for "minutes" and that SOS's operations bothered neither David nor his guests. 1 Verbatim Report of Proceedings (VRP) at 125. David testified that motorcycles on SR 106 produced the loudest source of noise, while SOS was about as loud as the Kruegers' leaf blower. He further testified that SOS produced no fumes.

Jacobs testified that the noise, fumes, or smoke from SOS had never bothered him. Jacobs confirmed that the Kruegers used a leaf blower daily when leaves were falling. Jacobs had not observed any traffic safety problems at SOS.

Gordon testified that SOS produced no odors or fumes. Gordon testified that just about everyone parked their boats on the right-of-way. Gordon testified that he knew of no traffic

safety problems caused by SOS, and that Steven used safety precautions when moving boats into the Loves' shop. Gordon also testified that SOS's engine noises did not bother him, and that motorcycles on SR 106 bothered him more.

2. SOS's Customers

The Loves presented the testimony of several of SOS's customers who had their outboard motors serviced at SOS. These customers uniformly testified that Steven was highly safety conscious, never caused traffic problems, had a procedure to quickly remove boats from the road, and used appointments to ensure that SOS was never overwhelmed with boats. Two customers testified that SR 106 regularly had numerous boats, delivery trucks, and other vehicles parked on its shoulder. Two customers testified to their ability to talk to Steven in his shop with the motors running.

3. Steven Love

Steven testified on his own behalf. Steven testified that he worked on motors usually between 10:30 AM and 5:00 PM, that he typically ran motors for 15 minutes per day at the most, and that he ran the motors on idle 95 per cent of that time. He also testified that he generally ran motors on open throttle for no more than 30 seconds.

Regarding smoke production, Steven testified that while he used to do a "fogging" procedure that produced a lot of smoke, he had not done it since 2000. 2 VRP at 323-24. He testified that two photos showing smoke at his property occurred before 2001. Steven also testified that while he did not do anything in his shop that caused excessive smoke, he sometimes used a wood stove that made smoke.

Regarding the permitting of the structures on his property, Steven testified that he replaced a carport attached to his house with a larger carport. Steven testified that as far as he knew, his contractor had obtained the proper permits for the carport. Steven also testified that he had no awareness of any shoreline permit for SOS.⁴

Steven testified that no one informed him that SOS was out of compliance with any law. Steven further admitted that his customers used the SR 106 right-of-way when delivering boats, but stated that he did not require them to do so. Steven testified that he stored boats on his property behind his shop or in his carports.

C. *The Trial Court's Decision*

The trial court issued findings of fact and conclusions of law. The trial court concluded, "Plaintiffs have not shown by a preponderance of the evidence that Defendants' business is a nuisance nor that they are entitled to injunctive relief under any of the theories presented." Clerk's Papers (CP) at 114-15. The trial court consequently dismissed the Moores' claims.

After the trial court issued its decision, the Loves moved for, and were awarded, attorney fees in the amount of \$36,034.69. The Moores appealed. After this first appeal, we remanded for the trial court to produce a more complete set of findings and conclusions.

D. *Post-Appeal Procedural History*

After remand, the Moores petitioned the trial court to reopen the case to enter a series of public records regarding the permitting of SOS. The Moores wanted to introduce this evidence

⁴ Based on this testimony, the Moores argue, "It was conceded at trial that Respondents did not have shoreline permits for their business operations." Br. of Appellant at 20. But Steven simply testified that he was not aware of any shoreline permit. The Loves did not concede that no permit existed, nor did his counsel.

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Consolidated with No. 44377-5-II

to lend further support to their claims of nuisance in fact and nuisance per se. The trial court denied the Moores' motion to reopen.

The trial court entered amended and supplemental findings of fact and conclusions of law. The trial court entered numerous factual findings to support its conclusions that SOS's operation did not constitute a nuisance because, on balance, SOS's operation did not constitute an unreasonable burden on the Moores' use and enjoyment of their land.

The trial court made no findings as to whether SOS operated lawfully. Instead, the trial court found that SOS operated primarily from a rebuilt carport on the Loves' property that was permitted by Mason County. The trial court also found that the County took no action on a 2003 complaint regarding operation of the boat repair business. The trial court found that Mason County allowed SOS to continue as a cottage industry.

The trial court concluded that whether SOS operated lawfully was irrelevant to both the nuisance in fact and nuisance per se claims. The trial court supported this conclusion with its statement that both theories of nuisance require a plaintiff to establish an unreasonable interference with their use and enjoyment of land, which the Moores had failed to prove.

The trial court further concluded that the Land Use Petition Act (LUPA)⁵ statute of limitations barred the Moores' nuisance per se claim, because Mason County had approved SOS to operate as a "cottage industry." CP at 240-42. The trial court stated in its conclusions that "[i]n order to prevail on a claim of nuisance *per se*, Plaintiffs here would need to belatedly have a Mason County interpretive decision regarding application of land use regulations to the Loves'

⁵ Chapter 36.70C RCW.

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property declared improper” CP at 241-42. The trial court reduced the Loves’ attorney fee award from \$36,034.69 to \$28,907.44.

In addition to appealing the judgment dismissing their claims and awarding attorney fees to the Loves, the Moores appeal the trial court’s order refusing to reopen the case. *See generally*, I Br. of Appellants; III Br. of Appellants at 4; SCP at 11-12. We consolidated these appeals.

ANALYSIS

I. MOTION TO REOPEN FOR INTRODUCTION OF ADDITIONAL EVIDENCE

After remand, the Moores moved the trial court to admit evidence that SOS lacked the proper permits to operate and was, therefore, a nuisance per se. Citing *Rochester v. Tulp*, 54 Wn.2d 71, 337 P.2d 1062 (1959), the Moores argue that the trial court abused its discretion in refusing to reopen the case for the introduction of this new, dispositive evidence. We disagree.⁶

A trial court’s ruling on whether to reopen a case for the introduction of new evidence is reviewed for an abuse of discretion. *In re Ott*, 37 Wn. App. 234, 240, 679 P.2d 372 (1984). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Ameriquest Mortg. Co. v. Office of Attorney General*, 177 Wn.2d 467, 478, 300 P.3d 799 (2013).

The Moores cite *Rochester* to support their argument that the trial court abused its discretion by refusing to reopen for introduction of dispositive evidence. In *Rochester*, a

⁶ Citing RAP 7.2, the Loves argue that the trial court is prohibited from reopening the case after an appeal has started, absent explicit authorization from this court. But the decision to grant a motion to reopen after a remand is within the trial court’s discretion. *Zink v. City of Mesa*, 162 Wn. App. 688, 706, 256 P.3d 384 (2011); *Sweeny v. Sweeny*, 52 Wn.2d 337, 339, 324 P.2d 1096 (1958).

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defendant's uncontroverted testimony led the trial court to rule that the statute of limitations required dismissal of a plaintiff's conversion claim. 54 Wn.2d at 71-74. After trial, records came to light directly disproving the defendant's testimony and proving that the statute of limitations had not expired. 54 Wn.2d at 73-74. Our Supreme Court held that the trial court abused its discretion when it denied the plaintiff's motion to reopen to introduce this evidence, because the evidence was dispositive and because the plaintiff was not at fault for failing to discover the evidence before trial. 54 Wn.2d at 74.

Rochester is distinguishable. Here, the Moores offer no explanation for failing to produce the permitting evidence at trial. At the Moores' behest, the trial court admitted evidence concerning SOS's permitting. After remand, the Moores moved the trial court to reopen to admit public records regarding these same permitting issues; records that had been in existence years before the trial. The Moores do not describe any prior efforts to acquire these public records before the trial, nor do they allege a lack of knowledge as to these records' existence. It is not an abuse of discretion for a trial court to refuse to reopen a case to allow a party to belatedly submit evidence they could have, but failed to produce at trial. The trial court did not abuse its discretion in refusing to reopen the case after appeal.

II. SUBSTANTIAL EVIDENCE TO SUPPORT FINDINGS

The Moores argue that substantial evidence does not support the trial court's findings of fact regarding SOS's impacts on their property. Specifically, the Moores argue that substantial evidence does not support the trial court's findings regarding noise, smoke, fumes, and traffic impacts. We disagree.

Where the trial court considers evidence in a bench trial, we review the findings of fact for substantial evidence. *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 78, 180 P.3d 874 (2008). Substantial evidence is evidence sufficient to persuade a fair-minded person that the finding is true. *Saviano*, 144 Wn. App. at 78. The challenging party bears the burden of showing that the record does not support the challenged findings. *Saviano*, 144 Wn. App. at 78. We review the evidence in the light most favorable to the prevailing party and we defer to the trial court regarding witness credibility and conflicting testimony.⁷ *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

We hold that substantial evidence supports the findings of fact regarding SOS's production of noise, fumes, and traffic congestion.

A. *Findings Regarding Noise*

The Moores argue that substantial evidence does not support the trial court's findings regarding the impact of SOS's noise on their property: (1) the outboard motor noise from SOS was not deafening, even up close; (2) Krueger characterized the noise's frequency as periodic, and that Krueger heard SOS's noise only when she was outside her home, when she got her mail, and when she worked in her flower gardens; (3) Moore's testimony regarding the frequency and volume of the noise lacked credibility; (4) none of the Moores' neighbors, particularly David, Jacobs, and Gordon, had any problems with SOS's noise; (5) the beeping of SOS's tractor had not occurred in the last couple of years; (6) the motors on boats and jet skis and leaf blowers made noise in the same region as SOS; and (7) the motor vehicle traffic on SR 106, including

⁷ The Moores argue that the trial court misapplied the preponderance of the evidence standard, suggesting that we should review the findings under a preponderance of the evidence standard. But we review findings of fact for substantial evidence. *Saviano*, 144 Wn. App. at 78.

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motorcycles, produced the most significant noise source in the area. We hold that substantial evidence supports all of these factual findings.

Two customers testified to their ability to talk to Steven in his shop with the motors running. Krueger's own testimony supported that she heard the noise "periodically," as well as the specific places that she heard the noise. 1 VRP at 16. David, Jacobs, and Gordon all testified that the noise did not bother them at all. Krueger admitted that SOS had not used the tractor beeper for years, and that she regularly used a leaf blower that made noise. Krueger's use of the leaf blower was confirmed by two neighbors' testimonies. Four witnesses' testimonies all confirmed that SR 106 noise was significantly louder than noise produced by SOS.

The Moores argue that the Loves' witnesses lived farther away from SOS than the Moores, or lived there less frequently than the Kruegers, such that the Loves' witnesses did not provide substantial evidence to support the trial court's findings regarding noise. The Moores also attack the trial court's determination that Krueger's testimony regarding the noise's duration and volume lacked credibility. The Moores' argument is actually a request for us to reweigh the evidence, couched in terms of a substantial evidence argument. We do not reweigh evidence, but defer to the trial court regarding witness credibility. *City of University Place*, 144 Wn.2d at 652. Substantial evidence supports the trial court's findings relating to noise.⁸

⁸ The Moores argue that the trial court erred by focusing on the duration of the use of SR 106, instead of focusing on its repetitiveness, when determining nuisance in fact. The Moores do not support this proposition with any legal authority, and thus we do not consider it. *See Escude v. King County Public Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003).

B. *Findings Regarding Smoke and Fumes*

The Moores also argue that substantial evidence does not support the trial court's findings regarding the smoke and fumes produced by SOS: (1) while SOS's running of motors produced some smoke, SOS ran motors for only 15 minutes per day, and was a clean and environmentally conscious company; (2) the smoke and fumes did not bother the other adjacent neighbors, including David, Jacobs, and Gordon; and (3) the area had other sources of smoke at times. Substantial evidence supports all of these factual findings.

A great deal of testimony supports the trial court's findings regarding the smoke and fumes SOS produced. David, Jacobs, and Gordon all testified that the smoke did not bother them, and/or that they had never even noticed it. Krueger testified that the motors ran "just periodically." 1 VRP at 16. David testified that he heard the motors for only minutes a day. Jacobs testified that he heard engines revving up "once in a while." 1 VRP at 142. Steven testified that in an entire day he typically ran motors for 15 minutes at the most, 95 per cent of which was on idle. He also testified that he generally ran motors on open throttle for no more than 30 seconds. Testimony clearly established that the busy SR 106 was nearby, producing potential alternative sources of smoke. Steven testified that he and the Kruegers had wood stoves which caused a great deal of smoke at times.

It is true that Moore testified that smoke and fumes occasionally presented a problem on her property, and that Krueger testified that smoke and fumes from SOS reached her property. It is also true that the Moores submitted photographs showing several plumes or hazes of smoke, purportedly from SOS. Thus the testimony conflicted, and the trial court resolved the conflict in

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favor of the Loves. We defer to that decision. *City of University Place*, 144 Wn.2d at 652.

Substantial evidence supported the trial court's findings regarding smoke and fumes.

C. *Findings Regarding Traffic Impacts*

The Moores further argue that substantial evidence failed to support the trial court's findings regarding SOS's effect on traffic on SR 106: (1) that no accidents had occurred on SR 106 for the previous 20 years; (2) that SOS's operation was low volume; (3) that SOS's operation only had brief use of the road and that this use did not deviate from SR 106's typical usage; (4) that SOS's use of SR 106 obstructed neither traffic, nor anyone else's use of SR 106. We hold that substantial evidence supports all of these factual findings.

Krueger testified that no serious accident had occurred on SR 106. Krueger, two neighbors, and a customer all testified that SR 106 had a great deal of traffic other than that produced by SOS. Gordon testified that no one, including SOS, had caused traffic congestion problems, and that "everybody parks boats on the right-of-way." 1 VRP at 177. Two customers testified that SR 106 regularly had numerous boats, delivery trucks, and other vehicles parked on the shoulder.

Steven testified that he stored boats on his property behind his shop or in his carports, rather than on SR 106. Gordon testified that he knew of no traffic safety problems caused by SOS, and that Steven took safety precautions when moving boats. Many of SOS's customers confirmed that Steven was highly safety conscious, testifying that SOS never caused traffic problems, and had procedures to quickly move boats off of SR 106 so as to ensure that SOS was never overwhelmed with boats.

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Both Krueger and Moore testified that SOS's customers and delivery trucks used the SR 106 right-of-way, potentially impeding traffic and causing safety concerns. However, the trial court resolved this conflict in favor of the Loves and we defer to that decision. *City of University Place*, 144 Wn.2d at 652. Substantial evidence supports the trial court's findings regarding SOS's traffic impacts.

III. NUISANCE IN FACT

The Moores next argue that the trial court's factual findings fail to support the conclusion that SOS was not a nuisance in fact. We disagree.

We review the trial court's conclusions of law de novo to see if the findings of fact support them. *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 562 (2002). When the trial court's findings are susceptible of two constructions, one that supports the conclusions of law and one that does not, "the findings of fact must be construed in a manner which will support the trial court's conclusions of law." *Lincoln Shiloh Assoc., Ltd. v. Mukilteo Water Dist.*, 45 Wn. App. 123, 131, 724 P.2d 1083 (1986).

RCW 7.48.120 defines nuisance in Washington, and provides:

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

A nuisance in fact exists if one owner's use of land *unreasonably* interferes with another's use and enjoyment of the other's own land. *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998). A trial court determines reasonableness by balancing the rights, interests, and

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convenience of the parties. *Jones v. Rumford*, 64 Wn.2d 559, 563, 392 P.2d 808 (1964). Such balancing requires consideration of the social utility of the defendant's conduct, the gravity of the harm to the plaintiff, and the character of the neighborhood in which the activity is located. *Highline School Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 17-18 n.7, 548 P.2d 1085 (1976). This is an objective analysis based on the standards of a "person of ordinary and normal sensibilities." *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 622, 358 P.2d 975 (1961).

Here, the trial court concluded that, on balance, SOS's operations did not create an unreasonable interference with the Moores' use and enjoyment of their land. It is clear from the findings that the trial court reached this conclusion after balancing the parties' rights, interests, and conveniences. In addition, the trial court also found that the Moores' land suffered no injury or loss of value.

The trial court supported its conclusion that the noise did not constitute an unreasonable interference by finding that the noise SOS produced was limited in duration and volume, comparable to that of the Kruegers' own leaf blower, and less than the SR 106 noise. The trial court also found that much of Moore's testimony as to the noise lacked credibility.

The trial court supported its conclusion that SOS's smoke production was not unreasonable by finding that SOS's shop was clean, Steven had not intentionally produced significant smoke in conducting SOS's operations since 2000, and other sources of smoke existed in the area. The trial court supported its conclusion that SOS's impact on traffic was not unreasonable by finding that Steven placed great importance on traffic safety, took work only by appointment, and blocked SR 106 for a very limited amount of time, not inconsistent with

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regular usage of SR 106.⁹ Finally, the trial court supported its legal conclusion that no aspect of SOS's operation constituted an unreasonable interference with the Moores' land on balance by finding that SOS's operations bothered none of the neighbors besides the Moores.

The Moores cite *Davis v. Taylor*, 132 Wn. App. 515, 132 P.3d 783 (2006) for the proposition that courts are obligated to consider the impact on the complaining party's property. But *Davis* addressed whether a farm was protected under right-to-farm laws and did not announce the rule the Moores claim. 132 Wn. App. at 519-23.

The Moores also cite *Riblet v. Spokane-Portland Cement Co.*, 45 Wn.2d 346, 274 P.2d 574 (1954) for the principle that the trial court must base its nuisance in fact conclusion upon the impacts to a particular plaintiff's property, without considering whether the alleged nuisance bothers others in the community. This argument inaccurately interprets *Riblet*. *Riblet* held that the trial court should consider intangible harms in addition to tangible harms, but never suggested that the trial court should measure losses subjectively based on a plaintiff's unique sensibilities. See 45 Wn.2d at 354-55.

The Moores also cite *Payne v. Johnson*, 20 Wn.2d 24, 145 P.2d 552 (1944) for the proposition that the trial court must judge a nuisance in fact solely on the impacts to a plaintiff's property without considering whether such impacts are unreasonable. But *Payne* held, "Whether

⁹ The Moores cite *Park v. Stolzheise*, 24 Wn.2d 781, 167 P.2d 412 (1946) for the proposition that so long as the Moores showed subjective fear due to traffic safety concerns, they have demonstrated a nuisance in fact. But *Park* dealt with the fear of an entire 1940's residential community regarding the potential opening of a mental institution within that community. 24 Wn.2d at 797-98. The Court held that where an entire residential community shared a strong common fear of a proposed land use, the community's fear was per se reasonable, regardless of whether science justified the fear. 24 Wn.2d at 797-98, 800. Thus, *Park* is distinguishable.

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appellant's particular use of his property constitutes a nuisance presents the question whether the use to which the property is put is reasonable or unreasonable." 20 Wn.2d at 29.

We hold that the findings of fact support the trial court's conclusion that the Moores did not establish that SOS was a nuisance in fact.

IV. NUISANCE PER SE

The Moores argue that the trial court erred in (1) concluding that LUPA's 21 day statute of limitations barred the Moores' nuisance per se claim and (2) concluding that the Moores' claim for nuisance per se fails even if SOS operated in violation of law. We agree.¹⁰

A. *Improper Application of LUPA*

The Moores argue that the trial court erred in ruling that because the nuisance per se claim would require the trial court to overturn a county determination that SOS could operate, LUPA's 21 day statute of limitations bars the Moores' nuisance per se claim. We agree with the Moores.

We review questions of statutory interpretation de novo. *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 890, 295 P.3d 1197 (2013), *review denied*, 178 Wn.2d 1007 (2013).

¹⁰ The Loves argue that the Moores did not plead nuisance per se in their complaint, and thus this court should not consider the issue. However, the Moores pleaded in their complaint that SOS built significant projects and operated its business without the required permits under the SMA. These pleadings put the Loves on notice that nuisance per se was at issue, and thus adequately pleaded the issue. See *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 175 Wn. App. 840, 865-66, 309 P.3d 555 (2013); *Jones Associates, Inc. v. Eastside, Properties, Inc.*, 41 Wn. App. 462, 466 n.3, 704 P.2d 681 (1985); *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987) (Pleadings must give adequate notice; if complaint states facts entitling plaintiff to relief it is immaterial what name the action is called).

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LUPA is the only method of judicial review for “land use decisions.” RCW 36.70C.030.¹¹

LUPA’s RCW 36.70C.020(2)¹² defines “land use decisions” as follows:

“Land use decision” means a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals

LUPA has a 21 day statute of limitations on bringing a claim.¹³ RCW 36.70C.040(3).

LUPA’s statute of limitations will bar a plaintiff’s nuisance claims where such claims require attacking the validity of a local government’s land use decision. *Asche v. Bloomquist*, 132 Wn. App. 784, 801, 133 P.3d 475 (2006).

In this case, the trial court ruled that LUPA bars the Moores’ claim because Mason County’s Case Activity Listing resolved a complaint filed against SOS, stating that SOS could continue to operate at its location as a “cottage industry.” Ex. 7. The trial court ruled that in order to prevail in showing illegality without violating LUPA, the Moores would have to have

¹¹ Former RCW 36.70C.030 (2003), *amended by* LAWS OF 2010, 1st Spec. Sess., ch. 7, §38. The amendments have no effect on this case.

¹² Former RCW 36.70C.020 (1995), *amended by* LAWS OF 2010, ch. 59, §1; LAWS OF 2009, ch. 419, §1. The amendments have no effect on this case.

¹³ LUPA explicitly exempts from its reach “[l]and use decisions of a local jurisdiction that are subject to review by . . . the shorelines hearings board” RCW 36.70C.030. The Shorelines Hearings Board reviews appeals from “any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state.” Former RCW 90.58.180(1) (2003), *amended by* LAWS OF 2011, ch. 277, §4; LAWS OF 2010, ch. 210, §37. However, this does not apply to this case, because the Shorelines Hearings Board cannot review a local government’s determination that a permit is *not* required. *Toandos Peninsula Ass’n v. Jefferson County*, 32 Wn. App. 473, 485, 648 P.2d 448 (1982). Here Mason County allowed SOS to operate without a permit as a “cottage industry.” Ex. 7.

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produced an order declaring improper a Mason County interpretive decision relating to the Loves' use of their land.

The trial court erred as a matter of law in ruling that LUPA precludes the Moores' claims for three reasons. First, the Case Activity Listing was the result of a low-level case study summarily dismissing a complaint. This does not constitute a land use decision as defined by LUPA, because Mason County was not determining whether SOS could legally continue to operate on the Loves' property without further permits. Rather, it was summarily dismissing a complaint for lack of evidence.

Second, even if we assume that the Mason County Case Activity Listing constituted a final land use decision regarding whether SOS is a cottage industry, this decision did not impact the Moores' claim—whether SOS is operating without a shoreline conditional use permit. Mason County requires cottage industries to obtain conditional use permits, and thus whether SOS is a “cottage industry” does not resolve the legality of the Loves' commercial use of their property for SOS. MCC 17.03.021; 17.50.040.¹⁴ Third, the Moores raised additional arguments as to why SOS's operations constitute nuisance per se that do not involve any permitting decision. For example, the Moores argue that SOS violated the Mason County noise ordinance, chapter 9.36 MCC, and violated the WSDOT's regulations. Mason County's Case Activity

¹⁴ Mason County Code's Shoreline Management Master Program states in the definitions section that cottage industries must obtain a conditional use permit. MCC 17.50.040. The broader development rules section of the Mason County Code requires a cottage industry to obtain a conditional use permit *unless* it can meet seven requirements, including that the cottage industry uses “[n]o equipment or process . . . which creates noise, vibration, glare, fumes, odors, or electrical interference *detectable to the normal senses off the property.*” MCC 17.03.021(6) (emphasis added).

Listing did not discuss, and, thus cannot constitute a land use decision on, these issues. Thus, the trial court erred in asserting that LUPA bars the Moores' nuisance per se claim.

B. *Improper Reasonableness Balancing*

The Moores argue that the trial court erred in ruling that because SOS's interference with the Moores' land was not unreasonable, their nuisance per se claim must fail. We agree with the Moores.¹⁵

We review interpretations of law de novo. *Freedom Foundation v. Wash. State Dept. of Transp., Div. of Wash. State Ferries*, 168 Wn. App. 278, 286, 276 P.3d 341 (2012). Whereas nuisance in fact requires the trial court to balance the parties' interests to determine the reasonableness of the defendants' conduct, a claim for nuisance per se does not require such balancing. "When the conditions giving rise to a nuisance are also a violation of statutory prohibition, those conditions constitute a nuisance per se, and *the issue of the reasonableness of the defendant's conduct* and the weighing of the relative interests of the plaintiff and defendant is precluded because the Legislature has, in effect, already struck the balance in favor of the innocent party." *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 418, 922 P.2d 115 (1996) (quoting *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 276 (Utah 1982)).

This gives nuisance per se the character of strict liability. *Tiegs*, 83 Wn. App. at 418. However, the unlawful conduct must still interfere with a plaintiff's use and enjoyment of his or her land in some way for a nuisance per se claim to lie. *Tiegs*, 83 Wn. App. at 418; *see also*

¹⁵ The Moores also argue that the trial court erred in interpreting the SMA to abolish a common law right of nuisance. However, the trial court did not interpret the statute in such a way. The trial court said that the Moores' nuisance per se claim fails because SOS's interference with their land is not, on balance, unreasonable. The trial court then added as an unrelated aside that the Moores could have received a damages remedy under the SMA if they had proven any damages.

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Motor Car Dealers Assoc. of Seattle v. Fred S. Haines Co., 128 Wash. 267, 273-74, 222 P. 611 (1924) (business competitor of car dealer could not establish nuisance per se where the defendant operated on Sunday in violation of law, because not a nuisance at all times, and because no negative impacts to the plaintiff's use of property whatsoever). However, establishing any interference of a plaintiff's use and enjoyment of property caused by acts violating a law satisfies nuisance per se, regardless of the interference's reasonableness. *Tiegs*, 83 Wn. App. at 418.

The trial court stated in its findings that SOS, on balance, did not have an unreasonable impact on the Moores' use and enjoyment of their land. However, it also found that SOS impacted the Moores' land. Thus the trial court found that SOS interfered with the Moores' use and enjoyment of their land to some degree, just not an unreasonable degree.

But after ruling that SOS's business had some impact on the Moores' use and enjoyment of their land, the trial court ruled that the Moores' nuisance per se claim failed, and that "[w]hether or not Mr. Love is operating in violation of the SMA, other Mason County or Washington State regulations or permits would not change the result." CP at 242. This is because the trial court determined that nuisance per se requires establishing that the violations lead to a use of land which "*injures* the plaintiffs' properties or *unreasonably* interferes with their enjoyment of their properties." CP at 242 (emphasis added). For this reason, the trial court rejected the Moores' claim, stating that the Loves' use of their property for SOS was "not, on balance, found to be unreasonable considering the rights, interests and conveniences of the parties." CP at 242.

In finding that the Moores' nuisance per se claim failed, the trial court misinterpreted the law, by applying a reasonableness balancing test to a nuisance per se claim. This is in direct

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conflict with the law and, thus, constituted reversible error. We hold that the trial court erred in conducting reasonableness balancing when analyzing the Moores' nuisance per se claim.

C. *New Trial on Nuisance Per Se*

We remand on the limited issue of nuisance per se. RAP 12.2 allows us to “take any other action as the merits of the case and the interest of justice may require” when deciding a case. An appellate court may affirm some issues, while remanding others. *See In re Yakima River Drainage Basin*, 177 Wn.2d 299, 350, 296 P.3d 835 (2013). This can serve as an effective way to bring a long and complex land use adjudication “one step closer to finality.” *See Yakima River Drainage Basin*, 177 Wn.2d at 350.

Thus we hold that the trial court committed a reversible error of law, and that we may, in instructing the trial court, take any action as the interests of justice require. RAP 12.2. In this case, because the trial court erroneously interpreted the law, the trial court never reached the question of whether SOS had proper permitting. For this reason, justice would be served if we remanded this case for a new trial on nuisance per se, to allow the trial court to fully address and determine SOS's permitting status, and to determine whether that permitting status violated the law. Thus we remand for trial on the issue of nuisance per se.

We remand the issue to the trial court for a new trial where both sides may produce evidence of SOS's permitting status, which the trial court can use in making a new determination based upon the correct legal standard for nuisance per se.¹⁶

V. ATTORNEY FEES AT TRIAL

Finally, the Moores argue that the trial court erred in granting the Loves attorney fees, arguing a number of theories. We hold that (1) the Loves are entitled to attorney fees under RCW 90.58.230 because they prevailed on the Shoreline Management Act claim, (2) the trial court did not need to make a finding of bad faith to award attorney fees under the SMA, but (3) the trial court impermissibly failed to segregate the fees. We reverse the attorney fee award, because the trial court improperly segregated the fees of the Loves' trial counsel Finlay, and then remand for a recalculation of fees consistent with our opinion.

A. *Applicability of the SMA's Attorney Fee Provision*

The Moores argue that the trial court had no lawful basis for awarding attorney fees under the SMA's attorney fee provision. RCW 90.58.230. The Moores contend that the SMA did not make attorney fees available because the Moores did not make a claim under the SMA.

¹⁶ The Loves argue that this court should dismiss the Moores' nuisance per se claim because the Moores failed to prove whether or not SOS had proper permits, citing *Gill v. LDI*, 19 F.Supp. 2d 1188 (W.D. Wash. 1998) as persuasive authority. However, in *Gill* the federal court held in defendant's favor on a dispute of *fact* (regarding whether or not defendant was in compliance with a permit), because plaintiff was the moving party on summary judgment. 19 F.Supp. 2d at 1191-92, 1199-1200.

Unlike *Gill*, which dealt with factual disputes on summary judgment, this case concerns a trial court's erroneous legal conclusion regarding nuisance per se following a bench trial. We review this erroneous conclusion of law de novo. Because the trial court's erroneous conclusion of law led it to refrain from making a factual finding as to whether or not SOS had proper permitting, remand is the appropriate remedy so as to resolve the factual dispute.

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The Moores argue that they abandoned all damages claims during trial, meaning that they could not have possibly had a claim under the SMA, given that the SMA limits private parties' relief to damages. Thus the Moores argue that the Loves did not "prevail" on an SMA claim, and cannot collect attorney fees under the SMA. *See* Br. of Appellants at 45. We disagree.

Whether a legal basis to award attorney fees exists is a legal issue reviewed de novo. *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 484, 260 P.3d 915 (2011). RCW 90.58.230, part of the SMA, provides:

Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. . . . [t]he court in its discretion may award attorney's fees and costs of the suit to the prevailing party.

Private citizens may sue for damages under the SMA, but may not sue for injunctive or declaratory relief. *Hedlund v. White*, 67 Wn. App. 409, 414, 836 P.2d 250 (1992).

In this case, the Moores explicitly pleaded a claim for damages under the SMA in their complaint. At closing argument, the Moores stated, "While the plaintiffs are not necessarily seeking damages, damages are allowed both under the nuisance statute and state 'Shoreline Management Act' and should be considered by the court." CP at 160.

The Moores argue that when making the determination of whether the Moores made a claim for damages, the trial court should have limited itself to considering only admitted evidence. Thus, the Moores argue that the trial court should have disregarded the Moores' closing argument (because closing arguments are not evidence) and should have instead focused on the testimonies of Moore and Krueger, both of whom testified that they wanted only to prevent SOS from operating.

However, the Moores cite no authority suggesting that a trial court may consider admitted evidence only when determining whether a party made a claim. Nor do they cite any authority that a party may abandon a claim via witness testimony, or that such an abandonment would be effective in the face of a subsequent request at closing argument that the trial court considers the claim. We hold that the record reflects no abandonment of the SMA claim and that the SMA authorizes attorney fees in this case.

B. *RCW 90.58.230's Attorney Fee Provision*

The Moores argue that the trial court violated RCW 90.58.230, because it allows the trial court to impose attorney fee awards only against a party who has litigated in bad faith. The Loves argue that the statute allows the trial court discretionary imposition of attorney fees against parties, irrespective of bad faith. II Br. of Respondents at 13. We agree with the Loves.¹⁷

We review questions of statutory interpretation de novo. *Manna Funding, LLC*, 173 Wn. App. at 890. RCW 90.58.230 states that the trial court “in its discretion may award attorney’s fees and costs of the suit to the prevailing party.” The trial court may award attorney fees to either the plaintiff or the defendant. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 823, 828 P.2d 549 (1992).

¹⁷ The Moores also argue that the trial court abused its discretion by granting attorney fees because the fee award was “an undue deterrent, punishing Appellants’ use of the courts to raise legitimate concerns when government defaults on its responsibilities.” Br. of Appellant at 46-47. But the Moores cite no law to support this argument in their original briefs, and did not add any support in their supplemental briefs. Thus we do not consider it. *See Escude*, 117 Wn. App. at 190 n.4.

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The Moores cite two cases for the proposition that RCW 90.58.230 limits the trial court to awarding fees against parties who have engaged in malicious conduct or made frivolous claims. *Cowiche Canyon Conservancy*, 118 Wn.2d at 823-24; *Hunt v. Anderson*, 30 Wn. App. 437, 443, 635 P.2d 156 (1981). However, both cases affirm the discretionary rulings by a trial court on attorney fees, and support the proposition that the trial court has discretion on whether to impose fees, overturned only for abuse of discretion. *Cowiche Canyon Conservancy*, 118 Wn.2d at 825; *Hunt*, 30 Wn. App. at 443. Thus we hold that RCW 90.58.230 does not require the trial court to make a finding of bad faith prior to awarding attorney fees in its discretion.

C. *Segregation of Fees*

The Moores further argue that the trial court erred by awarding attorney fees to Finlay, incurred defending the Loves in district court in a criminal case. We agree.

The trial court's attorney fee award will not be overturned absent a manifest abuse of discretion. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 375, 798 P.2d 799 (1990). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

A trial court must ordinarily segregate claims for which attorney fees are available from those for which fees are not available. *Dice v. City of Montesano*, 131 Wn. App. 675, 690, 128 P.3d 1253 (2006). However, a trial court need not segregate fees for claims that it finds so related that segregation is not reasonable. *Dice*, 131 Wn. App. at 690. A trial court need not segregate fees where the claims all relate to the same fact pattern, but provide different bases for recovery. *Manna Funding, LLC*, 173 Wn. App. at 901.

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Of the trial court's attorney fee award of \$28,907.44 to the Loves, \$16,812.50 went to Finlay.¹⁸ This \$16,812.50 included fees that Finlay accrued by defending the Loves in a district court criminal case regarding their dock and jet ski float. The Moores had complained about the dock and jet ski float on June 5, 2007, almost one year after filing their lawsuit against the Loves on June 23, 2006. Finlay stated by declaration that he charged \$2,000 for this district court criminal case. Finlay stated not only that the Kruegers instigated the district court criminal case through their complaint, but also that he used the legal research from the district court case to defend the Loves against the Moores' civil suit.

The trial court concluded that the time Finlay spent on the district court criminal case was too integrated with the litigation against the Moores for separation. The trial court did this because Finlay used much of the research done in defending the criminal complaint in the case against the Moores, and because the complaint occurred after the litigation with the Moores began.

It is well settled that courts may decline to segregate fees for unsuccessful *claims* when such *claims* are too intertwined to reasonably separate. *Dice*, 131 Wn. App. at 690. However, no authority states that courts may combine the fees for *separate cases* in *separate courts* on this basis.

¹⁸ When the trial court reduced the attorney fee award from \$36,034.69 to \$28,907.44, it took the difference out of Eisenhower and Carlson, PLLC's fees, and did not reduce the amount awarded to Finlay. In its amendment to the attorney fee award, the trial court maintained that it had no obligation to segregate the fees Finlay incurred. The trial court ruled that it need not segregate attorney fees where the claims are too integrated to properly segregate them.

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Although the district court case may have concerned the same legal issues as the Moores' nuisance suit and shared background research, this is not sufficient to justify merging a criminal case in district court with a civil case in superior court. Moreover, Finlay himself segregated the billing for the district court case. Finlay stated by declaration that he billed the Loves a \$2,000 flat fee for the district court case, while he billed a \$5,000 flat fee for the Moores' civil suit. Furthermore, one case focused on the Loves' dock and jet ski float, whereas the other case focused on the operation of SOS. Thus, not only could the trial court have segregated the cases, the Loves' attorney Finlay had already segregated them. The trial court abused its discretion by granting the Loves attorney fees for the district court case. We reverse the award of attorney fees for the district court case.

ATTORNEY FEES ON APPEAL

The Loves request attorney fees on appeal under the SMA's RCW 90.58.230. *See* RAP 18.1. The Loves argue that RCW 90.58.230 authorizes such fees. However, the Loves do not prevail on appeal based on any violation of the SMA, because the Moores did not appeal the SMA issue. Thus the Loves are not entitled to attorney fees on appeal under RCW 90.58.230. *See Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 86-87, 510 P.2d 1140 (1973) (SMA does not authorize attorney fees to a plaintiff that did not prevail on his SMA claim, even though he prevailed on a related claim in the same case.

APPENDIX A-2
ORDINANCES

APPENDIX A-2-1

7.04.031 These regulations shall apply to every person, firm, corporation, local and state governmental agencies and other non-federal entities which would develop, use, or own lands, wetlands, or waters under the control of the Master Program.

7.04.032 Adjacent Lands. The purpose of this subsection is to discuss the coordination of development of lands adjacent to shorelines with the policies of the Master Program and the Shoreline Management Act. A development undertaken without obtaining the applicable shoreline permits or which is inconsistent with the regulations of the Master Program, is unlawful. On the other hand, a use or development which is to some extent inconsistent with a policy plan may not be unlawful, but may be denied or conditioned on the basis of its inconsistency with the plan. These principles apply to the regulation of shoreline and adjacent lands:

- a. Part of the property is inside the shoreline, part is outside, and all of the development is outside the shoreline. No shoreline permit is required because all of the "development" lies outside the shoreline. However, uses and actions within the shoreline, though they do not constitute "development" must be consistent with the regulations of the Act and Shoreline Program. Change of use within shoreline jurisdiction may require a Conditional Use Permit.
- b. Part of the property is in the shoreline, part is outside, and all or part of the development is proposed within the shoreline. A permit is required for "development" within the shorelines. In addition, uses and other actions within the shorelines must comply with Master Program regulations. Furthermore, when the development proposal consists of a single, integrated project and a shoreline permit is required due to development within the shorelines, review and approval of development outside the shorelines may be postponed until shoreline permit review is accomplished if the public interest would be served by such a review sequence. Finally, although development conditions may be attached to developments within shorelines, conditions may not be attached, pursuant to the Shoreline Management Act, to aspects of a development lying outside the shorelines.

7.04.033 Developments and Uses Subject to Several Regulatory Sections. Some proposed developments or uses will be subject to more than one regulatory section of this program. For example, a proposed marina may be subject to regulations concerning "Dredging, Landfilling, Marinas", etc. A proposed development must be reviewed for consistency with the regulations of each applicable section.

7.04.034 Unspecified Uses. This program does not attempt to identify or foresee all conceivable shoreline uses or types of development. When a use or development is proposed which is not readily classified within an existing use or development category, the unspecified use must be reviewed as a Conditional Use and Performance Standards relating to the most relevant category shall be used.

APPENDIX A-2-2

Chapter 7.16: Project Classifications

Development proposals that propose to locate along the shoreline are categorized within each shoreline designation as "permitted", "conditional uses", or "prohibited". This priority system determines the proposal's administrative requirements and encourages activities that are compatible with each shoreline designation.

During application review, the basic element or intent of a proposed development will guide in the determination of the proposal's particular use activity. When a proposal contains two or more use activities, including accessory uses, the most restrictive category will be applied to the entire proposal.

DEFINITIONS:

Permitted. Those uses that are preferable and meet the policies of the particular shoreline designation, but because of their dollar value require a Substantial Development Permit or any development which materially interferes with the normal public use of the water or shorelines of the state.

Conditional Use. A Conditional Use Permit is intended to allow for flexibility and the exercise of judgment in the application of regulations in a manner consistent with the policies of the Shoreline Management Act and this Master Program. While not prohibited, these uses are an exception to the general rule. Criteria used for judging conditional uses are outlined in Chapter 7.28.

Prohibited. Some developments and uses are viewed as inconsistent with the definition, policies or intent of the shoreline environmental designation. For the purposes of this program, these uses are not considered appropriate and are not allowed, including by Conditional Use or Variance.

PROJECT CLASSIFICATION TABLE

ENVIRONMENT DESIGNATION	URBAN	RURAL	CONSERVANCY	NATURAL
Agriculture	P	P	P	C
Commercial Feedlots	X	C	X	X
Aquaculture				
non-floating	P	P	P	C
floating	C	C	C	C
gravel enhancement projects > 1,000 c.y.	C	C	C	C
Forest Practices	P/X	P	P	C
Commercial				
Water dependent	P	C	C ²	X ¹
non-water dependent/ with waterfront	C	C	C ²	X
non-water dependent without waterfront	P	C	C ²	X
Marinas	C	C	C ¹	X ¹
Mining	C	C	C	X
Outdoor Advertising	P	P	P	X
Residential - single family	E	E	E	X
duplex	P	P	C	X
multi-family	C	C	X	X
nonconforming development	E/V	E/V	E/V	X
accessory living quarters	P	P	P	X
Ports				
water dependent	P	C	C	X ¹
non-water dependent	C	C	C	X
Bulkheads	P	P	P	X
Breakwaters, Jetties, Groins	C	C	C	X ¹
Shore Defense Works (flood protection and stabilization)	P	P	C	C
Diking	C	C	C	C

ENVIRONMENT DESIGNATION	URBAN	RURAL	CONSERVANCY	NATURAL
Landfill				
water dependent-upland	P	P	C	X
water dependent-beyond OHWM	C	C	X	X
non-water dependent-upland	C	C	C	X
non-water dependent-beyond OHWM	X	X	X	X
sanitary landfill/ solid waste disposal site	X	X	X	X
Dredging				
water dependent	P	P	C	X ¹
non-water dependent	C	C	C	X ¹
Transportation	P	P	C	C
Piers & Docks	P	P	C	X
Marine rails/ boat ramps	P	P	C	X
mooring buoys	E	E	E	E
Boat house on land	P	P	P	X
Boat house over water/ *Covered moorage	C	C	X	X
Archaeological/ Historic Sites	P	P	P	C
Recreation				
campgrounds	C	C	C	C
parks	P	P	C	C

P=Permitted
C=Conditional Use
X=Prohibited
E=Substantial Development Permit Exempt

*Permitted only in marinas.

NOTE: This matrix is a guide only. The classifications can be found in the appropriate section.

¹ Prohibited when upland is designed Conservancy, Natural or in biological wetlands

² See Conservancy definition

Chapter 7.16.040 Commercial Development

Definition

Uses and facilities that are involved in wholesale or retail trade or business activities. Water dependent commercial uses are those commercial activities that cannot exist in other than a waterfront location and are dependent on the water by reason of the intrinsic nature of its operation.

1. Home Occupation. A business conducted within a dwelling which is the residence of the principal practitioner. A Home Occupation may be reviewed as a residential use provided it complies with all applicable County Ordinances and no alteration is made to the exterior of the residence or site which would alter the character of the site as a residential property including parking and signs. Home Occupations which require more than \$2,500 in exterior development costs require a Substantial Development Permit.
2. Cottage Industry. Small scale commercial or industrial activities on residential properties performed in the residence or building accessory thereto. The principal practitioner must reside on the property. Cottage Industries are considered as residential use and minor commercial development and are Substantial Development under this Master Program, provided they do not alter the character of the site as a residential property and wholesale and retail trade are minimal. Cottage Industries must comply with all applicable County Ordinances and require a Conditional Use Permit.

Policies

1. Commercial development on shorelines should be encouraged to provide physical and/or visual access to the shoreline, and other opportunities for the public to enjoy the shoreline.
2. Multiple use concepts which include open space and recreation should be encouraged in commercial developments.
3. Commercial development should be aesthetically compatible with the surrounding area. Structures should not significantly impact views from upland properties, public roadways or from the water.
4. The location of commercial developments along shorelines should ensure the protection of natural areas or systems identified as having geological, ecological, biological, or cultural significance.
5. Commercial developments should be encouraged to be located inland from the shoreline area unless they are dependent on a shoreline location. Commercial developments should be discouraged over-water or in marshes, bogs, swamps and floodplains.
6. New commercial development in shorelines should be encouraged to locate in those areas with existing commercial development that will minimize sprawl and the inefficient use of shoreline areas.
7. Parking facilities should be placed inland, away from the immediate water's edge and recreational beaches.
8. Commercial development should be designed and located to minimize impacts of noise and/or light generated by the development upon adjacent properties. Commercial developments which generate significant noise impacts should be discouraged.

Use Regulations

1. The County shall utilize the following information in its review of commercial development proposals:

- nature of the activity;
 - need for shore frontage;
 - special considerations for enhancing the relationship of the activity to the shoreline;
 - provisions for public visual or physical access to the shoreline;
 - provisions to ensure that the development will not cause severe adverse environmental impacts;
 - provisions to mitigate any significant noise impacts;
 - provisions to mitigate light or glare impacts.
2. Commercial development may be permitted on the shoreline in the following descending order of priority: water dependent, water related and water oriented. Non-water related, non-water dependent and non-water oriented developments in an urban and rural environment may be permitted by Substantial Development Permit when:
- The parcel of land to be developed is a minimum of 100 feet from OHWM and is located on the upland side of a public roadway, railroad right of way or government controlled property.
3. Parking and loading areas shall be located well away from the immediate waters' edge and beaches, unless there is no other practical location for parking. Perimeters of parking areas shall be landscaped to minimize visual impacts to the shorelines, roadways and adjacent properties subject to approval by Public Works and/or Department of Transportation. Permit application shall identify the size, general type and location of landscaping. Design of parking and loading areas shall ensure that surface runoff does not pollute adjacent waters or cause soil or beach erosion. Design shall provide for storm water retention. Parking plans shall be reviewed by Mason County Department of Public Works for compliance with all applicable County Ordinances. Creation of parking areas by landfilling beyond OHW mark or in biological wetlands is prohibited.
4. Those portions of a commercial development which are not water dependent are prohibited over the water.
5. Water supply and waste facilities shall comply with the strictest established guidelines, standards and regulations.
6. New commercial developments shall be located adjacent to existing commercial developments whenever possible.
7. New or expanded structures shall not extend more than 35 feet in height above average grade level.
8. Commercial developments adjacent to aquaculture operations shall practice strict pollution control procedures.
9. Commercial developments shall be located and designed to minimize noise impacts on adjacent properties.

COMMERCIAL DEVELOPMENT

URBAN RURAL CONSERVANCY NATURAL

Shore setbacks from the OHWM

Primary Structures:

Water Dependent	15'	50'	50'	X
Non-water Dependent	50'	75'	100'	X

* Water dependent commercial structures may be constructed over the water if this is a functional requirement. No variance from setback is required.

Accessory Uses (including parking)	50'	100'	150'	X
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* Water dependent commercial structures may be constructed over the water if this is a functional requirement. No variance from setback is required.

Side Yard Setbacks ¹	5-25'	15-25'	20-30'	X
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Site coverage by structures, roads, parking and primary uses	70%	50%	20%	X
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Height Limit	35'	35'	35'	X
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X = Prohibited Use

¹ Side yard setbacks will be increased depending upon the height of the building. Buildings shall have a setback of five feet plus five feet for every ten feet or fraction thereof in height over 15 feet.

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(Ord. 179-02, Attach. B (part), 2002; Ord. 142-02, Attach. B (part), 2002; Ord. 88-02, Attach. B (part), 2002; Ord. 116-01, Attach. A (part), 2001; Ord. 129-00, Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

15.03.015 Application types and classification.

- (a) Applications for review pursuant to Title 15 shall be subject to a Type I, Type II, Type III, or Type IV process.
- (b) Unless otherwise required, where the county must approve more than one application for a given development, all applications required for the development may be submitted for review at one time. Where more than one application is submitted for a given development, and those applications are subject to different types of procedure, then all of the applications are subject to the highest-number procedure that applies to any of the applications.
- (c) The review authority for the application in question shall classify the application as one of the four types of procedures.
 - (1) The act of classifying an application shall be an administrative interpretation, if written and transmitted to the applicant.
 - (2) Questions about what procedure is appropriate shall be resolved in favor of the type providing greatest notice and opportunity to participate.
 - (3) The review authority shall consider the following guidelines when classifying the procedure type for an application:
 - (A) A Type I (ministerial) process involves an application that is subject to clear, objective and nondiscretionary standards or standards that require an exercise of professional judgment about technical issues.
 - (B) A Type II (administrative) process involves an application that is subject to objective and subjective standards that require the exercise of limited discretion about nontechnical issues and about which there may be a limited public interest.
 - (C) A Type III (quasi-judicial) process involves an application for relatively few parcels and ownerships. It is subject to standards that require the exercise of substantial discretion and about which there may be a broad public interest.
 - (D) A Type IV (legislative) process involves the creation, implementation, or amendment of policy or law by ordinance. The subject of a Type IV process involves a relatively large geographic area containing many property owners, and a Type IV application should follow the format detailed in Section 15.09.060.
- (d) Type I and Type II Review—Without Notice—Letter of Completeness. Type I and Type II permit reviews, which are categorically exempt from environmental review under Chapter 43.21C RCW, or for which environmental review has been completed in connection with other permits, shall be excluded from the notice of application and notice of decision provisions in this title, except when specifically required for a particular category of project. Also a letter of completeness shall be at the option of the review authority, provided that, if no letter of completeness is prepared, the application is considered complete after twenty-eight days from receiving a date stamped application and within the meaning of Chapter 36.70B RCW.

(Ord. 179-02, Attach. B (part), 2002; Ord. 142-02, Attach. B (part), 2002; Ord. 88-02, Attach. B (part), 2002; Ord. 116-01, Attach. A (part), 2001; Ord. 129-00, Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

15.03.020 Administrative direction.

Each director or authorized official shall review and act on the following:

- (1) **Review Authority.** The director of community development, the director of health services, the fire marshal, and the building official, are responsible for the administration of the respective titles of the Mason County Code and ordinances. The responsibilities of the review authority may be delegated when not contrary to law or ordinance.
- (2) **Administrative Interpretation.** Upon request or as determined necessary, the review authority shall interpret the meaning or application of the provisions of such titles and issue a written administrative interpretation within thirty days. Requests for interpretation shall be written and shall concisely identify the issue and desired interpretation.
- (3) **Administrative Decisions.** Administrative approval, approval with conditions, or denial of permit applications as set forth in Sections 15.09.020, 15.09.030, and 15.09.040.

(Ord. 179-02, Attach. B (part), 2002; Ord. 142-02, Attach. B (part), 2002; Ord. 88-02, Attach. B (part), 2002; Ord. 116-01, Attach. A (part), 2001; Ord. 129-00, Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

15.03.030 Board of county commissioners.

The board of county commissioners shall review and act on:

- (1) Type IV applications including changes to the Mason County comprehensive plan and land use regulations;
- (2) Applications for removal of utility and drainage easements set forth in Section 15.03.060.

(Ord. 50-04, Attach. B (part), 2004; Ord. 80-03, Attach. B (part), 2003; Ord. 179-02, Attach. B (part), 2002; Ord. 142-02, Attach. B (part), 2002; Ord. 88-02, Attach. B (part), 2002; Ord. 116-01, Attach. A (part), 2001; Ord. 129-00, Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

15.03.040 Planning advisory commission.

The planning advisory commission shall review and make recommendations on the following applications and subjects:

- (1) Amendments to the comprehensive plan and development regulations per RCW 36.70A.030;
- (2) Subjects referred by ordinance.

(Ord. 179-02, Attach. B (part), 2002; Ord. 142-02, Attach. B (part), 2002; Ord. 88-02, Attach. B (part), 2002; Ord. 116-01, Attach. A (part), 2001; Ord. 129-00, Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

15.03.050 Hearing examiner.

The hearing examiner shall review and act on the following subjects:

- (1) Appeals of decisions of the building official on the interpretation or application of the building code;

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15.07.050 Notice of final decision. 

- (a) When a notice is required for a final decision, such notice shall be sent to the applicant, all parties of record, all parties who requested to be notified, and the county assessor's office.
- (b) This notice shall include the statement of threshold determination (RCW 43.21C), information on requesting assessed valuation changes by affected property owners, and the procedures of administrative appeal, if any.
- (c) This notice may be combined with the transmittal requirements of other codes, state statutes, or ordinances, as appropriate.
- (d) Notice of administrative decisions shall be the responsibility of the issuing county department.

(Ord. 80-03 Attach. B (part), 2003; Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

county's development code, adopted plans and regulations. Notice of the hearing examiner meeting shall be in accordance with Section 15.07.030.

- (c) Required Review. The hearing examiner shall review a proposed development according to the following criteria:
- (1) The development does not conflict with the comprehensive plan and meets the requirements and intent of the Mason County Code, especially Titles 6, 8, and 16.
 - (2) The development does not impact the public health, safety and welfare and is in the public interest.
 - (3) The development does not lower the level of service of transportation and/or neighborhood park facilities below the minimum standards established within the comprehensive plan. If the development results in a level of service lower than those set forth in the comprehensive plan, the development may be approved if improvements or strategies to raise the level of service above the minimum standard are made concurrent with the development. For the purpose of this section, "concurrent with the development" is defined as the required improvements or strategies in place at the time of occupancy, or a financial commitment is in place to complete the improvements or strategies within six years of approval of the development.

(Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996). (Ord. No. 02-09, 1-6-2009)

15.09.055 Type III review—Shoreline master program.

- (a) Applicability to Substantial Development. Any person wishing to undertake substantial development or exempt development on shorelines shall apply to the review authority for a substantial development permit or a statement of exemption. Whenever a development falls within the exemption criteria outlined below and the development is subject to a U.S. Army Corps of Engineers Section 10 or Section 404 Permit, the review authority shall prepare a statement of exemption, and transmit a copy to the applicant and the Washington State Department of Ecology. The following exempt developments shall not require a substantial development permit, but may require a conditional use permit, variance and/or a statement of exemption. Exemptions shall be construed narrowly. All developments must be consistent with the shoreline master program and shoreline management act.
- (1) Any development of which the total cost or fair market value, whichever is higher, does not exceed five thousand dollars, if such development does not materially interfere with the normal public use of the water or shorelines of the state;
 - (2) Normal maintenance or the repair of existing structures or developments, including damage by accident, fire or elements;
 - (3) Construction of the normal protective bulkhead common to a single-family residence;
 - (4) Emergency construction necessary to protect property from damage by the elements;
 - (5) Construction and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities on wetlands, and the construction of a barn or similar agricultural structure, and construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels; provided that a feedlot of any size, all processing plants, other activities of a commercial nature, alteration of the contour of the

shorelands by leveling or filling other than that which results from normal cultivation, shall not be considered normal or necessary farming or ranching activities. A feedlot shall be an enclosure or facility used or capable of being used for feeding livestock hay, grain, silage, or other livestock feed, but shall not include land for growing crops or vegetation for livestock feeding and/or grazing, nor shall it include normal livestock wintering operations;

- (6) Construction or modification of navigational aids such as channel markers and anchor buoys;
- (7) Construction on wetlands by an owner, lessee or contract purchaser of a single-family residence for his own use or for the use of his family, which residence does not exceed a height of thirty-five feet above average grade level and which meets all requirements of the state agency or local government having jurisdiction thereof. "Single-family residence" means a detached dwelling designed for and occupied by one family including those structures and developments within a contiguous ownership which are a normal appurtenance. Interpretations of "normal appurtenances are set forth and regulated within the Mason County shoreline master program. Construction authorized under this exemption shall be located landward of the ordinary high water mark;
- (8) Construction of a dock, including a community dock designed for pleasure craft only, for the private non-commercial use of the owner, lessee, or contract purchaser of a single-family residence and multiple-family residences. A dock is a landing and moorage facility for watercraft and does not include recreational decks, storage facilities or other appurtenances. This exception applies if either: (A) in salt waters, the fair market value of the dock does not exceed five thousand dollars; or (B) in fresh waters, the fair market value of the dock does not exceed ten thousand dollars, but if subsequent construction having a fair market value exceeding five thousand dollars occurs within five years of completion of the prior construction, the subsequent construction shall be considered a substantial development. For purposes of this section salt water shall include the tidally influenced marine and estuarine water areas of the state including the Puget Sound and all bays and inlets associated with any of the above;
- (9) Operation, maintenance or construction of canals, waterways, drains, reservoirs or other facilities that now exist or are hereafter created or developed as a part of an irrigation system for the primary purpose of making use of system waters, including return flow and artificially stored ground water from the irrigation of lands;
- (10) The marking of property lines or corners on state owned lands, when such marking does not significantly interfere with the normal public use of the surface of the water;
- (11) Operation and maintenance of any system of dikes, ditches, drains, or other facilities existing on September 8, 1975, which were created, developed or utilized primarily as a part of an agricultural drainage or diking system;
- (12) Any project with a certification from the governor pursuant to RCW Chapter 80.50;
- (13) Site exploration and investigation activities that are prerequisite to preparation of an application for development authorization under this chapter, if:
 - (A) The activity does not interfere with the normal public use of the surface waters;
 - (B) The activity will have no significant adverse impact on the environment including but not limited to fish, wildlife, fish or wildlife habitat, water quality, and aesthetic values;
 - (C)

Lots created prior to December 2002 which do not meet the minimum lot size may be used for a single family residence without a variance permit; provided both of the following criteria can be met:

- (1) A permit for on-site sewage disposal system which meets all current codes for setbacks and sizing, has been granted by the Mason County health services.
- (2) All side yard and shore yard setbacks can be met.

Residential development on lots which do not meet these bulk, dimensional or performance standards criteria may be allowed as a variance; provided approval has been granted by the Mason County health services.

- (c) Criteria for Granting Permits. Upon the December 2002 effective date of this program, a permit or a statement of exemption shall be granted only when the proposed development is consistent with:
 - (1) Policies and regulations of the Mason County shoreline master program and applicable policies enumerated in Chapter 90.58 RCW in regard to shorelines of the state and of statewide significance; and
 - (2) Regulations adopted by the Department of Ecology pursuant to the act; including Chapter 173-27 WAC.

The burden of proving that the proposed development is consistent with these criteria shall be on the applicant.

- (d) Fees. A filing fee in an amount established by the board of county commissioners shall be paid to the department of community development at the time of application.
- (e) Permit Application. The review authority shall provide the necessary application forms for the substantial development permits, conditional use permit and variance permit. In addition to the information requested on the application, the applicant shall provide, at a minimum, the following information.
 - (1) Site plan - drawn to scale and including:
 - (A) Site boundary;
 - (B) Property dimensions in vicinity of project,
 - (C) Ordinary high water mark;
 - (D) Typical cross section or sections showing:
 - (i) Existing ground elevation,
 - (ii) Proposed ground elevation,
 - (iii) Height of existing structures,
 - (iv) Height of proposed structures;
 - (E) Where appropriate, proposed land contours using five-foot intervals in water area and ten-foot intervals on areas landward of ordinary high water mark, if development involves grading, cutting, filling, or other alteration of land contours,
 - (F) Dimensions and location of existing structures which will be maintained;
 - (G) Dimensions and locations of proposed structures, parking and landscaping;
 - (H) Identify source, composition, and volume of fill material;
 - (I) Identify composition and volume of any extracted materials, and proposed disposal area;
 - (J)

- Location of proposed utilities, such as sewer, septic tanks and drain fields, water, gas and electricity;
 - (K) If the development proposes septic tanks, does proposed development comply with local and state health regulations;
 - (L) Shoreline designation according to shoreline master program;
 - (M) Show which areas are shorelines and which are shorelines of statewide significance.
- (2) Vicinity Map.
- (A) Indicate site location using natural points of reference (roads, state highways, prominent landmarks, etc.).
 - (B) If the development involves the removal of any soils by dredging or otherwise, identify the proposed disposal site on the map. If disposal site is beyond the confines of the vicinity map, provide another vicinity map showing the precise location of the disposal site and its distance to nearest city or town.
 - (C) Give brief narrative description of the general nature of the improvements and land use within one thousand feet in all directions from development site.
- (3) Adjacent Landowners. Provide names and addresses of all real property owners within three hundred feet of property where development is proposed. When adjacent property widths exceed one hundred feet, at least three adjacent property owners' names and addresses shall be provided.

Completed application and documents shall be submitted to the review authority for processing and review. Any deficiencies in the application or documents shall be corrected by the applicant prior to further processing.

- (f) Permit Process. When a complete application and associated information have been received by the review authority, the review authority shall mail notice of proposed project to all property owners named on the list as supplied by the applicant, and shall post notice in a conspicuous manner on the property upon which the project is to be constructed. The review authority shall also be responsible for delivering legal notice to the newspaper, to be published at least once a week on the same day of the week for two consecutive weeks in a newspaper of general circulation within the area in which the development is proposed. Advertising costs will be the responsibility of the applicant. The review authority shall schedule a public hearing before the hearing examiner in the case of a conditional use permit, variance permit, or a substantial development permit. For the purpose of scheduling a public hearing, the date of submittal of a complete application shall be considered the date of application. The minimum allowable time required from the date of application to hearing examiner hearing date shall be forty-five days. Any interested person may submit his written views upon the application to the county within thirty days of application or notify the county of his desire to receive a copy of the action taken upon the application. All persons who so submit their views shall be notified in a timely manner of the action taken upon the application.
- (1) Application Review. The hearing examiner and review authority shall make recommendations and decisions regarding permits, based upon:
- (A) The policies and procedures of the act;
 - (B) The shoreline master program for Mason County, as amended.
- (2) Review by the Hearing Examiner.
- (A)

- Upon receipt of the recommendation from the review authority, the hearing examiner shall either approve, conditionally approve, deny the application, or postpone for further information.
- (B) The hearing examiner shall review the permit application at the first regularly scheduled public meeting of the hearing examiner following the expiration of the thirty-day period required in Section 15.09.055(f).
 - (C) The hearing examiner shall review the application and make decisions regarding permits based upon:
 - (i) The shoreline master program for Mason County;
 - (ii) Policies and procedures of Chapter 90.58 RCW, the shoreline management act;
 - (iii) Written and oral comments from interested persons;
 - (iv) The comments and findings of the review authority.
 - (D) A written notice of the public meeting, at which the hearing examiner considers the application, shall be mailed or delivered to the applicant a minimum of five days prior to hearing.
 - (E) The decisions of the hearing examiner shall be the final decision of the county on all applications and the hearing examiner shall render a written decision including findings, conclusions, and a final order, and transmit copies of the decision within five days of the hearing examiner's final decision to the following.
 - (i) The applicant;
 - (ii) The department of ecology;
 - (iii) Washington Attorney General.
- (3) Washington State Department of Ecology Review. Development pursuant to a substantial development permit, conditional use or variance shall not begin and is not authorized until twenty-one days from the date the review authority files the permit decision with the Department of Ecology and the Attorney General, in the case of a substantial development permit, or up to sixty days in the case of variance or conditional use permit, provided all review and appeal proceedings initiated within twenty-one days of the date of such filing of a substantial development permit or twenty-one days of final approval by the Washington State Department of Ecology for a conditional use permit or variance have been terminated.
- (4) Time Limit for Action. No permit or exemption authorizing construction shall extend for a term of more than five years. If actual construction of a development for which a permit has been granted has not begun within two years after the approval, the hearing examiner (or review authority, in the case of an exemption) shall, review the permit and upon a showing of good cause, may extend the initial two-year period by permit for one year. Otherwise the permit terminates; provided, that no permit shall be extended unless the applicant has requested such review and extension before the hearing examiner prior to the expiration date.
- (g) Appeal to State Shorelines Hearings Board. Any person aggrieved by the granting, denying, rescission or modification of a shoreline permit may seek review from the state shoreline hearings board by filing an original and one copy of request for the same with the hearings board within twenty-one days of receipt of the final decision by the hearing examiner. The request shall be in the form required by the rules for practice and procedure before the State Shoreline Hearings Board. Concurrent with the filing of request for review with the hearings

board, the person seeking review shall file a copy of the request for review with the Department of Ecology, the Attorney General and the hearing examiner. Hearing board regulations are contained in Chapter 461-08 WAC.

- (h) Permit Revisions/Rescission. A person operating under a current shoreline permit may apply to the review authority for modification to the permit, or the hearing examiner board or review authority may rescind a permit if there is evidence of noncompliance with the existing permit. In either case, the following procedure shall apply:
- (1) The review authority shall determine if the revision is within the scope and intent of the original permit set forth under WAC 173-27-100, as amended.
 - (2) If said revision is determined to be outside the scope and intent of the original permit, a new and complete permit application shall be made in compliance with the act and this program.
 - (3) If said revision is determined to be within the scope and intent of the original permit, the hearing examiner may approve the revision. The revised permit shall become effective immediately. The approved revision along with copies of the revised site plan and text, shall be submitted by certified mail to the Department of Ecology Regional Office, the Attorney General, and to persons who have previously notified the county relative to the original application.

If the revision to the original permit involves a conditional use or variance which was conditioned by the Department of Ecology, local government shall submit the revision to the Department of Ecology for the WDOE's approval, approval with conditions, or denial. The revision shall indicate that it is being submitted under the requirements of WAC 173-27-100(6). The WDOE shall render and transmit to local government and the applicant its final decision within fifteen days of the date of the department's receipt of the submittal from local government. Local government shall notify the parties of record of the department's final decision. The revised permit is effective immediately upon final action by local government, or, when appropriate under WAC 173-27-100 (7).

- (4) Appeals shall be in accordance with RCW 90.58.180 and shall be filed within twenty-one days from receipt of local action by WDOE or, when appropriate under subsection (h)(3) of this section, the date the WDOE's final decision is transmitted to local government and the applicant. The party seeking review shall have the burden of proving the revision granted was not within the scope and intent of the original permit.
- (5) If the review authority or hearing examiner determines that there exists noncompliance with a shoreline permit and/or any conditions attached thereto or any revisions and modifications, then the review authority or hearing examiner shall issue notice of noncompliance to the permittee and to parties of record and move to rescind the shoreline permit after a hearing.

(Ord. 80-03 Attach. B (part), 2003; Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

15.09.057 Variance criteria.

Variations from the bulk and dimension requirements of the resource ordinance or the development regulations (zoning regulations) may be allowed as follows. The county must document with written findings compliance or noncompliance with the variance criteria. The burden is on the applicant to prove that each of the following criteria are met:

Description of Use	Land Use Classification	Code of Ordinances Title 17 - ZONING >> Chapter 17.03 DEVELOPMENT REQUIREMENTS >> Urban Growth Areas	Resource Areas	Agricultural Resource Lands
Chapter 17.03 DEVELOPMENT REQUIREMENTS (U)				

Sections:

- [17.03.010 Permitted uses, generally.](#)
- [17.03.020 Matrix of permitted uses.](#)
- [17.03.021 Cottage industries.](#)
- [17.03.024 Residential uses as special uses.](#)
- [17.03.025 Provisions for airports.](#)
- [17.03.028 Essential public facilities.](#)
- [17.03.029 Accessory dwelling unit requirement.](#)
- [17.03.030 Development requirements and performance standards.](#)
- [17.03.031 Binding site plan required in the Belfair UGA \(Southern Connection—Long-term UGA Zone\)](#)
- [17.03.032 Development densities and dimensional requirements.](#)
- [17.03.033 Performance-based density bonuses.](#)
- [17.03.034 Classification of land uses established.](#)
- [17.03.035 Land divisions in resource lands.](#)
- [17.03.036 Buffer and landscape requirements.](#)
- [17.03.037 Density transfer and agricultural resource lands.](#)
- [17.03.040 Off-street parking.](#)
- [17.03.105 Motor vehicle impound yards.](#)
- [17.03.200 Intent of sign regulations.](#)
- [17.03.201 Exemptions to the sign regulations.](#)
- [17.03.202 Prohibited signs.](#)
- [17.03.203 Nonconforming signs.](#)

17.03.010 Permitted uses, generally.

It is the intent of this chapter to provide for the maximum amount of flexibility in the siting of differing types of land uses. For this reason, the performance standards and buffer yard requirements found at [Section 17.03.036](#) have been developed. However, both the comprehensive plan and this chapter recognize that some uses and densities will create inherent conflicts with surrounding land uses, and with the intent of the comprehensive plan. Thus, some uses are prohibited in some areas, and the intensity of some uses (such as residential, expressed in dwelling units per acre, and industrial, expressed in floor area ratio) are restricted in others. Many of the requirements that apply to rural lands have been placed in Chapter 17.04.

(Ord. 108-05 Attach. B (part), 2005).

17.03.020 Matrix of permitted uses.

The intent of this section is to assist proponents and staff in determining whether a proposed land use is consistent with the applicable policies of the comprehensive plan. Those policies were formed with the intention to allow property owners and project proponents as much flexibility as possible in the use of their property, within the constraints of the Growth Management Act. Therefore, the following matrix identifies the permitted uses in the urban or resource land areas in Mason County; note that the public should consult the specific adopted urban growth area plan for land use designation as permitted or prohibited. Permitted uses, as they apply to rural lands, have been placed in Chapter 17.04. All uses not listed as permitted uses, accessory uses, or special permit uses in the matrix or Chapter 17.04 are prohibited uses.

(Ord. 108-05 Attach. B (part), 2005).

17.03.021 Cottage industries.

Unless noted by an asterisk (*) any use shown in Figure 17.03.020 is permitted in any development area as a home-based occupation, or as a cottage industry. The activity shall comply with the criteria in RU-524A, and shall be required to obtain a special use permit unless they comply with the following standards:

- (1) Parking areas shall accommodate residents and employees only; any provision for additional parking shall require a special use permit;
- (2) The outdoor storage of merchandise or materials is allowed if they are not visible to the public from off the site;
- (3) A cottage industry shall involve the owner or lessee of the property who shall reside within the dwelling unit, and shall not employ on the premises more than five nonresidents. A temporary increase in the number of employees is permitted to accommodate a business that is seasonal in nature. However, not more than five additional persons shall be employed on a temporary basis (up to six weeks) without a special use permit;
- (4) More than one business may be allowed, in or on the same premises provided that all of the criteria are met for all business combined;

Description of Use (5) (6)	Land Use shall be no alterations to the outside appearance of the buildings or premises that are not consistent with the residential use of the property, or other visible evidence of the conduct of such cottage industry, other than twelve square feet of growth.	Resource Areas	Agricultural Resource Lands
	No equipment or process shall be used in such home occupations which creates noise, vibration, glare, fumes, odors, or electrical interference detectable to the normal senses off the property.		

(7) The cottage industry shall not create an increase of five percent or more in local traffic.

X=Permitted Use T=permitted only as tourist-related use R=permitted only as resource based use S=special use permit required
 *=not allowed as cottage industry U=consult the specific adopted urban growth area plan and development regulations for land use designation as permitted or prohibited.

[PLEASE NOTE: Rural Land Uses are addressed in Chapter 17.04]

MASON COUNTY
MATRIX OF PERMITTED USES
FIGURE 17.03.020

Description of Use	Land Use Classification (U)	Urban Growth Areas	Resource Areas	Agricultural Resource Lands
Accessory apartment or use	I	X	X	X
Adult retirement community	III	X		
Adult day care facility (less than 8)	II	X		
Adult day care facility (greater than 8)	III	X		
Agricultural buildings	I		X	X
Agricultural crops; orchards	I		X	X
Airport*	VI	X		
Ambulance service	V	X		
Animal hospital	V	X		
Aquaculture	IV	X	X	X
Assisted living facility*	III	X		
Auction house/barn (no vehicle or livestock)	V	X		
Automobile service station*	V	X		
Automobile wash*	V	X		
Automobile, repair	V	X		
Automobile, sales*	V	X		
Bakery	IV	X		
Banks, savings and loan assoc.*	IV	X		
Bed and breakfast	IV	X		X

Description of Use	Land Use Classification (U)	Urban Growth Areas	Resource Areas	Agricultural Lands
Bicycle paths, walking trails	II	X		
Billiard hall and pool hall*	V	X		
Blueprinting and photostating	V	X		
Boat yards*	V	X		
Bowling alley*	II	X		
Buy-back recycling center*	V	X		
Cabinet shops (see Industry, light)	V	X		
Carpenter shops (see Industry, light)	V	X		
Carport (accessory use)	I	X	X	X
Cemeteries*	I	X		
Child day care, commercial*	II	X		
Child day care, family	I	X	X	
Church	II	X		
Non-profit club or lodge, private*	IV	X		
Commercial outdoor recreation	II	X		
Confectionery stores (see Retail sales)	IV	X		
Contractor yards	V	X		
Convenience store, 3,000 sf or less	V	X		
Cottage industries	IV	X	X	X
Department stores (see Retail sales)*	V	X		
Distributing facilities (see Industry, light)	V	X		
Drug stores (see Personal services)*	V	X		
Dry cleaners (see Personal services)*	V	X		
Dwelling, multi-family (4 family or less)*	II	X		
Dwelling, multi-family (5 family or greater)*	III	X		
Dwelling, single-family	(See Figure 17.03.034)	X	X	X
Educational learning center	II	X	X	S

Description of Use	Land Use Classification	X	Urban Growth Areas		Resource Areas		Agricultural Resource Lands
Espresso stands	IV (U)	X					
Fire stations*	IV	X		S		S	
Flea market	V	X					
Food markets and grocery stores*	V	X					
Forestry	VI			X		X	
Freight terminal, truck*	V	X					
Fuel storage tanks (underground, >500 gal.) (accessory use)	I	X		X		X	
Fuel storage tanks (underground, 500 gal. or less) (accessory use)	I	X		X		X	
Fuel storage tanks, above ground (accessory use)	I	X		X		X	
Furniture repair (see Industry, light)	V	X					
Garage, private (accessory to dwelling)	I	X		X		X	
Garage, public parking	V	X					
Gravel extraction*	VI			R			
Greenhouses, private and noncommercial	I	X		X		X	
Group homes	III	X					
Hardware stores 3,000 sf or less	IV	X					
Hardware stores more than 3,000 sf*	V	X					
Health club*	V	X					
Heavy industry*	VI	X					
Home occupation	I	X		X		X	
Horticultural nursery, wholesale and retail	IV	X		X		X	
Hospitals*	V	X					
Hotel*	IV	X					
Industry, light	V	X					
Inn	IV	X					
Kennels	IV	X				X	

Description of Land Use	Classification	Urban	Growth	Resource Areas	Agricultural Resource Lands
Libraries*	II	X			
Liquor stores*	V	X			
Livestock	IV		X	X	
Locksmiths	IV (U)	X			
Logging	VI			R	R
Lumber yards*	V	X			
Machine shops, punch press up to 5 tons (see Industry, light)	V	X			
Marina*	V	X			
Medical-dental clinic	IV	X			
Mining*	VI			R	
Mobile home park*	III	X			
Mobile home sales*	V	X			
Mortuaries*	IV	X			
Motel*	IV	X			
Motor vehicle impound yards (see Section 17.03.105)*	V	X			
Non-automotive, motor vehicle and related equipment sales, rental, repair and service	V	X			
Paint shop (see Industry, light)*	V	X			
Parcel service delivery (see Industry, light)	V	X			
Parking area, private	I	X	X		X
Parking area, public	IV	X			
Pasture	I		X		X
Pesticide application service (see Industry, light)	V	X			
Pet shop	IV	X			
Plumbing shop (see Industry, light)	V	X			
Plumbing supply yards (see Industry, light)*	V	X			
Post office, branch or contract station	II	X			
Post office, distribution center or terminal*	V	X			
Printing establishments	V	X			

Professional Description of office Use	IV Land Use Classification (U)	X Urban Growth Areas	Resource Areas	X	Agricultural Resource Lands
Public parks	IV	X			
Public utility offices	I (U)	X			
Public utility service yard*	V	X			
Radio and TV repair shops	IV	X			
Radio and TV transmission towers (incl. cellular phone towers)*	IV	X			
Rail-dependent uses*	VI	X			
Recreational vehicle park*	II	X			
Resource based industry	VI	X		R	
Restaurant*	V	X			
Restaurants, drive-through*	V	X			
Rifle range*	VI				
Sawmills	VI	X		R	
Schools, private, elementary or secondary	II	X			
Secondhand store	V	X			
Self-service storage facility*	V	X			
Signs		X		X	
Shoe stores or repair shop	IV	X			
Small engine repair	V	X			
Special needs housing	III	X			
Stable	IV			X	X
Stationary store (see Retail sales)	IV	X			
Studios (i.e., recording, artist, dancing, etc.)	IV	X			
Taverns*	V	X			
Theaters, enclosed*	V	X			
Tool sales and rental	V	X			
Tourist-related uses	V	X			
Trailer-mix concrete plant* (resource-dependent use)	VI			R	
Upholstering	V	X			
	V	X			

APPENDIX A-2-7

program, is unlawful. On the other hand, a use or development which is to some extent inconsistent with a policy plan may not be unlawful, but may be denied or conditioned on the basis of its inconsistency with the plan. These principles apply to the regulation of shoreline and adjacent lands:

- a. Part of the property is inside the shoreline, part is outside, and all of the development is outside the shoreline. No shoreline permit is required because all of the "development" lies outside the shoreline. However, uses and actions within the shoreline, though they do not constitute "development" must be consistent with the regulations of the Act and shoreline program. Change of use within shoreline jurisdiction may require a conditional use permit.
- b. Part of the property is in the shoreline, part is outside, and all or part of the development is proposed within the shoreline. A permit is required for "development" within the shorelines. In addition, uses and other actions within the shorelines must comply with master program regulations. Furthermore, when the development proposal consists of a single, integrated project and a shoreline permit is required due to development within the shorelines, review and approval of development outside the shorelines may be postponed until shoreline permit review is accomplished if the public interest would be served by such a review sequence. Finally, although development conditions may be attached to developments within shorelines, conditions may not be attached, pursuant to the Shoreline Management Act, to aspects of a development lying outside the shorelines.

17.50.033 ~~Developments and Uses Subject to Several Regulatory Sections.~~ Some proposed developments or uses will be subject to more than one regulatory section of this program. For example, a proposed marina may be subject to regulations concerning "dredging, landfilling, marinas", etc. A proposed development must be reviewed for consistency with the regulations of each applicable section.

17.50.034 ~~Unspecified Uses.~~ These regulations and the master program in its entirety do not attempt to identify or foresee all conceivable shoreline uses or types of development. When a use or development is proposed which is not readily classified within an existing use or development category, the unspecified use must be reviewed as a conditional use and performance standards relating to the most relevant category shall be used.

(Ord. No. 108-05, Att. B, 11-29-2005)

17.50.040 Definitions.

For the purpose of this title, certain terms and words are defined in this chapter. All defined uses are subject to existing local, state and health regulations.

"Accessory Facilities." A use that is demonstrably subordinate and incidental to the principal use and which functionally supports its activities, including parking. The standards of performance for a development shall apply to an accessory facility unless otherwise indicated.

"Accessory Living Quarters." Separate living quarters attached or detached from the primary residence which contain less habitable area than the primary residence and which are used by guests, employees, or immediate family members of occupant of primary residence; provided no accessory living quarters shall be rented or leased, and are subject to all health department requirements.

"Bog." A depression or other undrained or poorly drained area containing or covered with usually more than one layer of peat. Characteristic vegetation of bogs are sedges, reeds, rushes, or mosses. In early stages of development, vegetation is herbaceous and the peat is very wet. In middle stages, dominant vegetation is shrubs. In mature stages, trees are dominant and peat near the surface may be comparatively dry. (Bogs represent the final stage of the natural process (eutrophication) by which lakes are very slowly transformed into land; bogs are sometimes mined for peat on a commercial basis; bogs are often an intake for ground water (aquifer recharge area).

"Breakwaters." Offshore structures which may or may not be connected to land. Their primary purpose is to protect harbors, moorages and navigation activity from wave and wind action by creating still water areas. A secondary purpose would be to protect shorelines from wave-caused erosion.

"Bulkhead." Retaining wall-like structures whose primary purpose is to hold or prevent sliding of soil caused by erosion and wave action, and to protect uplands and fills from erosion by wave action.

"Channelization." The straightening, deepening or lining of natural stream channels, including construction of continuous revetments or levees for the purpose of preventing gradual, natural meander progression.

"Commercial Development." The primary use is for retail or wholesale trade or other business activities.

"Community Dock." A dock development providing moorage for pleasure craft and recreational activities for use in common by residents of a certain subdivision or community. Marinas are not considered community docks.

"Commercial Feedlot." An enclosure or facility used or capable of being used for feeding livestock hay, grain, silage, or other livestock feed, but shall not include land for growing crops or vegetation for livestock feeding and/or grazing, nor shall it include normal livestock wintering operations. Said enclosure/facility for commercial livestock.

"Conditional Use." Conditional use means a use, development, or substantial development which is classified as a conditional use or not classified within this master program.

"Conservancy Environment." Conservancy environment means that environment in which the objective is to protect, conserve and manage existing natural resources and valuable historic and cultural areas in order to ensure a continuous flow of recreational benefits to the public and to achieve sustained resource utilization. The conservancy environment is for those areas which are intended to maintain their existing character. The preferred uses are those which are by nature nonconsumptive of the physical and biological resources of the area. Nonconsumptive uses are those uses which can utilize resources on a sustained yield basis while minimally reducing opportunities for other future uses of the resources in the area. Activities and uses of a nonpermanent nature which do not substantially degrade the existing character of an area are appropriate uses for a conservancy environment. Examples of uses that might be predominant in a conservancy environment include diffuse outdoor recreation activities, timber harvesting on a sustained yield basis, passive agricultural uses such as pasture and range lands and other related uses and activities. Compatible commercial uses are low intensity and low impact activities such as small camping or picnic facilities (less than ten spaces), aquacultural retail booths (less than six hundred square feet) and cottage industries when the operation is entirely contained within the

primary residence excluding outbuildings, provided, such commercial activities must not alter the character of the conservancy environment. The designation of conservancy environments should seek to satisfy the needs of the community as to the present and future location of recreational areas proximate to concentrations of population, either existing or projected. The conservancy environment would also be the most suitable designation for those areas which present too severe biophysical limitations to be designated as rural or urban environments. Such limitations would include areas of steep slopes presenting erosion and slide hazards, areas prone to flooding, and areas which cannot provide adequate water supply or sewage disposal.

"Cottage Industry." Small scale commercial or industrial activities on residential properties performed in the residence or building accessory thereto. The principle practitioner must reside on the property. Cottage industries are considered as residential uses and minor commercial development and substantial developments under this master program provided they do not alter the character of the site as a residential property and wholesale and retail trade is minimal. Cottage industries must comply with all applicable county ordinances and require a conditional use permit.

"County." Mason County.

"Covered Moorage." A roofed, floating or fixed offshore structure for moorage of watercraft or float planes.

"Dam." A barrier across a streamway to confine or regulate stream flow or raise water level for purposes such as flood or irrigation water storage, erosion control, power generation, or collection of sediment or debris.

"Department." The Washington State Department of Ecology (WDOE).

"Development." A use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to the Act at any state of water level.

"Dike." An artificial embankment or revetment normally set back from the bank or channel in the floodplain for the purpose of keeping floodwaters from inundating adjacent land.

"Dock." A structure built over or floating upon the water, used as a landing place for marine transport, or for commercial or recreational purposes.

"Dredging." The removal, displacement, and disposal of unconsolidated earth material such as silt, sand, gravel, or other submerged material from the bottom of water bodies, ditches or biological wetlands; maintenance dredging and other support activities are included in this definition.

"Dredge Spoil." The material removed by dredging.

"Drift Sector." A segment of the shoreline along which littoral along shore movements of sediments occur at noticeable rates. Each drift sector includes a feed source that supplies the sediment, a driftway along which the sediment moves, and an accretion terminal where the drift material is deposited.

- (5) Fertilization,
- (6) Prevention and suppression of diseases and insects,
- (7) Salvage of timber,
- (8) Brush control, and
- (9) Slash and debris disposal.

Excluded from this definition is preparatory work such as tree marking, surveying and removal of incidental vegetation such as berries, greenery, or other natural product whose removal cannot normally be expected to result in damage to shoreline natural features. Log storage away from forestlands is considered under industry.

"Groins." A barrier type of structure extending from the beach or bank into a water body for the purpose of the protection of a shoreline and adjacent uplands by influencing the movement of water or deposition of materials. Generally narrow and of varying lengths, groins may be built in a series along the shore.

"Hearings Board." The state shorelines hearings board established by the Act in RCW 90.58.170.

"Height." Height is measured from average grade level to the highest point of a structure: provided, that television antennas, chimneys, and similar appurtenances shall not be used in calculating height, except where such appurtenances obstruct the view of the shoreline of a substantial number of residences on areas adjoining such shorelines, or this master program specifically requires that such appurtenances be included: provided further, that temporary construction equipment is excluded in this calculation.

"Home Occupation." A business conducted within a dwelling which is the residence of the principal practitioner. A home occupation may be reviewed as a residential use provided it complies with all applicable county ordinances and no alteration is made to the exterior of the residence or site which would alter the character of the site as residential property including parking and signs. Home occupations, which require more than two thousand five hundred dollars in exterior development costs, require a substantial development permit.

"Industrial Development." Facilities for processing, manufacturing, and storage of finished or semifinished products, together with necessary accessory uses such as parking, loading, and waste storage and treatment.

"Jetties." Structures generally perpendicular to shore extending through or past the intertidal zone. They are built singly or in pairs at harbor entrances or river mouths mainly to prevent shoaling or accretion from littoral drift. Jetties also serve to protect channels and inlets from storm waves or cross currents.

"Joint-Use Private Dock." A dock or float for pleasure craft moorage or water sports for exclusive use by two or more waterfront lot owners, excluding marinas.

"Landfill." The creation of or addition to a dry upland area by depositing materials. Depositing topsoil in a dry upland area for normal landscaping purposes is not considered a landfill.

"Littoral Drift (or transport)." The natural movement of sediment, particularly sand and gravel, along shorelines by wave action in response to prevailing winds or by stream currents. (See Drift Sector.)

"Marina." A commercial moorage with or without dry storage facility for over ten pleasure or commercial craft excluding canoes, kayaks and rowboats. Goods or services related to boating may be sold commercially. Uses associated with marinas shall conform to the regulations for these uses.

"Marine Waters." All bodies of water having a connection with the open sea and which are tidally influenced, together with adjoining transitional and estuarine areas where average ocean derived salts exceed five parts per thousand.

"Master Program." Mason County program for regulation and management of the shorelines of the state including goals and policies, use regulations, maps, diagrams, charts and any other text included in the program. The enforceable provisions of the master program are embodied in this ordinance [chapter].

"Mean Higher High Tide." The elevation determined by averaging each day's highest tide in a particular saltwater shoreline area over a period of eighteen and six-tenths years.

"Mining." The removal of sand, gravel, minerals or other naturally occurring materials from the earth.

"Multifamily Dwelling." A building designed or used for a residence by three or more household units, including, but not limited to, apartments, condominium complexes, and townhouses.

"Natural Environment." The natural environment is intended to preserve and restore those natural resource systems existing relatively free of human influence. Local policies to achieve this objective should aim to regulate all potential developments degrading or changing the natural characteristics that make these areas unique and valuable. The main emphasis of regulation in these areas should be on natural systems and resources, which require severe restrictions of intensities and types of uses to maintain them in a natural state. Therefore, activities, which may degrade the actual or potential value of this environment, should be strictly regulated. Any activity that would bring about a change in the existing situation would be desirable only if such a change would contribute to the preservation of the existing character. The primary determinant for designating an area as a natural environment is the actual presence of some unique natural or cultural features considered valuable in their natural or original condition which are relatively intolerant of intensive human use.

"Nonconforming Development." A shoreline use, structure or lot which was lawfully constructed or established prior to the effective date of the Act, or the master program, or amendments thereto, but which does not conform to present regulations or standards of the program or policies of the Act.

"Normal Maintenance." Those usual acts to prevent a decline, lapse or cessation from a lawfully established condition.

"Normal Repair." To restore a development to a state comparable to its original condition, including, but not limited to, its size, shape, configuration, location and external appearance, within a reasonable period after decay or partial destruction except where repair involves total replacement which is not common practice or causes substantial adverse effects to the shoreline resource or environment (WAC 173-27-040, as amended). A reasonable period of time for repair shall be up to one year after decay or partial destruction, except for bulkhead replacement which shall be allowed up to five years. Total replacement that is common practice includes, but is not limited to, floats, bulkheads and structures damaged by accident, fire and the elements.

"Normal Protective Bulkhead" (also referred to as "erosion control bulkhead"). A retaining wall-like structure constructed at or near ordinary high water mark to protect a single-family residence or lot upon which a single-family residence is being constructed and is for protecting land from erosion, not for the purpose of creating land.

"Ordinary High Water Mark (OHWM)." On all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, or as it may naturally change thereafter or as it may change thereafter in accordance with permits issued by local government or the department provided that in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the line of mean higher high tide and the ordinary high water mark adjoining fresh water shall be the line of mean high water. (WAC 173-22-030 as amended.)

"Permit." A shoreline substantial development permit, conditional use permit, or variance permit, any combination thereof, or their revisions, issued by Mason County Pursuant to RCW 90.58.

"Person." An individual, partnership, corporation, association, organization, cooperative, public or municipal corporation, or agency of the state or local governmental unit however designated.

"Pier." An open pile structure generally built from the shore extending out over the water to provide moorage for private recreation, commercial or industrial watercraft and/or float planes.

"Plot Plan." An area drawing to scale of proposed project showing existing structures and improvements including wells, septic tanks and drainfields, proposed structures and other improvements and the line of ordinary high water.

"Port Development." Public or private facilities for transfer of cargo or passengers from water-borne craft to land and vice versa; including, but not limited to, piers, wharves, sea islands, commercial float plane moorages, off-shore loading or unloading buoys, ferry terminals, and required dredged waterways, moorage basins and equipment for transferring cargo or passengers between land and water modes. Excluded from this definition and dealt with elsewhere are marinas, boat ramps or docks used primarily for recreation, cargo storage and parking areas not essential for port operations, boat building or repair. The latter group are considered as industrial or accessory to other uses.

"Recreational Development." Recreational development includes facilities such as campgrounds, recreational vehicle parks, day use parks, etc.

"Residential Development." The development of land or construction or placement of dwelling units for residential occupancy.

"Revetment." A sloped wall constructed of rip rap or other suitable material placed on stream banks or other shorelines to retard bank erosion from high velocity currents or waves respectively.

"Rip Rap." Dense, hard, angular rock used to armor revetments or other flood control works.

"Road and Railway Development." Includes also related bridges and culverts, fills, embankments, causeways, parking areas, truck terminals and rail switchyards, sidings and spurs. These are addressed under "recreation and forest practices."

"Rural Environment." The rural environment is intended to protect agricultural land from urban expansion, restrict intensive development along undeveloped shorelines, function as a buffer between urban areas, and maintain open spaces and opportunities for recreational uses compatible with agricultural activities. The rural environment is intended for those areas characterized by intensive agricultural and recreational development. Hence, those areas that are already used for agricultural purposes, or which have agricultural potential should be maintained for present and future agricultural needs. Designation of rural environments should also seek to alleviate pressures or urban expansion on prime farming areas. New developments in a rural environment are to reflect the character of the surrounding area by limiting residential density, providing permanent open space and maintaining adequate building setbacks from the water to prevent shoreline resources from being destroyed for other rural types of uses. Public recreation facilities for public use, which can be located and designed to minimize conflicts with agricultural activities, are recommended for the rural environment. Linear water access which will prevent overcrowding in any one area, trail systems for safe nonmotorized traffic along scenic corridors and provisions for recreational viewing of water areas illustrate some of the ways to ensure maximum enjoyment of recreational opportunities along shorelines without conflicting with agricultural uses. In a similar fashion, agricultural activities should be conducted in a manner that will enhance the opportunities for shoreline recreation. Farm management practices that prevent erosion and subsequent siltation of water bodies and minimize the flow of waste material into watercourses are to be encouraged by the master program for rural environments.

"Shorelands." Those lands extending landward for two hundred feet in all directions, as measured on a horizontal plane from the ordinary high water mark, floodways and contiguous floodplain areas landward two hundred feet from such floodways, and all wetlands and river deltas associated with the streams, lakes and tidal waters which are subject to the provisions of the Act and this master program.

"Shorelines." All of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them; except:

- (1) Shorelines of statewide significance;
- (2) Shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and
- (3) Shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes.

"Shorelines of Statewide Significance." Those shoreline areas as defined in RCW 90.58-030 (2)(e), and, specifically the following bodies and associated shorelands in Mason County: Hood Canal, Lake Cushman, the Skokomish River from the confluence of the North Fork of the Skokomish River and the South Fork of the Skokomish River, downstream to the Great Bend of Hood Canal (excluding that portion within the Skokomish Indian Reservation), and all saltwater bodies below the line of extreme low tide.

"Shorelines of the State." The total of all "shorelines" and shorelines of "state-wide significance".

"Shoreline Permit." One or more of the following permits: substantial development permit, conditional use permit, or variance.

"Single-family Residence." A detached dwelling designed for and occupied by one family, including those structures and developments within a contiguous ownership that are normal appurtenance.

"Structure." A building or edifice of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.

"Subdivision." The division or redivision of land for purposes of sale, lease or transfer of ownership into five or more lots, any one of which is smaller than five acres or one one-hundred-twenty-eighth of a section of land.

"Substantial Development." Any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with normal public use of the water or shorelines of the state; except that those developments defined above as an "exemption" do not require a substantial development permit but may require a variance or conditional use permit.

"Tideland." The land on the shore of marine water bodies between OHWM or MHHW and the line of extreme low tide which is submerged daily by tides.

"Upland." Those shoreline areas landward of OHWM except berms, backshores, natural wetlands, and floodplains.

"Urban Environment." Those shorelines designated for urban uses provided that industrial development is prohibited in all categories except the urban industrial designation. The urban area is an area of high intensity land use including residential, commercial, and industrial development. The environment does not necessarily include all shorelines within an incorporated city, but is particularly suitable to those areas presently subjected to extremely intensive use pressure, as well as areas planned to accommodate urban expansion. Shorelines planned for urban expansion should present few biophysical limitations for urban activities and not have a high priority for designation as an alternative environment. Because shorelines suitable for urban industrial uses are a limited resource, emphasis should be given to development within already developed areas and do not have a high priority for designation as an alternative environment.

"Urban Industrial." The objective of the urban industrial environment is to ensure optimum utilization of shorelines within urbanized areas by managing industrial development. The urban industrial environment is an area of high intensity industrial land use. The environment does not necessarily include all shorelines within an unincorporated city, but is particularly suitable to those areas presently subjected to extremely intensive use pressure, as well as areas planned to accommodate industrial expansion. Shorelines planned for future industrial expansion should not have a high priority for designation as an alternative environment. Because shorelines suitable for urban industrial uses are a limited resource, emphasis should be given to development within already developed areas and particularly to water-dependent industrial uses requiring frontage on navigable waters. Industrial development is prohibited in all categories but urban industrial environment.

"Urban Commercial." The objective of the urban commercial environment is to ensure optimum utilization of shoreline within urbanized areas by managing commercial development. The urban commercial environment is an area of high intensity commercial land use. The environment

does not necessarily include all shorelines within an unincorporated city, but is particularly suitable to those areas presently subjected to extremely intensive use pressure, as well as areas planned to accommodate commercial expansion. Shorelines planned for future commercial expansion should not have a high priority for designation as an alternative environment. Because shorelines suitable for urban commercial uses are a limited resource, emphasis should be given to development within already developed areas and particularly to water-dependent commercial uses requiring frontage on navigable waters.

"Urban Residential." The objective of the urban residential environment is to ensure optimum utilization of shorelines for residential development. The urban residential environment is an area of high intensity residential land use. Shorelines planned for future residential expansion should have few geographic limitations and not have a high priority for designation as an alternative environment.

"Variance." An adjustment in the application of this program's regulations to a particular site pursuant to Chapter 7.28, to grant relief from a specific bulk, dimensional or performance standards set forth in the applicable master program and not a means to vary the use of a shoreline.

"Vector." An organism that carries and transports disease (i.e., rat, fly).

"Water Dependent Use." A use that cannot exist in other than a waterfront location and is dependent on the water by reason of the intrinsic nature of its operation. Examples include, but are not limited to, cargo terminal loading areas, barge loading, ship building, repair, servicing and dry docking, aquaculture and log booming.

"Water-oriented Use." A use that provides the opportunity for a substantial number of the general public to enjoy the shoreline without causing significant adverse impacts upon other uses and shore features. Examples include, but are not limited to, restaurants, parks, recreation areas, marine or freshwater educational facilities, fresh seafood only retail sales. The use must be consistent with at least one of the following:

- (1) Offer a view of waterfront activities;
- (2) Make use of a unique characteristic of the site; and
- (3) Support other proximate water dependent, water-related or water-oriented activities.

"Water-related Use." A use that is not intrinsically dependent on a waterfront location but whose operation cannot occur economically and functionally without a shoreline location. Examples include, but are not limited to, warehousing of goods transported by water, seafood processing, oil refineries, paper and wood mills (if materials or products are water transported) and ships' parts and equipment fabrication.

"Wetlands." Areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, waste water treatment facilities, farm ponds, and landscape amenities. However, wetlands may include those artificial wetlands intentionally created from non-wetland areas created to mitigate conversion of wetlands, if permitted by the county.

(Ord. No. 108-05, Att. B, 11-29-2005)

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HAL MOORE and MELANIE MOORE,
husband and wife; and LESTER KRUEGER
and BETTY KRUEGER, husband and wife,

Appellants,

v.

STEVE'S OUTBOARD SERVICE, a sole
proprietorship operating in Washington;
STEVEN LOVE and MARY LOU LOVE,
husband and wife and the marital property they
together comprise,

Respondents.

No. 41557-7-II

ORDER STAYING APPEAL
AND REMANDING TO TRIAL COURT

This matter came on for oral argument on April 6, 2012. Hal and Melanie Moore and Lester and Betty Krueger (the Moores) appeal the trial court's judgment dismissing their nuisance claims against Steve's Outboard Service and Steve and Mary Lou Love (SOS) and granting attorney fees to SOS. The trial court entered a memorandum opinion that does not address the legal issues necessary for us to review its decision. We therefore stay this case and remand to the trial court for entry of written findings of fact and conclusions of law within 60 days of the date this order is filed.

The trial court's findings and conclusions must address nuisance in fact, which turns on (1) whether SOS interferes with the Moores' use and enjoyment of their property; and (2) whether such interference is reasonable, balancing the rights, interests, and convenience of the parties. *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998); *Highline School Dist. No. 401, King County v. Port of Seattle*, 87 Wn.2d 6, 18 n.7, 548 P.2d 1085 (1976); *Jones v. Rumford*, 64 Wn.2d 559, 563, 392 P.2d 808 (1964) (quoting *Riblet v. Spokane-Portland Cement Co.*, 41 Wn.2d 249, 254, 248 P.2d 380 (1952), *overruled on other grounds in Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985)).

The trial court's findings and conclusions must also address nuisance per se, which turns on (1) whether SOS interferes with the Moores' use and enjoyment of their property; and (2) whether SOS operates lawfully, including its compliance with the Shoreline Management Act (ch. 90.58 RCW), the Mason County Code, and any other relevant law. *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 418, 922 P.2d 115 (1996) (quoting *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 276 (Utah 1982)).

In the event that the superior court concludes that the Moores do not prevail on theories of nuisance in fact or nuisance per se and that SOS is entitled to reasonable attorney fees, the court must support its decision on attorney fees with written findings of fact and conclusions of law setting forth a complete lodestar analysis. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 593, 220 P.3d 191 (2009); *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632, 966 P.2d 305 (1998). SOS is directed to supplement the record with all necessary documentation to support any award of attorney fees.

No. 41557-7-II
ORDER STAYING APPEAL AND REMANDING
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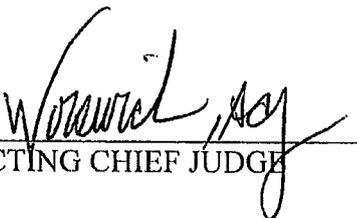
No later than 30 days after the superior court has entered the findings and conclusions herein ordered, SOS shall designate such findings and conclusions as supplemental clerk's papers under RAP 9.10. The parties may provide supplemental briefing to this court within 20 days after the supplemental clerk's papers are designated.

It is so **ORDERED**.

Panel: Jj. Worswick, Hunt, Quinn-Brintnall.

DATED this 26th day of April, 2012.

FOR THE COURT:



ACTING CHIEF JUDGE

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