

No. 70218-1-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

DAVID C. COTTINGHAM and JOAN S. COTTINGHAM,
Appellants

v.

RONALD J. MORGAN and KAYE L. MORGAN, husband and wife,
MARK COSTELLO, WHATCOM COUNTY and WHATCOM
COUNTY BUILDING SERVICES DIVISION of PLANNING AND
DEVELOPMENT SERVICES,
Respondents.

APPEAL FROM
SUPERIOR COURT OF WASHINGTON,
Whatcom County No. 12-2-03029-1

HONORABLE DAVID NEEDY,
VISITING SKAGIT COUNTY
SUPERIOR COURT JUDGE

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APPELLANT COTTINGHAMS' OPENING BRIEF

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II. INTRODUCTION

A Land Use Petition seeking review of Morgans' compliance with a special Shoreline Ordinance-Exempting Condition denying driveway within a setback followed waste¹ of Cottinghams' improvements and stands summarily dismissed. No hearing examiner hearing was allowed Cottinghams. The question whether final agency approval violated ordinance-mandated² compliance enforcement and requisite due process notice after substantively impacts upon Cottinghams' property and title was presented. Agency approval had ceased upon Morgans' wrongful waste but its jurisdiction continued while Morgans provoked Cottinghams' civil quiet title action. Summary judgment³ in Cottinghams' favor delineated the area of Cottinghams' title. As the petition reflects, trial

¹ The Judgment awarded treble damages "For timber trespass waste under RCW 64.12.020..." Page Two, Judgment, No. 09-2-01773-1 (emphasis added, Appendix. See, Appeal no. 68202-4-1).

² Whatcom County accepts two significant duties effecting a neighbor's right to notice. Special Shoreline Ordinance-Exemption Conditions "shall" be enforced and compliance "shall" be documented. WCC 23.50.02.B - D . CP 632 of 500-671. Also, land divisions revealing survey discrepancies require notice to adjacent neighbors and technical review "shall" occur. WCC 21.01.150. (CP 221); Also, lot division and adjustment regulations are incorporated into "Development Standards" and therefore into permit application ordinance requirements for any complete application determination under RCW 19.27.095.

³ The petition identifies the first date of that decision as well as the summary judgment-ordered) pre-existing location of corner and boundary which Morgans should have reported in any fully complete building permit application (30 of CP 6-49), being the corner approved in 1976 by Whatcom County in shared plat corner and shared lot corner representations, including the parties' lot corners. CP

of Morgans' unsuccessful private condemnation counterclaim followed summary judgment in No. 09-2-01773-1, and its equitable relief later a stated cause for summary dismissal here in No. 12-2-03029-1. That Civil Trial had unearthed remarkable evidence, in court under oath and satisfying CR 11 duties, which Morgans even requested immunity regarding in this LUPA proceeding. Contrary to surveyor certificate, permitting representations omitted found corner evidence (CP 44), when Morgans' surveyor allowed them their choice (CP 52) where to represent the corner shared in common with Cottinghams' lot, and they subjected their conveyance to that survey showing Cottinghams improvements (CP 213, CP83, item 5, and CP 103). Trial also uncovered Morgans' septic planning issues as their stated need for equity.

RCW 58.17.210 prohibit permits where land division violates regulations. When the trial court exceeded even Morgans' survey for equitable forced sale of yet-unstaked area from Cottinghams to Morgans⁴ appeal 68202-4-1 commenced raising lack of jurisdiction to satisfy permit conditions without exercise of LUPA review, even during continuing agency jurisdiction. Agency interpretation of compliance with the permit condition's setback and Morgans' failure

⁴ The quiet title proceedings (CP 6, Petition para. 2.2) concluded well before agency jurisdiction itself concluded or any compliance decision was made.

to apply for lot corner modification had not been reviewed in the Civil Action. WCPDS was neither party nor deferred to.

No agency decision was therefore ripe for Cottinghams' review here other than an *initial* construction permit issuance predating Morgans' wrongful waste. No notice to Cottinghams of final approval of Morgan' setback compliance or any agency decision affirming any *new* boundary corner has been asserted before action on October 25, 2012. The petition was filed at first notice of any agency decision, arriving as final approval. Morgans' compliance was necessarily determined in such final approval. The petition identified the Shoreline Ordinance-Exemption Condition attached⁵ to Morgans' construction permit denying driveway in the setback and on Cottinghams' property and was filed within twenty one days of the first notice that the agency might *not* enforce Condition.⁶

The dismissal order entered without return of any agency record for review or use in defense against Morgans' CR 12 and CR

⁵ WAC 173-27-040(1)(e) ("Local government may attach conditions to the approval of exempted developments and/or uses as necessary...").

⁶ Before the petition, in less than twenty-one days from notice, Cottinghams appealed to the Appeals Board also to the Hearing Examiner under WCC 20.92.210 to employ or exhaust remedies, receiving no hearing setting, order, dismissal or other accommodation. CP 27, para.5.4, 5.5; CP 354-388.

56 motions, or any consideration of remand to the agency⁷ so no record can be included to satisfy RAP 9.14(a)(4) or statement of agency errors. RAP 10.3(h). The dismissal, at CP 742, equated the trial of claims and findings from the Civil Trial⁸ with opportunity to review agency land use decisions. It regarded the *initial construction* permit issuance date as the only relevant "final" land use decision, a date depriving the court of jurisdiction, notwithstanding assertion of unpermitted conduct on Cottingham's property thereafter, and a required agency compliance decision regarding that conduct. CP 21, para. 3.47, 3.57. The dismissal also denied Morgans' request for immunity from their representations in the civil trial (CP 748, stricken Para. 16),⁹ holding that "any claims" should have been brought earlier, presumably including *decisions concerning* Morgans' post-issuance violation of shoreline-exempting conditions before any notice regarding them, and lot modification violations regarding the shared corner. After finding Morgans' counterclaims to be unpermitted in LUPA proceedings (CP 871) the court awarded fees

⁷ RCW 36.70C.110; RCW 36.70C.140. Remand for Hearing Examiner decision on finality under WCC 20.92.210 was within the court's jurisdiction, given proof of attempt to exhaust the remedy without opportunity for a hearing. *Ferguson v. City of Dayton*, 168 Wn. App. 591 (2012).

⁸ Respondents Morgan actually sought immunity in this LUPA proceeding from the representations they made in the prior quiet title litigation. CP 224, 758.

⁹ See, Petition, CP 22, para. 3.53 ((Morgans' representation of "entire lot"survey)

against Cottinghams¹⁰ (Finding 6, 8, *contra*, RP 15, In. 7-8 "not making that finding"; Finding 9; RP 15, In. 19- pg 16, In 1) CP 871.

III. ASSIGNMENTS OF ERROR.

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¹⁰ Cottinghams' had called for deduction for pursuit of immunity and pursuit of fact finding. (CP 861-865, Petitioners' Objection To Order And Judgment).

IV. STATEMENT OF THE CASE

Exemption from full shoreline management program ordinance procedure, notices and open record hearings¹¹ was granted to Morgans with the required attachment of a special condition, CP 36, under WCC 23.50.02.B.¹² (CP 14, para. 21) asserted as violated by a substantive change in performance with wrongful waste and installations upon Cottinghams' title and improvements.¹³ Conditions (Nos. 12, 21, 22, and Shoreline Exemption, CP 35-36) had protected Cottinghams' property with a

¹¹ WCC 2.33.010 "describes how the county will process applications for development," including variances, Subdivisions and "Shoreline permits when an open record hearing is required. WCC 2.33.020 serves the question whether open record hearings are required, and should be regarded as the "local ordinance" corresponding to RCW 19.27.095(2)(and Lauer v. Pierce County) WCC 2.33.020 conditionally exempts from open record hearings " building permits and short plats" provided "the county" has made a "final decision" under WCC 2.33.090.C.3, which incorporates any substantial revision" including all redesigns of proposed land divisions pursuant to WCC 21.01.150. WCC 2.33.050.C refers applicants to WCC 2.33.040.C for determination of application completeness, and that section informs that "Submittal requirements for project permits are contained within the specific county code for each type of project proposal, in the corresponding chapter of the Whatcom County Development Standards, in applicable state law or WACs..." (emphasis added). (CP 603 incl. WCC 2.33).

¹² CP 632, Supplemental Authorities; See, also, Exhibit to Petition (CP 36, Shoreline Exemption Review Form, revealing a side yard setback variance as granted ("40 5 Ft.")). Under Shoreline Management Program section WCC 23.60.03.D, variance occurs when it " will not cause adverse effects on adjacent properties," the "the variance authorized does not constitute a grant of special privilege not enjoyed by the other properties in the area," and is conditioned "to offset unavoidable adverse impacts caused by the proposed development or use."

¹³ WAC 173-27-100 "A permit revision is required whenever the applicant proposes substantive changes to the design, terms or conditions of a project from that which is approved in the permit."

denial of planned driveway in a reduced setback variance, requiring approval of "any deviation." Boundary disclosure at permitting was material to permit validity. RCW 58.17.210¹⁴.

Compliance decisions are land use decisions. RCW 36.70C.020(b)(interpretation); RCW 36.70C.020(c)(enforcement decision-making). Local Development Standards required additional land division application or exemption under WCC 2.33 for lot modification.¹⁵ WCC 23.50.02.D and WCC 21.01.150 required scrutiny of division, therefore Morgans' initial application was far from fully complete under RCW 19.27.095 unless it made the disclosure of lot corner modification as necessary to approval or exemption and essential to locating setback compliance decisions.

The courts' Findings Of Fact And Order On All Pending Motions (CP 742-753) entered without addressing whether the *relevant* final decision occurred with compliance and enforcement decisions at a date later than initial building permit issuance, and without entry of Cottinghams' Order for return of the agency record

¹⁴ (septic tank, other development permits not to be issued for land divided in violation of chapter or local regulations).

¹⁵ See, also, RCW 58.17.040(2), *Chelan County v. Nykreim*, 146 Wn.2d 904, 913, (2002).

for review, doing so after fact-based motions.¹⁶ Findings or Conclusions held the initial "Building Permit" and the quiet title proceedings¹⁷ as depriving it of jurisdiction.

The petition asserted Cottinghams' constitutionally protected interest in notice of elimination of Morgans' side yard setback and reduction by variance, due to material withholding of the lot's full extent and as a grant of a special privilege (para. IV. 3.4) which is not enjoyed by others in violation of WCC 23.50.02.B. The petition asserted error because trial had revealed application misrepresentation compared with Morgans' representations of need at trial for condemnation based upon insufficient area for development. It asserted that the agency, WCPDS, had no authority to approve clearing on Cottingham's property (CP 27 para. V. 5.6); it had affirmative duties to cause record proof of the location of the setback (Petition para. V. 5.7); it had a duty to stop work and cause reapplication for misrepresentation (withholding conflicting boundary evidence, Petition para. V. 5.8); and it had a [due process] duty to consider Cottinghams' interests (Petition para. V. 5.9) before

¹⁶ Morgans' Motion For Memorandum and Summary Judgment – CR 56, CP 224-256, and Morgans' Motion And Memorandum To Dismiss For Failure To State A Claim Upon Which Relief May Be Granted CP 224, 758.

¹⁷ No. 68202-4-I, No. 09-2-01773-1, Whatcom County Superior Court.

subjecting property to erroneous risk of loss without notice.

Remedies requested through Declaratory Judgment were a declaration of permit invalidity and need for prompt reapplication for permitting; (Para VI 5.1, VI 5.4). The prayer requested declaration of the agency's duty to cause staked evidence and preservation of setback boundaries (Prayer for Relief, VII 5.2), and true lot dimension 5.3. Fees were requested for the cloud upon Cottinghams' title resulting from flagrant abuse of the reasonable necessity doctrine, citing *Ruvalcaba v. KwangHo Baek*, 175 Wn.2d 1, 6 (2012)(August 9, 2012) (para.5.6).

Morgan's permit was not shown as reviewed in the Civil Title Trial¹⁸, or in any LUPA petition by Morgans. Cottinghams' Declaration Of David C Cottingham Re Jurisdictional Facts (CP 64-121) includes exhibit H (Shoreline Exemption Form denying encroachment). Cottinghams' Motion For Order Determining Jurisdictional Facts as well as Motion For Orders On Preliminary Matters, pursuant to RCW 36.70C. 080 was not entered.

Cottinghams relied upon a protective side yard setback condition and the enforcement assurance adopted in Whatcom

¹⁸ This condition was mentioned during analysis of the part its timing and location played in revealing that Morgans' possessed the requisite notice which negates good faith necessary to obtain equitable relief. *Bach v. Sarich*, 74 Wn.2d 575(1968).

County Ordinance at WCC 23.50.02.B.Delay in agency decisions affected commencement of LUPA's (RCW 36.70C.040(3)) twenty one day appeal deadline.¹⁹

WCC 21.01.150 requires notice of boundary discrepancies found during land division. WCC 21.03.030 Exemptions, Boundary Line Adjustments and short subdivisions require disclosure and review. WCC 21.03.060. If the setback exemption condition were not performed, Shoreline Management Act review and additional notice through open record hearings decisions results. WCC 23.60.13.A.6, 7 (Appendix). Cottinghams were allowed no administrative review. Declaration Of David C Cottingham Re Exhaustion Of Administrative Remedies (CP 354-388)(Appeal to the Whatcom County Appeals Board and to the Whatcom County Hearing Examiner).²⁰ Cottinghams also filed their Petitioners Response To Morgans' CR 12(b)(6) Motion To Dismiss And CR 56 Summary Judgment Motions (CP 389-414); Declaration Of David C Cottingham In Defense Of Motion For Partial Summary Judgment (CP354-388); Declaration Of David C Cottingham Re Unavailability

¹⁹ WCC 23.50.02.B (Appendix) assures that in Whatcom County shoreline ordinance exemptions are accompanied by conditions which it mandates "shall" attach and "shall" be enforced. See the Shoreline Exemption Form. (Petition Exhibit A-Shoreline Exemption Review Form, CP 36)

²⁰ The petition was filed only after receiving no opportunity to be heard further.

Of Record In Response To Summary Judgment; and their Motion For Relief From CR 6(a), CR 56(C) ; Declaration Of David C Cottingham Re Motion For Relief. Findings and Conclusions entered on March 12, 2013, with no agency record. (CP 742-753) Fees were awarded June 19, 2013.²¹

V. ARGUMENT:

Occasion for review arose by Morgans' unpermitted conduct well after the building permit issued, once the first notice issued of any agency decision on Morgans' compliance decisions.

ASSIGNMENT No. 1. USE OF CR 56 FOR REVIEW OF FACTS WAS ERROR AND UNSUPPORTABLE IN FACT. "*Findings Of Fact And Order On All Pending Motions.*"

The superior court civil rules govern "procedural" matters under LUPA to the extent that the rules are consistent with RCW 36.70C. RCW 36.70C.030(2). CR 56 is inconsistent with agency record review. Summary judgment is impermissible fact finding in proceedings which do not include fact finding trial. CR 56 therefore conflicts with LUPA record review. Trial of facts, absent controlled need under RCW 36.70C.120 (2)-(4), is error.

Summary Judgment's assessment of facts to avoid later findings at trial was misplaced and unnecessary. Regardless,

²¹ The court granted Cottinghams Motion to Strike and yet refused Cottinghams' proposed order.

considering facts and reasonable inferences in the light most favorable to Cottinghams,²² including Morgans' immunity request, partial summary judgment evidence entered and a wrongful waste judgment of record, the inescapable conclusion is that Morgans' material factual omissions were misrepresentation; that they only influenced initial permit issuance but –once discovered-- caused enforcement by final approval denial for six years; that required lot modification permitting and notice to Cottinghams was sidestepped by concealing corner evidence (CP 44) under survey practices act-certificated report which Cottinghams had to discover at trial supported no condemnation, which need of condemnation would have prevented issuance of the permit, if disclosed.

Under RCW 36.70C.140, the court may affirm or reverse the land use decision; remand for modifications or further proceedings; review for substantial evidence in light of the "whole record" before the court RCW 36.70C.130(c); review for facts revealing the "decision" as a clearly erroneous application of the law to the facts (RCW 36.70C.130(d)); determine a decision extra jurisdictional (RCW 36.70C.130(e)); or determine a decision as violating the constitutional rights of the party seeking relief (RCW 36.70C.130(f)).

²² *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

Substantial evidence will only be in the agency record, being a quantum of evidence "to persuade a reasonable person that the declared premise is true." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Issue One. Did WCPDS Enter A Final Land Use Decision?

Yes. The final approval determinations are referenced October 25, 2012, in the exhibit at CP 64 at 121"Occupancy Approval" with decisions required by IBC § 110.2. Additionally, the court had jurisdiction to remand for Hearing Examiner appeal under WCC 20.92.210 and RCW 36.70C.140. The decision to determine the conditions at CP 32-36 eliminated or complied with (the development's installation and use of driveway only where permitted and only so long as the driveway is not within the varied side yard setback --as a condition of Shoreline Ordinance Exemption) was a "final" land use decision communicated on October 25, 2012²³. RCW 36.70C.020(2)(a)("An application for a project permit *or other governmental approval* required by law *before* real property may be improved, developed, emphasis added)²⁴. "An interpretative or

²³ The decision to grant final approval is revealed by the entry "PW- Occupancy Approval - 10/25/12 DONE" at CP 121 (Case Activities , Exh J, Declaration Of David C Cottingham Re Jurisdictional Facts).

²⁴ As discussed regarding lot modification, a decision to allow *modified* lot corners is also a "land use decision" ("An application for a project permit or other governmental approval required by law before real property may be... *modified*,

declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, *or use* of real property" is also a Land Use Decision, RCW 36.70C.020(2)(b), was met by the agency decision whether to apply or enforce WCC 23.50.02.B , RCW 36.70C.070(2)(b)at the time that IBC §110.2 was applied to find that "no other laws which are enforced by the jurisdiction" entered. "The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property" is also a Land Use Decision, RCW 36.70C.020(2)(c), a definition which was met by a decision to enforce WCC 23.50.02.B until October 25, 2012, by refusing issuance of the final approval, and then again also by change in the enforcement decision on such date.²⁵

The "final" quality of the Land Use Decision, RCW 36.70C.020 and jurisdiction,²⁶ are added by Whatcom County failure to allow

sold, transferred...) RCW 36.70C.020(2)(a)(emphasis added), however no decision was made to allow modification.

²⁵ The change in position may have been due to an erroneous view that the court's equitable forced sale in No. 09-2-01773-1 (reciting no LUPA jurisdiction) was itself a land use decision, employed agency jurisdiction or review, or allowed and promoted the notion of a floating, not fixed and vested, setback location *after* vesting of the permit application.

²⁶ *Durland v. San Juan County*, ___ Wn. App. ___ (No. 68453-1-I, July 1, 2013).

Cottinghams' requested administrative review hearing.²⁷ CP354-388. Error was assigned to final approval at CP 25 (Petition IV. 3.3, pg 20; error to approve final occupancy). LUPA's definition and the court's jurisdiction include compliance decisions as "final" decisions, *Twin Bridge Marine Park v. Ecology*, 162 Wn. 2d 825 (2008); *Heller Bldg LLC v. City of Bellevue*, 147 Wn. App 46 (2008).

Cottinghams appealed administratively. Declaration Of David C Cottingham Re Exhaustion Of Administrative Remedies. (CP 386 of CP 354-388) Appeal to the Hearing Examiner asserted "*D. ..error to grant a final occupancy revealing satisfaction of side yard setback conditions.*"²⁸ RCW 36.70C.140 Jurisdiction still lies for remand, RCW 36.70C.140,²⁹ as no review has allowed record development.

Issue Two. Findings And Conclusions From Title Litigation Were Irrelevant to Performance Condition Progress.

The use of CR 56 is highly inconsistent with LUPA where

²⁷ WCC 20.92.210(2) gives the hearing examiner ability to render final decisions on "any decisions or determinations."

²⁸ See, CP 634 (of Supplemental Authorities, CP 500- 671): Whatcom County's Shoreline Management Ordinance specifically defines "finality" as the last possible date, even for finality of an exemption. WCC 23.60.19.A.3 (providing, in part, that: "The effective date of a shoreline ... exemption shall be the date of the last action required. ... including administrative and legal actions on any such permit or approval." See, *also*, WCC 23.60.19.C When permit approval is based upon conditions, such conditions shall be satisfied prior to occupancy.(Appendix).

²⁹ WCC 20.92.210 provides "The hearing examiner shall conduct open record hearings and prepare a record thereof, and make a final decision upon ... (1) Appeals from any orders, requirements, permits, decisions or determinations made by an administrative official or committee in the administration of this title, WCC Title 16, Environment, WCC Title 21, Land Division Regulations, or WCC Title 24, Health Regulations."

applied to draw facts from trial of title in which the agency was never even involved, as though the trial court's result could include instruction on the agency's permit and new location of the setback. Washington only allows vested development rights in return for "fully" complete permits, tolerating no misrepresentation. *Lauer v. Pierce County*, 173 Wn.2d 242 (2011).

When a party petitions under LUPA, it asks the superior court to act in an appellate, not a fact-finding capacity. *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 693 (2002); *Sunderland Family Treatment Servs. v. City of Pasco*, 107 Wn. App. 109, 117, 26 P.3d 955 (2001); *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 596-97, 972 P.2d 470 (1999); cf. *Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284, rev. den., 142 Wn.2d 1001 (2000). A court acting in that capacity may not make its own findings of fact, *Leavitt v. Jefferson County*, 74 Wn. App. 668, 677, 875 P.2d 681 (1994); *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618-19, 829 P.2d 217, rev. den., 120 Wn.2d 1008 (1992), and such findings will later be treated as mere surplusage. *Wellington River Hollow, LLC v. King County*, 121 Wn. App. 224, 230 n.3, 54 P.3d 213 (2002), rev. den., 149 Wn.2d 1014 (2003); *Leavitt*, 74 Wn. App. at 677; *Van Sant v. City of*

Everett, 69 Wn. App. 641 (1993). A LUPA petition measures agency action against RCW 36.70C.130 ("superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120).

Issue Three. Was Morgans' Performance Of Special Exemption-Conditions Even Shown As Ripe For LUPA Review During Continuing Agency Administration Without Notice Of Any Agency Decision, Or Was LUPA Relief Premature?

Cottinghams were until October 25, 2012, without notice of any decision regarding Morgans' performance on the Shoreline Ordinance-Exempting Condition. They were also protected by its setback and WCC 23.50.02.B, as Whatcom County's assurance of enforcement, supported by *Chaney and Lauer, supra*. (no reason to review setback *benefiting* them)³⁰ In advance of knowledge that their interest was impaired by an agency determination on review of Morgan's compliance, they were not required to litigate and seek LUPA certiorari-styled review. *Durland* ((*Pub. Order, March 27, 2013*), *Lauer* ("Before their interest is known impaired, LUPA "does not require parties to participate in litigation."); *Ferguson, infra*. A matter, question, or claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual

³⁰ A LUPA appeal is premature when it is "not apparent that the permittee will behave in an objectionable manner" with regard to compliance conditions. *Durland v. San Juan County*, 174 Wn. App. 1 (2012)

development. *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 940 P.2d 286 (1997), *rev. den.*, 135 Wn.2d 1009 (1998)

Issue Four. Is An Agency Authorized To Permit Project Activity Upon Land Of Another?

Only to an "owner or authorized agent." IBC 105.1

Issue Five. Did Preclusion Apply Because Of Full And Fair Trial Of An Identical Issue In Earlier Civil Proceedings Which Neither Involved The County Nor Review Of Its Agency's Decision Under LUPA Procedures?

LUPA Procedures were not involved in the civil trial. The jurisdiction necessary to estoppel's requirement of identical issues will not effect a bar and risk injustice where no full and fair opportunity occurred to litigate the issue. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299 (2004). Whether the setback vested floated at Morgans' application or at later litigation was neither shown nor found litigated. No pronouncement of litigations' effect in administrative proceedings has entered. Only prospective application of the equitable decision could be concluded as determined in the civil trial. Therefore, although setback was accommodated by forced sale and included in findings in 09-2-01773-1, no LUPA jurisdiction or review had commenced or was contemplated by the Trial Court, and injustice would follow any attempt to bend the Trial Court's decision (and impair the notice

required in the prior trial) to sideline today's actual inquiry.

"The injustice component is generally concerned with procedural, not substantive irregularity. *Thompson v. Dep't of Licensing*, 138 Wn.2d 783 , 795-99, 982 P.2d 601 (1999). This is consistent with the requirement that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum. Accordingly, applying collateral estoppel may be improper where the issue is first determined after an informal, expedited hearing with relaxed evidentiary standards. " *Christensen*, at 309.

There is also no evidence that either Morgans or Whatcom County asserted the Civil Trial's Findings (and either supplemental or amended Findings) as *amending a permit condition denying driveway* in the setback. Any assertion that the title litigation was competent to move the Shoreline Ordinance-exempting setback without agency deference, involvement or LUPA jurisdiction and review would be more than claim or issue preclusion. It would be LUPA *jurisdiction* preclusion. Whether and to what extent the agency made any decision contrary to Whatcom County's enforcement assurance under WCC 23.50.02.B, was not raised in pleadings or trial.

Issue Six. Is A Reviewing Court Engaged In Administrative Agency Review Under LUPA Authorized To Try, Determine Or Enter Findings Of Fact?

Only under RCW 36.70C.120(2)-(4) in the interest of ensuring that, consistent with due process when there has not been

opportunity to develop a record evidence of material facts which are not a part of the agency's record, the material facts may be offered. Then "the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record." RCW 36.70C.120(3).

Issue Seven. Is It Premature And Error For A Reviewing Court To Enter Conclusions Before The Agency Record Is Ordered And Reviewed?

Yes. Except for RCW 36.70C.120(2)-(4), the " review the record and such supplemental evidence as is permitted under RCW 36.70C.120" in order that the petitioner may meet RCW 36.70C.130(a)-(f) standards.

Issue Eight. When A Petition Asserts That Project Activity Occurred Upon A Neighbor's Property Does RCW 36.70C.120's Due Process Reference Require Identification Of And Supplement To The Agency Record?

Yes, and the petition includes supplementary evidence arising after the permit issuance. Failure to allow supplement to the record offends due process when it risks loss of a property right, as Assignment Five discusses *infra*. RCW 36.70c.120(2)-(4). The petition asserts that the record includes factual disclosures to the agency which supplement the record as allowed under RCW 36.70C.consisting of property conditions inconsistent with permit application representations, location of Cottinghams' title, even a

subdivision survey which Whatcom County had conditioned and approved, IV. 3.5 and 3.6.

ASSIGNMENT No. 2. FINDINGS FIVE AND SIX ARE IRRELEVANT, UNLESS NOTICE OF ANY DECISION APPROVED THE ACTIVITIES. "*Findings Of Fact And Order On All Pending Motions.*"

The building footing (No. 4) was not at issue unless its permit proceeded from misrepresentation regarding title, and no record yet reveals agency approval of Morgans' post-permit waste and driveway project placement activity. The reviewing court even specifically modified Finding/Conclusion No. three at entry to conclude that it only referred to commencement of time for appeal of the "building permit decision." Findings of fact are procedural errors of law, *Lakeside, supra*, and are unsupported by any evidentiary result of agency record-review. They are regarded as surplusage. *fn., Holder v. City of Vancouver*, 136 Wn. App. 104 (2006). No conclusion can be supported therefrom.

ASSIGNMENT No. 3. FINDING/CONCLUSION NUMBERS SEVEN THROUGH TEN ARE ERROR, UNSUPPORTED BY FACT AND APPLICATION OF LAW TO FACT. "*Findings Of Fact And Order On All Pending Motions.*"

Issue One. Does An Agency's Decision To Grant Final Approval, Under IBC § 110.2 Required Finding "No Violation Of The Provisions Of This Code Or Other Laws That Are Enforced By The Jurisdiction" Require The Agency To Consider Whether Lot Modification Regulations and The Special Shoreline Ordinance-Exemption Condition Have Been Violated Without Exemption Or Approval?

Issue Two. If No Prior Notice Has Been Given That Any Decision Has Been Made Regarding Morgans' Progress Toward, Or Violation Of, A Special Shoreline Ordinance-Exemption Condition And Cottinghams' Property Was Used, Are The Agency's Required Determinations Under Final Approval, IBC § 110.2, A Land Use Decision Under RCW 36.70C.020(a),(b), or (c)?

Number Seven's conclusion that the petition is untimely identifies the wrong decision for support and error of law, as though agency review of condition compliance decisions had been shown both made and also ripe for review at such time. Number Eight has no support in law because no Washington case has found that decisions required at the time of final occupancy *cannot* be final land use decisions. As in *Ferguson v. City of Dayton*, "focus on the original building permit was misplaced." 168 Wn. App. 591 (2012). Further, timing begins for new land use decision with an agency's change in decision on compliance,³¹ and decisions regarding Shoreline Ordinance Exemption compliance occur on the "*date of last action required on the permit or exemption and all other ... approvals ...including legal action*" WCC 23.60.19.A.3 (Appendix) For six years the Exemption Condition was addressed by the agency's denial of final approval, asserted as changed by the

³¹ See, *Durland v. San Juan County*, ___ Wn. App. ___ (Pub. Order, March 27, 2013)(last compliance plan must "set at rest" the cause and "nothing open to further dispute."); citing *Samuel's Furniture, Inc. v. State. Dep't of Ecology*. 147 Wn.2d 440, 452, 54 P.3d 1194 (2002).

agency's notice to Cottinghams on October 25, 2012. Interpretation had occurred and the change in the enforcement decision was a reviewable final land use decision as to Cottinghams.

No. Eight's Conclusion, that a final occupancy decision cannot initiate the deadline, also errs by excessive commitment to a label. As a matter of law it is not the label that is the land use decision. If final land use decisions are made within its conclusions (as required by IBC §110.2), the LUPA deadline commences then, because the decision is made then. Timing of compliance decisions, interpretations and enforcement decisions regarding Morgan's performance are simply unaddressed, as is the necessity of a decision regarding lot modification approval, technical review and notice. Risk or erroneous deprivation without post-deprivation notice and review violates constitutional norms. See Assignment Five, *infra*.

Issue Three. The Court Does Have Subject Matter Jurisdiction When A Petition Is Filed Within Twenty One Days Of The Relevant Decision?

Whether as a matter of jurisdiction or even as a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) review as a question of law is de novo. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

For CR 12(b)(6) dismissal it must appear beyond a reasonable doubt that no facts exist that would justify recovery and courts presume the allegations of the complaint to be true. *Id.* Whatcom County reported no lot modification (or notice to Cottinghams) in its rather opaque response that it had "administratively affirmed" boundaries identified at permitting. CP 341-346. The petition squarely raises not only the county's *prior* subdivision approval but arbitrary action affirming boundaries different therefrom, even false corners not meeting Washington's definitions in the survey practices act. If Morgans' new corner modification was the boundary Whatcom County "affirmed" at permitting, review for notice of that decision to Cottinghams is deserved, as such is the very purpose of WCC 21.01.150. Such a response offers no sense whether the boundary was at Cottinghams improvements, at the 1976 shared plat corner subdivision, or at Morgans' self-directed corners, and certainly decisions thereon are final as to Cottinghams.

Conditions looking to additional approval, particularly those Whatcom County has determined "shall" be enforced, clearly create later, "final" land use decision dates" satisfying jurisdiction. Denial of Hearing Examiner review alone conferred jurisdiction under RCW 36.70C.130(a)(unlawful procedure, prescribed process) and

preclusion of standards (e)(extra jurisdictional agency act) and (f)(constitutional error) were prejudicial. WCC 20.92.210. Denial of the right to petition for redress of grievances, Wash. Const. Art. I, § 4 and taking Cottinghams' property under assumed LUPA jurisdiction in No 09-2-01773-1, and denial of post deprivation review relief required by Due Process all operate to support jurisdiction. *Mathews v. Eldridge*³², *infra*.

ASSIGNMENT No. 4. FINDING/CONCLUSION Nos. THIRTEEN AND FOURTEEN AND ORDER "A" AND "B" ARE UNSUPPORTED BY ANY RECORD, CONCLUSION OR ARGUMENT THAT AGENCY DECISIONS WERE REVIEWED IN THE CIVIL TRIAL. "*Findings Of Fact And Order On All Pending Motions.*"

The defendants themselves raised No. 09-2-01773-1, a decision without any Decree, dated December 30, 2011, as cause to dismiss. While no model of clarity, that court's Findings and Conclusions and Judgment clearly recite no jurisdiction over agency proceedings and neither reference review of the permit's specific conditions, nor any date of agency post-issuance decisions as ripe for appeal. An exercise of purely equity jurisdiction (forced sale) resulted, begging the compliance review Morgans had avoided by not questioning the agency's driveway denial or involving the agency

³² Review of the implicit decision regarding necessity of the application and notice attending lot corner modification from the earlier subdivision approval(as required in WCC 21.01.150)would substantially limit the risk of erroneous deprivation of fundamental interests in real property at minimal cost, meeting Mathews' test.

See Radach. The decision appealed here accepted Morgans' invitation to regard as Cottinghams' burden initiation of agency review before any final compliance decision. Only highly frivolous argument will assert that the Civil Trial court's decision invoked that very different LUPA jurisdiction in review of a non-party's right as affected by land use permitting agency administration and decisions. Abusive use of an unfounded motion has simply encouraged a reviewing court to attempt to consider that Civil Trial record (the wrong record to review in LUPA proceedings) so as to avoid review. No support whatsoever can be found for a Finding or Conclusion that "all issues raised and claims made" were previously raised or "should have been raised."³³ Without a dated condition compliance decision and notice, ripe to appeal, such opaque and general conclusions fail to demonstrate any earlier opportunity to engage in agency decision review.

³³ The Findings in the instant "Findings and Order" may have included "and Conclusions" as an afterthought, but Findings And Conclusions in the Civil Trial of title appear even appear drafted to avoid clarity. The extent to which original Findings and Conclusions (Appendix) in cause No. 09-2-01773-1 were amended or simply supplemented when marked as "Amended Findings" and Amended Conclusions" in the "Supplemental Findings Of Fact And Conclusions Of Law" (Appendix) is far from clear, but the *original* Finding No. 23 allowed no idea that it determined a boundary Morgans should have represented at permitting, holding that "the court should use its equitable powers and require that Morgans purchase that portion of the disputed area adversely possessed...;" and its Conclusion No. 5 was drafted by Morgans' present counsel ("boundary line .. should be as legally described as part of the north line of the property...").

Mutually exclusive, because a LUPA action does *not* try title, *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886 (2004) RCW 36.70C.030(1)(c) LUPA review allowed none of the claims brought in 09-2-01773-1. "The nature of the two claims is entirely disparate." *Hayes v. City Of Seattle*, 131 Wn.2d 706 (1997). Here the request, as in *Hayes*, was an "action for judicial review focused exclusively on the propriety of the decision making process." It was brought as soon as any decision on the special Shoreline Exemption-Ordinance was known and ripe for review because final.

There is real question whether Morgans' now use the Civil Action's result beyond its failed and frivolous condemnation claim now for the mere cloud that it may add, when decisions --by an agency charged with deciding on setback condition compliance and "other laws enforced by the jurisdiction" IBC §110.2)-- are reviewed to determine whether any "decision" actually occurred. If that agency simply surrendered its jurisdiction in response to having its decision handed to it by a court appearing possessed of LUPA jurisdiction, but which never invoked LUPA or reviewed the agency's interpretations or decisions, due process is highly questionable.³⁴ Not only does no record support any finding as a review of the facts

³⁴ See, *Ruvalcaba v. Baek*, *infra*.

the agency must take into account, no record was available below for Cottinghams' use in defense against entry of Finding/Conclusion No. 14 ("new claims,... subject to statute of limitations"). It was error to hold that new claims should have been raised in the civil trial regardless of whether review jurisdiction was invoked or the agency decisions were ripe for review.

Furthermore, no open record with notice of the initial permit to Cottinghams was shown. The CR 12(b)(6) "reasonable inferences" include the assumption that the agency's belief that no lot modification was presented and no open record was therefore required were erroneous. But *lot modification* including movement of Cottinghams corner is extraordinary and would certainly require notice and an open record absent determination of completeness and final decision on lot modification. WCC 2.33.020(A)(2), .090(c)(3)³⁵ Further, the date of notice and effective date of a shoreline permit or exemption "shall be the date of last action required on the shoreline permit or exemption and all other

³⁵ A lot has fixed boundaries. WCC 21.01.020. A boundary adjustment must also be approved prior to the transfer of property unless exempt. WCC 21.03.060; 21.01.020(4), and, for complete application, requires "clear depiction of property lines proposed for adjustment which identifies existing property lines and proposed property lines. WCC 21.03.085. Most importantly, "In reviewing a proposed boundary line adjustment, the subdivision administrator or hearing examiner shall use the following criteria for approval ... The boundary line adjustment shall not ... prevent suitable area for on-site sewage disposal systems... (emphasis added)."

government permits and approvals that authorize the development to proceed, including administrative and legal actions on any such permit or approval." WCC 23.60.19.A.3 (emph. added). Whatcom County's own ordinance thereby creates another instance of a "final land use decision." WCC 23.60.19.A.3. RCW 36.70C.020(2)

ASSIGNMENT No. 5. DECLARATORY RELIEF'S DISMISSAL WAS ERROR. "*Findings Of Fact And Order On All Pending Motions.*"

Issue One. Should Title Litigation's Findings and Conclusions, Entered Without Review Of An Agency's Decision, Support Dismissal Of Declaratory Relief Having Capacity To Declare Agency Duty With Fundamental Property Interests At Risk Of Loss?

Avoiding agency decisions allowing a continuing cloud upon Cottinghams' title requires declaration of jurisdictional scope of the agency duty under RCW 19.27.095 (permit completion); RCW 58.17 and WCC 21.01.150 (lot modification, notice and technical review); WCC 23 (Exemption Condition location and enforcement); and WCC 15.04 (IBC 110.2) to avoid recurring damage and loss to neighboring properties. The Declaratory Judgments Act, RCW 7.24.050, is liberally construed to allow declaration of duty. No such question was tried in the civil trial proceedings. If prior quiet title proceedings have capacity to affect land use permitting agency duties without use of LUPA jurisdiction, declaratory relief has become all the more

necessary to sort out competing jurisdiction.

Refusal to consider a declaratory judgment action is reviewed for abuse of discretion. *Wash. Fed. of State Employees v. State*, 107 Wn. App. 241, 244, 26 P.3d 1003 (2001). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Courts are authorized to 'declare rights, status and other legal relations,' and such declaration may be 'either affirmative or negative in form and effect.' RCW 7.24.010. The ability to prevent disorder already inspires zoning, development and permitting restrictions³⁶ Liberal construction of this authority "pursues the socially desirable objective of providing remedies not previously countenanced by our law.' *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 98, 38 P.3d 1040 (2002).

Constitutional standards intervene with government violation of notice affecting property *Mathews v. Eldridge scrutiny*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)(procedural due process analysis); particularly if boundaries are under equitable re-

³⁶ WCC 21.11.010 (Ord. 2000-056) (criminal offense); RCW 58.17.210(prohibiting land permits to and transfers of land "divided in violation of this chapter or local regulations"); *Halverson v. Bellevue*, 41 Wn. App. 457 (1985)(all owners must approve division, regardless whether title is of public record).

interpretation in Washington. *Stop The Beach Renourishment v. Florida Dep Env. Prot.*, 130 S. Ct. 2592 (2010). WCPDS duties require the prevention of neighboring property damage and loss.³⁷ Misrepresentation at permitting which avoids mandatory additional permit approvals, their notice and technical review of corner modification under WCC 21.01.150; constitutionally compel declaratory judgment response. The shoreline management ordinance's mandatory exemption-condition enforcement under WCC 23.60.050.B and D, required permit application reconsideration for misrepresentation under RCW 19.27.095 in reduction of risk of loss through erroneous deprivation. Since mandatory restrictions on permit development give rise to reasonable expectation of entitlement³⁸ procedural due process and record development required, at the least, remand to the hearing examiner³⁹ with

³⁷ Zoning standards evolved to prevent the same. WCC 20.80.737 provides that "Clearing activities shall not result in off-site physical damage not pose a danger or hazard to life or property."

³⁸ *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000); *Mission Springs, Inc. v. City of Spokane*, 134 Wn. 2d 947, 962 fn. 15, 954 P. 2d 250 (1998); See, *Veradale Valley Citizens' Planning Commission v. Bd of Comm'rs of Spokane County*, 22 Wn. App. 229, 232, 588 P. 2d 750 (1978) *Wedges/Ledges of California v. City of Phoenix*, 24 F. 3d 56, 63, (9th Cir., 1994); *Crown Point I, LLC v. Intermountain Rural Elect.Ass'n*, 319 F. 3d 1211, 1217 , fn. 4 (10th Cir., 2003).

³⁹ In every case government must provide notice and opportunity to be heard at a meaningful time and in a meaningful manner. *Halsted v. Sallee*, 31 Wn. App. 193, 197, 639 P. 2d 877 (1982) A due process violation for failure to allow Hearing

declaration of a duty to record discharge of enforcement duties.

Dismissal of declaratory relief was for untenable prior opportunity-to-litigate reasons, and prior proceedings regarding which Morgans requested immunity for their representations offered no support for dismissal of Declaratory relief. Dismissal was also abuse of discretion as manifestly unreasonable, since the petition's assertion that enforcement of the setback condition was mandatory at the least ensured consideration of agency findings whether it was performed and where it was considered located and vested.

Whatcom County and its Land Use Development agency WCPDS have duties requiring scrutiny. Necessity of a declaration regarding their duty to make a record that final land use decisions entered regarding compliance with "other laws that are enforced by the department" under IBC and IRC § 110.2 is unavoidably required. For no less than the strength of the IBC requirement the Shoreline Management Program and its Ordinance allow exemption conditions to be attached (WCC 23.60.050.B) for Building Official review and without additional processing under the Shoreline Program. The notion that WCPDS has no regulatory duty to make a record of a decision made under its duty to enforce the special setback condition

Examiner hearing would be avoided thereby. *Hudson v. Palmer*, 468 U.S. 517, 534, 104 S.Ct. 3194, 82 L.Ed. 2d 393 (1984)

(attached at Shoreline Exemption Review Form, CP 6-49) is untenable and error. WCC 23.60.050.B and RCW 19.27.095, as well as WCC 21.05.150 (Appendix) address WCPDS duty and are fairly raised by the petition's disclosure that Morgans' surveyor admitted excluding a known boundary stake after Cottinghams' complaint of Morgans' clearing. CP 43, 44.

ASSIGNMENT No. 6. COTTINGHAMS' PROPOSED ORDER WAS DENIED ENTRY IN VIOLATION OF RCW 36.70C.080 AT THE INITIAL HEARING AND THE COURT ABUSED DISCRETION PROCEEDING TO EVIDENTIARY MOTIONS WITHOUT THE RECORD.

LUPA clearly requires review of an agency decision, a record review. It was error to fail to enter Cottinghams' proposed order for return of the agency record. CP 122. RCW 36.70C.080

ASSIGNMENT No. 7. FINDING/CONCLUSION NO.14 IS ERROR OF LAW AND UNSUPPORTABLE IN FACT. *"Findings Of Fact And Order On All Pending Motions."*

Issue One. Did The Court Fail To Refer To The Statute?

"Claims" were regarded as presented (even counterclaims by them) despite invocation of RCW 36.70C (CP 6, Petition pg. one). But Cottinghams' right to constitutionally cognizable post-deprivation review of extra jurisdictional permitting (RCW 36.70C.130(1)(e)) was raised, and an agency was alleged as misled. The petition allegations could hardly emerge as meaningful viewed as tort "claims" as though calling for Answer which RCW 36.70C.080(6)

says is unnecessary. also, *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886 (2004). The motion to characterize claims as against Morgans, and as subject to a statute of limitations, was frivolous, unsupportable in law and in derogation to the call of the statute. Agency duties are raised by extra jurisdictional permitting, misrepresentation, a mandatory duty to protect adjacent property by enforcement rather than approval allowing continuing nuisance, and substantive rights and constitutional notice to a landowner deserving procedure are raised. *Asche v. Bloomquist*, 132 Wn.App 784 (2006).

Issue Two. Was It Appropriate To Bring Administrative Agency Review In A Civil Action Trying Title?

No agency response to Morgans' activity was shown as known or ripe and notice was absent. No notice of a post-issuance decision was given to alert to any need to review agency action. If a property right in the procedure --a guarantee of enforcement or technical review of a survey discrepancy-- substantively affected risk of erroneous property loss to Cottinghams then due process required notice sufficient to inform Cottinghams to protect their property interests. Failure to inform Cottinghams of any agency interpretation or decisions regarding the shoreline-exemption condition, or any technical review of a survey discrepancy before October 25, 2012, risked loss in a manner WCC 23 and WCC 21.01.150 were designed

to prevent. Any decision to avoid notice to Cottinghams was itself also a land use decision affecting Cottinghams' property interests, as the quiet title action provided no such notice.

RCW 36.70c must give the County's Ordinances both their obvious meaning in terms of regard for affected neighboring property and a constitutional application that preserves the constitutionality of LUPA and avoids taking under color of state and local laws. *Stop The Beach, supra*. Since Whatcom County assured by ordinance that additional decisions regarding exempting conditions would be enforced, notice that the denial of driveway would not be enforced was required by due process as offering protection of an interest in property. WCC 23.70.01.A.10 requires the agency "[a]dvis[e] interested persons and prospective applicants/proponents as to the administrative procedures and related components of this Program," as Cottinghams' October 2007 letter (Petition Exh. CP 43) called for.⁴⁰ WCC 23.50.02.B assured of the setback condition's attachment and WCC 21.01.150 mandated notice of boundary discrepancy to affected neighbors. The duty to interpret and apply RCW 19.27.095 to review jurisdictional limits and permit application

⁴⁰ A local government "shall" give notice of a land use decision to the applicant and to any person who, before the rendering of the decision, requested notice of the decision or "submitted substantive comments on the application." RCW 36.70B.130

should not be raised in quiet title proceedings *before* completion of agency jurisdiction. WCC 2.33 incorporates land division standards into permit application standards. Assertion at the civil trial of unpermitted project activity without boundary modification disclosure, or application for approval, raised the first notice of a violation of Whatcom County Development Standards (Chapter 4, *CP 672-701*), met by the promise of technical review with a survey discrepancy; a duty to ensure notice to Cottinghams *if their common corner* was being relocated without regard to past boundary evidence. Notice of agency approval thereof would have been the first and least response required. Development Standard Chapter 4, even required warnings for notice on the survey used to support Morgans' plan (section 410 "Evidence of Occupational Indicators," Appendix).

Morgans' dismissal order (entitled "Findings of Fact and Order on All Pending Motions" CP 742-753) identifies no record of the agency interpretation or position on land division and lot modification approval, before *or after* notice to Cottinghams on October 25, 2012, despite the petition's assertion of Cottinghams prompt report to the agency (CP 43) at the first sign of survey discrepancy, and the petition's assertion that it was filed upon notice that agency enforcement might not occur, and the effort has been substantial to

secure review.

Lack of notice of a final land use petition may prevent finality but not RCW 36.70C.130 jurisdiction to remand to achieve a record of finality. Normally under LUPA the appellate court stands in the shoes of the superior court reviewing the Hearing Examiner record. *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 525, 94 P.3d 366 (2004). RCW 36.70C.130(1) is premature, but standards (a), (b), (d), (e), and (f) present questions of law reviewed de novo requiring a record. *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371, 859 P.2d 610 (1993). Despite Cottinghams' prompt appeals within twenty one days of the first notice that it might not enforce the setback condition (Board of Appeals and Hearing Examiner); the county allowed neither hearing nor reason why it did not.

Courts may dismiss under CR 12 only when it appears beyond a reasonable doubt that no facts justifying recovery exist, and presume the pleaded to be true for the purpose of such a motion. *Berst v. Snohomish County*, 114 Wn. App. 245, 251 (2002).. Denial of a hearing examiner appeal justified relief by itself.

The agency duty to reconsider began with notice of material application misrepresentations from the civil trial. Washington State requires that a building permit application be complete, and with

amendment by the legislature, to be "fully " Complete and free from misrepresentation. RCW 19.27.095. Lauer v. Pierce County, 173 Wn.2d 242 (2011).

"C. A project permit application is complete when it meets the submittal information requirements of WCC 2.33.040, Application submittal information."

WCC 2.33.050. " Permit Receipt And Determination Of Completeness"

" Submittal requirements for project permits are contained within the specific county code for each type of project proposal, in the corresponding chapter of the Whatcom County Development Standards, in applicable state law or WACs and in any site specific conditions resulting from a preapplication conference.

WCC 2.33.040 (emphasis added).

The submittal information for each permit type constitutes the information necessary to determine whether an application is complete pursuant to WCC 2.33.050, Permit receipt and determination of completeness." WCC 2.33.040.

Whatcom County not only has a land division ordinance, but in a form adopted as Chapter Four, adopted its expectations as "Development Standards" as that term is used in WCC 2.33.050, above, ("Permit Receipt And Determination Of Completeness"). The Land Division Ordinance (Appendix) and Development Standards (Appendix) were provided the Reviewing Court. WCC 21.01.150,

applicable where land division is not shown exempt, addresses survey discrepancies, adopting a duty to provide technical review of survey discrepancies and notice to neighboring owners. Under WCC 2.33.090, "redesigns of proposed land divisions pursuant to WCC 21.01.150" are excepted from notice of final decision and are only regarded as complete after technical review.

The petition asserted that Morgans withheld at permitting the only staked lot corner evidence. CP 6, Petition pg 6-7, para. II. 3.9-3.11. Morgans invited reference to No. 09-2-01773-1 reflecting Cottinghams' title through summary judgment. Whatcom County has adopted the International Building Code.⁴¹ It authorizes permitting only to property owners and their agents.

Under §IBC 105.2,

"The construction documents submitted with the application for permit shall be accompanied by a site plan showing ... distances from lot lines... and it shall be drawn in accordance with an accurate boundary line survey. ... The building official is authorized to waive or modify the requirement for a site plan when the application for permit is for alteration or repair or when otherwise warranted.

Under IBC §110.2 findings are required before final approval of permit progress and performance of permit conditions. A

⁴¹ WCC 15.04. Whatcom county has enacted the IBC and IRC (International Residential Code) are cited here as IBC only. The reference is to both.

certificate is issued only "After the building official inspects the building or structure and finds no violations of the provisions of this code or other laws that are enforced by the department of building safety ..." The department of building safety is the Building Services Division of the Whatcom County Planning and Development Services Department (WCPDS)." WCC 15.04.015. IBC §103.1.

WCC 15.04.015 adopted IBC §105.3, and it states "To obtain the permit, the applicant shall first file an application therefor in writing on a form furnished by the department of building safety for that purpose. Such application shall:

1. Identify and describe the work to be covered by the permit for which application is made.
2. Describe the land on which the proposed work is to be done by legal description, street address or similar description that will readily identify and definitely locate the proposed building or work.

Because of Washington's fixed and date-certain vesting and Washington's permit misrepresentation intolerance, post-issuance inspection performs an important role in Washington. In Whatcom County the role is even more important, for WCC 23.50.02.B makes condition enforcement mandatory.

The petition included report to the Building Official of undisclosed lot corner evidence (Petition Exh. CP 43). Facts shown

only by Morgans' representations at trial were entirely inconsistent with valid permitting, including violation of RCW 58.17.210.⁴² and RCW 58.17.300 (gross misdemeanor to violate any local regulations ... relating to the sale, ... of any lot, tract or parcel of land). Land Division regulation investigation under RCW 19.27.095 and RCW 58.17.255 for LUPA decisions include an application "for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used." RCW 36.70C.020(1) (emphasis added). RCW 58.17.215. The petition revealed that Morgans had made their conveyance subject to their survey disclosing Cottinghams' property before their waste. (CP 6-49, Petition; CP 80-82, Deed Exhibit identifying Survey No.2051102233; CP 86; and see, also, CP 104-Exhibit F to, Decl. of David C. Cottingham Re Jurisdictional Facts, CP 64-121). The petition fairly asserts that Morgans modified an existing lot⁴³, even that resulting dimensions were been used for grant of a variance,

⁴² It Provides in part, " No building permit, septic tank permit, or other development permit, shall be issued for any lot, tract, or parcel of land divided in violation of this chapter or local regulations adopted pursuant thereto unless the authority authorized to issue such permit finds that the public interest will not be adversely affected thereby. The prohibition contained in this section shall not apply to an innocent purchaser for value without actual notice. All purchasers' or transferees' property shall comply with provisions of this chapter..."

⁴³ The Declaration of David C. Cottingham In Support Of Reply To Morgan Response, Preliminary Hearing, added Morgans' surveyor's testimony for its contradiction of Mr. Ron Morgan's sworn declaration that he had been retained to survey the entire lot. CP 204-221.

when Morgans had claimed additional need based upon area of their lot.

Washington's fixed and date-certain vesting rule precludes floating setbacks, preventing movement or expansion without new modified permit application. Though allowed, vesting is contrary to public policy. *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883 (1999). It could not have been anticipated that Morgans would disclose survey services they influenced to withhold boundary evidence during permitting, but no new setback decision occurred.

Issue Three. Was It Premature To Hold Petitioner To LUPA Burdens Before The Record Was Available.

Whatcom County intends further land use decisions after issuance in the shoreline zone. "The effective date of a shoreline permit or exemption shall be the date of last action required on the shoreline permit or exemption and all other government permits and approvals that authorize the development to proceed, including administrative and legal actions on any such permit or approval." WCC 23.60.19.A.3.

The court had no authority to enter findings of fact in the court's appellate capacity under RCW 36.70C, and the court therefore erred in entering its Finding/Conclusion No 14 and its dismissal under the "Findings Of Fact And Order On All Pending

Motions" dated March 13, 2013. CP 742-753.

ASSIGNMENT No. 8. AWARDING FEES TO MORGANS WAS ERROR. *Order And Judgment, CP 871-877*

An Order⁴⁴ (CP 871) and Judgment thereon (CP 877) entered April 20, 2013, awarding fees to Morgans. Its *Paragraph Three* incorporated the reviewing court's conclusion that "all issues raised and claims made " were previously litigated, unsupported by fact and filed "at least in part to harass and/or annoy."⁴⁵ No trial had allowed the court such discernment or any chance to become familiar with motives beyond support for certiorari-style review. See, CP 811, 837.⁴⁶ The facts in the petition supported protected communication regarding agency error and evidence received under oath regarding surveying showing a landlocked parcel (CP 107, 53, 55, 56,) in support of Morgans' private condemnation counterclaim. RCW 4.24.500.

Appeal No. 68202-4-I addresses whether the prior civil trial court exceeded jurisdiction without LUPA jurisdiction by proceeding to satisfy unreviewed agency conditions before agency deference,

⁴⁴ Entitled "Order On: 1) Defendant Morgans' Motion For Fees And Terms-RCW 4.84.185 And CR 11, 2) Plaintiff/Petitioners' Motion To Strike Counterclaims, Determine Finality, Granting Terms And Sanctions.."

⁴⁵ But See, RP 15, In. 7 ("not making that finding").

⁴⁶ Declaration In Support Of Motion For Leave To File Delayed And Overlength Response To Morgans' Motion For Fees Petitioners Fee Declaration," and " Pets Responsive Memorandum Re Morgans Motion For Award Of Terms, Fees."

interpretation or decisions. Here, Cottinghams employed LUPA as soon as they were notified of a change in whether conditions were being enforced, and after notice to the agency of a permit influenced by misrepresentation and another permit required, given full disclosure. Regard of the petition as annoyance, or without support in law or in fact, at the least deserves appraisal of the points of law raised. Cursory findings are insufficient. *In re Marriage of McCausland*, 159 Wn.2d 607, 620, 152 P.3d 1013 (2007) The Order is drafted by the same party and counsel who authored the Supplemental Findings Of Fact And Conclusions Of Law (Appendix) in No. 09-2-01773-1 for notice therein that equity jurisdiction was employed. Only twenty one days passed before Cottinghams, having filed before the Appeals Board and Hearing Examiner, were required to file before the Court, for opportunity to be heard. A manifest abuse of discretion resulted from denial of redress and opportunity to be heard, with error by adding a fees award.

Issue One. Was Discretion Abused And The Lodestar Assessment Followed, Without Segregation Of Fees For Efforts Devoted To Application For Immunity And Pursuit Of Impermissible Fact-Finding, And Avoidance Of Statutory LUPA Procedure?

Issue Two. Is It Error To Sanction Without Identifying Evidence Supporting The Award And The Conduct Sanctioned?

Issue Three. Do Findings Support The Reasons For Award and The Conduct Sanctionable?

The Order holds that an earlier title trial was being re-litigated and review should have been joined. CP 871-876, pgs. Three and Four. Cottinghams' "Responsive Memorandum Re Morgans' Motion For Award Of Terms, Fees," CP 837-854, and "Petitioners' Objection To Order And Judgment," CP 861-865, offered reasonableness of the petition and offered why the court should articulate cause for and make segregation of Morgans' Fees. \$25,432.80 were awarded on the unexpressed notion that the record of agency action is unnecessary to understanding of the petition. Gross error attended use of findings and conclusions from a prospective equitable ruling -- as though *nun pro tunc*, to the permit application date *and with* LUPA jurisdiction -- to questions concerning later permit administration

The amount of the recovery was substantial as well, entering before any attention to the statute or any record, much less actually review. RP 15-16. Review is therefore more rigorous. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 892, 912 P.2d 1052 (1996). CR11 is identified as cause. For sanctions under CR 11 the burden is great. *Biggs v. Vail*, 124 Wn. 2d 193,202,876 P.2d 448 (1994)(*Biggs II*). Explicit identification of the sanctionable conduct if required. *Quick-Ruben v*, 136 Wn.2d at 903- 04; *MacDonald v. Korum Ford*, 80 Wn.

App. 877, 892, 912 P.2d 1052 (1996). See also, *Blair v. GIM Corp., Inc.*, 88 Wn. App. 475, 483, 945 P.2d 1149 (1997) (record did not explain why the trial court believed the pleading to be groundless).

The amount is relevant in determining reasonableness of the fee award. *Beeson v. Atlantic-Richfield Co.*, 88 Wn.2d 499, 563 P2d 822 (1977); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P2d 1210 (1993). The award cannot be so weighed. The "Lodestar" method of finding the hours reasonable on the points material to the matter was not employed. Impermissible *factual* analysis, and *avoidance of* LUPA procedure were rewarded. No hours attending *only* to LUPA was considered. Wasteful or duplicative hours must be excluded. *Scott Fetzer Co v. Weeks, supra.* Discretion requires informing on the type of work performed. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581 (1983). Findings of fact and conclusions of law are required to establish such a record. *Mahler v. Szucs*, 135 Wn.2d 398 (1998). The ease of a motion asserting a permit issuance date for its value as the only "final" land use decision under RCW 36.70C.020(a) justifies minimal fees, hardly \$25,432.80.

Since fee decisions are entrusted to the discretion of the trial court, *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38 (1987), the record must hold significant articulable grounds and should

overcome the strong policy favoring the right to petition government. Also, since no authority establishes that a permit subject to conditions and administration does not look to *further* land use decisions as "final" (No. eight, CP 81), a matter of first impression is raised deserving no fee award. Discretion is abused by awarding fees for efforts in review of the wrong record rather than the agency record.

No evidence supports the finding in *Paragraph Three (CP873, incorporating No. 13)*. Since Morgans' only redacted their counterclaim fees, the court erred without determining the time necessary to dismissal according to the lodestar methodology. The trial court must provide articulable grounds for its fee award. *Mahler v. Szucs, supra; Bentzen v. Demmons*, 68 Wn. App. 339,350,842 P.2d 1015 (1993). Remand for inadequate record should result at the least on a record offering inadequate support. Review is not possible. Remand for entry of proper findings and conclusions is the remedy. *Mahler*, 135 Wn.2d at 435. *Mayer v. City of Seattle*, 102 Wn. App. 66, 78-79, 10 P.3d 408 (2000),

Issue Four. Determining That Sanctions Should Enter Was Abuse Of Discretion Unsupported By Specificity.

It is offensive to the right of petition to award fees in administrative proceedings without consideration of points made and

the agency record to do it with. "The right of petition . . . shall never be abridged." Wash. Const. Art. I, § 4. Tactical strategies protecting development have inspired the legislature's enactment of RCW 4.24.500-510 to encourage the reporting of potential wrongdoing to governmental entities. *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 366, 85 P.3d 926 (2004), but the encouragement is meaningless without ability to understand the agency interpretation and decision-making. LUPA controls a narrow window through which to seek such response, employed here in a context including two ordinances assuring of notice, response and enforcement.

"Discretion is abused when it is exercised on untenable grounds or for untenable reasons." *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 312, 202 P.3d 1024 (2009). A frivolous matter cannot be supported by *any* rational argument based in fact or law. *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). Concern that permit review was not in compliance with the SMP and SMA renders a LUPA petition the proper procedure. *Curhan v. Chelan County*, 156 Wn. App. 30 (2010).

VI. RAP 18.9 FEES REQUESTED

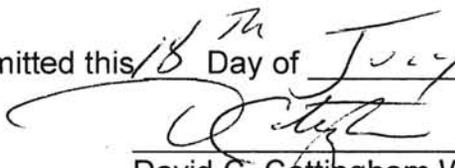
Morgans requested a view together with Findings and Conclusions in No. 09-2-01773-1, where prospective equity was

applied. Equity in avoidance of review showed bad faith and frivolous use of a motion. Need of review and defense of Cottinghams' home remains caused by Morgans' erratic use of condemnation and necessity, confounding to notions of permit validity resulting from planning and disclosure to an agency. RCW 4.84.370 allows fees to Cottinghams without requiring determination on the merits. *Prekeges v. King County*, 98 Wn. App. 275 , 285 (1999). Equity should also allows fees to an innocent neighboring owner. *Radach v. Guderson*, 39 Wn. App. 392(1985). A discretionary fee award should deter this abusive title-after-permitting and without disclosure approach. It erodes protections of private property and is preventable under RCW 58.17.210. Cottinghams' title remains clouded, compounded by characterization of earlier litigation's aims, in flagrant disregard of any reasonable necessity. *Ruvalcaba, supra*, Wash. Const. Art. I, § 16.

VII. CONCLUSION.

Error attending an agency compliance decision and neglect of another necessary permit stands unreviewed without cause for the petition's dismissal. An earlier action, resulting in taking of Cottinghams' property for permit satisfaction occurred without permit review. Development decisions regarding activity on Cottingham's

property required notice under due process. Petition and post-deprivation were denied by Whatcom County. Remand for review is required with reversal of the award of fees. A discretionary, deterrent award of fees to Cottinghams for impermissible and frivolous use of fact-finding motions and litigation is most appropriate.

Respectfully Submitted this 18th Day of July,
2013. 

David C. Cottingham WSB 9553
-Pro Se and Attorney for Joan
Cottingham

VIII. APPENDIXDIX

WCC 23	Whatcom County Shoreline Management Program
WCC 21	Whatcom County Land Division Regulations
Chapter Four	Whatcom County Land Development Standards
WCC 2.33	Permit Review Procedures
WCC 20.92.210	Final Decisions
Judgment	<i>No. 09-2-01773-1</i>
Partial Summary Judgment	<i>No. 09-2-01773-1</i>
Findings Of Fact And Conclusions Of Law	<i>No. 09-2-01773-1</i>
Supplemental Findings Of Fact And Conclusions Of Law	<i>No. 09-2-01773-1</i>
Answer and Counterclaims of Ron Morgan and Kaye Morgan	<i>No. 09-2-01773-1</i>
Amended Complaint To Quiet Title Of David C. Cottingham and Joan Cottingham	<i>No. 09-2-01773-1</i>
International Building Code §105.3	Application For Permit
International Building Code §105.4	Validity of Permit
International Building Code §106.2	Site Plan

APPENDIX EXHIBIT
TITLE 23
SHORELINE MANAGEMENT PROGRAM
WHATCOM COUNTY, WASHINGTON

TITLE 23

Shoreline Management Program

Adopted by **Whatcom County** May 27, 1976. This revised Program was adopted February 27, 2007 to comply with the Shoreline Master Program Guidelines, Washington Administrative Code (WAC) 173-26.

Approved by the Department of Ecology August, 8, 2008.



Chapter 5 Applicability and Non-conforming Uses

23.50.01 Application to Persons and Development

- A. This Program shall apply to any person as defined in Chapter 11.
- B. This Program shall apply to any use or development as defined in Chapter 11. All development and use of shorelines of the state shall be carried out in a manner that is consistent with this Program and the policy of the Act as required by RCW 90.58.140(1), whether or not a shoreline permit or statement of exemption is required for such development pursuant to Chapter 6 of this Program.
- C. No substantial development as defined in Chapter 11 shall be undertaken within shorelines by any person on shorelines without first obtaining a substantial development permit from Whatcom County; provided that, such a permit shall not be required for the exempt activities listed in SMP 23.60.02.2.

23.50.02 Relationship to Other Local Regulations

- A. In the case of development subject to the shoreline permit requirement of this Program, the County Building Official shall not issue a building permit for such development until a shoreline permit has been granted; provided that, any permit issued by the Building Official for such development shall be subject to the same terms and conditions that apply to the shoreline permit.
- B. In the case of development subject to regulations of this Program but exempt from the shoreline substantial development permit requirement, any required statement of exemption shall be obtained prior to issuance of the building permit; provided that, for single family residences, a building permit reviewed and signed off by the Administrator may substitute for a written statement of exemption. A record of review documenting compliance with bulk and dimensional standards as well as policies and regulations of this Program shall be included in the permit review. The Building Official shall attach and enforce conditions to the building permit as required by applicable regulations of this Program pursuant to RCW 90.58.140(1).
- C. In the case of zoning conditional use permits and/or variances required by WCC Title 20 for development that is also within shorelines, the County decision maker shall document compliance with bulk and dimensional standards as well as policies and regulations of this Program in consideration of recommendations from the Administrator. The decision maker shall attach conditions to such permits and variances as required to make such development consistent with this Program.
- D. In the case of land divisions, such as short subdivisions, long plats and planned unit developments that require county approval, the decision maker shall document compliance with bulk and dimensional standards as well as policies and regulations of this Program and attach appropriate conditions and/or mitigating measures to such approvals to ensure the design, development activities and future use associated with such land division(s) are consistent with this Program.

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- B. In the case of development subject to regulations of this Program but exempt from the shoreline substantial development permit requirement, any required statement of exemption shall be obtained prior to issuance of the building permit; provided that, for single family residences, a building permit reviewed and signed off by the Administrator may substitute for a written statement of exemption. A record of review documenting compliance with bulk and dimensional standards as well as policies and regulations of this Program shall be included in the permit review. The Building Official shall attach and enforce conditions to the building permit as required by applicable regulations of this Program pursuant to RCW 90.58.140(1).
- C. In the case of zoning conditional use permits and/or variances required by WCC Title 20 for development that is also within shorelines, the County decision maker shall document compliance with bulk and dimensional standards as well as policies and regulations of this Program in consideration of recommendations from the Administrator. The decision maker shall attach conditions to such permits and variances as required to make such development consistent with this Program.
- D. In the case of land divisions, such as short subdivisions, long plats and planned unit developments that require county approval, the decision maker shall document compliance with bulk and dimensional standards as well as policies and regulations of this Program and attach appropriate conditions and/or mitigating measures to such approvals to ensure the design, development activities and future use associated with such land division(s) are consistent with this Program.

- free-standing signs, or any development within an Aquatic or Natural shoreline designation; provided that no separate written statement of exemption is required for the construction of a single family residence when a County building permit application has been reviewed and approved by the Administrator; provided further, that no statement of exemption is required for emergency development pursuant to WAC 173-27-040(2)(d).
- C. No statement of exemption shall be required for other uses or developments exempt pursuant to SMP 23.60.02.2 unless the Administrator has cause to believe a substantial question exists as to qualifications of the specific use or development for the exemption or the Administrator determines there is a likelihood of adverse impacts to shoreline ecological functions.
- D. Whether or not a written statement of exemption is issued, all permits issued within the area of shorelines shall include a record of review actions prepared by the Administrator, including compliance with bulk and dimensional standards and policies and regulations of this Program. The Administrator may attach conditions to the approval of exempted developments and/or uses as necessary to assure consistency of the project with the Act and this Program.
- E. A notice of decision for shoreline statements of exemption shall be provided to the applicant/proponent and any party of record. Such notices shall also be filed with the Department of Ecology, pursuant to the requirements of WAC 173-27-050 when the project is subject to one or more of the following Federal Permitting requirements:
1. A U.S. Army Corps of Engineers section 10 permit under the Rivers and Harbors Act of 1899; (The provisions of section 10 of the Rivers and Harbors Act generally apply to any project occurring on or over navigable waters. Specific applicability information should be obtained from the Corps of Engineers.); or
 2. A section 404 permit under the Federal Water Pollution Control Act of 1972. (The provisions of section 404 of the Federal Water Pollution Control Act generally apply to any project that may involve discharge of dredge or fill material to any water or wetland area. Specific applicability information should be obtained from the Corps of Engineers.)
- F. Whenever the exempt activity also requires a U.S. Army Corps of Engineers Section 10 permit under the Rivers and Harbors Act of 1899 or a Section 404 permit under the Federal Water Pollution Control Act of 1972, a copy of the written statement of exemption shall be sent to the applicant/proponent and Ecology pursuant to WAC 173-27-050.

23.60.03 Variance Permit Criteria

- A. The purpose of a variance is to grant relief to specific bulk or dimensional requirements set forth in this Program and any associated standards appended to this Program such as critical areas buffer requirements where there are extraordinary or unique circumstances relating to the property such that the strict implementation of this Program would impose unnecessary hardships on the applicant/proponent or thwart the policy set forth in RCW 90.58.020. Use restrictions may not be varied.

- B. Variances will be granted in any circumstance where denial would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect.
- C. Proposals that would otherwise qualify as a reasonable use pursuant to WCC 16.16.270A shall require a shoreline variance and shall meet the variance criteria in this section.
- D. Variances may be authorized, provided the applicant/proponent can demonstrate all of the following:
 - 1. That the strict application of the bulk or dimensional criteria set forth in this Program precludes or significantly interferes with reasonable permitted use of the property;
 - 2. That the hardship described in SMP 23.60.03.A above is specifically related to the property, and is the result of conditions such as irregular lot shape, size, or natural features and the application of this Program, and not, for example, from deed restrictions or the applicant's/proponent's own actions;
 - 3. That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects on adjacent properties or the shoreline environment;
 - 4. That the variance authorized does not constitute a grant of special privilege not enjoyed by the other properties in the area, and will be the minimum necessary to afford relief;
 - 5. That the public interest will suffer no substantial detrimental effect;
 - 6. That the public rights of navigation and use of the shorelines will not be materially interfered with by the granting of the variance; and
 - 7. Mitigation is provided to offset unavoidable adverse impacts caused by the proposed development or use.
- E. Variance permits for development and/or uses that will be located waterward of the ordinary high water mark (OHWM), as defined herein, or within any wetland as defined herein, may be authorized provided the applicant can demonstrate all of the following:
 - 1. That the strict application of the bulk, dimensional or performance standards set forth in this Program precludes all reasonable use of the property; and
 - 2. That the proposal is consistent with the criteria established under SMP 23.60.03.D.1 through 7 of this section; and
 - 3. That the public rights of navigation and use of the shorelines will not be adversely affected.
- F. Other factors that may be considered in the review of variance requests include the conservation of valuable natural resources and the protection of views from nearby roads, surrounding properties and public areas; provided, the criteria of SMP 23.60.03.D

and notice of the proposed extension is given to parties of record and the Department of Ecology.

3. The effective date of a shoreline permit or exemption shall be the date of last action required on the shoreline permit or exemption and all other government permits and approvals that authorize the development to proceed, including administrative and legal actions on any such permit or approval. The applicant/proponent shall be responsible for informing the County of the pendency of other permit applications filed with agencies other than the County and of any related administrative and legal actions on any permit or approval. If no notice of the pendency of other permits or approvals is given to the County prior to the date of the last action by the County to grant county permits and approvals necessary to authorize the development to proceed, including administrative and legal actions of the County, and actions under other county development regulations, the date of the last action by the County shall be the effective date.
- B. Notwithstanding the time limits established in SMP 23.60.19.A.1 and .2, upon a finding of good cause based on the requirements and circumstances of the proposed project and consistent with the policies and provisions of this Program and the Act, the Hearing Examiner or Administrator as appropriate may set different time limits for a particular substantial development permit or exemption as part of the action to approve the permit or exemption. The Hearing Examiner may also set different time limits on specific conditional use permits or variances with the approval of the Department of Ecology. The different time limits may be longer or shorter than those established in SMP 23.60.19.A.1 and .2 but shall be appropriate to the shoreline development or use under review. "Good cause based on the requirements and circumstances of the proposed project" shall mean that the time limits established for the project are reasonably related to the time actually necessary to perform the development on the ground and complete the project that is being permitted, and/or are necessary for the protection of shoreline resources.
 - C. When permit approval includes conditions, such conditions shall be satisfied prior to occupancy or use of a structure or prior to the commencement of a nonstructural activity, provided that different time limits for compliance may be specified in the conditions of approval as appropriate.
 - D. The Hearing Examiner or Administrator as appropriate shall notify the Department of Ecology in writing of any change to the effective date of a permit, authorized by SMP 23.60.19.A through C, with an explanation of the basis for approval of the change. Any change to the time limits of a permit other than those authorized by the sections of this Program previously listed shall require a new permit application.

rules and regulations of SEPA (RCW 43.21C), the review requirements of SEPA, including time limitations, shall apply, where applicable.

- B. Applications for shoreline permit(s) or approval(s) that are not categorically exempt under SEPA shall be subject to environmental review by the responsible official of Whatcom County pursuant to the State Environmental Policy Act (WAC 197-11).
- C. As part of SEPA review, the responsible official may require additional information regarding the proposed development in accordance with WAC 197-11.
- D. Failure of the applicant/proponent to submit sufficient information for a threshold determination to be made shall be grounds for the responsible official to determine the application incomplete.

23.60.12 Burden of Proof

Permit applicants/proponents have the burden of proving that the proposed development is consistent with the criteria set forth in the Act and this Program.

23.60.13 Public Hearings

- A. The Administrator shall determine whether an application requires a public hearing pursuant to the criteria below no later than fifteen (15) days after the minimum public comment period provided by SMP 23.60.08. An open record public hearing shall be required for all of the following:
 - 1. The proposal has a cost or market value in excess of one-hundred-thousand dollars (\$100,000) except for single family residences, agriculture, commercial forestry and ecological restoration projects; or
 - 2. The proposal would result in development of an area larger than 5 acres; or
 - 3. The proposal is a new or expanded marina, pier, aquaculture structure, any building over 35 feet high, mine, dam, stream diversion, landfill; or
 - 4. The Administrator has reason to believe the proposal would be controversial based on public response to the Notice of Receipt of Application and other information; or
 - 5. The proposal is determined to have a significant adverse impact on the environment and an Environmental Impact Statement is required in accordance with the State Environmental Policy Act; or
 - 6. The proposal requires a variance and/or conditional use approval pursuant to this Program; or
 - 7. The use or development requires an open record public hearing for other Whatcom County approvals or permits.
- B. An open record public hearing on shoreline permit applications shall be held in accordance with the provisions of WCC 2.33, unless a continuance is granted pursuant

WAC 173-27-110(6), the department shall render and transmit to the decision maker and the applicant/proponent its final decision within fifteen (15) days of the date of the Department's receipt of the submittal from the decision maker. The decision maker shall notify parties on record of the Department's final decision. Appeals of a decision of the Department shall be filed in accordance with the provisions of WAC 461-08C.

23.60.18 Rescission and Modification

- A. Any shoreline permit granted pursuant to this Program may be rescinded or modified upon a finding by the Hearing Examiner that the permittee or his/her successors in interest have not complied with conditions attached thereto. If the results of a monitoring plan show a development to be out of compliance with specific performance standards, such results may be the basis for findings of non-compliance.
- B. The Administrator shall initiate rescission or modification proceedings by issuing written notice of non-compliance to the permittee or his/her successors and notifying parties of record at the original address provided in application review files.
- C. The Hearing Examiner shall hold a public hearing no sooner than fifteen (15) days following such issuance of notice, unless the applicant/proponent files notice of intent to comply and the Administrator grants a specific schedule for compliance. If compliance is not achieved, the Administrator shall schedule a public hearing before the Hearing Examiner. Upon considering written and oral testimony taken at the hearing, the Hearing Examiner shall make a decision in accordance with the above procedure for shoreline permits.
- D. These provisions do not limit the Administrator, the Prosecuting Attorney, the Department of Ecology or the Attorney General from administrative, civil, injunctive, declaratory or other remedies provided by law, or from abatement or other remedies.

23.60.19 Expiration

- A. The following time requirements shall apply to all substantial development permits and to any development authorized pursuant to a variance, conditional use permit, or statement of exemption:
 - 1. Construction shall be commenced or, where no construction is involved, the use or activity shall be commenced within two (2) years of the effective date of a shoreline permit or exemption or the permit shall expire; provided that, the Hearing Examiner or Administrator, as appropriate, may authorize a single extension for a period of not more than one (1) year based on a showing of good cause if a request for extension has been filed with the Hearing Examiner or Administrator as appropriate before the expiration date of the shoreline permit or exemption, and notice of the proposed extension is given to parties of record and the Department of Ecology.
 - 2. Authorization to conduct development activities shall terminate five (5) years after the effective date of a shoreline permit or exemption, provided that the Hearing Examiner or Administrator, as appropriate, may authorize a single extension for a period of not more than one (1) year based on a showing of good cause, if a request for extension has been filed with the Hearing Examiner or Administrator, as appropriate, before the expiration date of the shoreline permit or exemption

and notice of the proposed extension is given to parties of record and the Department of Ecology.

3. The effective date of a shoreline permit or exemption shall be the date of last action required on the shoreline permit or exemption and all other government permits and approvals that authorize the development to proceed, including administrative and legal actions on any such permit or approval. The applicant/proponent shall be responsible for informing the County of the pendency of other permit applications filed with agencies other than the County and of any related administrative and legal actions on any permit or approval. If no notice of the pendency of other permits or approvals is given to the County prior to the date of the last action by the County to grant county permits and approvals necessary to authorize the development to proceed, including administrative and legal actions of the County, and actions under other county development regulations, the date of the last action by the County shall be the effective date.
- B. Notwithstanding the time limits established in SMP 23.60.19.A.1 and .2, upon a finding of good cause based on the requirements and circumstances of the proposed project and consistent with the policies and provisions of this Program and the Act, the Hearing Examiner or Administrator as appropriate may set different time limits for a particular substantial development permit or exemption as part of the action to approve the permit or exemption. The Hearing Examiner may also set different time limits on specific conditional use permits or variances with the approval of the Department of Ecology. The different time limits may be longer or shorter than those established in SMP 23.60.19.A.1 and .2 but shall be appropriate to the shoreline development or use under review. "Good cause based on the requirements and circumstances of the proposed project" shall mean that the time limits established for the project are reasonably related to the time actually necessary to perform the development on the ground and complete the project that is being permitted, and/or are necessary for the protection of shoreline resources.
 - C. When permit approval includes conditions, such conditions shall be satisfied prior to occupancy or use of a structure or prior to the commencement of a nonstructural activity, provided that different time limits for compliance may be specified in the conditions of approval as appropriate.
 - D. The Hearing Examiner or Administrator as appropriate shall notify the Department of Ecology in writing of any change to the effective date of a permit, authorized by SMP 23.60.19.A through C, with an explanation of the basis for approval of the change. Any change to the time limits of a permit other than those authorized by the sections of this Program previously listed shall require a new permit application.

Chapter 7 Administration

23.70.01 Administrator

- A. The Administrator, as defined in SMP 23.110.A, is hereby vested with the authority to:
1. Overall administrative responsibility for this Program.
 2. Determine if a public hearing should be held on a shoreline permit application by the Hearing Examiner pursuant to SMP 23.60.13.
 3. Grant or deny statements of exemption.
 4. Authorize, approve or deny shoreline substantial development permits, except for those for which the Hearing Examiner or County Council is the designated decision maker.
 5. Issue a stop work order pursuant to the procedure set forth in WAC 173-27-270 upon a person undertaking an activity on shorelines in violation of RCW 90.58 or this Program; and seek remedies for alleged violations of this Program's regulations, or of the provisions of the Act, or of conditions attached to a shoreline permit issued by Whatcom County.
 6. Decide whether or not a proposal is subject to the consolidated review process of WCC 2.33 and determine what other permits are required to be included in the consolidated review.
 7. Make field inspections as needed, and prepare or require reports on shoreline permit applications.
 8. Make written recommendations to the County Council or Hearing Examiner as appropriate and insofar as possible, assure that all relevant information, testimony, and questions regarding a specific matter are made available during their respective reviews of such matter.
 9. Propose amendments to the Planning Commission deemed necessary to more effectively or equitably achieve the purposes and goals of this Program.
 10. The Administrator shall perform the following administrative responsibilities:
 - a. Advise interested persons and prospective applicants/proponents as to the administrative procedures and related components of this Program;
 - b. Collect fees as provided for in SMP 23.60.07 of this Program; and
 - c. Assure that proper notice is given to interested persons and the public through news media, posting or mailing of notice.

11. Review administrative and management policies, regulations, plans and ordinances relative to lands under County jurisdiction that are adjacent to shorelines so as to achieve a use policy on such lands that is consistent with the Act and this Program.
 12. Review and evaluate the records of project review actions in shoreline areas and report on the cumulative effects of authorized development of shoreline conditions. The Administrator shall coordinate such review with the Washington Department of Ecology, the Washington Department of Fish and Wildlife, the Lummi Nation and Nooksack Tribe and other interested parties.
 13. Make recommendations to the Planning Commission for open space tax designations pursuant to RCW 84.34.
- B. The Director of Planning and Development Services shall have the authority to develop administrative guidance materials related to the interpretations of principles and terms in this Program as required to provide for consistent and equitable implementation of this Program. Such administrative guidance documents shall be developed in consultation with the Washington State Department of Ecology to insure that any formal written interpretations are consistent with the purpose and intent of RCW 90.58, the applicable guidelines, and the goals and objectives of this Program.

23.70.02 SEPA Official

The Whatcom County SEPA Responsible Official is designated by WCC 16.08.040. The Responsible Official or his/her designee is hereby authorized to conduct environmental review of all use and development activities subject to this Program, pursuant to WAC 197-11 and RCW 43.21C.

23.70.03 Hearing Examiner

The Whatcom County Hearing Examiner is hereby vested with the authority to:

- A. Grant or deny shoreline permits requiring public hearings.
- B. Grant or deny variances from this Program.
- C. Grant or deny conditional uses under this Program.
- D. For consolidated applications for permits for which the County Council is designated as the decision maker, the Hearing Examiner shall have the authority to hold an open record public hearing and make a recommendation to the County Council on shoreline permits as part of a consolidated review as provided in WCC 2.33.
- E. Decide on appeals of administrative decisions issued by the Administrator of this Program.

23.70.04 Planning Commission

Chapter 11 Definitions

The terms used throughout this Program shall be defined and interpreted as indicated below. When consistent with the context, words used in the present tense shall include the future; the singular shall include the plural, and the plural the singular.

A

1. "Accessory Development" means any development incidental to and subordinate to a primary use of a shoreline site and located adjacent thereto.
2. "Accessory Structure" means a structure that is incidental and subordinate to a primary use and located on the same lot as the primary use, such as barns, garages, storage sheds, and similar structures.
3. "Accessory Use" means a use customarily incidental to a permitted use; provided, that such use shall be located on the same lot as the permitted use except where specifically permitted elsewhere in zoning district regulations.
4. "Accretion Shoreform" means a shoreline with a relatively stable berm and backshore that has been built up by long term deposition of sand and gravel transported by wind and/or water from a feeder bluff or other material source. Such shoreforms are scarce locally and include, but are not limited to, barrier beaches, points, spits, tombolas, pocket beaches, and point and channel bars on streams.
5. "Act" means the Shoreline Management Act of 1971 (RCW 90.58) as amended.
6. "Activity" means human activity associated with the use of land or resources.
7. "Administrator" or "Shorelines Administrator" means the Director of the Department of Planning and Development Services who is to carry out the administrative duties enumerated in this Program, or his/her designated representative.
8. "Adverse Impact" means an impact that can be measured or is tangible and has a reasonable likelihood of causing moderate or greater harm to ecological functions or processes or other elements of the shoreline environment.
9. "Agricultural Activities" means agricultural uses and practices including, but not limited to: producing, breeding, or increasing agricultural products; rotating and changing agricultural crops; allowing land used for agricultural activities to lie fallow in which it is plowed and tilled but left unseeded; allowing land used for agricultural activities to lie dormant as a result of adverse agricultural market conditions; allowing land used for agricultural activities to lie dormant because the land is enrolled in a local, state, or federal conservation program, or the land is subject to a conservation easement; conducting agricultural operations; maintaining, repairing, and replacing agricultural equipment; maintaining, repairing, and replacing agricultural facilities; and maintaining agricultural lands under production or cultivation.

Chapter 7 Administration

23.70.01 Administrator

- A. The Administrator, as defined in SMP 23.110.A, is hereby vested with the authority to:
1. Overall administrative responsibility for this Program.
 2. Determine if a public hearing should be held on a shoreline permit application by the Hearing Examiner pursuant to SMP 23.60.13.
 3. Grant or deny statements of exemption.
 4. Authorize, approve or deny shoreline substantial development permits, except for those for which the Hearing Examiner or County Council is the designated decision maker.
 5. Issue a stop work order pursuant to the procedure set forth in WAC 173-27-270 upon a person undertaking an activity on shorelines in violation of RCW 90.58 or this Program; and seek remedies for alleged violations of this Program's regulations, or of the provisions of the Act, or of conditions attached to a shoreline permit issued by Whatcom County.
 6. Decide whether or not a proposal is subject to the consolidated review process of WCC 2.33 and determine what other permits are required to be included in the consolidated review.
 7. Make field inspections as needed, and prepare or require reports on shoreline permit applications.
 8. Make written recommendations to the County Council or Hearing Examiner as appropriate and insofar as possible, assure that all relevant information, testimony, and questions regarding a specific matter are made available during their respective reviews of such matter.
 9. Propose amendments to the Planning Commission deemed necessary to more effectively or equitably achieve the purposes and goals of this Program.
 10. The Administrator shall perform the following administrative responsibilities:
 - a. Advise interested persons and prospective applicants/proponents as to the administrative procedures and related components of this Program;
 - b. Collect fees as provided for in SMP 23.60.07 of this Program; and
 - c. Assure that proper notice is given to interested persons and the public through news media, posting or mailing of notice.

11. Review administrative and management policies, regulations, plans and ordinances relative to lands under County jurisdiction that are adjacent to shorelines so as to achieve a use policy on such lands that is consistent with the Act and this Program.
 12. Review and evaluate the records of project review actions in shoreline areas and report on the cumulative effects of authorized development of shoreline conditions. The Administrator shall coordinate such review with the Washington Department of Ecology, the Washington Department of Fish and Wildlife, the Lummi Nation and Nooksack Tribe and other interested parties.
 13. Make recommendations to the Planning Commission for open space tax designations pursuant to RCW 84.34.
- B. The Director of Planning and Development Services shall have the authority to develop administrative guidance materials related to the interpretations of principles and terms in this Program as required to provide for consistent and equitable implementation of this Program. Such administrative guidance documents shall be developed in consultation with the Washington State Department of Ecology to insure that any formal written interpretations are consistent with the purpose and intent of RCW 90.58, the applicable guidelines, and the goals and objectives of this Program.

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The Whatcom County Hearing Examiner is hereby vested with the authority to:

- A. Grant or deny shoreline permits requiring public hearings.
- B. Grant or deny variances from this Program.
- C. Grant or deny conditional uses under this Program.
- D. For consolidated applications for permits for which the County Council is designated as the decision maker, the Hearing Examiner shall have the authority to hold an open record public hearing and make a recommendation to the County Council on shoreline permits as part of a consolidated review as provided in WCC 2.33.
- E. Decide on appeals of administrative decisions issued by the Administrator of this Program.

23.70.04 Planning Commission

APPENDIX EXHIBIT

Pertinent Parts of

TITLE 21

**LAND DIVISION REGULATIONS
WHATCOM COUNTY, WASHINGTON**

Exhibit 1

**WHATCOM COUNTY
LAND DIVISION REGULATIONS**

TITLE 21

November 28, 2000

**WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES DEPARTMENT
BELLINGHAM, WASHINGTON**

WHATCOM COUNTY LAND DIVISION REGULATIONS

Title 21

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Administered by:

**WHATCOM COUNTY
PLANNING AND DEVELOPMENT SERVICES**

CHAPTER 21.01 GENERAL PROVISIONS

21.01.010 Title

This Ordinance shall be known and may be cited as the Whatcom County Land Division Regulations.

21.01.020 Purpose

The purpose of this Ordinance is:

- (1) To promote the public health, safety, and general welfare, and to protect the environment.
- (2) To provide for proper application of Chapter 58.17 of the Revised Code of Washington (RCW).
- (3) To facilitate efficient and cost effective land division and to ensure orderly growth and development consistent with the Whatcom County Comprehensive Plan and the Whatcom County Code.
- (4) To establish an orderly transition from existing land uses to urban development patterns in designated urban growth areas.

21.01.030 Authority

This title is authorized pursuant to the authority delegated to Whatcom County under RCW 58.17 Plats--Subdivisions--Dedications.

21.01.040 Applicability

This title shall apply to all land divisions including boundary line adjustments, short subdivisions, long subdivisions, binding site plans, exemptions and dedications hereafter established in the unincorporated area of Whatcom County.

The following rules shall govern questions of precise applicability of these regulations to land divisions.

- (1) All contiguous parcels of land in the same ownership shall be included within the boundaries of any proposed long or short subdivision of any of the properties. For the purpose of this section, the lots so situated shall be considered as one parcel, provided that any of the contiguous parcels that are within a recorded long or short plat that was filed with the County Auditor at least five years prior to the new land division shall not be required to be included if the lot or lots are in conformance with the applicable zoning standards.
- (2) Parcels of land legally divided prior to the effective date of this Ordinance (as originally adopted February 3, 1972) shall be considered in accordance with land division laws and resolutions applicable at the time of plat recording per RCW 58.17.170 or other division.
- (3) Parcels of land divided in accordance with any plan for a future subdivision, or in accordance with or by reference to any recorded, unrecorded or vacated plat, shall be construed as comprising parts of a subdivision.
- (4) Portions intended for sale or lease shall be considered and counted as lots.

21.01.050 Interpretation, Conflict and Severability

- (1) In their interpretation and application, the provisions of this ordinance shall be held to be the minimum requirements.
- (2) In the event of any discrepancies between the requirements established herein and those contained in any other applicable regulation, code or program, the regulations which are more protective of the public health, safety and welfare shall apply.
- (3) The provisions of this title are severable. If a section, sentence, clause, or phrase of this title is adjudged by a court of competent jurisdiction to be invalid, the decision shall not affect the remaining portions of this title.

21.01.060 Enforcement and Penalties

Enforcement and penalties shall be applied pursuant to WCC 21.11.

21.01.070 Fees

All application, exemption, appeal, or other fees associated with this Ordinance shall be as set forth in the Whatcom County Unified Fee Schedule.

21.01.080 Administrative Responsibilities

The Director of the Planning and Development Services Department (hereinafter referred to as "Director") is designated as the responsible official for administering the provisions of these land division regulations. The Whatcom County Land Use Division shall act as a coordinating agent to ensure that the regulatory process is expeditious and shall recognize input provided by other officials, departments and divisions having appropriate expertise including, but not limited to: the Whatcom County SEPA Official for environmental analysis, Whatcom County Engineering for survey, monumentation, engineering design, road, stormwater management, drainage and utility improvements, and the form of plats and binding site plans; the Whatcom County Fire Marshal for fire-related issues; the Whatcom County Health and Human Services Department for water supply and waste disposal; and the Whatcom County Planning Division for comprehensive plan review and general site design.

21.01.090 Pre-Application Review

For the purpose of expediting applications and reducing land division and site plan design and development costs, the applicant may request a pre-application conference in accordance with the requirements of WCC 2.33.030. Whatcom County Planning and Development Services staff shall invite the appropriate city to the pre-application meeting if the proposed land division is located within that city's urban growth area. Additionally, for proposed land divisions within a city's urban growth area, County staff should recommend that the applicant contact the city prior to the pre-application meeting or, if a pre-application meeting is not held, prior to submittal of the land division application.

21.01.100 Application

- (1) The applicant is encouraged to seek assistance from the administrative official as to which approvals are required. The following applications may be filed:
 - (a) Exempt land division
 - (b) Boundary line (lot line) adjustment
 - (c) Short subdivision
 - (d) Preliminary long subdivision
 - (e) Final long subdivision
 - (f) Subdivision vacations and alterations
 - (g) Preliminary binding site plan
 - (h) General binding site plan
 - (i) Specific binding site plan.

- (2) For the purpose of expediting applications, the applicant may request consolidated permit review in accordance with the requirements of WCC 2.33.100.

21.01.110 Complete Application

All applications for subdivisions, binding site plans, short subdivisions, boundary line adjustments and other land divisions shall be reviewed for completeness in accordance with WCC 2.33.050.

21.01.120 Time Frames

Applications shall be processed within the time frames stipulated in WCC 2.33.

21.01.130 Underground Utilities

All on-site utilities that serve individual lots within a short subdivision, long subdivision or binding site plan shall be placed underground, unless the supplier of the service provides written documentation that underground installation is impractical or the County requests above ground utilities because of environmental constraints.

21.01.140 Regulatory Authority for Development Standards

Administrative and technical requirements for implementing these regulations shall be contained in Chapter 4 of the Whatcom County Development Standards.

21.01.150 Boundary Discrepancies

- (1) If, in accordance with State law, the Land Surveyor of record identifies a boundary discrepancy in a proposed short subdivision, preliminary long subdivision, or preliminary binding site plan, then the following shall occur:
 - (a) The applicant shall mail notice that describes the nature and extent of the boundary discrepancy to all affected property owners within 10 days of submitting the application. A copy of the notice shall be submitted to the Whatcom County Division of Engineering.
 - (b) The Whatcom County Technical Review Committee shall, within 10 days of the determination of completeness, determine whether the discrepancy affects any of the following factors:
 - (i) Gross density; or
 - (ii) Minimum lot size; or
 - (iii) Access, drainage or other easements; or
 - (iv) Reasonable use of the property.
- (2) If the Whatcom County Technical Review Committee determines that a boundary discrepancy affects any of the factors listed in (1)(b) above, then prior to approval of the land division application the applicant shall:
 - (a) Acquire a boundary line agreement in accordance with WCC 21.03.060(1) with the owner of the property that is disputed; or
 - (b) Obtain a judicial decree, order or judgement rendered by a court of competent jurisdiction resolving the boundary discrepancy.
- (3) As an alternative to acquiring a boundary line agreement or judicial decree as set forth in (2) above, the applicant may choose to redesign the proposed land division in a manner which does not utilize nor depend upon the area subject to the boundary discrepancy. The boundary discrepancy shall be noted on the face of the final long plat or short plat in accordance with RCW 58.17.255 or on the face of the binding site plan.
- (4) The administrative determination that a boundary discrepancy does or does not affect any of the factors listed in (1)(b) above may be appealed to the Hearing Examiner by any party to the determination. The appeal will run concurrently with processing the land division application unless the applicant puts the application on hold.

21.01.160 City Urban Growth Areas

City development standards shall be addressed, in accordance with adopted interlocal agreements, for land divisions located within a city's urban growth area.

21.01.170 Hearing Examiner Consultation with Technical Advisory Committee

The Hearing Examiner may choose to consult with the Technical Advisory Committee concerning technical matters relating to land division applications.

CHAPTER 21.02 VARIANCES, APPEALS AND AMENDMENTS

21.02.010 Variances

The Hearing Examiner, or in the case of short subdivisions, the Technical Review Committee, shall have authority to grant a variance from the provisions of this ordinance when they have found the conditions set forth below to exist. In such cases, a variance may be granted which is in harmony with the general purpose and intent of this ordinance so that the spirit of this ordinance shall be observed, and public safety and welfare secured.

A variance may be granted only when all of the following circumstances listed in either criteria set A or criteria set B are found to apply. Applicants shall specify which criteria set they are proposing to qualify for a variance under and shall provide information to the County demonstrating compliance with that criteria set before a variance may be granted.

Criteria Set A

- (1) That any variance granted shall not constitute a grant of special privilege, be based upon reasons of hardship caused by previous actions of the property owner, nor be granted for financial reasons alone.
- (2) That the strict application of these regulations would cause a hardship because of special circumstances applicable to the subject property, including size, shape, topography, environmental constraints or location. Aesthetic considerations or design preferences without reference to restrictions based upon the physical characteristics of the property do not constitute sufficient hardship under this section.
- (3) That the granting of the variance will not be detrimental to the public health, safety, or welfare or injurious to other property.

Criteria Set B

- (1) That any variance granted shall not constitute a grant of special privilege, be based upon reasons of hardship caused by previous actions of the property owner, nor be granted for financial reasons alone.
- (2) The granting of the variance results in better lot design than would be permitted under the standard regulations. Better lot design is defined as meaning such items as more practical site design because of topography, wetland or other environmental constraints, or the lot design will result in lots nearer to conformance to required development standards or applicable comprehensive plan goals and policies including those relating to urban growth areas.
- (3) The granting of any variance will not be unduly detrimental to the public welfare nor injurious to the property or improvements in the vicinity and subarea in which the subject property is located.

In granting variances and modifications, the Hearing Examiner or Technical Review Committee, as appropriate, may require such conditions as will in its judgement secure substantially the objectives of the requirements so varied.

21.02.020 Notification of Cities and Appeal Rights

- (1) Notice of a hearing or Technical Review Committee meeting for variances shall be provided to the appropriate city, if the land division is located within that city's urban growth area.
- (2) Any order, requirement, permit decision or determination issued by Whatcom County shall include a notice to the applicant of his or her appeal rights.

21.02.030 Appeals

- (1) The Hearing Examiner shall have the authority to create a record, hear and decide, in conformity with this ordinance, appeals from any order, requirement, permit decision or determination made by an administrative official or committee in the administration or enforcement of this ordinance. Such appeal shall be filed in writing within 14 calendar days of the action being appealed at the Planning and Development Services Department. The appeal shall follow all rules and procedures for appeals to the Hearing Examiner as set forth in Chapter 20.92 of the Official Whatcom County Zoning Ordinance.
- (2) Within 10 calendar days of its issuance, any party of record may appeal a decision of the Hearing Examiner to the County Council. The Examiner's decision may be overturned by a simple majority of the Council if it is found that the Examiner's decision is based upon an error of law or is clearly erroneous based on the entire record. The appeal shall follow all rules and procedures for appeals to the County Council as set forth in Chapter 20.92 of the Official Whatcom County Zoning Ordinance.
- (3) Appeals related to development standards shall be made to the Technical Advisory Committee as required by WCC 12.08.035(I).

21.02.040 Amendments – Advance Notice

Notice of the time, place and purpose of any public hearing regarding the amendment, adoption or repeal of an ordinance adopted pursuant to RCW 58.17 shall be given by at least one publication in a newspaper of general circulation in Whatcom County at least ten calendar days before the hearing. Advance notification shall also be provided by mail to individuals or organizations that have submitted requests for notice at least ten calendar days prior to the hearing.

CHAPTER 21.03 EXEMPTIONS AND BOUNDARY LINE ADJUSTMENTS

21.03.010 Purpose

The purpose of this chapter is to establish or reference the procedure and requirements for the application, review and approval of exemptions and boundary line adjustments. The procedure is intended to provide orderly and expeditious processing of such applications.

21.03.020 Exemptions

The following land divisions are exempt from the provisions of this Ordinance except as noted or conditioned. All land divisions must be consistent with applicable zoning regulations.

- (1) Cemeteries and burial plots while used for that purpose.
- (2) Divisions of land made by testamentary provisions or the laws of descent.
- (3) Divisions of land into lots, none of which are smaller than twenty (20) acres or 1/32 of a section of land and not containing a dedication. Any further division below 20 acres or 1/32 of a section of land shall go through the appropriate long subdivision, short subdivision, or binding site plan procedure, except for exemptions under # 1 above.
- (4) Divisions of land into no more than four (4) lots, provided that all of the following conditions are met:
 - (a) All lots are less than twenty (20) acres or 1/32 of a section of land, but not smaller than five (5) acres or 1/128 of a section of land.
 - (b) The division does not contain a proposed dedication.
 - (c) All lots in such divisions shall have access onto maintained public roads constructed to current minimum road standards for two-way traffic.
 - (d) All lots in such divisions shall have at least 300 feet of frontage abutting maintained public Collector or Arterial roads or at least 150 feet of frontage abutting maintained public Minor, Local or General Access roads. All access points to public roads shall comply with county standards to provide for a safe physical access. Lot depth to road frontage ratio shall be no greater than 3:1. The 3:1 ratio shall also apply to the panhandle or flag stem portion of the parcel. Access points shall be shared wherever possible.
 - (e) No private access road shall serve more than four lots.

- (f) A legal description and dimensional sketch of the proposed division, prepared by a Surveyor, is submitted to the Planning and Development Services Department for final approval and recordation.
 - (g) No lots sold, leased or transferred using this exemption shall be re-divided within five years of the date of exemption certification except by long subdivision.
- (5) Divisions made for the purpose of lease for agricultural uses, provided that each such leased parcel is a minimum of five (5) acres or 1/128 of a section of land. The remaining portion of the parcel shall also be a minimum of five (5) acres or 1/128 of a section of land. This exemption authorizes leasing the parcel but shall not authorize the sale of the parcel.
- (6) A gift of land between grandparents, parents, spouses and children provided that all of the following conditions are met:
- (a) No more than four (4) lots are created; and
 - (b) All of the lots created by the division and the remaining lot are a minimum of five (5) acres or 1/128 of a section of land; and
 - (c) The new lots must be created from a legal lot of record that existed as of the effective date of this ordinance; and
 - (d) A covenant shall be placed upon the instrument of conveyance stating that no further exempt divisions may be created from any of the lots. Furthermore, the covenant shall state that no short plat may be created from any of the lots within five years. After this five year period, any further division of the lot that was given as a gift or the remaining lot shall go through the appropriate long subdivision, short subdivision, or binding site plan procedure; and
 - (e) Legal ingress and egress access of record is provided to the lot created by the gift exemption.
- (7) Divisions of land for environmental mitigation, conservation or restoration provided that all of the following conditions are met:
- (a) All lots are a minimum of five (5) acres or 1/128 of a section of land.
 - (b) Except as provided in subsection (c), all lots shall be used exclusively for:
 - (i) Environmental mitigation required under local, state or federal law; or
 - (ii) Environmental conservation or restoration when a nonprofit nature conservancy corporation or association as defined by RCW 84.34.250 or public agency will own the lots.

- (c) If residential, commercial, or industrial buildings already exist, then one lot containing these buildings shall be created. This one lot shall not be subject to the requirements of subsection (d) below.
- (d) A permanent covenant acceptable to the Director of Planning and Development Services shall be recorded against each lot, except as provided in subsection (c) above. This covenant shall state the following:
 - (i) The lot shall be used exclusively for environmental mitigation, conservation or restoration.
 - (ii) The lot shall not be further divided.
 - (iii) New structures not necessary for environmental mitigation, conservation or restoration including residential, commercial and industrial development shall be prohibited.
 - (iv) After recording, if the original purposes underlying the covenant can no longer be fulfilled and changed conditions warrant, the covenant may be revised with the consent of the County Council, consistent with then applicable policies and regulations.
- (e) A legal description and a record of survey of the parcels created for environmental mitigation, conservation or restoration, prepared by a Surveyor, shall be submitted to the Planning and Development Services Department for final approval and recordation.
- (f) Legal ingress and egress access of record is provided to the lots created by the exemption and verified by Whatcom County Engineering. All access points to public roads shall comply with county development standards to provide for a safe physical access.

21.03.030 Pre-Approval

Applicants may request that their proposed exempt land division be reviewed by the Director and pre-approved using forms supplied by the Planning and Development Services Department. A deed history obtained from the County Auditor's records or from a title company shall accompany said pre-approval application.

21.03.040 Certificate of Exemption

A certificate of exemption shall be obtained from the Planning and Development Services Department for exemptions under Paragraphs 2, 3, 4, 6, and 7 of above Section 020. A certificate of exemption shall consist of a suitably inscribed stamp on the instrument conveying land title and shall be certified prior to the recording of the instrument with the County Auditor. An exempt land division does not occur and is not considered approved until said instrument has been duly stamped exempt and filed for record.

21.03.050 Access on State Highways

For parcels that will access onto a State Highway, the applicant shall provide evidence of an approved access from the State Department of Transportation prior to approval of the exemption.

21.03.060 Boundary Line Adjustments

The purpose of this section is to provide a method for summary approval of boundary line adjustments between lots of record, as defined by WCC 20.97.220, which do not create any additional lot, tract, parcel, site or division, while insuring that such lot boundary adjustment satisfies public concerns of health, safety, and welfare.

- (1) If the purpose of the adjustment is to resolve a dispute over the location of a point or line or identify the same in accordance with RCW 58.04.007(1), then the Department of Planning and Development Services shall approve such boundary line adjustment within 30 days of the submittal of a properly prepared application if it finds that:
 - (a) The purpose of the division is to adjust a boundary line between platted or unplatted lots or both done to resolve a bona fide dispute over the location of a point or line in accordance with RCW 58.04.007(1) which is evidenced by affidavits submitted by the effected property owners attesting to the same;
 - (b) The existence of the bona fide dispute is further evidenced in the recitals in the boundary agreement executed in accordance with the requirements of RCW 58.04.007(1);
 - (c) If the existing boundary is readily ascertainable, the boundary line adjustment sought constitutes a nominal (i.e., minor or insignificant) movement of the existing boundary;
 - (d) No increase in the number of building sites will result from the adjustment, unless the land is subsequently divided in accordance with zoning and land division laws;
 - (e) If the division results in a lot that contains insufficient area and dimensions to meet currently existing minimum requirements for width and area for a building site, or if either parcel is already less than the required minimum and would be further reduced as a result of the proposed boundary line adjustment, then:

Absent a judicial order or decree establishing the new boundary line, the owner(s) of a lot which is reduced in size shall execute and record a covenant which shall run with the land acknowledging the fact the adjustment has reduced the size of the lot and this voluntary reduction constitutes a self-imposed hardship for the purposes of seeking any future variance should the variance sought be predicated upon the reduction resulting from the adjustment.
 - (f) All documents required by RCW 58.04.007(1) and any deeds, including legal descriptions prepared by a land surveyor, transferring title to property necessary to effectuate the adjustment have been properly executed and recorded.

- (2) If the adjustment is the result of a judicial order or decree, the adjustment shall be approved within 30 days so long as no additional lot is created and the Department of Planning and Development Services is presented with an order or decree issued by a court of competent jurisdiction which establishes or relocates the boundary as requested by the applicant and said application is accompanied by all deeds and conveyances necessary to give effect to said order or decree.
- (3) If the adjustment sought is not undertaken to resolve a dispute nor the result of a judicial order or decree, then the Department of Planning and Development Services shall give written pre-approval to the applicant of a boundary line adjustment within 30 days of the submittal of a properly prepared application if it finds that:
 - (a) The purpose of the division is to adjust boundary lines between platted or unplatted lots or both, which does not create any additional lot, tract, parcel, site or division;
 - (b) The division does not create any lot that contains insufficient area and dimensions to meet minimum requirements for width and area for a building site;
 - (c) No road is altered, vacated or dedicated;
 - (d) The proposed boundary line adjustment will not create a new access which is unsafe or detrimental to the existing road system because of sight distance, grade, road geometry or other safety concerns, as determined by the County Engineer; and
 - (e) No on-site sewage disposal system, water line, or water supply is negatively impacted, unless suitable mitigation including, but not limited to the giving of utility easements, is provided to the satisfaction of Whatcom County.
- (4) Upon receiving pre-approval under subsections (2) or (3) above, the applicant(s) shall have prepared all maps, and instruments of conveyance as required below:
 - (a) A deed, with a legal description, conveying that property necessary to effectuate the adjustment and a map for all boundary line adjustments.
 - (b) After final approval and signature by the County, the boundary line adjustment including the above-described final map and instruments of conveyance shall be recorded with the County Auditor.
- (5) If the application is denied, a notice specifying the reasons for the denial shall be sent to the applicant within 30 days of the application.

21.03.070 Inactive Applications

An applicant may place an exemption or boundary line adjustment application, which has not yet received final approval, on hold for a cumulative maximum of two years. After the two years, the County shall continue processing the application and either approve or deny the application. This two-year period shall not include time the applicant is performing studies required by the County when the study is provided within the time frame agreed to by the County and the applicant.

21.03.080 Requirements for a Fully Completed Application for Exemptions and Boundary Line Adjustments

Requirements for a fully completed application must be provided in order to vest an application.

(1) WRITTEN DATA AND FEES

- Name, address and phone number of land owner, applicant, and contact person.
- Intended uses.
- Title report (only required for boundary line adjustments).
- Assessor's parcel number (of the parent parcel).
- Fees as specified in the Unified Fee Schedule.

(2) MAP DATA

- Name of land owner.
- Name of proposed land division (if an original drawing is prepared).
- General layout of proposed land division.
- Common language description of the general location of the land division.
- Approximate locations of existing roads.
- Approximate locations of existing utilities and infrastructure (only required for boundary line adjustments).
- Vicinity map.
- Common engineering map scale/north arrow/sheet numbers (on each sheet containing a map).
- Section, township, range, and municipal and county lines in the vicinity.
- General boundaries of the site with general dimensions shown.
- Legal description of the land.

21.03.090 Original Drawing

If an original drawing is prepared, the following items shall be submitted (these items are not required to vest an application):

- Original drawings of acceptable sizes (18" x 24" to 24" x 24").
- Two map copies made from original drawings (i.e. "blue-lines" or "black-lines").
- Date of original and significant revisions.

APPENDIX EXHIBIT

Pertinent Parts of

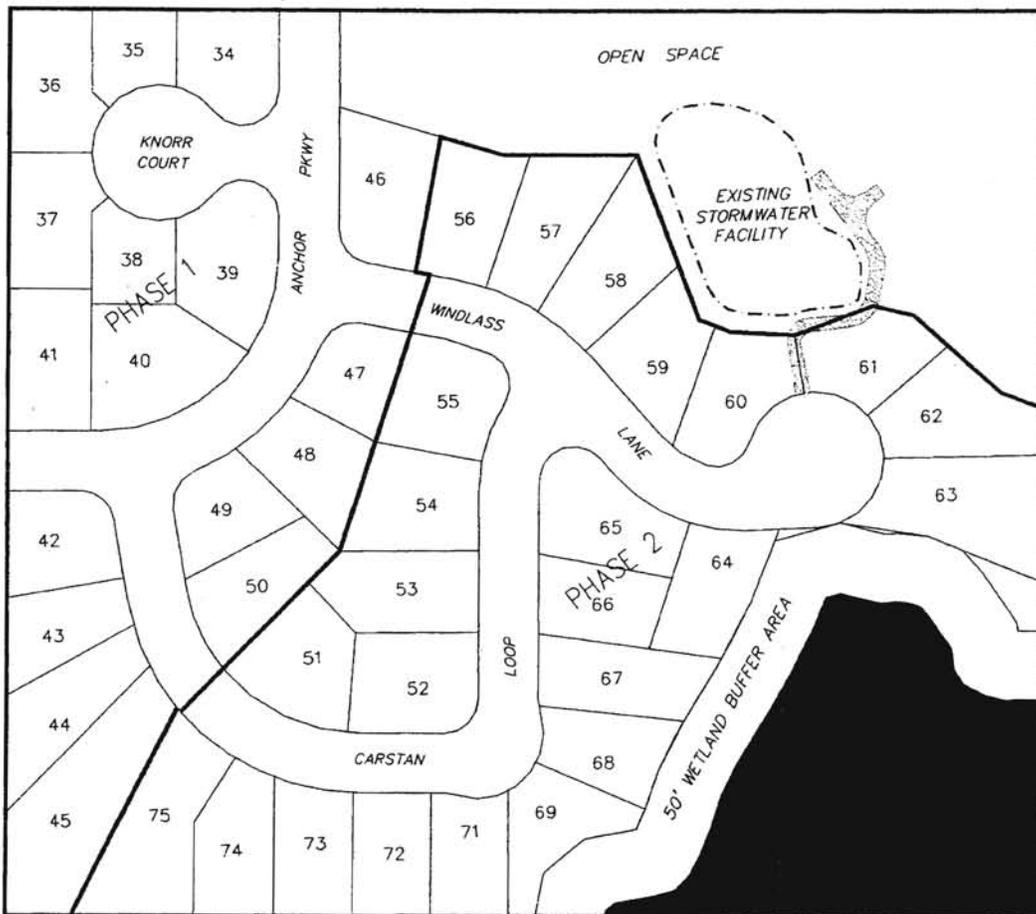
Chapter Four

**LAND DIVISION STANDARDS
LAND DEVELOPMENT STANDARDS
WHATCOM COUNTY, WASHINGTON**

CHAPTER 4

LAND DIVISION STANDARDS

March 2005



WHATCOM COUNTY DEVELOPMENT STANDARDS

WHATCOM COUNTY DEVELOPMENT STANDARDS

CHAPTER 4 – LAND DIVISION

PURPOSE

The purpose of this chapter is to implement the provisions of the Whatcom County Land Division Regulations (Whatcom County Code Title 21), by providing uniform Development Standards for dividing land.

Section 401 – REGULATORY AUTHORITY

Whatcom County Code 21.01.140 authorizes the adoption of Development Standards to implement the Whatcom County Land Division Regulations.

Section 402 – TECHNICAL ADMINISTRATOR

The Director of the Planning and Development Services Department is designated as the Technical Administrator for administering Sections 403, 406, 411 and the coordinating agent for the regulatory process of this chapter. The County Engineer is designated as the Technical Administrator for administering Sections 405, 407, 409, 410 and the overall form of plats and binding site plans of this chapter.

Section 403 – EXEMPTIONS

Land divisions that meet the qualifications for an exemption under Section 21.03.020 of the Whatcom County Land Division Regulations are exempt from this chapter of the Development Standards.

Section 404 – GENERAL CONSIDERATIONS

A. Applicability

This chapter applies to long subdivisions, binding site plans, short subdivisions, boundary line adjustments, and dedications.

B. Variances/Appeals

Alternatives to any specific requirement of the Development Standards may be considered through an administrative variance procedure. The Technical Administrator will be responsible for reviewing applications for variances to

Section 407 – SURVEYS

Horizontal control monuments are permanent references for the establishment and perpetuation of the location of the boundaries, roads and lots of a land division. The establishing and recording of permanent control monuments and lot corners protects the public and contributes to the body of public record.

A. Permanent Survey Monuments**1. Permanent Control Non-Roadway Monuments:**

Shall be installed in accordance with Drawing 407.A-1.

2. Permanent Control Roadway Monuments:

Shall be installed in accordance with Drawing 407.A-1.

3. Lot Corner:

Survey monument shall be at least ½" (No. 4) reinforcing bar, 18" long marked per RCW 58.09.120, set no more than 3" above finished ground level. Lot corners that fall on a concrete sidewalk may use a rock or concrete nail with a shiner (brass washer with LS number).

4. Alternate Monument:

A commercial pre-manufactured rod or pipe driving type monument may be used subject to approval. (See appendix for typical styles).

B. Disturbed, Destroyed and Removed Survey Monuments WAC 332-120-030:

(1) No survey monument shall be removed or destroyed before a permit is obtained as required by this chapter.

(2) Any person, corporation, association, department, or subdivision of the state, county or municipality responsible for an activity that may cause a survey monument to be removed or destroyed shall be responsible for ensuring that the original survey point is perpetuated. It shall be the responsibility of the governmental agency or others performing construction work or other activity (including road or street resurfacing projects) to adequately search the records and the physical area of the proposed construction work or other activity for the purpose of locating and referencing any known or existing survey monuments.

C. Temporary Survey Markers

Temporary survey markers will consist of a minimum 1"x2" wood hub or equivalent material, and long enough to reasonably secure in the ground.

- D. Refer to WAC 332-130 for regulations setting minimum standards for land boundary surveys, geodetic control surveys, survey map requirements and providing guidelines for the preparation of land descriptions.

Section 408 – SECURITIES

As an alternate to complete installation of required improvements, the subdivider may elect to post securities, with the approval of the appropriate County authority, as set forth in the Whatcom County Development Standards guaranteeing completion of the work. No occupancy permit, final inspection, or use of the lot(s) created by a short subdivision, long subdivision or binding site plan shall be issued or allowed until all necessary infrastructure improvements as specified by Title 21 have been met.

Section 409 – SURVEY MONUMENT CERTIFICATE

- A. Each set of original drawings for a final long plat, binding site plan, or short plat for which temporary survey and reference markers are set, shall provide a certificate block for the surveyor, as follows:

SURVEYOR'S CERTIFICATE

Temporary survey and referenced markers have been placed. Permanent survey monuments and/or lot corner monuments will be set prior to expiration of the performance security for construction of improvements and any extensions thereof.

Name of Surveyor
(Signed and Sealed) _____
Certificate No. _____
Date _____

- B. Required wording for Surveyor Certificate for Setting Monuments pursuant to the requirements of Section 409(A). This certificate shall be filed with the County Auditor.

SURVEYOR'S CERTIFICATE

Permanent survey monuments and/or lot corner monuments have been set as shown on (Name of long plat, binding site plan, or short plat) recorded under A.F. No. _____ by me or under my direction in conformance with the requirements of the Survey Recording Act.

Name of Surveyor
 (Signed and Sealed) _____
 Certificate No. _____
 Date _____

Section 410 – OCCUPATIONAL INDICATORS, FENCE, PRIVATE ROAD AND STORMWATER NOTES

- A. Required wording for Occupational Indicators and Existing Fence Line Notes:

OCCUPATIONAL INDICATORS AND EXISTING FENCE LINE NOTE:

This survey has depicted existing fence lines and/or encroachments in accordance with WAC Chapter 332-130; these occupational indicators may indicate a potential for claims of unwritten ownership. The legal resolution of ownership based upon unwritten title claims has not been resolved by this survey. Whatcom County, by approval of this long plat/binding site plan/short plat, makes no determination as to the validity of such claims should they arise.

- B. Road Maintenance wording is required on the face of the plat for Private Roads. Suggested wording as follows:

1. MAINTENANCE OF PRIVATE ROADS:

All costs of maintaining, repairing, improving or otherwise connected with said easement(s) shall be (borne equally/ by length of use/or other cost sharing mechanism) by the lot owners and other users if they are users thereof. Said costs shall therefore become an enforceable lien against any lot whose owner refuses or fails to participate in the maintenance, repairs, or improvements made by agreement of the other owners. This provision shall be construed as a covenant running with the land.

2. MAINTENANCE OF PRIVATE ROADS:

All costs of maintaining, repairing, improving or otherwise connected with said easement(s) shall be according to the declaration of covenants, conditions, reservations and restrictions of the long plat/binding site plan/short plat of _____, as recorded under Auditor's File No. _____ in the Whatcom County Auditor's office.

APPENDIX EXHIBIT

Pertinent Parts of

Chapter Four

**PERMIT REVIEW PROCEDURES
WHATCOM COUNTY, WASHINGTON**

Chapter 2.33 PERMIT REVIEW PROCEDURES

Sections:

- 2.33.010 Purpose and applicability.
- 2.33.020 Exemptions.
- 2.33.030 Preapplication review.
- 2.33.040 Application submittal information.
- 2.33.050 Permit receipt and determination of completeness.
- 2.33.060 Notice of application for a proposed land use action.
- 2.33.070 Notice of an open record hearing.
- 2.33.080 Consistency review and staff report.
- 2.33.090 Permit review limitations and notice of final decision.
- 2.33.100 Consolidated permit review.
- 2.33.110 Open record hearings.
- 2.33.120 Annual report.

2.33.010 Purpose and applicability.

A. The purpose of this chapter is to consolidate the application, review, and approval processes for land development in Whatcom County in a manner that is easily understood and concise. It is further intended for this chapter to comply with state direction by integrating environmental and land use review within a 120-day period.

B. This chapter describes how the county will process applications for development. The provisions of this chapter shall apply to all applications for a project permit that require an open record hearing including, but not limited to:

1. Conditional uses;
2. Variances;
3. Subdivisions;
4. Shoreline permits when an open record hearing is required;
5. General binding site plans;
6. Lot consolidation relief;
7. Site-specific rezones;
8. Reasonable use. (Ord. 2005-068 § 2; Ord. 2000-016 § 1; Ord. 99-081; Ord. 96-031 § 1).

2.33.020 Exemptions.

The following are exempt from the provisions of this chapter:

A. Project permits not subject to open record hearings; including, but not limited to, building permits and short plats, are exempt from the provisions of this chapter; provided, that:

1. The county shall make a determination of completeness pursuant to WCC 2.33.050; and

2. A final decision is made by the county pursuant to WCC 2.33.090:

a. Within 90 days of a determination of completeness if the project is exempt from SEPA review unless a shorter review period is provided in other provisions of the Whatcom County Code;

b. Within 120 days of a determination of completeness if the project is subject to SEPA review unless a shorter review period is provided in other provisions of the Whatcom County Code;

B. Planned unit development permits; provided, that the county shall make a determination of completeness pursuant to WCC 2.33.050;

C. Major development permits; provided, that the county shall make a determination of completeness pursuant to WCC 2.33.050;

D. Concomitant rezones; provided, that the county shall make a determination of completeness pursuant to WCC 2.33.050;

E. Legislative actions including standard map amendments, comprehensive plans or other related plans and regulations. (Ord. 2000-016 § 1; Ord. 99-081; Ord. 96-031 § 1).

2.33.030 Preapplication review.

A. The purpose of preapplication review is to acquaint county staff with a sufficient level of detail regarding the proposal. It is also the purpose of this review to acquaint the applicant with the applicable requirements of the Whatcom County Code.

B. A preapplication conference may be requested prior to the submittal of a project permit application subject to this chapter.

C. A fee shall be charged to the applicant for preapplication review. If the county makes a determination of completeness within one year of the preapplication meeting, the preapplication fee shall be applied to the application cost.

D. It is the responsibility of the applicant to initiate a preapplication conference through a written request or other means allowed by the technical administrator. The request shall, at a minimum, include the following written information:

1. Property owner's name, address, phone number, fax number;

A. Project permits not subject to open record hearings; including, but not limited to, building permits and short plats, are exempt from the provisions of this chapter; provided, that:

1. The county shall make a determination of completeness pursuant to WCC 2.33.050; and

2. A final decision is made by the county pursuant to WCC 2.33.090:

a. Within 90 days of a determination of completeness if the project is exempt from SEPA review unless a shorter review period is provided in other provisions of the Whatcom County Code;

b. Within 120 days of a determination of completeness if the project is subject to SEPA review unless a shorter review period is provided in other provisions of the Whatcom County Code;

B. Planned unit development permits; provided, that the county shall make a determination of completeness pursuant to WCC 2.33.050;

C. Major development permits; provided, that the county shall make a determination of completeness pursuant to WCC 2.33.050;

D. Concomitant rezones; provided, that the county shall make a determination of completeness pursuant to WCC 2.33.050;

E. Legislative actions including standard map amendments, comprehensive plans or other related plans and regulations. (Ord. 2000-016 § 1; Ord. 99-081; Ord. 96-031 § 1).

2.33.030 Preapplication review.

A. The purpose of preapplication review is to acquaint county staff with a sufficient level of detail regarding the proposal. It is also the purpose of this review to acquaint the applicant with the applicable requirements of the Whatcom County Code.

B. A preapplication conference may be requested prior to the submittal of a project permit application subject to this chapter.

C. A fee shall be charged to the applicant for preapplication review. If the county makes a determination of completeness within one year of the preapplication meeting, the preapplication fee shall be applied to the application cost.

D. It is the responsibility of the applicant to initiate a preapplication conference through a written request or other means allowed by the technical administrator. The request shall, at a minimum, include the following written information:

1. Property owner's name, address, phone number, fax number;

2.33.040 Application submittal information.

A. Applications for a project permit shall be submitted using forms provided by the review authority.

B. If the applicant decides to mail a notice of application under WCC 2.33.060.D.2.a, the applicant shall include stamped and addressed envelopes (pursuant to WCC 2.33.060.D.2.a) with the application.

C. Submittal requirements for project permits are contained within the specific county code for each type of project proposal, in the corresponding chapter of the Whatcom County Development Standards, in applicable state law or WACs and in any site specific conditions resulting from a preapplication conference.

The submittal information for each permit type constitutes the information necessary to determine whether an application is complete pursuant to WCC 2.33.050, Permit receipt and determination of completeness.

D. All information and agreements resulting from preapplication review must be submitted with the application unless otherwise agreed to by the county.

E. If the proposal submitted with the application has changed to such a degree that it requires substantial re-evaluation, any agreements made by the county may be voided. (Ord. 96-031 § 1).

2.33.050 Permit receipt and determination of completeness.

A. An application shall meet all submittal requirements before the proposal is submitted to the county for review. Upon submittal by the applicant, the county will accept the application and note the date of receipt. Receipt of an application does not constitute approval of the project proposal.

B. Within 14 days of accepting the application, the county shall make a determination of completeness or issue a determination that the application is incomplete.

C. A project permit application is complete when it meets the submittal information requirements of WCC 2.33.040, Application submittal information.

D. When an application is determined to be complete, the county shall proceed as follows:

1. Issue a determination of completeness either via postal service or directly provided to the applicant within 14 days of accepting a project permit application.

2. To the extent known, identify other agencies that may have jurisdiction over the project permit application. A list of agencies shall be included in the determination of completeness.

3. A determination of completeness shall not preclude the county from requiring additional information or studies at any time prior to permit approval.

E. If the application is determined to be incomplete, then the following procedure shall take place:

1. The county will notify the applicant that the application is incomplete and indicate what is necessary to make the application complete.
2. The applicant shall have 90 days from the date that the notification was issued to submit the necessary information to the county. This period shall be extended at the applicant's request in 90-day increments.
3. Upon receipt of the requested additional information, the county shall have 14 days to make a determination and notify the applicant.
4. If the applicant does not submit the necessary information to the county in writing within the 90-day period, the county shall make findings and issue a decision that the application is rejected.

F. If the county rejects an application, all vesting rights are lost.

G. If the county rejects an application because the applicant has failed to submit the required information within the necessary time period the county will return the application materials and the application will be closed.

H. A project permit application shall be deemed complete under this section if the county does not provide a written determination to the applicant that the application is incomplete within 14 days from the date of submittal as required in subsection E of this section. (Ord. 96-031 § 1).

2.33.060 Notice of application for a proposed land use action.

A. A notice of application shall be issued for project permit applications within 14 days after a determination of completeness and at least 15 days prior to the open record hearing.

B. If the county has made a determination of significance concurrently with notice of application, the determination of significance and scoping notice shall be combined with the notice of application.

C. Notice shall include:

1. The date of application, the date of notice of completion for the application, and the date of the notice of application;
2. The date, time, place and type of the hearing, if applicable, and scheduled at the date of notice of the application;

APPENDIX EXHIBIT

**WCC 20.92.210
20.92.210 Final Decisions
Whatcom County, Washington**

20.92.210 Final decisions.

The hearing examiner shall conduct open record hearings and prepare a record thereof, and make a final decision upon the following matters:

- (1) Appeals from any orders, requirements, permits, decisions or determinations made by an administrative official or committee in the administration of this title, WCC Title 16, Environment, WCC Title 21, Land Division Regulations, or WCC Title 24, Health Regulations.
- (2) Appeals from a decision of the administrator of the Shoreline Management Program.
- (3) Applications for zoning ordinance conditional use permits.
- (4) Applications for variances from the terms of the zoning ordinance.
- (5) Applications for shoreline management substantial development permits not accompanied by a major project permit when an open record hearing is required.
- (6) Applications for variances from the terms of the Whatcom County Shoreline Management Program.
- (7) Applications for variances from the terms of Chapter 16.16 WCC, Critical Areas.
- (8) Applications for reasonable use permits under the terms of Chapter 16.16 WCC when an open record hearing is required.
- (9) Applications for Shoreline Management Program conditional use permits.
- (10) Applications for flood damage prevention variances.
- (11) Appeals from SEPA determinations of significance, determinations of nonsignificance, and mitigated determinations of nonsignificance.
- (12) Preliminary subdivisions and subdivision variances.
- (13) Preliminary binding site plan proposals.

(14) Application for variances from the provisions of WCC Title 22.

(15) Revocation proceedings involving previously approved zoning conditional use permits, shoreline management substantial project permits and shoreline conditional use permits.

(16) Applications to continue operations of nonconforming adult businesses pursuant to WCC 20.83.015.

(17) Appeals of decisions relating to water service issues under Section 9.2 of the Coordinated Water System Plan.

(18) Appeals from any orders, requirements, permits, decisions or determinations made by an administrative official relating to essential public facilities. (Ord. 2008-008 Exh. A, 2008; Ord. 2005-068 § 2, 2005; Ord. 2005-052 Exh. A, 2005; Ord. 2005-029 § 1 (Exh. A), 2005; Ord. 2004-014 § 2, 2004; Ord. 2002-071, 2002; Ord. 2000-056 § 2, 2000; Ord. 2000-039 § 1, 2000; Ord. 99-070 § 2, 1999; Ord. 99-045 § 1, 1999; Ord. 96-056 Att. A §§ A2, W2, 1996; Ord. 96-031 § 2, 1996; Ord. 88-104, 1988; Ord. 87-12, 1987; Ord. 87-11, 1987; Ord. 85-41, 1985).

APPENDIX EXHIBIT

JUDGMENT

**No. 09-2-01773-1 Superior Court, Whatcom
County**

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WASHINGTON
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SUPERIOR COURT OF WASHINGTON
IN AND FOR WHATCOM COUNTY

DAVID C. COTTINGHAM, and JOAN
S. COTTINGHAM,

Plaintiffs,

v.

RONALD J. MORGAN and KAYE L.
MORGAN, husband and Wife,

Defendants.

No. 09 2 01773 1

JUDGMENT

I. JUDGMENT SUMMARY

Judgment Creditor:	David Cottingham, and Joan Cottingham
Judgment Debtor:	Ronald Morgan and Kaye Morgan
Principal Judgment Amount:	\$21,245.49
Interest to Date of Judgment:	Twelve Per Cent
Interest Rate after Judgment:	Twelve Per Cent
Attorney's Fees:	
Costs:	
Other Recovery Amounts:	
Attorney for Judgment Creditor:	David C. Cottingham
Attorney for Judgment Debtor:	Douglas Shepherd

This matter having come on regularly for trial in open court, the plaintiffs represented by David C. Cottingham, and defendants represented by Douglas Shepherd, and the court having taken testimony, heard argument, and entered its Findings and Conclusions of Law, now, therefore, It is

Ordered, Adjudged and Decreed, as follows,

COTTINGHAM LAW OFFICE PS
Bellingham National Bank Building
103 East Holly Street, Suite 418
Bellingham, Washington 98225
Ph: 360 733-6668 • Facsimile: 360 734-5997

PROPOSED JUDGMENT
Page 1 of 3

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12-9-00001-0

1 Judgment is awarded against defendants in favor of plaintiffs as follows:

2 1. For timber trespass waste under RCW 64.12.030, damages for which, at
3 \$4,342.98, are trebled for \$13,028.94 .

4 2. For injury to the land under RCW 4.24.630, as follows,

2. For purchase
of the dis-
puted area
\$8216⁵⁵

5 a. Injury to the land, at \$ _____.

6 b. Costs of restoration, at \$ _____.

7 c. Plaintiff's reasonable costs, at \$ _____.

8 d. Plaintiff's investigative costs, at \$ _____, and

9 e. Reasonable attorneys' fees and litigation-related costs, at \$ _____.

10 3. For distress, inconvenience, discomfort and mental anguish attending intentional
11 interference with plaintiffs' property interests in the laurel hedge, at \$ _____.

12 4. For intentional interference with plaintiffs' property interests causing loss of
13 privacy and quiet use, at \$ _____.

14 5. For the tort of trespass by installation of, as well as failure to remove a first and
15 second driveway as well as fence and gravel in the area quieted and onto Lot Ten, with
16 intrusion during the removal, and by excluding plaintiffs therefrom, at \$ _____.

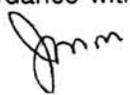
17 6. For general emotional distress damages due to nuisance during a period of
18 mandatory report and cure of septic drain field failure without timely cure, at
19 \$ _____.

20 7. For general emotional distress damages due to malicious harm; intentional
21 infliction of distress by extreme and outrageous conduct, inflicted with wanton disregard
22 of risk of injury, injury being substantially certain to occur; accompanied by apprehension
23 of risk of immediate assault; humiliation; worrying and loss of sleep as emotional
24

25

1 damage; with intentional, willful and wanton intrusion into and denial of privacy, peace
2 and quiet, at \$ _____.

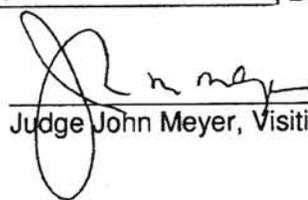
3 8. For damages resulting to plaintiff's from impact of defendants' nonconforming
4 structure erected within the setback required by zoning ordinance and by their building
5 permit, at \$ _____.

6 9. For costs equal to surveying and staking of the area quieted in plaintiffs as well
7 as the side yard setback in the area of the driveway in accordance with this Judgment,
8 the Decree and Injunction herein. 

9 10. For plaintiffs' costs equal to any removal of fence, gravel, or other side yard or
10 setback improvements or property remaining in the area quieted in plaintiffs and areas
11 subject to injunctive relief on January 30, 2012.

12 11. Postjudgment interest shall be twelve percent.

13 Dated this _____ day of _____, 2011. 12/30

14 
15 Judge John Meyer, Visiting Judge

16 Presented by:

17
18 David C. Cottingham, WSB 9553
19 Attorney for Plaintiffs

20 Copy received and Approved for entry:

21
22 Douglas Shepherd WSC
23 Attorney For Defendants

APPENDIX EXHIBIT

**PARTIAL SUMMARY JUDGMENT
No. 09-2-01773-1 Superior Court, Whatcom
County**

FILED

JAN 11 2011

WHATCOM COUNTY CLERK

By: CA

SUPERIOR COURT OF WASHINGTON
IN AND FOR WHATCOM COUNTY

DAVID C. COTTINGHAM, and JOAN S.
COTTINGHAM,

Plaintiffs,

v.

RONALD J. MORGAN and KAYE L.
MORGAN, husband and Wife,

Defendants.

No. 09 2 01773 1

~~PROPOSED~~ PARTIAL SUMMARY
JUDGMENT

THIS MATTER coming on regularly for hearing in open court this date on motion of plaintiff for summary judgment on plaintiffs' claim quieting title, and the court having considered the motion, heard argument and considered the following:

1. Plaintiffs' Motion for Partial Summary Judgment Quieting Title and Granting Ejectment ;
2. Plaintiffs Memorandum of Authorities in Support of Motion for Partial Summary Judgment Quieting Title;
3. Declaration of David C. Cottingham, with Exhibits;
4. Declaration of Richard Koss, with Exhibit;
5. Declaration of Steven Otten, with Exhibits;
6. Plaintiffs' Memorandum of Authorities;
7. Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment Quieting Title and Granting Ejectment;
8. Declaration of David Anderson;
9. Declaration of Ronald Morgan;
10. Plaintiffs' Rebuttal;
11. Declaration of Bruce Ayers PLS

the Court finding no prejudice in allowing same.

* Page 4

[Signature]
**PROPOSED PARTIAL SUMMARY
JUDGMENT - 1**

COTTINGHAM LAW OFFICE PS
BELLINGHAM NATIONAL BANK BUILDING
103 EAST HOLLY STREET, SUITE 418
BELLINGHAM, WASHINGTON 98225
PH: 360 733-6668 • FACSIMILE 360 734-5997

SVA

1 Based upon the forgoing and CR 56, the court finds no material issue of fact
2 remains requiring trial on plaintiff's first and second causes of action; that plaintiff's claims
3 thereunder are entitled to relief as pleaded and supported,

4 The court further finds that summary judgment quieting title and granting
5 ejectment is appropriate. Now, Therefore,

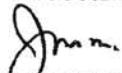
6 It Is Ordered, adjudged and decreed that judgment shall enter against defendants
7 as follows

8 1. Decree should enter quieting title in plaintiffs to Nixon Beach Tracts Lot Ten
9 including within the legal description of such lot all area south to and including the
10 Maintenance Line from the Iron Pipe to the South Shoreland Alder according to Exhibit E
11 (*Decl. David C. Cottingham*) designated therein as "Occupation and Maintenance Line as
12 Per Cottingham (Request Dated 7/21/2008) S 59°04'35" W, 251.13", including area of the
13 ten foot road found platted within Nixon Beach Tracts plat where abutting such Lot Ten
14 and south to such Maintenance Line between such decreed legal description and
15 Burlington Northern Railroad Along Lake Whatcom Division One Lot Sixteen described as
16 follows:

17 All that part of Tract 11, "Nixon Beach Tracts" Whatcom County, Washington as per
18 the map thereof, recorded in Book 7 of Plats, Page 71 in the Auditor's Office of said
19 County and State being a portion of the Northeast Quarter of the Northeast Quarter
(Government Lot 1) of Section 5, Township 37 North, Range 4 East of W.M.,
Whatcom County Washington, being more particularly described as follows:

20 Commencing at the Northeast Section Corner of said Section 5, thence South
21 89°32'30" West, for a distance of 1110.20 feet along the North line of said Section 5
22 to a point of intersection with the centerline of North Shore Drive; thence South
23 12°35'29" East, for a distance of 375.34 feet to the Southeast corner of Lot 16, "Plat
of Burlington Northern, Inc., Railroad Right-of-Way, along Lake Whatcom, Division
No. 1", as per the map thereof, recorded in Volume 13 of Plats, Pages 60 through
65, records of Whatcom County Washington and the true point of beginning:

24 Thence South 29°25'37" West, for a distance of 0.40 feet (an existing iron rod);
25 thence South 59°04'35" West, for a distance of 251.13 feet to a point on the
common line between Tract 10 and Tract 11 of said "Nixon Beach Tracts"; Thence
along said common line North 57°48'12" East for a distance of 232.18 feet to the
Westerly line of a 10' Plat Road; Thence continuing North 57°48'12" East, for a


PROPOSED PARTIAL SUMMARY
JUDGMENT - 2

COTTINGHAM LAW OFFICE PS
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1 distance of 19.47 feet to a point on the Westerly line of Lot 16 of said "Plat of
2 Burlington Northern"; Thence along a curve to the right and concave to the
3 Northeast, having a radial bearing of North 60°24'07" East, a radius of 1750.23 feet,
4 a delta angle of 00°10'36" and a length of 5.40 feet to the point of beginning.
5 Containing 703 Square Feet.

6 All Situate in Whatcom County, Washington

7 2. Decree should enter ejecting defendants, their heirs, successors assigns and
8 agents from entry within the above property, ~~with order affirmatively commanding that
9 they remove within seven days all gravel, fencing, ribbons, stakes, posts, wires and any
10 other item installed by or for them therefrom, and~~

Jmm.

11 ~~3. Protective Penumbra Area. Decree should enter granting plaintiffs' area south
12 of the above-described "Occupation and Maintenance Line" onto over, across and
13 through Nixon Beach Tracts Lot Eleven, surrounding and protective of plaintiffs'
14 vegetation, plants and improvements and order should enter, enjoining and prohibiting
15 defendants, their heirs, successors assigns to any interest in such Lot from the following:~~

Jmm.

- 16 a. Interfering with plaintiffs' effort at staking such line;
- 17 b. Trimming vegetation closer to such line;
- 18 c. Interference with maintenance of vegetation, and
- 19 d. Interference with plaintiffs' restoration to the land, gardens and vegetation
20 therein.

21 4. Decree should enter ejecting and excluding defendants, their heirs, successors
22 and assigns and improvements forever, from the above described area, ~~and Protective
23 Penumbra Area.~~

Jmm.

24 5. Plaintiffs may stake and record this order with the Office of the Whatcom
25 County, Washington Auditor without delay.

Dated this 11 day of Jan, 2011.

Jmm.

Jmm.
Judge (visiting)

COTTINGHAM LAW OFFICE PS
BELLINGHAM NATIONAL BANK BUILDING
103 EAST HOLLY STREET, SUITE 418
BELLINGHAM, WASHINGTON 98225
PH: 360 733-6668 • FACSIMILE 360 734-5997

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Presented by:

David C. Cottingham, WSB 9553
Attorney for Plaintiffs

Copy received and Approved for entry:

David Anderson, WSB
Attorney For Defendants

* The Court notes Def's motions to strike. These are granted to the extent that the proffered declarations would violate either Hearsay or Deadman's Statute provisions of the ER's. The Defense has raised disputed legal conclusions, but no relevant issues of material fact. The adverse possession lasted well in excess of the statutory requirement.

[Handwritten signature]

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PROPOSED PARTIAL SUMMARY
JUDGMENT - 4

COTTINGHAM LAW OFFICE PS
BELLINGHAM NATIONAL BANK BUILDING
103 EAST HOLLY STREET, SUITE 418
BELLINGHAM, WASHINGTON 98225
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APPENDIX EXHIBIT

FINDINGS AND CONCLUSIONS
No. 09-2-01773-1 Superior Court, Whatcom
County

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WASHINGTON
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IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

DAVID C. COTTINGHAM and JOAN S.
COTTINGHAM,

Plaintiffs,

vs.

RONALD J. MORGAN and KAYE L.
MORGAN, husband and wife,

Defendants.

Cause No: 09-2-01773-1

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Visiting Judge: Hon. John M. Meyer

199

1 This case came before the Honorable John M. Meyer for trial before the
2 bench held November 30, December 1, 6 (the date upon which the Court
3 personally viewed the properties), 7 and 15, 2011. Plaintiffs David C.
4 Cottingham and Joan S. Cottingham were represented by David C. Cottingham,
5 and defendants Ronald J. Morgan and Kaye L. Morgan were represented by
6 Douglas R. Shepherd. The Court, having heard testimony, admitted exhibits,
7 and reviewed the materials submitted, therefore, enters the following:

8 **I. FINDINGS OF FACT**

- 9 1. The parties hereto are residents of Whatcom County, Washington.
- 10 2. The claims of David C. Cottingham and Joan S. Cottingham
11 (Cottingham[s]), and of defendants Ronald J. Morgan and Kaye L. Morgan
12 (Morgan[s]) include quieting title to certain real property located in Whatcom
13 County, Washington. The real property is located in an area commonly known
14 as the Nixon Beach Tracts, which were dedicated and recorded with Whatcom
15 County in July 1945. The road on the tract was to be held in undivided interests
16 by all lot owners, to remain open for free and unobstructed use by the entire
17 community. The Court is unable to address in these proceedings whether the
18 road has been abandoned, as not all the affected parties are before the Court.
19 Furthermore, there are concerns whether the Cottinghams, as 1/14th owners of
20 the road, can adversely possess against themselves.
- 21 3. The Cottinghams purchased Lot 10 of Nixon Beach Tracts at some
22 point in 1989.
- 23 4. The Morgans acquired title to the following described property by
24 statutory warranty deed from Bryan M. Maksymetz dated January 11, 2006, and
25

1 recorded January 13, 2006, under Whatcom County Auditor's File No.
2 2060101940:

3 Lot 11, Nixon Beach Tracts, Whatcom County, Washington,
4 according to the plat thereof, recorded in Volume 7 of Plats, page
5 71, records of Whatcom County, Washington.

6 Situate in Whatcom County, Washington. Lot 11, as surveyed,
7 contained approximately 10,840 square feet of unimproved real estate on
8 Lake Whatcom.

9 The Morgans also took subject to, inter alia, the Larry Steele survey
10 referenced directly below.

11 5. Prior to the purchase of Lot 11, in 2005, the Morgans had Lot
12 11 surveyed and corner stakes placed on Lot 11 by Larry Steele.

13 6. The south side of the Cottinghams' Lot 10 abuts the north
14 side of the Morgans' Lot 11.

15 7. Along the common boundary line of the Morgans' property
16 and the Cottinghams' property there has been a disputed area within the
17 property legally described as part of the property acquired by the Morgans
18 from Maksymetz (the "disputed area").

19 8. The Cottinghams brought this action to quiet title as to the
20 disputed area, relying upon the doctrine of adverse possession. The
21 Morgans, by way of counterclaim, also ask the court to quiet title in all of
22 Lot 11 in the Morgans.

23 9. A row of laurel bushes ("laurels") was planted, at different
24 times but in any event no later than in 1995, in various locations around
25 and about the common boundary between lots 10 and 11 by the
Cottinghams.

1 10. A portion of the laurels, eight bushes, all on Lot 11 as
2 surveyed, were removed by the Morgans in September of 2007.

3 11. In 2004 and 2005, the Morgans visited and inspected Lot 11
4 and saw no evidence of maintenance by the Cottinghams on the disputed
5 parcel. They did, however, see the row of laurels which had been in the
6 ground for quite some time. The Cottinghams aver that they had
7 maintained the area both north and south of the laurels since 1985, and
8 that there had been other evidence of occupancy on Lot 11.

9 12. In 2005, Larry Steele visited Lot 11 and found little evidence
10 of maintenance of Lot 11. Steele did depict the laurels on his 2005 survey.

11 13. A portion of the row of laurels on the east part of the
12 common line were planted by the Cottinghams on Lot 11, in the disputed
13 area. The Steele and Ayers' surveys demonstrate the area in which the
14 laurels were planted on Lot 10, on the common line, and in the disputed
15 area.

16 14. Except for the laurels, the Steele pictures demonstrate no
17 evidence of adverse possession of Lot 11 by Cottingham at the time of the
18 2005 Steele survey.

19 15. The disputed area was established at summary judgment as
20 approximately 800 square feet of the property legally described as part of
21 the property acquired by the Morgans from Maksymetz.

22 16. When the Morgans purchased their property they were aware
23 of the laurels and their location in close proximity to the survey line
24 between lots 10 and 11.

1 17. In 2006, the Morgans began construction of a home on Lot
2 11. The construction of the Morgan residence included a fence, a septic
3 system (location of which was controlled by a preexisting septic system),
4 and a driveway. The construction was completed in 2007.

5 18. On January 11, 2011, this court entered an order on partial
6 summary judgment quieting title in Cottinghams in a portion of the
7 disputed property, property legally described as part of the property
8 acquired by the Morgans from Maksymetz.

9 19. Pursuant to CR 54(b), the Morgans have requested that this
10 Court revise its earlier Summary Judgment ruling. The Court should revise
11 its earlier Summary Judgment ruling, because at trial it became clear that
12 many laurels were planted on a portion of the joint property line and a
13 substantial portion of them were clearly on Lot 10 and not Lot 11.

14 20. Cottinghams have established that they adversely possessed
15 292.3 square feet of Lot 11.

16 21. The fair market value of the property adversely possessed by
17 Cottinghams is \$28.11 per square foot.

18 22. Title in the disputed property, and all of Lot 11 should be
19 quieted in Morgan upon the payment of \$8,216.55 to Cottingham.

20 23. Although Cottingham acquired a portion of Lot 11 by adverse
21 possession, that portion acquired:

22 A. provides little value to the Cottinghams;

23 B. is of great value to the Morgans, providing for minimum set back
24 requirements;

1 C. any remedy requested by Cottingham would result in substantial
2 permanent improvements being removed on Lot 11 and/or would likely create
3 safety issues related to access to all of the Morgan residence and property; and

4 D. any remedy requested by Cottingham would likely result in further
5 disputes and conflict as opposed to ending this matter.

6 E. not to allow the Morgans to purchase the property from the
7 Cottinghams would place an unreasonable restriction on the use of the Morgan's
8 property, without giving much benefit to the Cottinghams.

9 F. not to allow the purchase would significantly affect marketability
10 and usability of the Morgans' property.

11 The Court should exercise its equitable powers and require that the
12 Morgans purchase that portion of the disputed area adversely possessed at fair
13 market value.

14 24. In 2007, as part of the new home construction, the Morgans
15 installed a new septic tank on the property. After a rain event in fall 2008, Ron
16 Morgan noticed an odor and discoloration around the preexisting septic system
17 on Lot 11. This raised concern as to whether there might be problems with the
18 septic system, specifically the old drain field, as the tank was relatively new. Ron
19 Morgan contacted Leo Day, a certified septic installer, to look into the issue. On
20 or about October 31, 2008, Day - in order to remove the lid of the septic tank to
21 inspect the system - pumped ground water from that hole onto real property
22 south of Lot 11 owned by a third party. Later that day, Ron Morgan did the
23 same thing for a brief period of time, believing that he was merely pumping
24 odorless ground water. The water was pumped onto vacant land more than 130
25 feet from a river and more than 150 feet from Lake Whatcom.

1 There was no substantial evidence that effluent was pumped from the
2 tank or, if it were, that it caused any damage. During the wet winter months it
3 can be problematic with the water table in the area to rebuild a septic field, so
4 the Morgans put the matter in Leo Day's hands and waited. After a number of
5 months, in drier times, a new septic field was professionally engineered and
6 designed by Burr McPhail; installed by Leo Day; and inspected, approved, and
7 permitted by Whatcom County. Health Department policy is that failures need to
8 be reported. The Health Department required large boulders to be placed on the
9 north side of the new field so that vehicles would not overrun it. The delay was
10 in the hands of professionals and not unreasonable under the circumstances.

11 25. The Morgans have not been involved in a public nuisance as
12 claimed by Cottinghams. Any spill from the old septic system or delay in
13 designing a new system was de minimus and occurred in good faith.

14 26. The Morgans have not been involved in any substantial or
15 unreasonable interference with the Cottinghams' use and enjoyment of their
16 property. The Cottinghams had for many years lived in relative quietude in this
17 eastern Lake Whatcom area. The Morgans moving next door changed things,
18 although no more than any new construction or people in the typical
19 neighborhood would do. When the Morgans and Cottinghams began to disagree
20 on issues, tensions accelerated and the area undoubtedly became an unpleasant
21 place for all parties concerned. The Cottinghams consciously chose to avoid
22 interaction with the Morgans, thus modifying the manner in which they
23 traditionally used their property. Though unfortunate, this change of use is not
24 actionable.

1 the nature and location of the property. The claimant's subjective believe
2 regarding his or her true interest in the land, and the claimant's intent to
3 dispossess another, is irrelevant to a determination of adverse possession.

4 4. Actual possession is possession by the claimant of a character that
5 a true owner would assert. Uninterrupted possession is a component of the
6 element of actual and uninterrupted possession. Uninterrupted possession refers
7 to the statutory limitation period of 10 years.

8 5. The Cottinghams have established all elements of adverse
9 possession by clear, cogent and convincing evidence as to the disputed area.

10 6. The boundary line between the Cottingham property and the
11 Morgan property should be as legally described as part of the north property line
12 of the property acquired by the Morgans from Maksymetz.

13 7. The actions of Morgans in removing the laurels constitute trespass
14 and conversion. The Cottinghams shall have treble damages; the Court has no
15 discretion in that regard. Maier v. Giske, 154 Wn. App. 6 (2010). There shall be
16 no prejudgment interest because the damages were not fixed and certain until
17 trial.

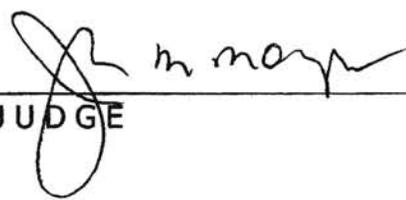
18 8. Title to Lot 11 should be quieted in Morgans, including that
19 triangular portion of land set forth in red in Exhibit 29. That area extends
20 essentially from the northeast corner of the Morgans' garage to the west side of
21 the B.N.R.R Right-of-Way, less the square footage on the 10' private road, which
22 is held in common ownership. In equity the Morgans shall be entitled to
23 purchase the property from the Cottinghams. The issue of abandonment of the
24 private road was not before the Court in this proceeding.

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9. Cottinghams' claims for maintenance easement, injunctive relief, nuisance, and outrage are hereby dismissed with prejudice.

10. Neither party substantially prevailed on the issues presented, so attorney fees will not be awarded.

DATED this _____ day of 12/30 2011.



JUDGE

Presented by:

SHEPHERD ABBOTT ALEXANDER

DOUGLAS R. SHEPHERD, WSBA #9514
EDWARD S. ALEXANDER, WSBA #33818
Attorney for Defendants Morgan

Copy Received and Approved for Entry:

DAVID C. COTTINGHAM, WSBA #9553
Attorney for Plaintiffs Cottingham

APPENDIX EXHIBIT

**AMENDED AND SUPPLEMENTAL
FINDINGS AND CONCLUSIONS
No. 09-2-01773-1 Superior Court, Whatcom
County**

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I – AMENDED FINDINGS OF FACT.

Pursuant to Cottinghams’ post trial motion(s), the Court’s December 30, 2011 Findings of Fact are amended and supplemented as follows:

10. A portion of the laurels, 5 bushes, all on Lot 11, were removed by the Morgans in September of 2007.

....

20. Cottinghams have not established that they adversely possessed any portion of Lot 11.

21. The fair market value of the property which Cottingham claimed they adversely possessed is \$28.11 per square foot.

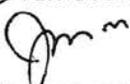
22. Title in the disputed property, and all of Lot 11 should be quieted in Morgan.

....

23. The portion of Lot 11 claimed by Cottingham by adverse possession:

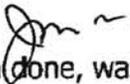
- A. provides little value to the Cottinghams;
- B. is of great value to the Morgans providing for minimum set back requirements for the residence, septic system and driveway;
- C. Morgan at no time acted in bad faith nor willfully in violation of any claim if title to Lot 11 of Cottingham;
- D. any remedy requested by Cottingham would result in substantial permanent improvements being removed on Lot 11 and/or would likely create safety issues related to access to all of the Morgan residence and property; and

....

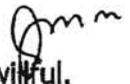
1 28. The fair market value of each Laurel removed by Morgan was \$185
2 per Laurel. 

3 29. As Cottingham has not proved title to any portion of Lot 11 by
4 adverse possession, there has been no trespass to any tree as defined in RCW
5 64.12.030 therefore Cottinghams are not entitled to treble damages.

6

7 33. The removal of the Laurels when done, was necessary for Morgan
8 to continue to have reasonable vehicle access to Lot 11. 

9 34. When Morgan committed the conversion Morgan reasonably
10 believed that the land upon which the bushes were removed was Morgan's
11 property.

12 35. Morgans' removal was casual and not willful. 

13 36. Morgans returned possession of the Laurels to the Cottinghams.

14 Except as amended and supplemented above, the Court's December 30,
15 2011 Findings of Fact remain.

16
17 **II – AMENDED CONCLUSIONS OF LAW.**

18 Pursuant to Cottinghams' post trial motion(s), the Court's December 30,
19 2011 Conclusions of Law are amended and supplemented as follows:

20 5. The Cottinghams have not established all elements of adverse
21 possession by clear, cogent and convincing evidence as to any portion of Lot 11.

22

23 7. The actions of Morgans in removing five laurels constitute
24 conversion. The Cottinghams shall not have treble damages for trespass

25

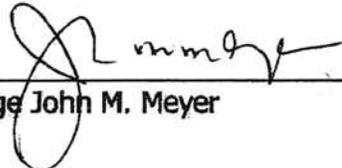
1 because the cutting did not occur on land of Cottinghams. There shall be no
2 prejudgment interest because the damages were not fixed and certain until trial.

3 8. Title to all of Lot 11 should be and is quieted in Morgans, less the
4 square footage on the 10' private road, which is held in common ownership. The
5 issue of abandonment of the private road was not before the Court in this
6 proceeding.

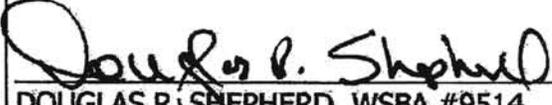
7
8 11. ~~The Cottinghams should immediately execute a Release of Lis~~
9 ~~Pendens in the form as filed with this Court and as attached as Exhibit~~ *The Lis Pendens filed herein was sub-*
10 *stantially justified. It should now be removed*
from the public record.
11 ~~January 19, 2012 Declaration of Douglas R. Shepherd.~~

12 Except as amended and supplemented above, the Court's December 30,
13 2011 Conclusions of Law remain.

14 Dated this 31 day of January 2012.

15
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17 
18 Judge John M. Meyer

19 Presented by:
20
21 SHEPHERD ABBOTT ALEXANDER

22 
23 DOUGLAS R. SHEPHERD, WSBA #9514
24 EDWARD S. ALEXANDER, WSBA #33818
25 Attorney for Defendants Morgan

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DAVID C. COTTINGHAM, WSBA #9553
Attorney for Plaintiffs

APPENDIX EXHIBIT

ANSWER AND COUNTERCLAIM
OF
RON MORGAN and KAYE MORGAN
No. 09-2-01773-1,
Superior Court, Whatcom County

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

DAVID C. COTTINGHAM AND JOAN S.)
COTTINGHAM,)

Case No.: 09 2 01773 1

Plaintiffs,

v.

ANSWER AND COUNTERCLAIMS

\$220.

RONALD J. MORGAN and KAYE L.)
MORGAN, husband and wife,)

Defendants.)

For answer to plaintiff's Amended Complaint to Quiet Title, defendants
admit, deny and allege as follows:

I. Parties

- 1. Admit paragraph 1.1 of Plaintiff's Complaint.
- 2. Admit paragraph 1.2 of Plaintiff's Complaint.
- 3. Deny paragraph 1.3 of Plaintiff's Complaint.

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II. Facts

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.1 of Plaintiff's Complaint, and therefore deny.

1. Admit paragraph 2.1 of Plaintiff's Complaint.

2. Admit paragraph 2.2 of Plaintiff's Complaint.

3. Admit paragraph 2.3 of Plaintiff's Complaint.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.4 of Plaintiff's Complaint, and therefore deny.

5. Deny paragraph 2.5 of Plaintiff's Complaint.

6. Deny paragraph 2.6 of Plaintiff's Complaint.

7. Deny paragraph 2.7 of Plaintiff's Complaint.

8. Deny paragraph 2.8 of Plaintiff's Complaint.

9. Admit that defendants have removed shrubbery planted by plaintiffs on property owned by defendants. Except as admitted, deny the allegations contained in paragraph 2.9 of Plaintiff's Complaint.

10. Admit that there was a discharge of effluent from defendants' septic system onto defendants' property. Except admitted, deny the allegations contained in Paragraph 2.10 of Plaintiff's Complaint.

11. Deny paragraph 2.11 of Plaintiff's Complaint.

12. Deny paragraph 2.12 of Plaintiff's Complaint.

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26. Deny paragraph 2.26 of Plaintiff's Complaint.

Fourth Cause of Action
CONVERSION

27. Defendants repeat and incorporate herein by reference each of their foregoing responses.

28. Deny paragraph 2.28 of Plaintiff's Complaint.

29. Deny paragraph 2.29 of Plaintiff's Complaint.

Fifth Cause of Action
INJUNCTION

30. Defendants repeat and incorporate herein by reference each of their foregoing responses.

31. Deny paragraph 2.31 of Plaintiff's Complaint.

32. Deny paragraph 2.32 of Plaintiff's Complaint.

33. Deny paragraph 2.33 of Plaintiff's Complaint.

34. Deny paragraph 2.34 of Plaintiff's Complaint.

Sixth Cause of Action
OUTRAGE

35. Defendants repeat and incorporate herein by reference each of their foregoing responses.

36. Deny paragraph 2.36 of Plaintiff's Complaint.

37. Deny paragraph 2.37 of Plaintiff's Complaint.

38. Deny paragraph 2.38 of Plaintiff's Complaint.

38.1 Deny paragraph 2.38.1 of Plaintiff's Complaint.

38.2 Deny paragraph 2.38.2 of Plaintiff's Complaint.

38.3 Deny paragraph 2.38.3 of Plaintiff's Complaint.

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- 39. Deny paragraph 2.39 of Plaintiff's Complaint.
- 40. Deny paragraph 2.40 of Plaintiff's Complaint.
- 41. Deny paragraph 2.41 of Plaintiff's Complaint.
- 42. Deny paragraph 2.42 of Plaintiff's Complaint.
- 43. Deny paragraph 2.43 of Plaintiff's Complaint.

Seventh Cause of Action
NUISANCE

44. Defendants repeat and incorporate herein by reference each of their foregoing responses.

- 45. Deny paragraph 2.45 of Plaintiff's Complaint.
- 46. Deny paragraph 2.46 of Plaintiff's Complaint.
- 47. Deny paragraph 2.47 of Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

- 1. Plaintiffs' Complaint fails to state a cause of action against defendants.
- 2. Plaintiff's Complaint is barred in whole or in part by laches.
- 3. Insofar as Plaintiff's Complaint seeks equitable relief, plaintiffs' inequitable conduct constitutes unclean hands.
- 4. Plaintiffs make allegations which are not well grounded in fact, in violation of Civil Rule 11.

COUNTERCLAIMS

Further answering Plaintiff's Complaint and for Counterclaims against plaintiffs, defendants allege:

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WHEREFORE, defendants pray for judgment as follows:

- 1. For judgment dismissing plaintiffs' Complaint;
- 2. For judgment quieting title in the name of defendants in the

following real estate, located in Whatcom County:

LOT 11, NIXON BEACH TRACTS, WHATCOM COUNTY, WASHINGTON, ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 7 OF PLATS, PAGE 71, RECORDS OF WHATCOM COUNTY, WASHINGTON. SITUATED IN THE COUNTY OF WHATCOM, STATE OF WASHINGTON.

3. In the alternative, if plaintiffs are held to have any interest in the aforementioned property, for condemnation of a private way of necessity in favor of defendants;

4. Also in the alternative, that defendants be granted the same interest in property to the west of the point where the shrub line crosses the boundary line as is granted to plaintiffs in property to the east of said point.

- 5. For costs of suit and reasonable attorneys' fees; and
- 6. For such other and further relief as the Court deems just.

DATED this 23^d day of September, 2009.

ANDERSON, CONNELL & CAREY



 DAVID B. ANDERSON WSBA #5528
 Attorneys for Defendants Ronald J. Morgan
 and Kaye L. Morgan

APPENDIX EXHIBIT
COMPLAINT
OF
DAVID COTTINGHAM
and
JOAN COTTINGHAM

No. 09-2-01773-1,
Superior Court, Whatcom County

SCANNED 12

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WHATCOM COUNTY
WASHINGTON

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SUPERIOR COURT OF WASHINGTON
IN AND FOR WHATCOM COUNTY

DAVID C. COTTINGHAM and JOAN S.
COTTINGHAM,

Plaintiffs,

vs.

RONALD J MORGAN and KAYE L
MORGAN, Husband and Wife,

Defendants.

No. 09 2 01773 1

AMENDED COMPLAINT TO
QUIET TITLE

Judge:

I. Parties

1.1 Plaintiffs. David C. Cottingham and Joan S. Cottingham are residents of Whatcom County, Washington.

1.2 Defendants. Ronald J. Morgan and Kaye L. Morgan are residents of Whatcom County, Washington.

1.3 Additional Defendants. Plaintiffs reserve right to add as additional defendants any persons discovered to have acquired any interest in the property which is the subject of the Complaint.

AMENDED COMPLAINT TO
QUIET TITLE - 1



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II. Facts

2.1 Plaintiffs David C. Cottingham and Joan S. Cottingham are fee owners of all right, title and interest in fee of Lot Ten, Nixon Beach Tracts, situated in Whatcom County, Washington.

2.1 Plaintiffs David C. Cottingham and Joan S. Cottingham are fee owners of all right, title and interest in fee of Burlington Northern Inc. Railroad Right of Way Along Lake Whatcom Division Number One (which plat is hereinafter referred to as B.N.R.R. Div. No. 1) Lot Sixteen, situated in Whatcom County, Washington.

2.2 Defendants Ronald J. Morgan and Kaye L. Morgan are believed and therefore alleged to be fee owners of Nixon Beach Tracts Lot Eleven in Whatcom County, Washington.

2.3 No persons other than Ronald J. Morgan and Kaye L. Morgan hold any interest in or resulting from Nixon Beach Tracts Lot Eleven. Plaintiffs reserve the right to name any persons discovered to hold any such interest or expectancy and to add them as John Does No. One through Five.

2.4 Since before plaintiff's purchase of Nixon Beach Tracts Lot Ten in 1989 an Iron Pipe has been present at the edge of the improved access to Lots Ten, and Eleven, (hereinafter referred to as the Iron Pipe and "IP" on Exhibit A), which Iron Pipe has not been moved and remains in place for reference at or near the southernmost corner of B.N.R.R. Div. 1 Lot Sixteen. The same Iron Pipe is depicted in attached exhibit A, hereto, being a true and correct copy of a portion of that survey recorded under Whatcom County Auditor Number A.F.

1 #2080101636, by Lawrence Steele, Steele and Associates surveyors, and is
2 identified in such record attended by the following description: "FND IP LIES
3 N49°45'W 0.87FROM CALC".

4 2.5 Since June 14, 1985, as agents of owners Walter and Vera Larson,
5 and since 1989 in their own right as Lot Ten owners, plaintiffs have regularly
6 occupied, used, improved and maintained property within and near Lot Ten,
7 Nixon Beach Tracts; Lot Sixteen, Burlington Northern Inc Railroad R/W Along
8 Lake Whatcom Div No. 1, hereinafter referred to as B.N.R.R. Div. No. 1 Lot
9 Sixteen; and also all property generally southeasterly up to and including the
10 Area of Useage at the following described Bearing Line, being a line between
11 the above Iron Pipe through the stake depicted in Exhibit A between Lot Ten
12 and Lot Eleven, Nixon Beach Tracts, near the Lake Whatcom shore:

13 A line beginning at the southern corner of B.N.R.R. Div. No. 1 Lot
14 Sixteen bearing South 59°04'35" West straight from the
15 aforementioned Iron Pipe which is identified and located by that
16 record of survey filed January 16, 2008, records of the Whatcom
17 County Auditor under A.F. #2080101636 as "FND IP LIES
18 N49°45'W 0.87 FROM CALC" and thence bearing South
19 59°04'35" West, from the platted southern corner of B.N.R.R. Div.
20 1 Lot Sixteen, directly to a stake set and recorded by that same
21 record of survey as between Nixon Beach Tracts Lots Ten near
22 the shore of Lake Whatcom.

23 2.6 Since 1989, plaintiffs have used, maintained, occupied, and
24 improved an additional area south of the above line two feet in width measured
25 at right angles to the above Bearing Line, with regular landscaping maintenance
effort and regular mowing and trimming. The area so used, maintained,

AMENDED COMPLAINT TO
QUIET TITLE - 3



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1 occupied, improved, and accessed is hereinafter referred to as the
2 "Maintenance Easement Property" and "Maintenance Easement."

3 2.7 Any of the above Area of Useage or Maintenance Easement
4 Property which may be or is determined to be outside or in excess of the
5 description of Lot Ten, Nixon Beach Tracts or B.N.R.R. Div. No. 1 Lot Sixteen
6 south to the Bearing Line is hereinafter referred to as the "Occupied Property".

7 2.8 Plaintiffs have continuously conducted all of the above use,
8 occupation, improvement, maintenance and access for a period of at least ten
9 years in open fashion as owners under good faith claim of right and have done
10 so openly, notoriously, exclusively and adversely to rights of others, defendants,
11 their predecessors and any persons deriving any right title or interest from them
12 in Nixon Beach Tracts, whether as heir, successor or assignee.

13 2.9 Defendants have removed plaintiff's property and improvements
14 from the Nixon Beach Tracts Lot Ten and the Area Of Useage and Maintenance
15 Easement Property, destroying shrubbery planted and maintained by plaintiffs
16 in such area.

17 2.10 Upon information and belief after reasonable investigation it is
18 believed and therefore alleged that on or about October 31, 2009, defendants
19 commenced discharge of septic effluent under cover of night onto and above
20 the open ground upon properties of others adjacent to their Nixon Beach Tracts
21 Lot Eleven, and did so,

22 2.11 Without information to, approval of or permit from the Whatcom
23 County Health Department or the Washington State Public Health Department;

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AMENDED COMPLAINT TO
QUIET TITLE - 4



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1 extend specifically to and include the Bearing Line identified in paragraph 2.5
2 above, and all of the Occupied Property.

3 2.18 Plaintiffs have actually, continuously, openly, adversely, and
4 exclusively possessed and maintained the Area of Useage, Occupied Property,
5 and Maintenance Easement in uninterrupted fashion, have maintained and
6 excluded others from and acted under good faith claim of right and title from
7 property and area of Nixon Beach Tracts Lot Ten, B.N.R.R. Div. 1 Lot Sixteen,
8 including any of the area North and Northwest of the described Bearing Line
9 identified in 2.5 above as well as the Occupied Property as owners for at least
10 ten years, all under good faith claim of right and title thereto, and plaintiff's title,
11 whether legal or equitable, is superior to that of defendants.

12 2.19 Title to Nixon Beach Tracts Lot Ten, B.N.R R. Lot Sixteen, and
13 within the Area of Useage and Occupied Property should be quieted in the
14 name of the plaintiffs to the exclusion of defendants and all who derive any
15 interest from defendants.

16
17 **Second Cause of Action**
MAINTENANCE EASEMENT

18 2.20 Plaintiffs reiterate each of the forgoing allegations as if set out
19 herein in full.

20 2.21 Plaintiff's have continuously, openly, adversely possessed, used
21 and maintained Maintenance Easement Property a two foot strip south of and
22 in addition to the Occupied Property under claim of right to maintain land, lawn,
23 improvements trees and a hedge for a period exceeding ten years.

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**AMENDED COMPLAINT TO
QUIET TITLE – 6**

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1 Fourth Cause Of Action
2 CONVERSION

3 2.27 Plaintiffs reiterate each of the forgoing allegations as if set out
4 herein in full.

5 2.28 Defendants intentionally and wrongfully took unauthorized
6 possession of trees and shrubs planted by plaintiff as a part of plaintiff's
7 landscaping effort and denied possession thereof to plaintiffs.

8 2.29 Defendants are liable and indebted to plaintiffs for damages for
9 conversion of property therefore.

10 Fifth Cause Of Action
11 INJUNCTION

12 2.30 Plaintiffs reiterate each of the forgoing allegations as if set out
13 herein in full.

14 2.31 Defendants and all who derive any interest from defendants or any
15 interest in Lot Eleven should be enjoined from injury, damage and destruction of
16 any vegetation on Nixon Beach Tracts Lot Ten, B.N.R R. Lot Sixteen, and the
17 Occupied Property as well as the area of an additional two foot Maintenance
18 Easement parallel to the above described Bearing Line for maintenance of the
19 hedge, trees and shrubbery two feet in width located immediately south and
20 east of the Occupied Property, Nixon Beach Tracts Lot Ten and the
21 aforementioned hedge and trees thereon.

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25 AMENDED COMPLAINT TO
QUIET TITLE – 8



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2.38.1. By the maintenance of soils onto which septic has been openly discharged;

2.38.2. By maintaining a continuing threat to health and safety resulting from contamination of neighboring properties without identification and removal of soils onto which septic has been openly discharged;

2.38.3. By creating a continuing threat of physical invasion from discharge of septic effluent onto neighboring properties without warning sufficient to defend health and safety,

2.39 Defendants' conduct is in violation of a waste disposal permit.

2.40 Defendants' conduct is the direct, proximate and sole cause of bodily harm to plaintiffs, including but not limited to severe distress characterized by loss of sleep, annoyance and hypervigilance accompanying the maintenance of a threat of effluent discharge since October 31, 2009.

2.41 Defendants acted with conscious disregard of a high probability that their conduct would cause severe emotional distress.

2.42 Defendants' conduct is lacking in decency, unreasonably dangerous, extreme in degree and outrageous.

2.43 Defendants intentionally committed the tort of outrage.

1 Seventh Cause Of Action
2 NUISANCE

3 2.44 Plaintiffs reiterate each of the forgoing allegations as if set out
4 herein in full.

5 2.45 By failure to take proper and adequate safeguards to prevent
6 contamination of land, discharging beyond the bounds of a permit, discharging
7 onto open ground, maintaining a failed septic system, attempting modification
8 and repair without notice and attendance of persons certified in modification
9 and repair of septic systems defendants have acted to annoy, injures and
10 endanger the comfort, repose, health and safety of others, rendering the public
11 and the plaintiffs insecure in life and the use of property in violation of
12 Whatcom County Code 24.05 and RCW 7.48.120,

13 2.46 Defendants are maintaining a public nuisance.

14 2.47 In the even that there is insufficient area for septic disposal the use
15 of the property should be abated and discontinued.

16 III. Prayer for Relief

17 Wherefore plaintiffs request relief as follows:

- 18 1. For award of damages for trespass to land, trespass to
19 improvements to land, conversion, including value thereof and costs of
20 restoration, trebled in value;
- 21 2. For damages for emotional distress.
- 22 3. For award of a maintenance easement for area beyond occupied
23 area for the purposes of continuing maintenance of improvements to land;



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AMENDED COMPLAINT TO
QUIET TITLE – 11

1 4. For the court's Decree quieting title in the above described Lot
2 Sixteen and Lot Ten together with the Occupied Property to the southern extent
3 of the Bearing Line.

4 5. For a Writ of Ejectment removing defendants and their
5 improvements recently installed by defendants from the above Lot Sixteen and
6 Lot Ten and the Occupied Property;

7 6. For abatement of a Public Nuisance;

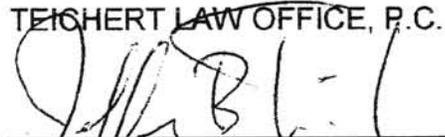
8 7. For Injunctive relief as described

9 8. For costs and disbursements herein with reasonable attorney fees
10 therefore; and

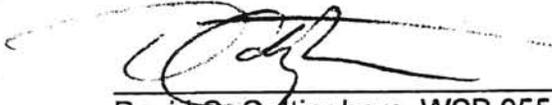
11 9. For such other and further relief as the court deems just and
12 equitable.

13 Dated this 23 day of June, 2009.

15 TEICHERT LAW OFFICE, P.C.

16 
17 Jeffrey B. Teichert, WSBA No. 29826
18 Attorney for Plaintiff

19 David C. Cottingham, under penalty of perjury under the laws according
20 to the State of Washington, states as follows, that I am the plaintiff in the above
21 entitled action, I have read the foregoing complaint, know the contents, and
22 believe the same to be true.

23 
24 David C. Cottingham, WSB 9553
25 103 East Holly Street, Suite 418
 Bellingham, Washington 98225



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AMENDED COMPLAINT TO
QUIET TITLE - 12

APPENDIX EXHIBIT

INTERNATIONAL BUILDING CODE

§105.3

- SECTION 113 VIOLATIONS
- SECTION 114 STOP WORK ORDER
- SECTION 115 UNSAFE STRUCTURES AND EQUIPMENT

105.1 Required.

105.2 Work exempt from permit.

105.3 Application for permit.

105.4 Validity of permit.

105.5 Expiration.

105.6 Suspension or revocation.

105.7 Placement of permit.

105.1 Required.

105.2 Work exempt from permit.

105.3 Application for permit.

105.4 Validity of permit.

105.5 Expiration.

105.6 Suspension or revocation.

105.7 Placement of permit.

[Top](#) [Previous Section](#) [Next Section](#) To view the next subsection please select the Next Section option.

105.3 Application for permit.

To obtain a permit, the applicant shall first file an application therefor in writing on a form furnished by the department of building safety for that purpose. Such application shall:

1. Identify and describe the work to be covered by the permit for which application is made.
2. Describe the land on which the proposed work is to be done by legal description, street address or similar description that will readily identify and definitely locate the proposed building or work.
3. Indicate the use and occupancy for which the proposed work is intended.
4. Be accompanied by construction documents and other information as required in Section 106.
5. State the valuation of the proposed work.
6. Be signed by the applicant, or the applicant's authorized agent.
7. Give such other data and information as required by the building official.

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APPENDIX EXHIBIT

INTERNATIONAL BUILDING CODE

§105.4

- SECTION 113 VIOLATIONS
- SECTION 114 STOP WORK ORDER
- SECTION 115 UNSAFE STRUCTURES AND EQUIPMENT

105.1 Required.

105.2 Work exempt from permit.

105.3 Application for permit.

105.4 Validity of permit.

105.5 Expiration.

105.6 Suspension or revocation.

105.7 Placement of permit.

105.1 Required.

105.2 Work exempt from permit.

105.3 Application for permit.

105.4 Validity of permit.

105.5 Expiration.

105.6 Suspension or revocation.

105.7 Placement of permit.

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105.4 Validity of permit.

The issuance or granting of a permit shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of this code or of any other ordinance of the jurisdiction. Permits presuming to give authority to violate or cancel the provisions of

this code or other ordinances of the jurisdiction shall not be valid. The issuance of a permit based on construction documents and other data shall not prevent the building official from requiring the correction of errors in the construction documents and other data. The building official is also authorized to prevent occupancy or use of a structure where in violation of this code or of any other ordinances of this jurisdiction. [Top](#) [Previous Section](#) [Next Section](#) To view the next subsection please select the Next Section option.

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APPENDIX EXHIBIT

**INTERNATIONAL BUILDING CODE
§106.2 SITE PLAN**

- SECTION 113 VIOLATIONS
- SECTION 114 STOP WORK ORDER
- SECTION 115 UNSAFE STRUCTURES AND EQUIPMENT

106.1 Submittal documents.

106.2 Site plan.

106.3 Examination of documents.

106.4 Amended construction documents.

106.5 Retention of construction documents.

106.1 Submittal documents.

106.2 Site plan.

106.3 Examination of documents.

106.4 Amended construction documents.

106.5 Retention of construction documents.

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106.2 Site plan.

The construction documents submitted with the application for permit shall be accompanied by a site plan showing to scale the size and location of new construction and existing structures on the site, distances from lot lines, the established street grades and the proposed finished grades and, as applicable, flood hazard areas, floodways, and design flood elevations; and it shall be drawn in accordance with an accurate boundary line survey. In the case of

demolition, the site plan shall show construction to be demolished and the location and size of existing structures and construction that are to remain on the site or plot. The building official is authorized to waive or modify the requirement for a site plan when the application for permit is for alteration or repair or when otherwise warranted.

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COURT OF APPEALS, DIVISION ONE
OF THE
STATE OF WASHINGTON

DAVID C. COTTINGHAM and JOAN S.
COTTINGHAM,

Appellants,

vs.

RONALD J. MORGAN and KAYE L.
MORGAN, Husband and Wife,
WHATCOM COUNTY and WHATCOM
COUNTY BUILDING SERVICES
DIVISION of PLANNING AND
DEVELOPMENT SERVICES,

Respondents,

No. 70218-1-I

CERTIFICATE OF
DELIVERY

I certify that that today I delivered delivery of Appellant Cottinghams' Opening Brief to the parties:

Court of Appeals, Division I
600 University Street
One Union Square

Personally Delivered

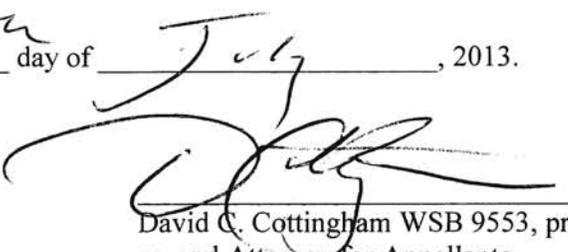
Douglas Shepherd
2011 Young Street, Suite 202
Bellingham, Washington 98225

By messenger, confirmed

Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite 201
Bellingham, Washington 98225

By messenger, confirmed

Dated this 18th day of July, 2013.


David C. Cottingham WSB 9553, pro
se, and Attorney for Appellants
Cottinghams