No. 317498

(Douglas County Superior Court
No. 13-2-00011-1)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

CARY AND CATHLEEN SCHENCK, husband and wife,

Appellants,

vs.

DOUGLAS COUNTY, subdivision of the
State of Washington,

Respondent.

BRIEF OF APPELLANTS

John M. Groen, WSBA #20864

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004

Telephone: (425) 453-6206

Attorneys for Appellants

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INTRODUCTION

This case involves alleged violations of the Shoreline Management Act for actions taken by Cary and Cathleen Schenck at their residence more than a decade ago. As will be shown, the Schencks worked with Douglas County and believed they followed all the correct procedures to install a dock at their property. The County's effort now, many years later, to create a violation and force the Appellants to remove their dock, and other amenities, is a miscarriage of justice that should be reversed by this Court.

Douglas County issued a Notice of Violation (NOV) which the Schencks appealed to the Douglas County Hearing Examiner. On December 19, 2012, the Hearing Examiner affirmed. Judicial review was sought under the Land Use Petition Act, and the Hearing Examiner decision was upheld. This appeal follows.[1]

ASSIGNMENTS OF ERROR

The court below erred in affirming the decision of the Hearing Examiner.

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[1] The Administrative Record (AR) was provided to the Court in the form of a CD. Clerk's Papers (CP) at 34. The content of the CD is identified as CP 37-565. Of course, those pages are also stamped with the AR numbering sequence, which is different from the CP numbering sequence. To assist the Court, citations will be to both the CP and corresponding AR page numbers.

The Schencks contend that the Hearing Examiner's findings of fact numbers 15, 16, 20, 27, 28, 29, 30, 31, 32, 36, 37, 38, 39, 40, 46, 49 and subparts, 51, 52, 53, 54 are not supported by substantial evidence or are conclusions that are erroneous interpretations of the law.

The Schencks contend that Hearing Examiner conclusions of law numbers 1, 2, 3, 4, 5, are erroneous interpretations of the law or are factual findings that are not supported by substantial evidence.

The issues pertaining to the assignments of error are as follows:

(1) Did the Hearing Examiner err in ruling that the exemption letter received by the Schencks did not apply because the dock had been revised subsequent to the issuance of the letter of exemption?

(2) Did the Hearing Examiner err in ruling that a Conditional Use Permit was required for the Schencks' boat lift?

(3) Did the Hearing Examiner err in ruling that certain testimony by Cathy Schenck concerning what she was told regarding permitting for boat lifts would be given no weight?

(4) Did the Hearing Examiner err in ruling that the wall/fence did not qualify for exemption because it was valued at less than $2500?

(5) Did the Hearing Examiner err in placing the burden of proof on the defendants to this enforcement action?

(6) Do these proceedings violate the applicable two year statute of limitations?

STATEMENT OF THE CASE

A. The Petitioners

The Petitioners are Carey and Cathy Schenck. Cathy was a classroom teacher until her daughter was born in 2001 and she became a stay at home mom. In 2003, she also became a volunteer firefighter and EMT with Douglas County #2, and she continues in that role today. When her daughter went to kindergarten, she returned to work as a substitute teacher and also was elected as the PTO President at Rock Island Elementary, which she did for three years. CP 410 (AR 373) (Declaration of Cathy Schenck).

Carey Schenck is an electrical engineer and he works for Chelan County PUD as a Principal Plant Electrical Engineer. He has been with Chelan County PUD for a total of 10 years, with an intervening 4 year stint with the Douglas County PUD. *Id.*

The Schencks purchased the subject property in 1999 and built their home there. They have lived there since that time. *Id.*

B. Factual Background

In 1999, the Schencks desired to install a dock and boat lift at their property. They went first to Douglas County to find out how to go about

getting a dock and boat lift installed. The County sent Cathy Schenck to the Washington Department of Fish & Wildlife and told her that whatever Bob Steele of Fish & Wildlife approved, the County would also approve. After many meetings with Bob Steele, the Schencks applied for a dock permit which included pilings, concrete pad with attaching ramp, and a dock made of wood and metal. Bob Steele told the Schencks that they did not need a boat lift permit, only a dock permit. CP 411 (AR 374).

On October 4, 1999, they applied to Douglas County for the dock permit. The proposed dock would have two steel/concrete pilings and be tied to the shore by a proposed concrete pad. The value of the project was $7,000. This is reflected on the permit application form, a copy of which is provided at CP 420 (AR 383) (Attachment A to Declaration of Cathy Schenck).

At the same time, the Schencks also submitted a Joint Aquatic Resource Permits Application (JARPA) Form. A copy of the JARPA application is at CP 422-427 (AR 385-390).

The Schencks also hired a consultant team, Bob and Tama Magnussen, to help them through the permit process. They knew about the JARPA form and filled it out for the Schencks. CP 411 (AR 374). The front page is stamped as received on October 4, 1999 by Douglas County Department of Transportation and Land Services (TLS).

The JARPA describes the proposed dock as a "ramp and floating wood dock finished with TREX decking." CP 423 (AR at 386) (JARPA, page 2, paragraph 7a). The TREX decking is the same type of TREX decking that is commonly used for decks and patios in back yards. CP 411 (AR 374).

The JARPA also describes that the dock will be secured in the water with two pilings, each being a " 3' steel piling, sleeved with 8' white PVC." It would be attached landward with a concrete pad attachment block. *Id.* The Schencks did not include anything about a boat lift apparatus in the JARPA because the Magnussens and Bob Steele had both told them that there was no requirement for a permit for a boat lift. *Id.*

On October 26, 1999, Douglas County issued a written "Exemption From Shoreline Management Act Substantial Development Permit Requirement." CP 429 (AR 392) (Attachment C to Cathy Schenck declaration). This exemption meant that a shoreline substantial development permit was **not required** for the dock. The exemption was issued under WAC 173-27-040 (2)(h)(ii) which allows private, noncommercial, freshwater docks of less than $10,000 without requiring a shoreline substantial development permit.

On November 9, 1999, Douglas County issued building permit No. 12107 for the dock and ramp system. CP 431 (AR 394).

Cathy Schenck worked with Bob Steele of Fish & Wildlife to secure the Hydraulic Project Approval (HPA). On February 10, 2000, the HPA was approved, HPA Permit No. 00-E3006-01. CP 434-445 (AR 397-408) (including fax transmittal sheet and the correspondence from Bob Steele that accompanied the permit).

At this point, everything was fine. Fish & Wildlife had issued an HPA for the dock, the County had issued a formal letter of exemption, and a building permit had also been issued by the County. Unfortunately, when the Schencks were ready to start construction, they learned that the cost of the dock had gone up and was over the $10,000 maximum for the exemption. Faced with that problem, the Schencks went back to Bob Steele to find out how they should proceed. As explained by Cathy Schenck:

> In March of 2000, shortly after we received the HPA permit, we learned that the cost for our dock had gone up and would be over our $10,000 maximum under the exemption. We went back to Bob Steele and asked if it mattered if we went over the $10,000 by a little bit. Bob was surprised by the increased cost, but instead of going over the maximum cost, we agreed with Bob to change to an EZ dock system. The EZ dock did not need construction of the piling and concrete pad that were part of the original dock design. Bob Steele was clearly in favor of the EZ dock system and seemed to strongly prefer we do that rather than construct pilings in the water. He told me in person that he approved of the change and he specifically said to go ahead and "move forward." He said he would take care of any paperwork changes.

AR at 375-76. Unfortunately, there is no record of Mr. Steele taking care of the paperwork to reflect these changes to the dock design.

In April 2000, thinking everything was fine, the Schencks purchased and installed the EZ dock. Cathy Schenck then called the County to come and inspect the new dock. However, the County representative said that since an EZ dock was installed, there was nothing to inspect because the Schencks didn't build anything. As explained by Cathy:

> The EZ dock did not need construction of the piling or concrete pad. My understanding is that it was those construction components that the County otherwise would have inspected. The County representative, who I believe was Joe Williams, told us that since Bob Steele approved it, the County was fine with it. Joe Williams was the Senior Planner who also issued our Exemption letter. Our understanding was that nothing further needed to be done and the County was satisfied.

CP 413 (AR 376).

Regarding the boat lift, Cathy testified as follows:

> Bob Steele knew that we intended to install a boat lift apparatus. He told us the same thing as the Magnussens, that there was no permit needed for a boat lift. So, in May 2000, shortly after we installed the dock, we purchased the boat lift and installed it. Joe Williams also told us that there was no County permit requirement for a boat lift.

CP 414 (AR 377).

With regard to the concrete wall/fence, the Staff Report states that the structure at its closest point is between 25 and 30 feet from the Ordinary High Water Mark (OHWM). The Schencks measured the distance and at its closest point, the fence is 27 feet from the OHWM. CP 416 (AR 379). The setback from the OHWM for a residence is 25 feet. CP 300 (AR 283).

The Schencks built the wall/fence themselves for a total cost, including their own labor, of approximately $1,000. CP 416 (AR 379). The wall is not 55 feet long, but is approximately 40 feet long. The fencing is pre-made sections which the Schencks purchased for $35 each. They have seven sections for a cost of $245.00. Adding tax and miscellaneous hardware, the cost for the fencing component is estimated to be approximately $300.00. Carey Schenck estimated the concrete to be 2.2 yards at a cost of $100 per yard. The Schencks did all the work themselves and it took them approximately 17 hours of labor to do the project, which they spread over several weekends. If they paid themselves $25 per hour for labor, this comes out to $425 in labor cost. *Id.*

The purpose of the wall/fence was to contain their toddler from accessing the river.

> We were concerned that if she was playing in the yard, she could get to the river edge and we might not see her. From our perspective the wall and fence is a normal amenity for a

> residence and it enhances the safety of living along the river.

CP 417 (AR 380).

With regard to placement of sand, the Schencks admit that in 2002, they did place some sand in the beach area. However, it was all **native sand** from next door.

> The sand is all natural to the area. The sand came primarily from our neighbor's property. We used our tractor and would get a bucket and dump it over and then spread it around. We may have also scooped up some sand from places on our own property. The sand made walking on the loose rocks easier and safer. We didn't place any sand in or near the river, and certainly not below the OHWM. It wouldn't make any sense to do that because it would just wash away anyway.

CP 417 (AR 380). The Schencks contend that this minor re-location of native sand, now 13 years ago, is not a violation of the Shoreline Management Act.

The County also alleges that there has been grading on the property. The Schencks contend that there is not substantial evidence to support the Hearing Examiner finding that there was grading on the property. The only evidence was provided by Cathy Schenck, wherein she testified as follows:

> We have not done any grading (other than to build our house). Mr. DeVries states at page 16 of the staff report that the "property appears to have been graded to be level waterward of the retaining wall." Contrary to this

> assertion, the beach area has not been graded and it is **not level**. The slope up from the water edge to the fence is readily seen in Picture 3 of Exhibit B. Likewise, Picture 8 of Exhibit B shows the slope from the water edge up to the fence. Moreover, that picture shows that slope is the same as the neighboring property. Mr. DeVries is speculating that there has been grading, but the pictures actually confirm the truth which is that we have not graded that area. The degree of slope is the same as our neighbors and has been the same since we bought the property.

CP 417-18 (AR 380-81).

With respect to the shed, the Schencks admit that they built the shed in 2004. It is within 25 feet of the OHWM. The Schencks acknowledge this was a mistake and they have offered to remove it to a location further back from the water. Nevertheless, the Schencks contend that the County should share some responsibility for how this came about. Cathy Schenck clarified:

> At the time we built the shed, I called the County and asked about getting a permit for a shed. I told them our address, that we were on the river, and I told them where we wanted to put the shed. The County staff person told me that because the shed was so small, no permit was needed. I was quite surprised by that answer because this was down by the river. So I called again, and I was again told that because the shed was so small, we could go ahead and build it and no permit was necessary. I realize now that this was wrong advice from the County. However, I relied on what the County told me and assumed it must have been correct, especially since I was given the same answer twice. I think it is very unfair for the County to not accept some of the blame for the shed since they told me to go ahead and build it. We would like to work out some sort of agreement with the County on this issue.

CP 418 (AR 381).

C. The Hearing Examiner Decision

The most significant issue involves the dock. The County could not deny that the Schencks had secured a written exemption for a freshwater dock less than $10,000, and had an approved HPA permit from Fish & Wildlife, and had a building permit from the County. Nevertheless, the County argued that while the Schencks had those approvals, the dock that was ultimately installed was modified and different than the original approvals. Accordingly, the County and the Hearing Examiner took the position that the dock was "not permitted" because the design had changed to the EZ dock system. The Hearing Examiner accepted that argument and affirmed the NOV.

The remedy the County seeks is to order the Schencks to apply for permits. The purpose of the permits is **not** to authorize the existing improvements, but to remove them. The Schencks are ordered to remove all improvements and to do so by applying for a Shoreline Substantial Development permit; submit a State Environmental Policy Act (SEPA) checklist; a fish and wildlife habitat management and mitigation plan; a planting plan for compensatory mitigation; and application fees of $3208.00. CP 65 (AR 28). As stated in the Notice and Order, "all

structures and development identified in this notice and order must be removed and remediated..." *Id.* If the Schencks do not comply with the order, they will be subject to civil penalties and criminal enforcement of a misdemeanor, including civil or criminal penalties under the Shoreline Management Act, RCW Chapter 90.58. CP 66 (AR 29).

ARGUMENT

This Court reviews questions of law *de novo*. *Julian v. City of Vancouver*, 161 Wash. App. 614, 623 ¶ 8, 255 P.3d 763 (2011). As an appeal under LUPA, this Court stands in the shoes of the superior court and reviews the administrative decision on the record before the hearings examiner. *Id.* The burden is on the appellant to show the grounds for reversal as set forth in RCW 36.70C.130.

I.

THE DOCK WAS EXEMPT FROM THE SHORELINE SUBSTANTIAL DEVELOPMENT PERMITTING REQUIREMENT

The Schencks secured a written exemption from the Shoreline Substantial Development permit requirement for their dock. CP 429 (AR 392). Under WAC 173-27-040 (2) (h), a freshwater dock for noncommercial purposes where the fair market value does not exceed $10,000 is exempt from the substantial development permit requirement.

The Schencks also received an HPA permit from Bob Steele at Fish & Wildlife. The modifications to the dock were approved by Bob Steele and **were known** to Douglas County. Indeed, it is because of the changes to the dock whereby construction of the pilings and concrete pad became unnecessary and, accordingly, there was no need to do a County inspection. The County never rescinded its letter of exemption.

Under the facts of this case, the Schencks complied with the applicable permitting requirements and the dock was exempt pursuant to the issued letter of exemption.

The Hearing Examiner ruled that the letter of exemption did not apply because the dock had been revised subsequent to issuance of the letter of exemption. This is an erroneous interpretation of the law and is not supported by substantial evidence.

The evidence is undisputed that Cathy Schenck called the County for an inspection of the completed dock. The evidence is also undisputed that the County refused to come out and do an inspection because there was nothing to inspect. The revisions to the dock design meant that there was no construction of pilings to inspect. This does not mean, however, that the letter of exemption became invalid.

If the letter of exemption had been rendered invalid, the County planner, **back in 2000**, should have recognized the exemption letter as

invalid and issued a new one for the revised dock. Any problem should have been raised at that time. The reality is that there was no need to re-issue another letter of exemption because the revisions did not make the dock ineligible for the exemption. Rather, the revisions were done to make sure that the completed dock **remained compliant** with the exemption. As testified by Cathy Schenck:

> In March of 2000, shortly after we received the HPA permit, we learned that the cost for our dock had gone up and would be over our $10,000 maximum under the exemption. We went back to Bob Steele and asked if it mattered if we went over the $10,000 by a little bit. Bob was surprised by the increased cost, but instead of going over the maximum cost, we agreed with Bob to change to an EZ dock system. The EZ dock did not need construction of the piling and concrete pad that were part of the original dock design. Bob Steele was clearly in favor of the EZ dock system and seemed to strongly prefer we do that rather than construct pilings in the water.

CP 412-13 (AR 375-76).

If these revisions, done to comply with the exemption, meant that the exemption became invalid, such information needed to be communicated to Schenck at that time. Of course, the dock complied with the exemption requirements, the cost was kept below $10,000, and the exemption letter was treated by the County as remaining in effect.

The County had full knowledge of what was installed at the Schenck property and never communicated any need to get a new

exemption letter. The silence by the County supports the conclusion that the County understood and treated the exemption letter as remaining applicable. Accordingly, there is no factual basis for the Hearing Examiner to conclude that the exemption letter was not considered valid by the County.

There is no contrary evidence whatsoever. Perhaps the hearing examiner's ruling was based on his allocation of the burden of proof. If that was the case, the decision should be reversed because of the significant procedural error concerning the burden of proof. That issue will be addressed below. Aside from the burden of proof, the conclusion that the dock was outside of the written exemption is not supported by substantial evidence. The evidence is undisputed that the County knew about the revisions to the design and allowed it to go forward. The County never rescinded the exemption letter, or took any action to indicate that the exemption became inapplicable. Under these circumstances there is no evidence to support the conclusion that the exemption letter was considered invalid by the County.

One final consideration. If the exemption letter became invalid because of the design changes, that would mean that the County should have required a substantial development permit in 2000. But the County knew about the changes, and did not require a substantial development

permit. The acquiescence by the County establishes that it did view the dock as being within the letter of exemption. Any other conclusion would be completely inconsistent with the County's actions at that time.

Accordingly, the Hearing Examiner decision should be reversed and the letter of exemption should be found to have been the lawful authority for the Schencks to proceed. There is no basis now, 13 years later, to require the Schencks to remove their dock.

II.

THE BOAT LIFT DID NOT VIOLATE THE COUNTY SMP

The Schencks were repeatedly told that there was no permit necessary for a boat lift. A review of the 1975 Douglas County SMP shows no provision for regulating installation of boat lifts.

The County contends that the absence of regulations means that a conditional use permit (CUP) must have been sought. That position, however, renders the SMP as void for vagueness.

Washington law recognizes that a land use regulation will be void for vagueness where terms are so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Burien Bark Supply v. King County*, 106 Wash.2d 868, 871 (1986). Such regulations violate due process because they lack "fair

warning." *Id.* The purpose of the doctrine is to eliminate arbitrary and discretionary enforcement of the law. *Id.*

The conditional use provision of the 1975 SMP is reproduced at CP 329 (Section XXV). The regulation states that the purpose of a conditional use permit is for uses

> ...which because of special circumstances peculiar to the proposed project or activity should be allowed there.

Id.

So, what is the "special circumstance peculiar" to a boat lift? Why would a person of common intelligence think that a conditional use permit is needed for a boat lift? What language in the CUP regulation will tip off a person that a CUP permit is needed for a boat lift apparatus? The reality is that there is nothing about a boat lift that is special, peculiar, or in any other way requires a CUP. The language simply does not give "fair warning" that a CUP was required for a boat lift.

Moreover, the procedure for a CUP requires a public hearing. CP 329. The findings required for issuance of a CUP make no sense for a boat lift. For example, it must be found that denial of the CUP would create a hardship on the applicant. Section XXV, 25.50. Of course, a boat lift is just a nice thing to have. Not having a boat lift is not a hardship.

Under the CUP requirements, it is difficult to think of any private boat lift that would qualify for a CUP.

Of course, the only evidence in the record shows that no CUP or other permit was required for boat lifts at other shorefront residences, particularly the residence built by Douglas County Commissioner Ken Stanton. Cathy Schenck attempted to corroborate that no permit was required by the County at that time. She wanted to show that other property owners also were not required to get a permit for a boat launch. She testified as follows:

> I checked on a residence located at 715 Turtle Rock Road, East Wenatchee. The current owners are Jane and Thomas Watson. They purchased the property from the original owner who built the house, namely Ken Stanton who is a current Douglas County Commissioner. I called the Watsons and they told me that the boat lift at their property was already present when they purchased the property from Mr. Stanton. I also checked County records online and there are no indications that any type of permit, including a conditional use permit, was ever issued for the boat lift at that property.

CP 414 (AR 377).

The print out from the County website for that address shows only permit number 13724 in 2003 for an LPG insert and lines. CP 452 (AR 415). There is no permit of record for a boat launch apparatus.

As stated above, the purpose of the void for vagueness doctrine is to prevent arbitrary and discretionary enforcement. But that is exactly what the County is here trying to do.

Rather than follow the County's contention, the preferred rule of construction is to interpret the regulation in a manner that avoids an unconstitutional result. Accordingly, the Court should rule that under the 1975 SMP in effect when the boat lift was installed, there was no requirement for a substantial development permit. Accordingly, there is no violation. The Hearing Examiner's contrary conclusion is not supported by the facts or by any clear and definite regulation and should be reversed.

The hearing examiner also ruled that the evidence from Cathy Schenck regarding being told by Jim Williams (County planner), and Bob Steele (Fish & Wildlife) and the Magnussens (consultants) that no permit was needed for the boat lift was hearsay and therefore was given no weight. CP 552 (AR 515) (Finding of Fact 20). The Hearing Examiner provided no rationale or other basis to explain why "no weight" was given to Mrs. Schenck's testimony.

First, the testimony is admissible at least to the extent it is offered to prove that these statements were made to Mrs. Schenck. Hearsay is excluded only when offered to prove the truth of the statement.

Second, there is no reason provided to doubt the credibility of Mrs. Schenck. Her background as a school teacher, volunteer firefighter, and President of the PTA, support her position and credibility in the community. Likewise, the actions by Mrs. Schenck in seeking permits for the dock are inconsistent with also trying to sneak something past the County at the same time. The truth is she went to the County, did what she was told, and when she asked about a boat lift, she was told by the County Planner, and Bob Steele, and her own consultants that no permit was needed. The Hearing Examiner's decision to provide no weight to that testimony is not supported on any ground and should be reversed.

Third, regardless of what the Schencks were told, the 1975 SMP does not regulate boat lifts. The statements made to Cathy Schenck are consistent with the absence of regulations in the SMP. To the extent the County relies on the CUP provisions for boat lifts, such provisions are void for vagueness.

III.

THE CONCRETE WALL/FENCE WAS EXEMPT FROM PERMITTING REQUIREMENTS

At the time of construction, the wall/fence was exempt from SMP permitting because the fair market value was far below the $2500 threshold to trigger the permitting requirement. Under WAC 173-27-040

and RCW 90.58.030 (3)(e), a substantial development permit was not required for a project valued at less than $2500.

There was no contrary evidence regarding the value of the fence. As set forth above, the fence had a value of less than $1,000. The fence was also exempt under WAC 173-27-040 (2) (g) as a normal appurtenance to the use and enjoyment of their single family residence.

The County contends that the Schencks had to get a letter of exemption for the wall/fence. That is not what the law requires. It is true that under WAC 173-27-050 a letter of exemption is required for exempt projects *that also require a federal permit.* So, for example, the dock required a written letter of exemption (which they got). However, the wall/fence is located landward of the OHWM and does not involve federal permitting. Accordingly, under WAC 173-27-050 (3) a written letter of exemption is only required if the local SMP specifies that a letter is required.

> (3) Local government may specify other developments not described in subsection (1) of this section as requiring a letter of exemption prior to commencement of the development.

WAC 173-27-050 (3). There was no such requirement for a fence. Accordingly, the Hearing Examiner's conclusions that the fence was not

exempt and required a substantial development permit is contrary to law and not supported by any substantial evidence.

IV.

THE HEARING EXAMINER ERRED BY PLACING THE BURDEN OF PROOF ON THE SCHENCKS

Under the Douglas County Code 2.13.070 A.(3), the Hearing Examiner must place the burden of proof on the appellant to a Notice of Violation. That procedure is contrary to state law.

This is an enforcement action. It is well established that in proceedings to enforce the Shoreline Management Act, the burden of proof is on the enforcement agency. For example, in *Twin Bridge Marine Park, LLC v. Department of Ecology*, 2002 WL 1650523 (Wash. Shore. Hrg. Bd.) SHB Nos. 01-016 and 01-017, July 17, 2002, the Department of Ecology issued cease and desist orders to stop further construction of a large marina facility. The Department of Ecology ordered the work stopped until proper permits were issued. Twin Bridges did not stop work and so civil penalties were also issued. On appeal, the **unanimous** shoreline hearings board stated:

> The Department of Ecology **has the burden of proving** that a violation has occurred, that the amounts of the penalties assessed are reasonable, and that a cease and desist order is justified.

Id. at 6 (Conclusion of Law no. I).

This ruling of the shoreline hearings board is not a surprise. Indeed, the WAC likewise places the burden of proof on the enforcing agency. In contrast to applications for permits, *in appeals involving enforcement*, the burden shifts to the enforcement agency.

> Persons requesting review [of permit decisions] pursuant to RCW 90.58.180 (1) and (2) shall have the burden of proof in the matter. The **issuing agency shall** have the **burden of proof** in cases involving penalties or regulatory orders.

WAC 461-08-500 (3) (emphasis added).

Unfortunately, the Douglas County Hearing Examiner was compelled to follow local rules which place the burden of proof on the Schencks. But, as shown here, state law governing enforcement of the SMA places the burden of proof on the agency. As quoted above, the "agency **shall** have the burden of proof."

The County will argue that only the Department of Ecology has the burden of proof in an enforcement action under the Shoreline Management Act, and that the County can place the burden of proof on the defendant. That position makes no sense whatsoever. Under RCW 90.58.210, both the Department of Ecology and the County Prosecutor are **equally empowered** to enforce the Act. The same alleged violation must be subject to the same procedural protections and requirements, regardless of whether the enforcement action is brought by Ecology or by the County. It would likely

be a violation of the Equal Protection Clause to shift the burden of proof in an enforcement action based on which government entity is bringing the action. The same alleged violation cannot be subject to a differing allocation of the burden of proof based on which government agency is bringing the action. If that is the law, we are all in trouble.

In a case such as this, where enforcement is being pursued for actions that took place long ago, the burden of proof is critical. Here, the Magnussens, who had been hired by the Schencks to help with the permitting, have gone out of business and did not have any records or documentation, or even recollection of the matter. CP 413. The passage of time and the difficulty of securing witnesses, such as Mr. Steele, renders the burden of proof critical. This error requires reversal of the hearing Examiner decision.

V.

THESE PROCEEDINGS ARE BARRED BY THE STATUTE OF LIMITATIONS

The NOV asserts that it can be the basis for civil or criminal penalties. CP 66 (AR 29). However, the statute of limitations to pursue civil penalties is the 2-year provision contained in RCW 4.16.100 (2) for penalties upon a statute. Similarly, the statute of limitations for a misdemeanor is one year. RCW 9A.04.080 (1) (j).

The Washington Supreme Court has held that this two-year provision applies to notices of violation for penalties. *U.S. Oil & Refining Company v. State Department of Ecology*, 96 Wn.2d 85, 91-92 (1981). In that enforcement proceeding, the Department of Ecology sought penalties for alleged violations of water discharge under the Washington Pollution Control Act, RCW Chapter 90.48. In recognizing that initiation of the enforcement proceedings through a notice of violation tolled the catch-all 2 year statute, the Court explained:

> Although the notice is not technically a complaint or a summons, it does as a practical matter commence the action and apprise the penalized party of it. Once the notice is served, the penalized party can either pay the penalty or have the claim adjudicated by the otherwise available administrative and judicial forums, with no liability arising until completion of all available judicial review. The notice has much the same effect as a complaint or summons, and hence the action should toll when the notice is served.

Id. at 91-92 (emphasis added).

Of course, while a NOV will toll the statute of limitations, the problem is that this NOV was not within 2 years of any of the alleged violations. Rather, it comes a decade later.

The County will contend that penalties are not imposed by the NOV. However, according to the County, penalties may be imposed if the Schencks fail to comply with the NOV. CP 66 (AR 29) ("failure to comply with the requirements of this Order shall result in …").

The County's contention is an attempt to revive the possibility of penalties long after the statute of limitations has passed. Indeed, under the County theory there would be no effective statute of limitation at all. The County could delay bringing an NOV for as long as it wanted, and then claim that penalties can be imposed if the NOV is not followed. Here the County waited 12 years before issuing its NOV concerning the dock. Under the County theory, it could have waited 30 years. There simply is no limit. Moreover, even after all that time, the County would then place the burden of proof on the defendant to prove that there is no violation. As in this case with the Schencks, evidence is lost, thrown out, memories are faded, and County representatives have moved on or retired. The unfairness of such procedures advocated by the County should be readily apparent.

The Court may be concerned about a situation where the County does not learn of the alleged violations until after the two year time frame has expired. In that situation, RCW 90.58.210 provides a solution.

Aside from the civil and criminal penalty provisions, RCW 90.58.210 (1) allows for injunctive relief through actions filed in Superior Court.

> The attorney general **or** the **attorney for the local government shall** bring such injunctive, declaratory, or other actions as are necessary to insure that no uses are made of the shorelines of the state in conflict with the

> provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter.

Following this statutory directive, the Shoreline Hearings Board has ruled that injunctive relief under the SMA can **only** be sought in Superior Court and **not** through **administrative proceedings** and the penalties provision of RCW 90.58.210 (2).

> The language of the Act directing injunctive or declaratory action **to a court** evinces a legislative policy choice which places this relief **with the court** and not this Board.

In the Matter of Nelson, 1979 WL 52505 (Wash.Shore.Hrg.Bd.) SHB No.79-11 (June 11, 1979) at 4.

> Consistent with our ruling in *Nelson*, we conclude that RCW 90.58.210(1) only authorizes actions to be brought in Superior Court. The sub-section does not incorporate any authority for administrative penalties.

H&H Partnership v. State Department of Ecology, 2001 WL 1022098 (Wash.Shore.Hrg.Bd.) SHB No. 00-022 (March 21, 2001) at 5.

In short, if Douglas County wants to go after **past** alleged violations beyond the 2 year statute of limitations, it must proceed through the authority set forth in the statute. That is, seek injunctive relief in Superior Court. But the County has not pursued that option. Here, the County has brought administrative proceedings with the threat of penalties, both civil and criminal. Such proceedings are beyond the statute

of limitation and should be vacated. The Hearing Examiner decision should be reversed.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court to rule that the proceedings violate the two year statute of limitations. In addition, Petitioners request that the Court reverse the decision of the Hearing Examiner and rule that the dock was properly exempt pursuant to the written exemption letter, the boat lift was not subject to a CUP or other permitting requirement and therefore was not in violation, and that the fence was exempt from permitting requirements because it was set back beyond 25 feet from the OHWM and did not exceed the minimum value for exemption.

RESPECTFULLY submitted this 4th day of November, 2013.

GROEN STEPHENS & KLINGE LLP

By: _____

John M. Groen, WSBA #20864
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

Attorneys for Appellants

DECLARATION OF SERVICE

I, Linda Hall, declare as follows:

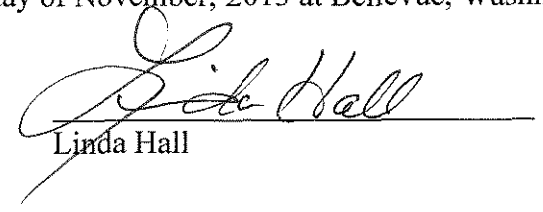
I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On November 4, 2013, I caused a true copy of the foregoing document to be served on the following persons via the following means:

Steven M. Clem Douglas County Prosecuting Attorney P.O. Box 360 Waterville, WA 98858-0360	☐ Hand Delivery via Messenger ☒ First Class U.S. Mail ☐ Federal Express Overnight ☐ E-Mail: sclem@co.douglas.wa.us ☐ Other _____

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

Executed this 4th day of November, 2013 at Bellevue, Washington.



Linda Hall