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**In the Court of Appeals
Division 1
for the State of Washington**

**DIANE M. PATTERSON and
DAVID E. ENGDahl,
Petitioners;**

v.

**MARIO A. SEGALE and
CITY OF BURIEN, WASHINGTON,
Respondents;**

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DIVISION ONE

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BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Table of Cases	ii
Assignments of Error, and Issues	1
Statement of the Case	3
Argument	5
Subpart 1 A	5
Subpart 1 B	19
Subpart 1 C	20
Subpart 2 A	21
Subpart 2 B	25
Subpart 3 A	28
Subpart 3 B	38
Subpart 3 C	41
Subpart 4 A	43
Subpart 4 B	47
Conclusion	48
Appendix	

TABLE OF CASES

Asarco, Inc. v. Air Quality Coalition, 92 Wn2d 685, 697 (1979)	25, 26
Citizens for Rational Shoreline Planning v. Whatcom County, 155 Wn. App. 937 (Div. 1, 2010)	13
Evergreen Trailways, Inc. v. City of Renton, 38 Wn.2d 82 (1951)	12 n. 25
Fell v. Spokane Transit Authority, 128 Wn.2d 618 (1996)	27, 28
Hoops v. Burlington Northern, Inc., 83 Wn.2d 396 (1974)	12 n. 25
Jones v. Willard, 224 Va. 602, 299 S.E.2d 504 (1983)	46
Kitsap-Mason Dairymen’s Assoc. v. Tax Comm’n, 77 Wn.2d 812 (1970)	9 n. 18
League v. DeYoung, 52 U.S. 185 (1850)	45
Magula v. Benton Franklin Title Co., Inc., 131 Wn.2d 171 (1997)	26
Orion Corp. v. State, 109 Wn.2d 621 (1987)	14
Park Homeowners Association , Inc. v. Tydings, 125 Wn.2d 337 (1994)	27, 46
People’s State Bank v. Hickey, 55 Wn. App. 367 (Div 1, 1989)	47
Public Utility Dist. v. Newport, 38 Wn.2d 221 (1951)	13 n. 26
Royer v. Public Utility Dist., 186 Wash. 142 (1936)	13 n. 26
Suburban Janitorial Services v. Clarke American, 72 Wn. App. 302 (Div. 1, 1993)	47,48
T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626 (9th Cir., 1987)	26
Tomm’s Redemption, Inc., v. Park, 333 Ill.App.3d 1003, 777 N.E.2d 522 (2002)	45-46
Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216 (1989)	6, 26 n.44

WASHINGTON STATUTES (RCW)

RCW 34.05.452	10 n22
RCW 34.05.461	10 n22
RCW 34.05.542	4
RCW 34.05.562	43, 45, 46, 47, 48
RCW 34.05.570	5, 21, 27
RCW c. 90.58 generally	1, 5
RCW 90.58.020	6, 13, 15
RCW 90.58.030	6
RCW 90.58.050	14, 15
RCW 90.58.060	6
RCW 90.58.080	7, 16, 16 n36, 18
RCW 90.58.090	7, 9, 19
RCW 90.58.100	7
RCW 90.58.140	7, 9, 14, 15, 16, 18, 20, 22, 23, 24, 25, 41, 42, 43, 45, 45 n87
RCW 90.58.190	19
RCW 90.58.900	23

WASHINGTON REGULATIONS (WAC)

WAC 173-16-060	38 n75 & 76
WAC c. 173-26 generally	5
WAC 173-26-020	7, 28, 29 nn48 & 50, 38, 49
WAC 173-26-040	17
WAC 173-26-050	10
WAC 173-26-060	9 n19
WAC 173-26-080	17
WAC 173-26-160	17 n38
WAC 173-26-171	6 n9

WAC 173-26-231	7 n11, 28, 29, 30n52, 24, 33,3 4, 35, 41, 41 n82
WAC 173-27-010	7
WAC 173-27-150	6 n9, 15 nn27-29, 20, 43
WAC 173-27-040	33, 34, 38
WAC 461-08-500	25
WAC 461-08-505	15 n27
WAC 461-08-515	10, 22
WAC 461-08-570	4

KING COUNTY CODE (KCC)

KCC Title 25 generally	4, 7, 8, 9,1 1, 12, 13, 19, 20, 40, 41
KCC 25.04.040	40 n80
KCC 25.08.480	30, 34
KCC 25.08.490	13
KCC 25.16.180D	30, 31, 32
KCC 25.32.010	19, 20, 30, 31, 34, 40n79, 42

ASSIGNMENTS OF ERROR

and ISSUES

ASSIGNMENT OF ERROR no. 1

The tribunals below erroneously interpreted and applied the law in failing to apply the Department of Ecology “Guidelines” to this case.

Issue 1 A

Did Burien have in force at the material times a Shoreline Management Program that might render the Department of Ecology “Guidelines” inapplicable?

Issue 1 B

If Burien had a Shoreline Management Program in force that included King County Code Title 25, did that Title 25 itself require application of the Department of Ecology “Guidelines” to this case?

Issue 1 C

If the Department of Ecology “Guidelines” apply to this case, can King County Code Title 25 be applied only as *supplemental* to the DOE Guidelines?

ASSIGNMENT OF ERROR no. 2

The tribunals below erroneously interpreted and applied the law with regard to the burden of proof

Issue 2 A

Where a shoreline development permit applicant produces no evidence to show satisfaction of prerequisites thereto, is a challenger’s burden met by showing such absence of evidence, or must he affirmatively prove facts negating such satisfaction?

Issue 2 B

Does the movant for summary judgment have the initial burden to show, *prima facie*, the facts material to the motion, even if his opponent might have the burden of proof on those facts at a trial?

ASSIGNMENT OF ERROR no. 3

The Orders below are not supported by evidence that is substantial when viewed in light of the whole record, including the agency record for judicial review.

Issue 3 A

Was there substantial evidence that the proposed bulkhead was necessary to support or protect an existing structure?

Issue 3 B

Was there substantial evidence that the proposed bulkhead would conform to applicable requirements regarding use of bulkheads to create new or newly usable lands?

Issue 3 C

Was there substantial evidence that the proposed bulkhead would conform to applicable requirements limiting height?

ASSIGNMENT OF ERROR no. 4

THE SUPERIOR COURT ERRONEOUSLY INTERPRETED OR APPLIED THE LAW, AND ABUSED ITS DISCRETION, IN REJECTING PETITIONERS' REQUEST FOR REMAND

Issue 4 A

Does RCW 34.05.562(2) authorize remand to an administrative tribunal in the circumstances of this case.

Issue 4 B

Was it an abuse of discretion not to remand to the administrative tribunal in this case.

STATEMENT OF THE CASE

In August, 2009, Respondent Segale applied¹ to Respondent City of Burien for a Shoreline Substantial Development Permit (SSDP) required under the Shoreline Management Act (SMA), RCW c. 90-58. The Segale proposal was to replace an older bulkhead, reaching approximately five to six feet above beach level across 182 linear feet of low-bank Puget Sound waterfront on a nearly 28,000 square-foot site, *see* site plan, SHBR 139. The proposed replacement was to be more than twice the height of a typical adult for its entire 182-foot length, being approximately 12-13 feet above beach level (21 feet above sea level). Measurements are from site plan and Henderson Declaration, SHBR 208, at 209.

Petitioners duly objected under City procedures; and when the City nonetheless granted the SSDP, Land Use Decision, SHBR 159-170, Petitioners duly sought de novo review by the Shorelines Hearings Board (SHB), SHBR 298. Midway through the period scheduled for discovery, and while ruling in Petitioners' favor on several other points,² SHB granted summary judgment to Respondents, holding that "the applicable SMP ["shoreline master program"] in this case is the King County SMP that was in effect at the time the City incorporated in 1993," including

¹ *See* SHBR 135.

² The Board rejected Respondent's challenges to Petitioners' standing; to the Board's subject matter jurisdiction, and to the timeliness of Petitioners' raising certain issues.

KCC Title 25;³ that such SMP being in force made the SMA provision calling for direct use of Department of Ecology (DOE) Guidelines “not applicable”;⁴ that Respondents had shown sufficient prima facie compliance with KCC Title 25 and Petitioners had not shown violation of any “specific provision” thereof.⁵ Petitioners had contended – there as here – that since Burien had not developed or secured DOE approval for any SMP, it had none; that therefore, under SMA, Burien could lawfully grant no SSDP except by application of the “Guidelines” and other DOE regulations pursuant to SMA; and that Respondents had shown prima facie compliance with *neither* the guidelines requirements nor even with those of KCC Title 25. Petitioners asked SHB for reconsideration, which was denied.⁶

Petitioners then duly petitioned the Superior Court for judicial review pursuant to RCW 34.05.542 and WAC 461-08-570.⁷ The Amended Petition is CP 1-21. On April 1, 2011 the Court, on written arguments and declarations and after argument, granted in part two limiting motions of Respondents; each of those Orders⁸ is specified in Petitioners’ Notice of

³ SHBR 399, at 413, lines 7-9.

⁴ *Id.* at lines 16-18.

⁵ *Id.* at 413-420.

⁶ SHBR 374 *et seq.*

⁷ CP 1-21.

⁸ Order on Motion to Dismiss Certain Issues Only, CP 237; Order on Motion to Strike, CP 240.

Appeal, and each is argued where appropriate in this brief. On the merits there was no answer or dispositive motion, and no evidentiary proceeding; but on trial briefs and declarations and after argument on June 10, 2011, the Superior Court affirmed the SHB Orders on Summary Judgment and Denying Rehearing, and dismissed the Petition for Judicial Review, CP 520-522. Petitioners then noticed this appeal, CP 523 *et seq.*.

Notwithstanding the directive in RCW 34.05.570(1)(c), the Superior Court's June 10 Order is quite conclusory, and fails to make separate and distinct rulings on each of the material issues requiring decision to either affirm or reverse SHB in this case. One must therefore resort to the SHB Orders and to the underlying Record.

PART 1: THE TRIBUNALS BELOW ERRONEOUSLY INTERPRETED AND APPLIED THE LAW IN FAILING TO APPLY THE DEPARTMENT OF ECOLOGY "GUIDELINES" TO THIS CASE.

All parties to this case agree it is governed by Washington's Shoreline Management Act (SMA, or "the Act"), RCW c. 90.58; but Petitioners maintain that it *also* is governed by the Department of Ecology (DOE) "Guidelines" set out as Part II of WAC c. 173-26 (as well as by other DOE regulations).

Subpart 1A: The Guidelines were applicable because Burien had no SMP in force when the bulkheading permit was applied for, considered, and approved.

In enacting the SMA, the legislature found that

the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation,

RCW 90.58.020; “that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest,” *id.*; and that “there is... a clear and urgent demand for a planned, rational, and concerted effort ... to prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines,” *id.* It therefore established a unique, centrally directed partnership of the State and its local governments in shoreline areas, the most prominent feature of which is a set of “Guidelines” adopted and periodically revised by the DOE. RCW 90.58.060.

The DOE Guidelines, published as WAC c. 173-26, Part III, are “those standards adopted to implement the policy of [the Act] for regulation of the use of shorelines of the state prior to adoption of” a localized “shoreline master program” (SMP) developed pursuant to the Act, RCW 90.58.030(3)(a);⁹ and the Guidelines also provide criteria for local governments in developing, and DOE in approving or disapproving, SMPs. Localized development of SMPs facilitates adaptation to local conditions,

⁹ See also WAC 173-26-171(3)(c), “In local jurisdictions without approved master programs, development on the shorelines of the state must be consistent with the policy of RCW 90.58.020 and the applicable guidelines under RCW 90.58.140.” And see also WAC 173-27-150(1)(c).

interests, and needs;¹⁰ but an SMP must be “consistent with the required elements of the guidelines,” RCW 90.58.080(1), and only “takes effect when and in such form as approved ... by the department,” RCW 90.58.090(7) (emphasis added); *see also* RCW 90.58.090(1); RCW 90.58.100(1). Until then, under RCW 90.58.140(2)(a) the Guidelines themselves govern shoreline development permits directly.

Since Burien was incorporated, the Guidelines have become much more protective against the impacts¹¹ of bulkheads¹² than they previously had been.¹³ But the SHB held that RCW 90.58.140 (2)(a) “is not applicable” here¹⁴ (and the Superior Court affirmed), because

the applicable SMP in this case is the King County SMP that was in effect at the time the City incorporated in 1993. This SMP included the goals, policies, and objectives of the King County SMP,¹⁵ as well as KCC Title 25.¹⁶

There was evidence that various Burien officials had considered KCC Title 25 to be Burien’s SMP, and utilized it as such. But local government “approval” of an SMP is defined in WAC 173-26-020(5) as

¹⁰ *See, e.g.*, WAC 173-27-010, first paragraph.

¹¹ Many impacts of bulkheads are itemized in WAC 173-25-231(3)(a)(ii).

¹² The principal changes were made by Order 03-02, Wash. St. Reg 04-01-117, § 173-26-231, eff. January 17, 2004. The material bulkheading provisions of the Guidelines, and also of the KCSMP as of 1993, will be examined later in this brief.

¹³ SMPs, of course, are required to conform. Thus recently the King County Council, for example, approved an update of the County’s SMP to conform to the current Guidelines regarding bulkheads, K.C. Ord. 16985 (2010), CP316-323 (pending DOE approval).

¹⁴ SHBR at 413, line 18.

¹⁵ The relevant portions of that Goals Policies Objectives document is at SHBR 227 et seq.

¹⁶ SHBR at 413, lines 7-9.

an official action by a local government *legislative* body *agreeing to submit* a proposed shoreline master program or amendments to the department [of Ecology] for review and official action . . . ,¹⁷

and there was no evidence of that. Indeed, beyond finding “no evidence that the City ever submitted the Plan to Ecology for approval,” SHB noted that KCC Title 25 by itself “does not meet the minimum requirements for an SMP,” SHBR at 410, and *id.*, n, 7.

Indispensable to the decisions below, therefore, is the premise that

the SMP that applied to a shoreline area prior to its incorporation within a city, continues to apply after incorporation, until the city adopts a new SMP and Ecology approves it.

SHBR at 411-412. Although SHB has asserted this premise before, no Court heretofore has reviewed it; and SHB has never tried to ground it on any SMA provision or give it any legal rationale. Later in this Subpart, Petitioners will argue that the thesis (essentially a doctrine of “ordinances running with the land”) cannot be reconciled either with SMA’s terms or with its purposes and policy; but the thesis also has practical flaws that are very well illustrated by this case, and those will be discussed first.

SHB believes that its thesis represents preferable policy. It said:

Applying a complete, fully adopted and approved SMP, drafted to meet the requirements of a specific shoreline area albeit when it was governed by another governmental entity, provides better management of the shorelines

¹⁷ (Emphasis added.) Originally this language had been designated subsection (3), but subsequent DOE Orders renumbered it subsection (5)

than proceeding as RCW 90.58.140(2)(a) prescribes, SHBR at 412. Aside from the fact that agencies have no power to “improve” statutes,¹⁸ however, that “better management” assertion is wholly inaccurate here. King County is a huge entity with many scores of miles of marine and freshwater shoreline – much of it developed long ago for non-residential uses, and some not developed at all). Its SMP was never “*specialized*” to the needs of this small, outlying urban area with just five miles of marine and about one mile of freshwater shoreline, all of it (apart from park land) developed for residential uses. The notion that KCC Title 25 – either in the 1970’s when it was drafted, or when Burien incorporated in 199 – was designed “to meet the requirements of [this] specific shoreline area” is bizarre.

Beyond that, SHB’s thesis entails troublesome confusion, anomalies, and headaches. Ever since early 1995 (two years after Burien’s incorporation), subsection (7)¹⁹ of RCW 90.58.090 has required DOE to maintain a record of each localized master program and of its own action taken on it, declaring that “the department’s approved document of record constitutes the official master program.”²⁰ This official record, however, contains no

¹⁸ “An agency . . . may not amend or change enactments of the legislature,” *Kitsap-Mason Dairymen’s Assoc. v. Tax Comm’n*, 77 Wn.2d 812, 815 (1970) (citing cases).

¹⁹ Originally this subsection (7) was numbered (6), *see* Laws of 1995, c. 347, § 306(6). Since October 1996, WAC 173-26-060 has provided likewise, with greater specificity. Order 95-17, Wash. St. Reg 96-20-075 at 17, § 173-26-060, filed 9/30/96, eff. 10/31/96.

²⁰ Order 95-17, Wash. St. Reg 96-20-077, § 176-26-050, at p. 17. This was the same Order that first included Burien on the WAC 173-26-080 list as a local governments required to “develop and administer a shoreline master program,” as discussed further be-

SMP document for Burien. Also, in 1996 DOE established, by WAC 173-26-050,²¹ the “State Master Program Register” showing dates of DOE approval of original SMPs and subsequent SMP amendments, “available for public viewing and inspection” The Register can be found online at <http://www.ecy.wa.gov/programs/sea/shorelines/smp/citizen.html>, under the heading “SMP Register – List of all state-approved SMPs and amendments since 1971.” As of its latest update in November 2009 – three months *after* Respondent Segale submitted his bulkheading application – this official SMP Register *still did not show Burien* as having an SMP.

Moreover, there is uncontroverted evidence of record in this case that Mr. Peter Skowlund, Policy Lead for Shoreline Management of the Shorelines and Environmental Assistance Program of DOE – to whom the Rules Coordinaator at DOE’s state headquarters referred Petitioners as the appropriate DOE authority on the question – orally confirmed to Petitioners on May 7, 2011, that *Burien does not have any SMP in force.*²²

King County has no reason to maintain any complete, coherent text of KCC Title 25 *as it stood in 1993*, when Burien was incorporated; and ap-

low.

²¹ Order 95-17, Wash. St. Reg 96-20-975, eff. 9/30/96.

²² Declaration, ¶¶ 2, 3, &4, SHBR 221. This was hearsay, but nonetheless admissible in the SHB proceeding by virtue of WAC 461-08-515(1), since it was neither objected to by either Respondent nor excluded by the presiding Administrative Judge. See also RCW 34.05.452(1) and .461(4). Regarding Mr. Skowlund’s role and responsibilities with DOE, *see note 75 infra.*

parently it does not. But while Burien has never acknowledged or publicized the other documents that SHB held to be parts of its SMP, the City does keep a copy of what it identifies as “KCC Title 25” on its website, at <http://burienwa.gov/DocumentView.aspx?DID=1356>. A printout from that website version is in the Record as CP 269-323. It is a loose-leaf montage of photocopies of some 57 typed pages, some of them blank and many of them only partially filled-up. The pages are irregularly numbered; and nearly half bear dates subsequent to Burien’s incorporation. Also, many sections are indicated by notations at section ends as including amendments made subsequent to 1993, with no indication what parts of the text were current when Burien incorporated or what language might have been changed or deleted by the subsequent amendments noted. It therefore is simply impossible to know precisely what the version of KCC Title 25 that Burien purportedly “carried over” from county days really says.

Furthermore, as it appears on Burien’s website KCC Title 25 assigns various functions and responsibilities to *County* offices and officials,²³ and nowhere intimates that the functions or responsibilities will be performed now by one or another Burien office or official instead. Of course the City

²³ *E.g.*, the Director of King County’s Department of Planning and Community Development, KCC §§ 25.08.170 and 25.32.010, .040, .050, .090, .110, and .120; the manager of the county Building and Land Development Division, KCC § 23.08.285; the King County Council, KCC § 25.32.100; the King County prosecuting attorney, KCC § 25.32.120. It also calls for the application of other King County ordinances, *e.g.* KCC § 25.32.060 C.

does not apply KCC Title 25 literally; the Record shows, for example, that it was Burien officials, not any county ones, who processed the bulkhead permit at issue in this case. When the City of Sammamish, incorporated in 1999, tried to “adopt by reference” KCC Title 25 as the shoreline management component of its Interim Development Code, at least it was careful enough to alter such provisions to fit that city’s own organization, *see* CP 498-517. But Burien did no such thing, apparently content to rely instead on an informal “rule of approximation.”²⁴ Such a rule tends to work mischief, however, in a culture that values the “rule of law”: Resort to the lazier expedient has a woeful tendency to spread. Indeed, as is more fully shown later in this brief, Burien – as well as the tribunals below – applied such a “rule of approximation” even to the *substantive* provisions of Burien’s purported SMP regarding shoreline developments.

If DOE-approved SMPs could be considered as no more than local ordinances, SHB’s unsupported *ipse dixit* that they remain in force notwithstanding a change of local governmental jurisdiction would offend the basic principle of Washington local government law that a city’s authority necessarily extends to its corporate limits,²⁵ and that “there cannot at the same time within the same territory exist two distinct municipal corpora-

²⁴ Recall the popular disparaging remark “close enough for government work.”

²⁵ *See, e.g., Hoops v. Burlington Northern, Inc.*, 83 Wn.2d 396, 401 (1974); *Evergreen Trailways, Inc. v. City of Renton*, 38 Wn.2d 82, 86 (1951).

tions exercising the same powers.”²⁶ Presumably aware of this basic principle, and realizing that increasing population and development would probably induce the creation of more new cities from King County territory, those who originally drafted KCC Title 25 were careful to define the “shorelines” governed by its terms as only “the water areas *within the un-* incorporated portion of King County,” KCC 25.08.490. Petitioners maintain that this explicit provision means that KCC Title 25 *by its very terms* lost all possible force within Burien at the moment of City incorporation.

But in any event, DOE-approved SMPs are not mere local ordinances. Last year this Court noted “the pervasive level of state control over and involvement in the development of SMPs,” and “the state’s pervasive involvement throughout the entire SMP development process,” *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 944, 950 (Div. 1, 2010). Whatever impressions might once have prevailed, our Supreme Court concluded fourteen years ago that because of the detailed “coordinated planning” (RCW 90.58.020) required by the Act, “an agency

²⁶ *Royer v. Public Utility Dist.*, 186 Wash. 142, 148 (1936); but “this rule is applicable only where the two corporations are exercising governmental functions in contrast with proprietary functions,” *Public Utility Dist. v. Newport*, 38 Wn.2d 221, 227 (1951). SMA functions are plainly governmental, not proprietary.

Specific legislation, at least, is necessary to change the result. Today, many Washington statutes do authorize cooperative, collaborative, or joint undertakings crossing jurisdictional lines: e.g., RCW ch.36.115 (authorizing interlocal service agreements); RCW ch.36.135 (authorizing public works assistance funding); RCW 41.14.250 *et seq.* (regarding contracts between cities and counties for law enforcement sharing). These practical, *legislative* responses to particular needs, however, serve to confirm the recognized general rule.

relationship developed,” with the State as “the principal of an agent acting within its authority,” *Orion Corp. v. State*, 109 Wn.2d 621, 644, (1987). The locality thus “acted under the direction and control of the state,” and upon DOE’s approval the SMP “became state regulation,” *id.* at 643.

The state, of course, can make its own regulations applicable regardless of municipal boundaries, perhaps (to some extent, at least) regardless what principles of local administrative and regulatory jurisdiction might otherwise prevail; so if it were to espouse SHB’s policy preference, perhaps the legislature could ordain that SHBs “run with the land.” But only the legislature, and not the SHB, can do that; and Petitioners maintain that even on the face of the Shoreline Management Act (which we now turn to discuss), it is quite clear that the legislature has made a different choice.

The SMA prohibits undertaking any “development” (defined in RCW 90.58.030 (3)(d) to include “bulkheading”) on shorelines “without first obtaining a permit from the government entity having administrative jurisdiction under” SMA, RCW 90.58.140(2). All “government entities” embracing shorelines are charged by subsection (3) of that section, as well as by RCW 90.58.050, to “establish a program, consistent with rules adopted by [DOE], for the administration and enforcement of the permit system” prescribed by SMA.

But *even before* it develops an SMP, every local government to which

SMA applies carries, by virtue of RCW 90.58.050 (emphasis added),

the primary responsibility for ... *administering the regulatory program* consistent with the policy and provisions of [SMA]. The department [of Ecology] shall act primarily in a supportive and review capacity with an emphasis on providing assistance to local government and on insuring compliance with the policy and provisions of [SMA].

This *administering* responsibility is not made contingent; it is a separate mandate to the government of every municipality embracing shorelines, whether or not it ever performs the *planning* tasks assigned. But where no localized SMP is in force, “administering the regulatory program” requires applying the Guidelines *directly*, for RCW 90.58.140 (2)(a)²⁷ has always required that development permits be granted,

until such time as an applicable master program has become effective, only when the development is consistent with

- (i) The policy of RCW 90.58.020; and
- (ii) after their adoption, the guidelines and rules of the department [of Ecology];²⁸ and
- (iii) so far as can be ascertained, the master program being developed for the area.²⁹

DOE’s first Guidelines, in 1972,³⁰ required that SMPs be developed

²⁷ See also WAC 173-27-150(1)(c), and WAC 461-08-505(1)(b).

²⁸ Since 1996, WAC 173-27-150 has been even more explicit, providing “that where no master program has been approved for an area, the development shall be reviewed for consistency with the provisions of *chapter 173-26*” (emphasis added) – the WAC chapter that includes the Guidelines.

²⁹ See also the equivalent in WAC 173-27-15: “to the extent feasible, any draft or approved master program which can reasonably be ascertained as representing the policy of the local government.”

³⁰ Order DE 72-12 filed 6/20/72 and 7/20/72.

within two years;³¹ but most local governments took longer.³² For example, King County's first SMP took effect only in July 1976. Thus, by virtue of RCW 90.58.140(2)(a), most local governments were obliged to administer the shoreline permit process for an extended period by directly applying the Guidelines – whether or not supplemented by draft SMP terms “being developed for the area” (if such could “be ascertained”).

Respondent City of Burien was incorporated on February 23, 1993, and as soon as it came into existence it was obligated under RCW 90.58.140(3)³³ and RCW 90.58.080³⁴ (as they stood at that time) to develop an SMP within the two-year timeline that would remain in place throughout the next decade.³⁵ But Burien failed to do so.³⁶

Meanwhile, if anyone in that period could have imagined that *King County's* SMP might remain in force *within Burien* after the City's incor-

³¹ See Laws of 1974, c. 61, § 1, replacing the original 18 month deadline of RCW 90.58.080.

³² See <http://www.ecy.wa.gov/programs/sea/shorelines/smp/citizen.html>, under the heading “SMP Register – List of all state-approved SMPs and amendments since 1971.” See also *History of Washington's Shoreline Management Act and Regulatory Guidelines*, http://www.ecy.wa.gov/programs/sea/sma/guidelines/downloads/SMA_History.pdf.

³³ “The local government shall establish a program, consistent with rules adopted by the department, for the administration and enforcement of the permit system provided in this section.” Laws of 1992, c.105, § 3.

³⁴ “Local governments are directed with regard to shorelines of the state within their various jurisdictions ... (2) To develop ... a master program for regulation of uses of the shorelines of the state consistent with the guidelines ...,” Laws of 1974 ex.s. c. 61 §. 1.

³⁵ Not until Laws of 2003, c. 262, § 2, was the 2-year timeline displaced by the timelines now appearing in RCW 90.58.080.

³⁶ Three other cities similarly incorporated out of King County and placed on the WAC 173-26-080 list in 1996 – Federal Way, Woodinville, and Seatac – *have* developed SMPs, and secured DOE approval, *see* SMP Register, *supra* note 31.

poration had otherwise ended county administrative and regulatory jurisdiction there, changes made in 1996 to DOE's master program regulations made that quite impossible to credibly maintain. In that year DOE promulgated an Order³⁷ which for the first time specifically named those "local governments, listed alphabetically by county, [which] are required to develop and administer a shoreline master program." That list, in WAC 173-26-080, included in 1996 (and today still includes) Burien and five other cities incorporated from King County during the prior six years. In addition, that 1996 Order also created the new section WAC 173-26-040, prescribing that whenever, because of municipal incorporation or other

change in shoreline jurisdiction, a city or town with shorelines of the state within its boundaries is not listed [in WAC 173-26-080], such local government is required to develop and administer a shoreline master program

No distinction was drawn according to whether the entity previously having jurisdiction did or did not have an SMP in force there.³⁸ And it cannot be overlooked that, continuously since the SMA was enacted – both before and after Burien's incorporation – the section codified as RCW 90.58.090 has directed, in the most mandatory of terms (our emphasis added), that

³⁷ Order 95-17, Wash. St. Reg 96-20-075 (eff. 9/30/1966).

³⁸ But if the change were due to *annexation* rather than a new incorporation, and if the prior local jurisdiction had an SMP in place, the provision just quoted must be construed along with another new section added by the same 1996 Order – WAC 173-26-160 – which allows applying the prior SMP in the annexed area *for up to one year* while the annexing city develops or (if it already had one) suitably amends its own SMP. Whether that dubious regulation exceeds DOE's legal authority, is not at issue in this case.

each local government *shall have submitted* a master program ... for all shorelines of the state within its jurisdiction to the department for review and approval,

“*within the time period provided in*” RCW 90.58.080. Until 2003,³⁹ that time period was two years. (By 2003, Burien was already eight years delinquent; and it still was delinquent when the facts of this case occurred.)

These provisions seem conspicuously designed to place newly incorporated cities in the same situation that had prevailed for every municipality with shorelines during the interval between when SMA first took effect and whenever DOE approved an SMP developed and proposed for the particular municipality: Having not yet completed the required process of self-study, consultation, public input, and planning required by the Act and the Guidelines, and having crafted neither the locally-focused planning goals and purposes integral to an SMP, nor a set of regulations tailored toward those ends, they were required by RCW 90.58.140(2)(a) to administer the Act’s shoreline permit process by “directly” applying the version of the DOE Guidelines then current, until the obligations imposed upon localities by SMA had been satisfied – not by some predecessor local government, but by the local government having administrative and regulatory jurisdiction currently. There would be no “vacuum” of shoreline regulation; nor could there be any uncertainty about persistence of the

³⁹ Laws of 2003, c. 262, § 2.

shoreline regime, since in order for a new SMP to be approved by DOE it would have to be consistent with the Guidelines the municipality would have been directly applying in the interim, *see* RCW 90.58.090(3).)

Subpart 1B. Even if KCC Title 25 was in force for Burien, that Title 25 itself required applying the Guidelines to Respondent Segale’s bulkheading permit application.

KCC Title 25 itself explicitly negates any possibility that it might displace the DOE Guidelines from development permit decisions, saying,

No development shall be undertaken by any person on the shorelines of the state unless such development is consistent with ... *the guidelines and regulations* of the Washington State Department of Ecology *and* the King County shoreline master program.

KCC 25.32.010(A) (emphasis added). This provision was adopted by the County as a part of § 801 of Ord. 3688 in 1978, and was approved by DOE as part of King County’s SMP on June 30 of that year (see the SMP Register). That, of course, imports DOE’s conclusion that the provision comports with SMA, the Guidelines, and other relevant DOE regulations.

In the face of this explicit provision, the holding by SHB (affirmed by the Superior Court) that KCC Title 25 renders the DOE Guidelines “not applicable” in this case is, frankly, incoherent.

The original SMA required that “each local government shall periodically review any master programs under its jurisdiction and make such adjustments thereto as are necessary,” Laws of 1971, § 19 (codified as the original RCW 90.58.190). Insofar as some change in the Act, Guidelines,

or DOE regulations might necessitate such adjustments, KCC 25.32.010(A) might have seemed to its drafters (who were already submitting their second update in as many years) a more convenient and efficient means of keeping their SMP consistent with DOE changes. In any event, it was nicely tailored to perform that function, and so elegantly served to maintain county consistency with changing regulations (including the newer bulkhead Guidelines) regardless of delinquency in preparing, or tardiness in securing DOE approval of, conforming SMP amendments. If KCC Title 25 is rightly to be regarded as Burien’s SMP, this beneficent provision performs the same service here, requiring application to this case of the more rigorous bulkheading restrictions recently added to the Guidelines

Subpart 1C. KCC Title 25 can be applied in this case, but only as *supplemental* to the DOE Guidelines.

Mr. Peter Skowlund, DOE’s Policy Lead for Shoreline Management, whose uncontroverted evidence of record was referred to earlier,⁴⁰ suggested that KCC Title 25 might be viewed for purposes of RCW 90.58.140 (2)(a)(iii) as the “program being developed” for Burien, or – to put it in the words of the equivalent WAC 123-27-150(1)(c) – a “draft or approved master program which can be reasonably ascertained as representing the policy of the local government.” Because the clauses in both that statute

⁴⁰ See text accompanying note 22, *supra*.

and that regulation are joined with the conjunctive “and,” however, rather than the disjunctive “or,” treating KCC Title 25 in this manner could not support the holding below that the KCC provisions make the Guidelines “not applicable.” Rather, shoreline development permits could be issued lawfully only for projects found consistent *not only* with the inchoate or informally followed SMP, *but also* with the current Guidelines.

PART 2: THE TRIBUNALS BELOW ERRONEOUSLY INTERPRETED AND APPLIED THE LAW WITH REGARD TO THE BURDEN OF PROOF

Subpart 2A: Where a shoreline development permit applicant has produced no evidence to show satisfaction of prerequisites thereto, a challenger’s burden is met by showing such absence of evidence; he need not affirmatively prove facts negating such satisfaction.

It is necessary to distinguish between who has the “burden of proof,” and what it is that the party is burdened to prove.

The APA, RCW 34.05.570(1)(a), provides that “the burden of demonstrating the invalidity of agency action is on the party asserting invalidity.”⁴¹ There, what the party is burdened to prove is explicit; he must undertake to show, and must persuade, one or more of the grounds required for relief under RCW 34.05.570(3). But RCW 34.05.570(1) also says, “except to the extent that ... another statute provides otherwise” – indicating that some such “otherwise” provision might, to some “extent,” affect how that APA burden might operate. *There is* such an “otherwise” provi-

⁴¹ 9 WIGMORE ON EVIDENCE § 2486, at 291 (Chadbourne rev., 1981).

sion applicable to this case: It is RCW 90.58.140; and one must consider it thoughtfully, to avoid a serious mistake made by both tribunals below.

The insight of WIGMORE ON EVIDENCE that proof burdens on common-law issues really are questions “of policy and fairness based on experience in the different situations,” seems also useful as a guide to statutory interpretation when the phrase, “burden of proof, “ is used indiscriminately in statutes. RCW 90.58.140(7) provides that the applicant for a shoreline substantial development permit has “the burden of proving that a proposed substantial development is consistent with the criteria that must be met before a permit is granted.” This elaboration of *what the applicant must prove* is essential to clarity; and it must be noted that it requires showing consistency with “the criteria,” not just with some of them). But RCW 90.58.140(7) then goes on to say that, “in any review of the granting or denial of” such a permit application, “the person requesting the review has the burden of proof.” This does not alter what an applicant who failed below is burdened to show on review; but *what is it* that an *opponent, after losing below*, must show for success on review?

For many, probably most cases, the answer would be obvious: The opponent would be burdened on review to refute each showing made by the applicant below that he satisfied the criterion (or criteria) at issue. But what if the applicant and the agency in the “first round” both overlook,

disbelieve, or disregard some criterion which the opponent believes is imposed by law? What is the opponent burdened to prove on review then? On the legal questions, of course, the opponent must persuade any reviewer to his view of the law; but assuming that is accomplished, what is he burdened to show as to fact?

That, Petitioners contend, is the circumstance in this case; and the answer must be conditioned – “ala Wigmore” – by respect for the important purposes and public policy of the SMA. RCW 90.58.900 directs that the SMA “shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.” This directive applies to RCW 90.58.140(7) as much as to every other provision of the Act. It certainly does not justify any “rule of approximation,” or other loose or sloppy construction; but it does counsel against any interpretation that would frustrate the evident goals of SMA provisions. The burden allocation

So: As further developed in Part 3A of this brief, below, among the Guidelines’ criteria for a permit to enlarge a bulkhead to support or protect an existing primary structure is that there be “conclusive evidence, documented by a geotechnical analysis, that the existing structure is in danger from tidal action, currents, or waves” – the geotechnical analysis also addressing drainage issues on the site before considering bulkhead enlarge-

ment.⁴² Now suppose a case (like this one, actually) in which the permit is granted without any showing by the applicant that the foregoing criteria are satisfied; what is it that an opponent is burdened to prove?

Is he burdened to *prove the negative* of what the applicant was burdened by RCW 90.58.140(7) to affirmatively show? Must the opponent commission a geotechnical analysis of the applicant's land (which he and his agents cannot enter against the applicant's will), bearing the cost of drilling and analyzing soil samples, surveying, mapping topography, and studying gradients and erosion and its possible upland causes, all to demonstrate (conclusively?) that the proposed bulkhead enlargement really isn't needed at all because the structure the applicant says is threatened really is not? Surely nothing could more effectively frustrate the avowed purposes and mandates⁴³ of the Shoreline Management Act!

Or, suppose the applicant opts to save the expense of a geotechnical study, and instead just introduces the observation of an engineer that the original bulkhead was leaking; or, suppose the applicant simply fails to address the point at all, but the permitting authority grants the permit any-

⁴² Cf. WAC 173-26-231(3)(a)(iii)(D).

⁴³ Including the mandate burdening the applicant to prove the proposed development is consistent with each criterion that must be met before a permit is granted!

A development *shall not be undertaken* on the shorelines of the state *unless* it is consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, rules, or master program.
RCW 90.58.140(1) (emphasis added).

way. What is it that the opponent is burdened to prove then, to prevail on review? The indiscriminating generality of 90.58.140(7)'s final sentence gives no guidance here.

Petitioners maintain that a challenger's burden of proof under RCW 90.58.140(7) (and WAC 461-08-500(3)) cannot be a burden to affirmatively negate what the applicant has not even attempted to show. That would mock the statute's mandates, and it cannot be presumed that the legislature even conceived of so self-defeating an interpretation. It must instead be sufficient, to satisfy the opponent's burden of proof on review where a permit has been issued which the law unqualifiedly preconditions upon the applicant's proof of consistency with prescribed criteria, for the aggrieved opponent to show that the applicant failed to present some specifically mandated, or otherwise substantial, evidence of his proposal's consistency with one (or more) of the criteria prescribed.

Subpart 2B: The movant for a summary judgment has the initial burden to show, prima facie, the facts material to the motion, even if his opponent might have the burden of proof on those facts at a trial.

In any event, this case was decided by the SHB on Respondents Segale's "speaking" motion to dismiss (*ergo* for summary judgment, joined by Respondent City; and this necessarily affects the burden of proof. While our Supreme Court has approved "administrative summary judgment," *Asarco, Inc. v. Air Quality Coalition*, 92 Wn2d 685, 697

(1979), it also has stressed that this “efficient judicial tool” has corollaries regarding burdens and judicial review.

“In a summary judgment motion, the moving party bears the burden of demonstrating an absence of any genuine issue of material fact, and entitlement to judgment as a matter of law,” *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182 (1997), citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989) (“in a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.”). If, but only if, the movant meets this initial burden, “then the inquiry shifts to the party with the burden of proof at trial,” *Young, supra*, at 225 (emphasis added). Only “[t]hereafter, the nonmoving party must set forth specific facts evidencing a genuine issue of material fact,” *Magula, supra*, at 182 (emphasis added).

A “material” fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense

T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir., 1987).⁴⁴ Thus a summary judgment *opponent* need not posit conceivable scenarios that might entitle the proponent to judgment as a matter of law, and negate them; instead, the summary judg-

⁴⁴ “Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules,” *Young v. Key Pharmaceuticals, Inc., supra*, 112 Wn.2d at 226, citing cases.

ment *proponent* must *canvas the law to ascertain what facts are material to his claim or defense*, and show *each* of those facts *prima facie*. Only then does the burden shift to the summary judgment opponent to show a genuine dispute as to one or more of those material facts.

It is sufficient, then, for the opponent to show simply that the proponent of summary judgment has *failed to show prima facie* some fact or facts prerequisite to his entitlement to judgment as a matter of law. Such failure would require denial of *summary* judgment, for the case to proceed through the ordinary processes of proof after full (not prematurely curtailed) discovery, and with opportunity for cross-examination, in an ample evidentiary hearing – where, of course, the normal rules governing burdens in the relevant kind of proceedings would apply.

It should be added that a person wrongfully deprived of such an evidentiary hearing by an improper grant of summary judgment has surely been “substantially prejudiced” thereby, within the meaning of RCW 34.05.570(1)(d). Moreover, in this case Petitioners were substantially prejudiced by the loss of those legally protected interests which SHB found ample to establish their legal standing.

As to judicial review: the reviewing court “reviews a summary judgment *de novo*, treating all facts and inferences therefrom in a light most favorable to the non-moving party,” *Fell v. Spokane Transit Authority*,

128 Wn.2d 618, 625 (1996), citing *Park Homeowners Association, Inc. v. Tydings*, 125 Wn.2d 337, 341 (1994). This de novo rule as to the *facts of record* departs from the rules *generally* applied to appellate fact review; and the difference is attributable to the same characteristics of this “efficient judicial tool” that require the “initial burden” deviation from the general rules of proof burden allocation.

PART 3: THE ORDERS BELOW ARE NOT SUPPORTED BY EVIDENCE THAT IS SUBSTANTIAL WHEN VIEWED IN LIGHT OF THE WHOLE RECORD, INCLUDING THE AGENCY RECORD FOR JUDICIAL REVIEW.

Subpart 3A: There was no substantial evidence that the proposed bulkhead was necessary to support or protect an existing structure.

The DOE Guidelines, in WAC 173-26-231(2)(a),

allow structural shoreline modifications [which includes bulkheads⁴⁵] only where they are demonstrated to be necessary to support or protect an allowed primary structure or legally existing shoreline use that is in danger of loss or substantial damage

In the case at bar, no party and no tribunal below sought to justify the proposed bulkhead on any ground except to protect the *existing* structure.⁴⁶ Petitioner Segale even declared under oath that the existing structure was not to be demolished, Environmental Checklist, SHBR 141, at 147-148 and 152.

⁴⁵ Bulkheads are included within the definition of “shoreline modifications,” WAC 173-26-020(34), as used in WAC c. 173-26 (which includes the Guidelines).

⁴⁶ See, e.g., site plan, SHBR 139; City’s Land Use Decision approving application, SHBR at 167; SHB’s final discussion of the issue, SHBR at 378.

Even for bulkheads proposed for that purpose, however, the Guidelines prescribe exacting prerequisites: “An existing shoreline structure may be *replaced*,” but only “with a *similar* structure,” WAC 173-26-231(3)(a)(iii)(C) (emphasis added). The project must “*limit the size ... to the minimum necessary*,” and “soft approaches⁴⁷ shall⁴⁸ be utilized unless *demonstrated* not to be sufficient.⁴⁹ Moreover, even merely *enlarged* bulkheads for the purpose

should⁵⁰ not be allowed unless there is *conclusive* evidence, *documented by a geotechnical analysis*, that the [existing residential] structure *is* in danger from shoreline erosion caused by tidal action, currents, or waves. Normal sloughing, erosion of steep bluffs, or *shoreline erosion itself*, without a scientific or geotechnical analysis *is not demonstration of need*. The geotechnical analysis should evaluate on-site drainage issues and address drainage problems away from the shoreline edge before considering structural shoreline stabilization.⁵¹

Geotechnical reports pursuant to this section that address the need to

⁴⁷ “‘Soft’ structural measures rely on less rigid materials, such as biotechnical vegetation measures or beach enhancement,” WAC 173-26-231(3)(a)(ii).

⁴⁸ “‘Shall’ means a mandate; the action must be done,” WAC 173-26-020(32).

⁴⁹ WAC 173-26-231(3)(a)(iii)(E) (emphasis added).

⁵⁰ “‘Should’ means that the particular action is required unless there is a demonstrated, compelling reason, based on policy of the Shoreline Management Act and this chapter, against taking the action,” WAC 173-26-020(35).

⁵¹ WAC 173-26-231(3)(a)(iii)(B)(1) (emphasis added).

The next sub-subsection, (II), prescribes *additional* requirements “in support of *new* nonwater-dependent development, including single-family residences” (emphasis added), which likewise require demonstration through a geotechnical report. These include that “nonstructural measures, such as placing the development further from the shoreline, planting vegetation, or installing on-site drainage improvements, are not feasible or not sufficient,” *id.* The last sentence of the last bulleted paragraph of WAC 173-26-231(3)(a)(iii)(C) provides that “[a]dditions to or *increases in size* of existing shoreline stabilization measures *shall be considered new structures*” (emphasis added).

prevent potential damage to a primary structure shall address the necessity for shoreline stabilization by estimating time frames and rates of erosion and report on the urgency associated with the specific situation. As a general matter, hard armoring solutions should not be authorized except when a report confirms that there is a significant possibility that such a structure will be *damaged within three years* as a result of shoreline erosion in the absence of such hard armoring measures⁵²

Even if KCC Title 25 should be regarded as Burien's SMP (so that the foregoing Guidelines provisions would not govern *by their own force* in Burien), those Guidelines are affirmed and expressly made applicable by KCC 25.32.010A, which says:

No development shall be undertaken by any person on the shorelines of the state unless such development is consistent with ... the guidelines and regulations of the Washington State Department of Ecology

Moreover, KCC 25.16.180D provides that

Shoreline protection⁵³ shall not be considered an outright permitted use and shall be permitted only when it has been *demonstrated* that shoreline protection is *necessary* for the *protection of existing* legally established structures ... (emphasis added).

Segale moved the Superior Court to dismiss the issue under KCC 25.16.180D, first as having been abandoned, CP 237, and then (in a tardily-served memorandum⁵⁴) as never having been raised to the SHB. Neither assertion was true; but the Superior Court granted the motion. At pages 4-12 of their Motion to Reconsider that order, CP 242, at 245-253 –

⁵² WAC 173-26-231(3)(a)(iii)(D) (emphasis added).

⁵³ This is defined in KCC 25.08.480 to include bulkheads.

⁵⁴ CP 225 et seq. Petitioners received it hours *after* oral argument on the motion.

pages hereby incorporated as if set forth herein – Petitioners documented their reliance on KCC 25.16.180D from the first City proceeding and through every step of the SHB proceeding; but their Motion to Reconsider was denied, CP 262 (or 264). The Superior Court’s dismissal of the KCC 25.16.180D issue is included in Petitioners’ Notice of Appeal, CP 523.

In any event – whether by virtue of the Guidelines directly or under KCC 25.32.010A, or by virtue of KCC 25.16.180D – the requirements for the permit the City issued for this bulkhead are essentially the same; and the Record shows that Respondents never demonstrated – even *prima facie* – that Mr. Segale’s proposal satisfied these requirements.

In its Order Denying Reconsideration, SHB declared:

The applicant presented sufficient evidence to the City during the initial permitting process to convince the City that the replacement bulkhead was necessary to protect an existing residential structure. The evidence established that the lot contained an existing residence, that the bulkhead would be a replacement bulkhead, and that it would be located in the same alignment as the existing bulkhead. The evidence included an environmental checklist stating that the bank behind the existing bulkhead was eroding, and that the deteriorating bulkhead is allowing the erosion to occur.⁵⁵

The SHB proceeding was of course *de novo*; but the same evidence was before SHB as well, and thus is in the record here for review.

⁵⁵ Order Denying Reconsideration, SHBR 374 ,at 378. The Order here cited the site plan, SHBR 139; the Environmental Checklist, SHBR 141 *et seq.*, and the City’s Land Use Decision, SHBR 159 *et seq.* Each is discussed further below; and none of the three actually addressed the *necessity* for so enormous a bulkhead (or, indeed, of *any* bulkhead) *to protect the existing* (or any other) building.

But the first sentence just quoted from the SHB Order is not supported by substantial evidence. In fact, the Record includes Respondent City's admission, in its March 8 "Type I Land Use Decision," that

The application did not include an analysis specifically stating that the existing single-family residence is eminently [sic] threatened by erosion from waves or currents.⁵⁶

(*Emphasis in original*). The SHB – and the Superior Court – nowhere even mentioned this admission; and that is quite telling, especially since the evidence they claimed to rely upon was immaterial. They apparently thought it sufficient that, as the site plan showed, the bulkhead would be located on a site (a very large site, approximately 28,000 square-feet) that contained a modest residential structure in one corner.⁵⁷ In its Land Use Decision, the City declared – as its *only* response to the "necessary for the protection of existing legally established structures" requirement of KCC 25.16.180(D) – nothing more than that the project "will reconstruct an existing seawall on a lot that contains a single-family residence."⁵⁸ But the mere existence of a residential structure somewhere on the same plot of land does not demonstrate that adding more than six feet or more to the height of a 182-foot bulkhead is necessary to protect that structure from damage by "shoreline erosion caused by tidal action, currents, or waves"

⁵⁶ Land Use Decision, SHBR 159, at 164.

⁵⁷ Site plan, SHBR 139.

⁵⁸ SHBR 159, at 167.

within three – or even three hundred – years.

Indeed, Respondent Segale’s counsel effectively conceded in the Superior Court (notwithstanding his client’s contrary representations on the point⁵⁹) that protecting or preserving the existing dwelling was not really the purpose of the proposed bulkhead at all.⁶⁰

With regard to the “replacement” and “alignment” statements made in the passage above quoted from the SHB Order: These facts have never been disputed; but they satisfy none of the material requirements. In fact, “replacement” bulkheads are themselves allowed under the Guidelines only if they are “comparable to the original structure or development including but not limited to its size, shape, configuration, location and external appearance,” WAC 173-27-040(2)(b); – so at least as to size, simply being a “replacement” could not vindicate this proposal. Under WAC 173-26-231(3)(a)(iii)(C), replacement bulkheads are allowable only if there is a “demonstrated need to protect principal uses or structures from erosion caused by currents, tidal action, or waves,” *id.* – a requirement comparable to, though less elaborate than, that prescribed for new bulkheads. Moreover, whether or not characterized as replacements, “addi-

⁵⁹ See *infra*, text accompanying notes 64-65.

⁶⁰ At page 17 of the Segale Trial Brief, CP 325, at 341, Mr. Talmadge accused that Petitioners “filed this action to harass and delay Segale’s construction of his house and the bulkhead for it for their own personal motivations.” The accusation was untrue, both as to motivation and because Petitioners have not opposed the house construction; but it is an admission that preserving the “existing” structure was never the real aim of this project.

tions to or increases in size of existing shoreline stabilization measures shall be considered new structures,” *id.*, thus invoking the more elaborate requirements directly.

“Alignment” could be material only if it were claimed (which is *not* the case here) that the proposed bulkhead is *exempt* from the permitting process, *see* WAC 173-27-040(2)(c). For “enlarged” bulkheads – like the one in this case – just as for new ones, alignment is neither a distinct nor a sufficient consideration; the entire gamut of WAC 173-26-231(3)(a) principles and standards must be satisfied.

“Replacement” and “alignment” both are immaterial under KCC 25.16.180D. In addition, the King County “Goals Policies Objectives” document⁶¹ – which SHB held to be also a part of the King County SMP in force for Burien,⁶² – articulates material principles that are quoted in the note below.⁶³ Ironically, having held that it applies, SHB utterly ignored this “Goals Policies Objectives” document – and likewise ignored the complete absence of any evidence showing them satisfied.

⁶¹ Excerpted at SHBR 227-229.

⁶² KCC Title 25 itself actually affirms these goals, policies, and objectives, declaring that its provisions are “are consistent with and implement” them, KCC 25.04.010, second paragraph, even though Title 25 does not reiterate them verbatim.

⁶³ “1. Structural solutions to reduce shoreline damage should be allowed only after it is demonstrated that non-structural solutions would not be able to reduce the damage.” SHBR at 229.

“7. Whenever shoreline protection is needed, natural berms and vegetation should be favored over artificial means.” *Id.* And

“10. New development not shoreline dependent should be encouraged to locate so as not to require shoreline protection.” *Id.*

In the “environmental checklist” referred to in the third sentence quoted earlier from SHB’s Order on Summary Judgment, Respondent Segale declared under oath that the “proposal is to repair the existing sea wall which is in a deteriorating state and is allowing erosion”; that there is “erosion of bank behind the existing sea wall”; that the “work is intended to repair the existing sea wall adjacent to Puget Sound;” and that “the project will control or reduce erosion resulting from conditions of the existing wall.”⁶⁴ (In the same document, he attested that the site contained a single family residence, and that “no” structures would be demolished⁶⁵)

But WAC 173-26-231(3)(a)(iii)(B)(1), as quoted near the beginning of this Subpart, provides that “shoreline erosion itself, without a scientific or geotechnical analysis is not demonstration of need.” Moreover in this case the existing structure was located forty feet landward from the nearest part of the old bulkhead⁶⁶ (and at least 100 feet south of its northerly end⁶⁷), and on ground approximately eight feet higher.⁶⁸

Finally, SHB relied upon the Declaration of Gary W. Henderson, a qualified engineer specializing in geotechnical engineering.⁶⁹ But only

⁶⁴ Environmental Checklist, 141, at 143-144.

⁶⁵ Id. at 147-148.

⁶⁶ Land Use Decision, SHBR 159, at 160.

⁶⁷ Site plan, SHBR 139.

⁶⁸ Photo, SHBR at 46. See also SHBR at 51, confirming relative distance from shore (the bold black line is *not* the shoreline.)

⁶⁹ Henderson Declaration, SHBR 208 et seq.

one sentence in Mr. Henderson's very brief Declaration is even arguably pertinent to the criteria for permit approval discussed in this brief. It says, "the existing bulkhead is in a deteriorated condition and must be repaired or replaced."⁷⁰ In the same paragraph, Henderson declares he is "familiar with the proposal"; and while he only declares having "reviewed the plans for the bulkhead replacement," let us suppose that he visited the site, too. Nonetheless he does not elaborate, or provide any basis for, his conclusory statement that the existing bulkhead is "in a deteriorated condition," and offers no reason as to why it "must" be repaired or replaced. Perhaps it was just ugly. Perhaps some plans to which Henderson was privy required its replacement to protect some new structure in lieu of the old residence Segale had sworn to retain (although Henderson indicated indifference to whether the old bulkhead were "repaired or replaced." But he declared no fact, and ventured no opinion, as to any risk presented to any structure (unless to the existing bulkhead itself). Importantly, he did not claim to have conducted any geotechnical analysis of the site, or prepared any report, or evaluated any erosion or drainage issues. Either this witness was very poorly prepared, or else he declined to risk his reputation by vouching for propositions beyond what his Declaration contains. What it contains however, is wholly immaterial for the reasons already discussed in

⁷⁰ SHBR at 209, lines 14-15.

the preceding paragraphs regarding the other statements and documents on which the SHB (and the Superior Court) relied.

Like the SHB, however, the Superior Court proceeded as if all of the foregoing were beside the point. The audio recording of that Court's June 10 hearing was so poor that a great part of it was inaudible and much of the rest was unclear. Preparing a written transcript required unusually tedious and time-intensive effort; and still, many instances of incoherence and confusing inaccuracy remain.⁷¹ It nonetheless is evident that the Court's conclusion that Respondents' "prima facie" burden "clearly was met"⁷² was premised on that Court's legally erroneous impression that bulkhead deterioration and leakage was all that need be shown⁷³ – an impression which Petitioners' could not dislodge despite repeated efforts to do so.⁷⁴ Petitioners respectfully insist that once that legal error is corrected, the Superior Court's conclusion that the proposed bulkhead was necessary to support or protect an existing structure is unsupported by any evidence that is substantial in light of the whole record.

But that need not have doomed Mr. Segale's bulkheading plans: He could have applied for a variance. It is apparent from the Record, however,

⁷¹ In RP 6/10, *see* for example "existing road" instead of existing "existing home" several times on p. 20 and elsewhere; "visibility" instead of "building" on p. 20; "Anderson" instead of "Henderson" on page 21.

⁷² RP 6/10, at 16.

⁷³ *E.g.*, RP 6/10, at 16, 17.

⁷⁴ RP 6/10, at 14-15, 18-19, 26

that neither he nor the City regarded his application as a variance request.

Subpart 3B: There was no substantial evidence that the proposed bulkhead would be consistent with applicable requirements regarding use of bulkheads to create new or newly usable lands

The “Guidelines” have long recognized that “landfills,” often associated with wetlands or water areas, “also occur to replace shoreland areas removed by wave action or the normal erosive processes of nature.”⁷⁵ The latter commonly result from decades or centuries of gravity, rain, and runoff; and that seems part of what DOE has had in mind when it has prohibited using bulkheads “for the indirect purpose of creating land by filling behind the bulkhead.”⁷⁶ WAC 173-26-020 (14) expressly defines “fill” to mean “the addition of soil, sand, rock, gravel, sediment, earth retaining structure, or other material ... on shorelands in a manner that raises the elevation.” Also, WAC 173-27-040(2)(c) provides that a bulkhead which otherwise would be exempt from the shoreline permitting process “is not exempt if constructed for the purpose of creating dry land.”

The same section in WAC reinforces these prohibitions against creating “new lands” by providing that “not more than one cubic yard of fill per

⁷⁵ WAC 173-16-060 (14) (emphasis added). According to the DOE website, “Ecology repealed this rule [WAC c. 173-16] on November 29, 2000, and replaced it with guidelines codified as Chapter 173-26 WAC. This WAC is still applicable to local jurisdictions that have not adopted a SMP. Questions? Contact Peter Skowlund, 360-407-6522.” http://www.ecy.wa.gov/programs/sea/sma/laws_rules/172-16.html.

⁷⁶ WAC 173-16-060 (11)(e) (“The construction of bulkheads should be permitted only where they provide protection to upland areas or facilities, not for the indirect purpose of creating land by filling behind the bulkhead.”)

one foot of wall may be used as backfill.” That is plenty to backfill for such reasonable bulkheads as are commonly found on the settled shores of this state; but it is not nearly enough to backfill a monster like the one Mr. Segale proposed, towering twelve feet or more above the original ground level at the lower edge of a long and gentle slope. At best, it would leave a steep-walled revetment separating the near-shore area from the remainder of the lot, so that – to a virtual certainty – more fill must follow before development could take place.

SHB acknowledged (and all parties agreed) that “fill will be placed landward of the existing (and replacement) bulkhead to match the elevation of the replacement bulkhead,” SHBR at 418, lines 8-9; but without considering the quantity or consequences of that fill, the Board held that because the new bulkhead would be located along the same alignment and the surface square footage landward from the bulkhead would not change, the project would not create “new land.” SHBR at 418, lines 12-15.

But SHB’s interpretation of the “new lands” prohibition thus employed a flat-world conception that conceives “lands” only in terms of horizontal dimensions on a plane, and so defeated much of the purpose of the “new lands” provisions in the Guidelines and KCC Title 25.

As earlier noted, SHB held that the applicable SMP included the underlying “goals, policies, and objectives of King County’s shoreline man-

agement master program,” as much as the regulatory and enforcement terms of KCC Title 25.⁷⁷ This “Goals, Policies, Objectives” document,⁷⁸ which articulates the purposes, and so should guide the interpretation, of KCC Title 25’s “new lands” provisions, specifically reaches landfill “to create usable land by adding ... material in order to remove obstructions for developments,” so as “to create land usable for specific developments from land not previously usable for the developments,” SHBR at 228. It observes that so raising the land’s surface elevation “commonly destroys vegetation subsequently eliminating habitat,” and “may also cover animal life or breeding ... grounds,” *id.* In sum, it declares that “Shoreline protection on marine and lake shorelines should not be used as the reason for creating new land *or newly usable land*” (emphasis added), SHBR at 229.

KCC Title 25 itself asserts that its regulations “are consistent with and implement”⁷⁹ these “goals, policies, and objectives”; and it also instructs that Title 25 “shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.”⁸⁰ Nonetheless the SHB, deceived by its flat-earth, square-foot misconception, erroneously ignored these goals, policies, and objectives, and frustrated them utterly.

⁷⁷ SHBR at 413, lines 8-9.

⁷⁸ Excerpted at SHBR 227-229.

⁷⁹ KCC 25.04.010, second paragraph.

⁸⁰ KCC 25.04.040.

Subpart 3C: There was no substantial evidence that the proposed bulkhead would conform to applicable requirements limiting height.

WAC 173-26-231(3)(a)(iii)(E)⁸¹ mandates that bulkhead size be the “minimum necessary” to protect from tidal, wave, or current erosion. To the same effect is the “similarity” restriction applied to replacement stabilization structures.⁸²

If (as Petitioners contend) no SMP is legally in effect for Burien, RCW 90.58.140 requires that, until one is prepared by the City and DOE-approved, permit applications like that involved in this case must be determined under the DOE Guidelines directly. Reasonable application of the foregoing restrictions would have been ample to preclude the unnecessary and highly dissimilar, enormously tall bulkhead in this case.

The City had noted the project’s extraordinary height, but declared in its decision on this project that “[t]he local shoreline master plan [by which it meant KCC Title 25] does not limit the height of bulkheads,” SHBR at 162. The SHB agreed, SHBR at 413-415, and the Superior Court affirmed. Thus neither Respondents nor the tribunals below asserted the proposed bulkhead’s height was consistent with the foregoing WAC provisions; they maintained simply that those WAC provisions did

⁸¹ “When any structural shoreline stabilization measures are demonstrated to be necessary, ... [l]imit the size of stabilization measures to the minimum necessary.”

⁸² WAC 173-26-231(3)(a)(iii)(C) (“An existing shoreline stabilization structure may be replaced with a *similar structure* if there is a demonstrated need to protect principal uses or structures from erosion caused by currents, tidal action, or waves” (emphasis added)).

not apply, because KCC Title 25 did. Part 1 of this brief has refuted that thesis; but in any event, one cannot escape KCC 25.32.010's own mandate that

No development shall be undertaken by any person on the shorelines of the state unless such development is consistent with ... the guidelines and regulations of the Washington Department of Ecology

Moreover, since the material facts of this case transpired, Burien has at last developed a proposed SMP and is now negotiating to secure DOE's approval. Among those provisions that DOE thus far has found acceptable is one confirming a measurable height limit for bulkheads. All the while that Segale's permit application was pending, successive drafts of that developing SMP provided, in sec. 20.30.070(2)(i), that "the maximum height of a bulkhead on the marine shoreline shall be no greater than four (4) vertical feet above the OHWM [Ordinary High Water Mark]," SHBR at 237. In the version ultimately approved by the City Council and submitted for DOE approval, this had changed only to extend a modest indulgence for replacement bulkheads, so as to provide:

The maximum height of a new bulkhead on the marine shoreline shall be no greater than four (4) vertical feet above the OHWM. The height of a replacement bulkhead shall not exceed four (4) vertical feet above the OHWM or the height of the existing bulkhead, whichever is greater.⁸³

RCW 90.58.140(2)(a) requires that, where no SMP is yet in effect,

⁸³ Final City Council Draft – September 2010, ch. IV, 20.30.070 2. c. iv., online at <http://www.burienwa.gov/DocumentView.aspx?DID=1512>.

shoreline permits are to be granted “only when the development is consistent with ... (iii) so far as can be ascertained, the master program being developed for the area.”⁸⁴ The developing Burien draft with its measurable bulkhead limit was readily ascertainable and available, and in this respect not controverted, at all times while the Segale proposal was pending the application process. Not by its own force (for it was only a draft), but by virtue of the legislative mandate of RCW 90.58.140(2)(a), it should have been applied in this case.

PART 4: THE SUPERIOR COURT ERRONEOUSLY INTERPRETED OR APPLIED THE LAW, AND ABUSED ITS DISCRETION, IN REJECTING PETITIONERS’ REQUEST FOR REMAND

Subpart 4A: RCW 34.05.562(2) authorizes remand to an administrative tribunal in the circumstances of this case.

Paragraphs 39-42 of the Amended Complaint, CP at 347-348, alleged facts that Petitioners had not known of, and could not have (and were not required to have) discovered before the SHB decision, tending to show that Respondent’s representations that his proposal was to protect the existing residential structure – although made under oath – were untruthful. Once his effort to deceive the SHB had proven successful, however, the truth emerged when – the next day after the SHB denied⁸⁵ Petitioner’s petition for reconsideration of its Order on Summary Judgment, Segale ap-

⁸⁴ See also the equivalent WAC 173-27-150(1).

⁸⁵ CITE

plied for a permit to demolish that residential structure. The City granted that permit on the second day later; and within less than three days the structure the SHB had regarded as indispensable to legally permitting Segale's bulkheading proposal was gone, and the site had been cleared.

Petitioners had included evidence supporting these contentions, and thus tending to show a fraud upon the SHB, in a declaration supporting their (original) Trial Brief (not among the Clerk's Papers); or in their Opposition Declaration Against Dismissing Issues, CP 162et seq.; and referred to in their Opposition Memorandum Against Dismissing Issues, CP 175, at 183 et seq. That evidence included a letter documenting that Segale had procured consultant engineers' examination and advice regarding demolition of the existing structure the first week after his purchase of the subject site in 2007 (found in the City file for the permit to demolish that house, applied for on August 24, 2010, the day after SHB's Order Denying Reconsideration); a 2009 letter from one of Segale's agents to the Army Corps of Engineers saying that the "minimum amount of rock wall material" needed for erosion protection at the site "would be to elevation 14, which is the top of the [then] existing wall," that is, six to seven feet *lower* than the bulkhead being proposed; and several photographs comparing the original bulkhead to the much larger new one as Segale rushed to complete its construction without the delay mandated by his shoreline de-

velopment permit⁸⁶ and by statute⁸⁷ – thus assuming the risk of court-ordered removal at his own expense (see RCW 90.58.140(5)(c)) if judicial review should ultimately result in that remedy.

Subsection (1) of RCW 34.05.562 provides that the court may receive evidence beyond that in the agency record “if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding ... (b) Unlawfulness ... of decision-making process” It was already an ancient proposition when the United States Supreme Court observed more than a century and a half ago that “judgments as well as grants obtained by fraud or collusion are void ...,” *League v. DeYoung*, 52 U.S. 185, 203, 1850 WL 6836 (1850). “Void” certainly relates to the “validity of the agency action at the time it was taken.” Fraud on the forum definitely pertains to the “decision making process.” The abhorrence of fraud on a decision-making tribunal still arouses especial determination: For example, “fraud on the courts of this State is not to be countenanced. A judgment procured by fraud is void and will not be enforced. ... [I]t is too serious a matter for us to overlook.” *Tomm’s Redemption, Inc., v.*

⁸⁶ “Construction pursuant to this permit shall not begin or be authorized ... until all review proceedings are terminated.” Sub¶ B.4. on page 1, and Conclusion D.4. on page 10, of “Type I Land Use Decision” in File No. PLA 09-1225, March 8, 2010, part of R. Item 13. This condition was included in the SSDP “pursuant to RCW 90.58.140 (5).” *Id.* at p. 10.

⁸⁷ “Construction may be commenced no sooner than thirty days after the date of the appeal of the board’s decision is filed if ... an appeal for judicial review of the hearings board decision is filed pursuant to chapter 34.05 RCW.” RCW 90.58.140(5)(b).

Park, 333 Ill.App.3d 1003, 777 N.E.2d 522, 528 (2002). These comments had reference to judicial tribunals, but “the same rules apply with equal logic to a decision of” an administrative agency, *Jones v. Willard*, 224 Va. 602, 607, 299 S.E.2d 504, 508 (1983).

RCW 34.05.562(2) authorizes remand of a matter prior to final disposition of a petition for judicial review if “(b) the court finds that new evidence has become available that relates to the validity of the action at the time it was taken” (again, fraud on the forum destroys the validity of the agency *ab initio*); and “that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered (facts confirming the fraud and rendering it conspicuous, but *occurring after* the agency action, obviously could not have been discovered before the action; and the fact that Mr. Segale had evaluated the structure for purposes of demolition three years in advance – revealing his long-standing purpose – could not reasonably have been discovered before the engineers’ Report of that inspection and analysis was filed with the City *after* the SHB proceedings were done). Moreover, it is always strongly in the interests of justice to ferret out fraud – or to obviate suspicions thereof if they cannot be proved.

Subpart 4B: It was an abuse of discretion not to remand to the administrative tribunal in this case.

RCW 34.05.562 is a near-equivalent to CR 60(b)(3), (4), and (11); and our appellate courts have recognized that “FRCP 60(b)(3) is the federal counterpart to CR 60(b)(4). “When Washington statutes or regulations have the same purpose as their federal counterparts, we will look to federal decisions to aid us in reaching the appropriate construction,” *People’s State Bank v. Hickey*, 55 Wn. App. 367, 371 (Div 1, 1989). And “Wright & Miller, Wright & Miller, *Federal Practice and Procedure*, § 2864 (1973), review numerous cases giving relief under the federal rule analogous to our subsection (11) [of 60(b)] showing that it is not to be given a cramped or narrow reading,” *Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 312 (Div. 1, 1993). Also, CR 60 “contemplates a very broad definition of fraud when it refers both to extrinsic and intrinsic fraud and includes misrepresentation or other misconduct by an adverse party,” *id.*, 72 Wn. App. at 309 n. 8.

Respondents doubted below that things occurring *after* the SHB’s ruling in this case could count for purposes of RCW 34.05.562. But with regard to the comparable CR 60(b), this Court has held to the contrary:

No cited case has specifically held that relief under subsection (b)(4) [of CR 60] can never be granted by reason of conduct occurring after the entry of judgment. Indeed, such a holding would unreasonably and unfairly cramp the application of a remedial rule [W]e

hold that the fact that the acts complained of occurred after the entry of judgment does not bar relief.

Suburban Janitorial Services v. Clark American, supra, at 310.

RCW 34.05.562 being essentially the administrative-law counterpart of CR 60(b)(3), (4), and (11), Petitioners urge the foregoing authorities as persuasive that this case should be remanded to SHB for inquiry into the matters discussed in this Part 4 of this Brief, and for further relief.

Conclusion

For all of these reasons, Petitioners respectfully ask that the Court Reverse the decision of the Superior Court, and:

- Hold that the City of Burien does not have, and never has had, a Shoreline Master Program pursuant to the Shoreline Management Act approved for it by the State Department of Ecology;
- That the City of Burien is required to apply the Guidelines and other rules of the State Department of Ecology in considering and determining applications for substantial shoreline development permits under the Shoreline Management Act; until such time as it has in place a fully DOE-approved Shoreline Master Program;
- That the permit approved in March of 2010 for Respondent Segale's bulkheading project was unlawful and was void ab initio, and the bulkhead constructed pursuant to that permit was not law-

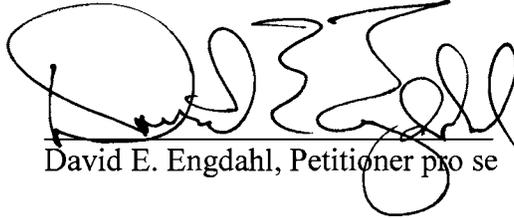
fully authorized and must be removed at Mr. Segale's sole expense as soon as it is "feasible," as that term is defined in WAC 173-26-020(15) and as determined by the Director of the State Department of Ecology, who shall report on the matter to this Court as and when this Court may direct, at the instance of petitioners herein or otherwise as the Court may direct;

- And that Petitioners shall have any other or further relief the Court might find warranted;

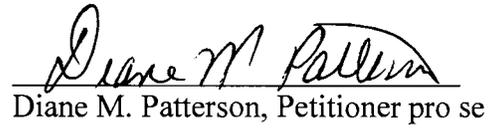
OR, IN THE ALTERNATIVE,

- Hold that the Superior Court erred and abused its discretion in refusing to remand to the Shorelines Hearings Board for hearing on the matters; and remand the case to the Superior Court for remand to the Shorelines Hearings Board for further proceedings in light of this Court's rulings on the points of law aforesaid, and including full factual inquiry into additional material facts including those identified in Part 4 of this Brief.

Respectfully submitted,



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[WACs](#) > [Title 173](#) > [Chapter 173-26](#) > [Section 173-26-231](#)[173-26-221](#) << [173-26-231](#) >> [173-26-241](#)**WAC 173-26-231**[Agency filings affecting this section](#)**Shoreline modifications.**

(1) **Applicability.** Local governments are encouraged to prepare master program provisions that distinguish between shoreline modifications and shoreline uses. Shoreline modifications are generally related to construction of a physical element such as a dike, breakwater, dredged basin, or fill, but they can include other actions such as clearing, grading, application of chemicals, or significant vegetation removal. Shoreline modifications usually are undertaken in support of or in preparation for a shoreline use; for example, fill (shoreline modification) required for a cargo terminal (industrial use) or dredging (shoreline modification) to allow for a marina (boating facility use).

The provisions in this section apply to all shoreline modifications within shoreline jurisdiction.

(2) **General principles applicable to all shoreline modifications.** Master programs shall implement the following principles:

(a) Allow structural shoreline modifications only where they are demonstrated to be necessary to support or protect an allowed primary structure or a legally existing shoreline use that is in danger of loss or substantial damage or are necessary for reconfiguration of the shoreline for mitigation or enhancement purposes.

(b) Reduce the adverse effects of shoreline modifications and, as much as possible, limit shoreline modifications in number and extent.

(c) Allow only shoreline modifications that are appropriate to the specific type of shoreline and environmental conditions for which they are proposed.

(d) Assure that shoreline modifications individually and cumulatively do not result in a net loss of ecological functions. This is to be achieved by giving preference to those types of shoreline modifications that have a lesser impact on ecological functions and requiring mitigation of identified impacts resulting from shoreline modifications.

(e) Where applicable, base provisions on scientific and technical information and a comprehensive analysis of drift cells for marine waters or reach conditions for river and stream systems. Contact the department for available drift cell characterizations.

(f) Plan for the enhancement of impaired ecological functions where feasible and appropriate while accommodating permitted uses. As shoreline modifications occur, incorporate all feasible measures to protect ecological shoreline functions and ecosystem-wide processes.

(g) Avoid and reduce significant ecological impacts according to the mitigation sequence in WAC [173-26-201](#) (2)(e).

(3) Provisions for specific shoreline modifications.**(a) Shoreline stabilization.**

(i) **Applicability.** Shoreline stabilization includes actions taken to address erosion impacts to property and dwellings, businesses, or structures caused by natural processes, such as

current, flood, tides, wind, or wave action. These actions include structural and nonstructural methods.

Nonstructural methods include building setbacks, relocation of the structure to be protected, groundwater management, planning and regulatory measures to avoid the need for structural stabilization.

(ii) **Principles.** Shorelines are by nature unstable, although in varying degrees. Erosion and accretion are natural processes that provide ecological functions and thereby contribute to sustaining the natural resource and ecology of the shoreline. Human use of the shoreline has typically led to hardening of the shoreline for various reasons including reduction of erosion or providing useful space at the shore or providing access to docks and piers. The impacts of hardening any one property may be minimal but cumulatively the impact of this shoreline modification is significant.

Shoreline hardening typically results in adverse impacts to shoreline ecological functions such as:

- **Beach starvation.** Sediment supply to nearby beaches is cut off, leading to "starvation" of the beaches for the gravel, sand, and other fine-grained materials that typically constitute a beach.

- **Habitat degradation.** Vegetation that shades the upper beach or bank is eliminated, thus degrading the value of the shoreline for many ecological functions, including spawning habitat for salmonids and forage fish.

- **Sediment impoundment.** As a result of shoreline hardening, the sources of sediment on beaches (eroding "feeder" bluffs) are progressively lost and longshore transport is diminished. This leads to lowering of down-drift beaches, the narrowing of the high tide beach, and the coarsening of beach sediment. As beaches become more coarse, less prey for juvenile fish is produced. Sediment starvation may lead to accelerated erosion in down-drift areas.

- **Exacerbation of erosion.** The hard face of shoreline armoring, particularly concrete bulkheads, reflects wave energy back onto the beach, exacerbating erosion.

- **Groundwater impacts.** Erosion control structures often raise the water table on the landward side, which leads to higher pore pressures in the beach itself. In some cases, this may lead to accelerated erosion of sand-sized material from the beach.

- **Hydraulic impacts.** Shoreline armoring generally increases the reflectivity of the shoreline and redirects wave energy back onto the beach. This leads to scouring and lowering of the beach, to coarsening of the beach, and to ultimate failure of the structure.

- **Loss of shoreline vegetation.** Vegetation provides important "softer" erosion control functions. Vegetation is also critical in maintaining ecological functions.

- **Loss of large woody debris.** Changed hydraulic regimes and the loss of the high tide beach, along with the prevention of natural erosion of vegetated shorelines, lead to the loss of beached organic material. This material can increase biological diversity, can serve as a stabilizing influence on natural shorelines, and is habitat for many aquatic-based organisms, which are, in turn, important prey for larger organisms.

- **Restriction of channel movement and creation of side channels.** Hardened shorelines along rivers slow the movement of channels, which, in turn, prevents the input of larger woody debris, gravels for spawning, and the creation of side channels important for juvenile salmon rearing, and can result in increased floods and scour.

Additionally, hard structures, especially vertical walls, often create conditions that lead to failure of the structure. In time, the substrate of the beach coarsens and scours down to bedrock or a hard clay. The footings of bulkheads are exposed, leading to undermining and failure. This process is exacerbated when the original cause of the erosion and "need" for the bulkhead was from upland water drainage problems. Failed bulkheads and walls adversely impact beach aesthetics, may be a safety or navigational hazard, and may adversely impact

shoreline ecological functions.

"Hard" structural stabilization measures refer to those with solid, hard surfaces, such as concrete bulkheads, while "soft" structural measures rely on less rigid materials, such as biotechnical vegetation measures or beach enhancement. There is a range of measures varying from soft to hard that include:

- Vegetation enhancement;
- Upland drainage control;
- Biotechnical measures;
- Beach enhancement;
- Anchor trees;
- Gravel placement;
- Rock revetments;
- Gabions;
- Concrete groins;
- Retaining walls and bluff walls;
- Bulkheads; and
- Seawalls.

Generally, the harder the construction measure, the greater the impact on shoreline processes, including sediment transport, geomorphology, and biological functions.

Structural shoreline stabilization often results in vegetation removal and damage to near-shore habitat and shoreline corridors. Therefore, master program shoreline stabilization provisions shall also be consistent with WAC [173-26-221\(5\)](#), vegetation conservation, and where applicable, WAC [173-26-221\(2\)](#), critical areas.

In order to implement RCW [90.58.100\(6\)](#) and avoid or mitigate adverse impacts to shoreline ecological functions where shoreline alterations are necessary to protect single-family residences and principal appurtenant structures in danger from active shoreline erosion, master programs should include standards setting forth the circumstances under which alteration of the shoreline is permitted, and for the design and type of protective measures and devices.

(iii) **Standards.** In order to avoid the individual and cumulative net loss of ecological functions attributable to shoreline stabilization, master programs shall implement the above principles and apply the following standards:

(A) New development should be located and designed to avoid the need for future shoreline stabilization to the extent feasible. Subdivision of land must be regulated to assure that the lots created will not require shoreline stabilization in order for reasonable development to occur using geotechnical analysis of the site and shoreline characteristics. New development on steep slopes or bluffs shall be set back sufficiently to ensure that shoreline stabilization is unlikely to be necessary during the life of the structure, as demonstrated by a geotechnical analysis. New development that would require shoreline stabilization which causes significant impacts to adjacent or down-current properties and shoreline areas should not be allowed.

(B) New structural stabilization measures shall not be allowed except when necessity is demonstrated in the following manner:

(I) To protect existing primary structures:

- New or enlarged structural shoreline stabilization measures for an existing primary structure, including residences, should not be allowed unless there is conclusive evidence, documented by a geotechnical analysis, that the structure is in danger from shoreline erosion caused by tidal action, currents, or waves. Normal sloughing, erosion of steep bluffs, or shoreline erosion itself, without a scientific or geotechnical analysis, is not demonstration of need. The geotechnical analysis should evaluate on-site drainage issues and address drainage problems away from the shoreline edge before considering structural shoreline stabilization.
- The erosion control structure will not result in a net loss of shoreline ecological functions.

(II) In support of new nonwater-dependent development, including single-family residences, when all of the conditions below apply:

- The erosion is not being caused by upland conditions, such as the loss of vegetation and drainage.
- Nonstructural measures, such as placing the development further from the shoreline, planting vegetation, or installing on-site drainage improvements, are not feasible or not sufficient.
- The need to protect primary structures from damage due to erosion is demonstrated through a geotechnical report. The damage must be caused by natural processes, such as tidal action, currents, and waves.

- The erosion control structure will not result in a net loss of shoreline ecological functions.

(III) In support of water-dependent development when all of the conditions below apply:

- The erosion is not being caused by upland conditions, such as the loss of vegetation and drainage.
- Nonstructural measures, planting vegetation, or installing on-site drainage improvements, are not feasible or not sufficient.
- The need to protect primary structures from damage due to erosion is demonstrated through a geotechnical report.

- The erosion control structure will not result in a net loss of shoreline ecological functions.

(IV) To protect projects for the restoration of ecological functions or hazardous substance remediation projects pursuant to chapter [70.105D](#) RCW when all of the conditions below apply:

- Nonstructural measures, planting vegetation, or installing on-site drainage improvements, are not feasible or not sufficient.

- The erosion control structure will not result in a net loss of shoreline ecological functions.

(C) An existing shoreline stabilization structure may be replaced with a similar structure if there is a demonstrated need to protect principal uses or structures from erosion caused by currents, tidal action, or waves.

- The replacement structure should be designed, located, sized, and constructed to assure no net loss of ecological functions.

- Replacement walls or bulkheads shall not encroach waterward of the ordinary high-water mark or existing structure unless the residence was occupied prior to January 1, 1992, and there are overriding safety or environmental concerns. In such cases, the replacement structure shall abut the existing shoreline stabilization structure.

- Where a net loss of ecological functions associated with critical saltwater habitats would occur by leaving the existing structure, remove it as part of the replacement measure.
- Soft shoreline stabilization measures that provide restoration of shoreline ecological functions may be permitted waterward of the ordinary high-water mark.
- For purposes of this section standards on shoreline stabilization measures, "replacement" means the construction of a new structure to perform a shoreline stabilization function of an existing structure which can no longer adequately serve its purpose. Additions to or increases in size of existing shoreline stabilization measures shall be considered new structures.

(D) Geotechnical reports pursuant to this section that address the need to prevent potential damage to a primary structure shall address the necessity for shoreline stabilization by estimating time frames and rates of erosion and report on the urgency associated with the specific situation. As a general matter, hard armoring solutions should not be authorized except when a report confirms that there is a significant possibility that such a structure will be damaged within three years as a result of shoreline erosion in the absence of such hard armoring measures, or where waiting until the need is that immediate, would foreclose the opportunity to use measures that avoid impacts on ecological functions. Thus, where the geotechnical report confirms a need to prevent potential damage to a primary structure, but the need is not as immediate as the three years, that report may still be used to justify more immediate authorization to protect against erosion using soft measures.

(E) When any structural shoreline stabilization measures are demonstrated to be necessary, pursuant to above provisions.

- Limit the size of stabilization measures to the minimum necessary. Use measures designed to assure no net loss of shoreline ecological functions. Soft approaches shall be used unless demonstrated not to be sufficient to protect primary structures, dwellings, and businesses.
- Ensure that publicly financed or subsidized shoreline erosion control measures do not restrict appropriate public access to the shoreline except where such access is determined to be infeasible because of incompatible uses, safety, security, or harm to ecological functions. See public access provisions; WAC 173-26-221(4). Where feasible, incorporate ecological restoration and public access improvements into the project.
- Mitigate new erosion control measures, including replacement structures, on feeder bluffs or other actions that affect beach sediment-producing areas to avoid and, if that is not possible, to minimize adverse impacts to sediment conveyance systems. Where sediment conveyance systems cross jurisdictional boundaries, local governments should coordinate shoreline management efforts. If beach erosion is threatening existing development, local governments should adopt master program provisions for a beach management district or other institutional mechanism to provide comprehensive mitigation for the adverse impacts of erosion control measures.

(F) For erosion or mass wasting due to upland conditions, see WAC 173-26-221 (2)(c)(ii).

(b) **Piers and docks.** New piers and docks shall be allowed only for water-dependent uses or public access. As used here, a dock associated with a single-family residence is a water-dependent use provided that it is designed and intended as a facility for access to watercraft and otherwise complies with the provisions of this section. Pier and dock construction shall be restricted to the minimum size necessary to meet the needs of the proposed water-dependent use. Water-related and water-enjoyment uses may be allowed as part of mixed-use development on over-water structures where they are clearly auxiliary to and in support of water-dependent uses, provided the minimum size requirement needed to meet the water-dependent use is not violated.

New pier or dock construction, excluding docks accessory to single-family residences, should be permitted only when the applicant has demonstrated that a specific need exists to support the intended water-dependent uses. If a port district or other public or commercial entity involving water-dependent uses has performed a needs analysis or comprehensive master plan projecting the future needs for pier or dock space, and if the plan or analysis is

approved by the local government and consistent with these guidelines, it may serve as the necessary justification for pier design, size, and construction. The intent of this provision is to allow ports and other entities the flexibility necessary to provide for existing and future water-dependent uses.

Where new piers or docks are allowed, master programs should contain provisions to require new residential development of two or more dwellings to provide joint use or community dock facilities, when feasible, rather than allow individual docks for each residence.

Piers and docks, including those accessory to single-family residences, shall be designed and constructed to avoid or, if that is not possible, to minimize and mitigate the impacts to ecological functions, critical areas resources such as eelgrass beds and fish habitats and processes such as currents and littoral drift. See WAC 173-26-221 (2)(c)(iii) and (iv). Master programs should require that structures be made of materials that have been approved by applicable state agencies.

(c) **Fill.** Fills shall be located, designed, and constructed to protect shoreline ecological functions and ecosystem-wide processes, including channel migration.

Fills waterward of the ordinary high-water mark shall be allowed only when necessary to support: Water-dependent use, public access, cleanup and disposal of contaminated sediments as part of an interagency environmental clean-up plan, disposal of dredged material considered suitable under, and conducted in accordance with the dredged material management program of the department of natural resources, expansion or alteration of transportation facilities of statewide significance currently located on the shoreline and then only upon a demonstration that alternatives to fill are not feasible, mitigation action, environmental restoration, beach nourishment or enhancement project. Fills waterward of the ordinary high-water mark for any use except ecological restoration should require a conditional use permit.

(d) **Breakwaters, jetties, groins, and weirs.** Breakwaters, jetties, groins, and weirs located waterward of the ordinary high-water mark shall be allowed only where necessary to support water-dependent uses, public access, shoreline stabilization, or other specific public purpose. Breakwaters, jetties, groins, weirs, and similar structures should require a conditional use permit, except for those structures installed to protect or restore ecological functions, such as woody debris installed in streams. Breakwaters, jetties, groins, and weirs shall be designed to protect critical areas and shall provide for mitigation according to the sequence defined in WAC 173-26-201 (2)(e).

(e) **Beach and dunes management.** Washington's beaches and their associated dunes lie along the Pacific Ocean coast between Point Grenville and Cape Disappointment, and as shorelines of statewide significance are mandated to be managed from a statewide perspective by the act. Beaches and dunes within shoreline jurisdiction shall be managed to conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beaches. Beaches and dunes should also be managed to reduce the hazard to human life and property from natural or human-induced actions associated with these areas.

Shoreline master programs in coastal marine areas shall provide for diverse and appropriate use of beach and dune areas consistent with their ecological, recreational, aesthetic, and economic values, and consistent with the natural limitations of beaches, dunes, and dune vegetation for development. Coastal master programs shall institute development setbacks from the shoreline to prevent impacts to the natural, functional, ecological, and aesthetic qualities of the dune.

"Dune modification" is the removal or addition of material to a dune, the reforming or reconfiguration of a dune, or the removal or addition of vegetation that will alter the dune's shape or sediment migration. Dune modification may be proposed for a number of purposes, including protection of property, flood and storm hazard reduction, erosion prevention, and ecological restoration.

Coastal dune modification shall be allowed only consistent with state and federal flood

protection standards and when it will not result in a net loss of shoreline ecological functions or significant adverse impacts to other shoreline resources and values.

Dune modification to protect views of the water shall be allowed only on properties subdivided and developed prior to the adoption of the master program and where the view is completely obstructed for residences or water-enjoyment uses and where it can be demonstrated that the dunes did not obstruct views at the time of original occupancy, and then only in conformance with the above provisions.

(f) Dredging and dredge material disposal. Dredging and dredge material disposal shall be done in a manner which avoids or minimizes significant ecological impacts and impacts which cannot be avoided should be mitigated in a manner that assures no net loss of shoreline ecological functions.

New development should be sited and designed to avoid or, if that is not possible, to minimize the need for new and maintenance dredging. Dredging for the purpose of establishing, expanding, or relocating or reconfiguring navigation channels and basins should be allowed where necessary for assuring safe and efficient accommodation of existing navigational uses and then only when significant ecological impacts are minimized and when mitigation is provided. Maintenance dredging of established navigation channels and basins should be restricted to maintaining previously dredged and/or existing authorized location, depth, and width.

Dredging waterward of the ordinary high-water mark for the primary purpose of obtaining fill material shall not be allowed, except when the material is necessary for the restoration of ecological functions. When allowed, the site where the fill is to be placed must be located waterward of the ordinary high-water mark. The project must be either associated with a MTCA or CERCLA habitat restoration project or, if approved through a shoreline conditional use permit, any other significant habitat enhancement project. Master programs should include provisions for uses of suitable dredge material that benefit shoreline resources. Where applicable, master programs should provide for the implementation of adopted regional interagency dredge material management plans or watershed management planning.

Disposal of dredge material on shorelands or wetlands within a river's channel migration zone shall be discouraged. In the limited instances where it is allowed, such disposal shall require a conditional use permit. This provision is not intended to address discharge of dredge material into the flowing current of the river or in deep water within the channel where it does not substantially affect the geohydrologic character of the channel migration zone.

(g) Shoreline habitat and natural systems enhancement projects. Shoreline habitat and natural systems enhancement projects include those activities proposed and conducted specifically for the purpose of establishing, restoring, or enhancing habitat for priority species in shorelines.

Master programs should include provisions fostering habitat and natural system enhancement projects. Such projects may include shoreline modification actions such as modification of vegetation, removal of nonnative or invasive plants, shoreline stabilization, dredging, and filling, provided that the primary purpose of such actions is clearly restoration of the natural character and ecological functions of the shoreline. Master program provisions should assure that the projects address legitimate restoration needs and priorities and facilitate implementation of the restoration plan developed pursuant to WAC 173-26-201 (2)(f).

[Statutory Authority: RCW 90.58.060 and 90.58.200. 04-01-117 (Order 03-02), § 173-26-231, filed 12/17/03, effective 1/17/04.]

In the
COURT OF APPEALS
for the
STATE OF WASHINGTON
DIVISION I

DIANE M. PATTERSON and)
DAVID E. ENGDAHL,)
Petitioners;)
v.)
MARIO A. SEGALE and)
CITY OF BURIEN, WASHINGTON,)
Respondents;)

67420-0

DECLARATION
OF SERVICE

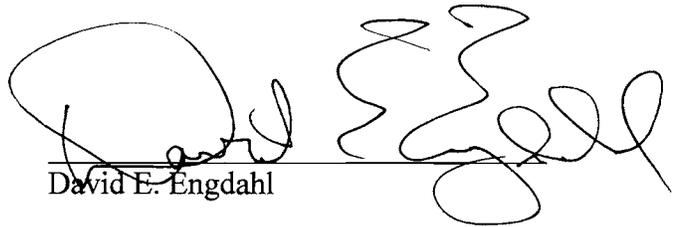
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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 28 AM 5:03

I, David E. Engdahl, under penalty of perjury under the laws of the State of Washington, declare that I served the BRIEF OF PETITIONERS upon the following by hand delivery to an adult person in the office of each – as follows:

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