90719-6

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.

PETITION FOR REVIEW

John M. Groen, WSBA #20864

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

Telephone: (425) 453-6206

Attorneys for Petitioners

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IDENTITY OF PETITIONER

Petitioners Cary and Cathleen Schenck ("Schencks") are residents in Douglas County, Washington. They were the appellants in the proceedings below.

COURT OF APPEALS DECISION

The Schencks seek review of the August 7, 2014, Court of Appeals' decision in *Cary and Cathleen Schenck v. Douglas County,* No. 31749-8-III ("Decision"). A copy of the Decision is attached hereto as Appendix A. The Decision is unpublished. There was no motion for reconsideration.

ISSUE PRESENTED FOR REVIEW

1. In the absence of any other statute of limitations, does the two year statute of limitations to pursue civil penalties (RCW 4.16.100(2)) apply to enforcement proceedings under the Shoreline Management Act?

2. In the absence of any other statute of limitations, does the one year statute of limitations for misdemeanors (RCW 9A.04.080(1)(j)) apply to enforcement proceedings under the Shoreline Management Act?

STATEMENT OF THE CASE

This case involves an alleged violation of the Shoreline Management Act for installation of a dock by Cary and Cathleen Schenck at their residence more than a decade ago. In 1999, the Schencks worked with Douglas County and believed they followed all the correct procedures to install a dock at their property. Although the dock was

determined to be exempt from the shoreline substantial development permit requirement, the County contends that the exemption letter did not apply because the dock design was changed. The County contends that the Schencks needed a new exemption letter for the revised dock.

Although the revised dock still met the criteria and would have qualified for another exemption letter, the County NOV is based on the dock being technically illegal. Accordingly, the County issued a Notice of Violation (NOV) on July 3, 2012. The NOV seeks removal of the dock. If the Schencks fail to remove the dock, they will be subject to civil and criminal penalties.

The Schencks contend that the NOV enforcement proceedings violate the statute of limitations. The County's effort now, many years later, to create a violation and force the Schencks to remove their dock is a miscarriage of justice that conflicts with this Court's decision concerning NOVs and the statute of limitation, and should be reversed by this Court.

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.

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 freshwater dock at their property on the Columbia River near the Rock Island dam facility in Douglas County. They went first to Douglas County to find out how to go about getting permits. 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. CP 411.

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. CP 420.

The Schencks also hired a consultant team, Bob and Tama Magnussen, to help them through the permit process. They knew about the Joint Aquatic Resource Permits Application (JARPA) form and filled it out for the Schencks. CP 411. The front page is stamped as received on October 4, 1999 by Douglas County Department of Transportation and Land Services (TLS). CP 422-427

The JARPA describes the proposed dock as a "ramp and floating wood dock finished with TREX decking." CP 423 (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.

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.*

On October 26, 1999, Douglas County issued a written "Exemption From Shoreline Management Act Substantial Development Permit Requirement." CP 429. 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.

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.

At this point, everything was fine. Fish & Wildlife had issued an HPA for the dock, the County had issued a formal letter of exemption from the need for a shoreline substantial development permit, 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 (rather than constructed on site), 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.

The County NOV asserts that without a letter of exemption for the revised dock, the EZ dock was not permitted properly and was therefore illegal. Accordingly, 12 years after its installation, the County served its

NOV and initiated enforcement proceedings against the Schencks. The relief required is removal of the dock.

C. The Court of Appeals Decision

The Court of Appeals addressed the statute of limitation issue in one short paragraph. Slip op. at 5. The conclusion was simply that the NOV "does not involve civil penalties or criminal liability" and therefore the cited statutes of limitation do not apply. The Court treated the NOV as not being subject to any other statute of limitation.

The Court of Appeals does not acknowledge that the NOV seeks removal of the dock. As stated in the Notice and Order, "all structures and development identified in this notice and order must be removed and remediated..." Moreover, if the Schencks do not comply with this order, the NOV expressly states that the Schencks 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.

In short, the Court of Appeals refused to apply either the one year or two year statute of limitations, but nevertheless allows the Schencks to be subject to civil penalties and criminal enforcement *based on the NOV*. In effect, the decision below eliminates any statute of limitation in enforcement proceedings.

ARGUMENT

The Decision Below Conflicts With A Decision of This Court

The NOV expressly asserts that it can be the basis for civil or criminal penalties. CP 66. In Section III at page 6 of the NOV, entitled "Enforcement on Failure To Comply" it states as follows: "Your failure to comply with the requirements of this Order shall result in further enforcement action" and then describes the civil and criminal enforcement provisions and penalties.

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. The statute of limitations for a misdemeanor is one year. RCW 9A.04.080 (1) (j).

The Court of Appeals decision is based on a perceived distinction between the NOV and a subsequent imposition of civil and/or criminal penalties. According to the Court of Appeals, the NOV does not **itself** impose any penalties and therefore the statutes of limitation do not apply.

Such a distinction is contrary to reality, and contrary to this Court's decision in *U.S. Oil & Refining Company v. State Department of Ecology*, 96 Wn.2d 85, 91-92 (1981). This Court held that the two year provision applies to notices of violation.

In *U.S. Oil & Refining*, the Department of Ecology sought enforcement for alleged violations of water discharge under the Washington Pollution Control Act, RCW Chapter 90.48. This Court held 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).

This decision recognizes that the NOV is the initiation of the enforcement action and is sufficient to toll the statute of limitation. This makes sense. Enforcement is enforcement. Just as the NOV is sufficient to toll the statute of limitations, likewise, the NOV must be subject to the statute of limitation. The decision by the Court of Appeals below directly conflicts with this holding.

The *U.S. Oil & Refining* case, including the above quote, was presented to the Court of Appeals in briefing. However, the Court of Appeals ignored it entirely, as if it did not exist.

The County contends that penalties are not *technically imposed* by the NOV. However, penalties are expressly called for 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 ..."). Accordingly, for all practical and legal purposes, the NOV is just the first step in imposing the penalties. In *U.S. Oil & Refining,* this Court held that the NOV is sufficiently part of the enforcement process to toll the statute of limitations. The same rationale should be applicable here. The statute of limitations should apply to the NOV just as it applies to the penalties that are declared within the NOV to flow from it. The Court of Appeals' decision directly conflicts with this Court's precedent.

The injustice of the County's contention is that it is an attempt to revive the possibility of penalties long after the statute of limitations has passed. Indeed, under the County theory and the Court of Appeals' decision below, 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 and endorsed by the Court of Appeals should be readily apparent.

This 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. Aside from notice arguments, RCW 90.58.210 provides a solution to this concern. Apart 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. The Schencks believe the reason the County does not seek injunctive relief is because then a Judge will be able to weigh equitable factors (such as the passage of time) and may not grant the relief to remove the dock. By pursuing a technical violation, the County has brought administrative proceedings with the threat of penalties, both civil and criminal. Such NOV proceedings that are directly linked to and are the first step in imposing penalties are beyond the statute of limitation and should be vacated. The Court of Appeals decision should be reviewed and reversed.

Douglas County is threatening a number of residents with similar enforcement proceedings based on actions taken long ago, even by prior

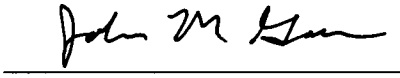
owners. These enforcement efforts by the County have become a significant local issue and many people are stunned that its government is not blocked from pursuing such old alleged violations. This is especially true in situations such as the Schencks, where they tried to comply with the permitting requirements, and even hired a consultant to help them, and still find themselves more than a decade later embroiled in a legal mess. One of the purposes of a statute of limitation is to prevent what is happening here.

CONCLUSION

It is respectfully urged that the Court grant the Petition and resolve the conflict between the decision below and this Court's decision in U.S. Oil & Refining. Such resolution will provide needed clarity for Counties and shoreline homeowners throughout the State.

RESPECTFULLY submitted this 8th day of September, 2014.

GROEN STEPHENS & KLINGE LLP

By: 

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

Attorneys for Petitioners

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 September 8, 2014, I caused a true copy of the foregoing document to be served on the following persons via the following means:

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

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

Executed this 8th day of September, 2014 at Bellevue, Washington.

Linda Hall

APPENDIX A

FILED
AUGUST 7, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CARY and CATHLEEN SCHENCK, Husband and wife, Appellants, v. DOUGLAS COUNTY, a subdivision of the State of Washington, Respondent.	)	No. 31749-8-III UNPUBLISHED OPINION

BROWN, A.C.J. — In 1999, Cary and Cathleen Schenck purchased property in Douglas County on the Columbia River shoreline to build a home. In that same year, they applied for and received a permit from Douglas County (County) to install a dock. Between 2000 and 2005, the Schencks installed a new dock, boat lift, and concrete wall and fence. In 2012, Douglas County issued a Notice of Land Use Violations and Order to Comply (NOV) for construction of the above items without a permit or exemption. The Schencks appealed the NOV and a public hearing was held before the Douglas County Hearing Examiner. The hearing examiner affirmed the NOV and the Schencks filed a Land Use Petition Act (LUPA) petition seeking judicial review. The trial court dismissed the LUPA petition. The Schencks appeal, contending the proceeding was

barred by the statute of limitations, the hearing examiner misallocated the burden of proof, and the hearing examiner's decision that the Schencks were not exempt from the permit requirements was an erroneous interpretation of the law and not supported by substantial evidence. We reject the Schencks' contentions, and affirm.

FACTS

In 1999, the Schencks purchased property along the Columbia River in Douglas County. Wanting to install a dock and boat lift, the Schencks contacted the County to inquire about the procedure. On October 4, 1999, they submitted a dock permit application to the County. 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.

At the same time, the Schencks hired a consultant team to help them submit a Joint Aquatic Resource Permits Application (JARPA) form. This form is a general form used to apply for permits from the United States Army Corps of Engineers (Corps), the Washington Department of Ecology (DOE), and the Washington Department of Fish & Wildlife (DFW). 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." Clerk's Papers (CP) at 423. The JARPA also states the dock will be secured in the water with two steel pilings sleeved with 8-foot white PVC. The dock would be secured with a concrete pad attachment block. The Schencks did not include information about

a boat lift. A transmittal letter from DFW to the Schencks warned that the Schencks were responsible to see that "all provisions within this HPA permit are strictly followed at all times." CP at 435.

In late 1999, Douglas County determined the Schencks' proposed dock was exempt from the Shoreline Management Act (SMA) permit requirement under WAC 173-27-040 (2)(h)(ii), which exempts permit requirements for private, freshwater docks costing less than $10,000. Douglas County then issued a building permit for the dock and ramp system. Soon after, the DFW issued a Hydraulic Project Approval (HPA).

In February 2000, the Schencks began installing their dock. They soon learned, however, that the cost of the dock had gone up and was over the $10,000 maximum for the exemption. They claim they contacted Bob Steele with the DFW and he advised they change to an EZ Dock system, which is cheaper. The Schencks then installed an EZ Dock. Ms. Schenk claims she called the County to inspect the new dock, but Joe Williams, a county senior planner, said that since an EZ Dock was installed (rather than built) and since Mr. Steele approved the changes, there was nothing to inspect. Mr. Williams denies this conversation. The Schencks did not obtain county inspections and the building permit expired. The Schencks did not obtain an SMA substantial development permit or exemption for the new dock from the County, a new HPA from DFW, or a federal permit from the Corps.

In May 2000, the Schencks installed a boat lift. They again claim the County told them a permit was not required. Again, Mr. Williams denies this.

The Corps wrote directly to the Schencks on November 24, 2000, to inform the Schencks their permit application was stale, incomplete and had been cancelled. This correspondence included the statement, "Do not proceed with the work until you have received a permit from the Corps." CP at 521.

Between 2003 and 2005, the Schencks constructed a concrete wall with an attached fence. The Schencks built the wall and fence themselves for a total cost, including their own labor of approximately $1,000. The wall and fence are approximately 40 feet long and between 2 and 3 feet high. And, by the Schencks' estimate, it is 27 feet from the river's ordinary high water mark (OHWM), sometimes referred to in the record as the ordinary high water level (OHWL). No permit was obtained for constructing the wall and fence.[1]

On July 3, 2012, the County issued a NOV relating to unauthorized Columbia River shoreline development by the Schencks. The Schencks appealed to the County hearing examiner. The hearing examiner affirmed the NOV after entering findings of fact and conclusions of law. The Schencks filed a LUPA petition in superior court, challenging the hearing examiner's decision. The court affirmed the hearing examiner and dismissed the petition. The Schencks appealed to this court.

[1] Other structures were also installed or brought in, including a jet ski dock, concrete pad with bench, and sand, but they are not the subject of this appeal.

ANALYSIS

A. Statute of Limitations

Preliminarily, the Schencks contend the County's NOV was barred by the statute of limitations. They argue the NOV is essentially a civil penalty and a misdemeanor that carry a two-year statute of limitations and a one-year statute of limitations, respectively. This case, however, does not involve civil penalties or criminal liability as contemplated by the time limitations of RCW 4.16.100(2) (two-year statute of limitations to pursue civil penalties) and RCW 9A.04.080(1)(j) (one-year statute of limitations for misdemeanors); rather, this case involves the validity of a NOV issued by the County. And, the Schencks do not point to a statute of limitations applicable to the issuing of an NOV. Accordingly, these proceedings are not barred by the statute of limitations.

B. Burden of Proof

The issue is whether the hearing examiner applied an incorrect burden of proof thereby justifying relief under LUPA. The Schencks argue the examiner wrongly placed the burden on them to demonstrate the improvements complied with the SMA.

Douglas County Code 2.13.070(A)(3), grants the hearing examiner authority to review appeals, "alleging an error in a decision" in the "enforcement of violations of the zoning code or any other development regulation." The error must be alleged by the appellant, in this case, the Schencks.

Further, under the SMA, the proponent seeking a development permit has the burden of proving the policies and regulations of the SMA have been met. RCW

90.58.140(7). The statute also places the burden of proof on any party challenging the granting or denial of a permit. Similarly, the proponent of development has the burden of proving the development is exempt from permitting. WAC 173-27-040(1)(c).

Compare *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), where the city had the burden of proof before the hearing examiner. There, however, the issue was $500,000 in infraction penalties administratively imposed by the city under its building code. The penalties were imposed without any opportunity for administrative challenge or review, and were struck down by the Supreme Court as violating due process. Here, the Schencks exercised their right to administratively challenge the NOV and no infractions were issued or penalties imposed. The Schencks will be subject to enforcement after their failure to comply with the NOV. Thus, the *Post* case is distinguishable on its procedure and facts.

The Schencks cite WAC 461-08-500(3), providing, "Persons requesting review pursuant to RCW 90.58.180(1) and (2) shall have the burden of proof in the matter. The issuing agency shall have the initial burden of proof in cases involving penalties or regulatory orders." This section, however, applies to proceedings before the SHB, which reviews cases de novo. And, the term "agency" used in WAC 461-08-305(1) is defined as "any state governmental entity." A county falls within the defined term "local government." WAC 461-08-305(7). Therefore, the burden of proof provision in WAC 461-08-500(3) is not applicable to proceedings before a county hearing examiner.

Accordingly, under RCW 90.58.140(7) and WAC 173-27-040(1)(c), the burden of proof is on the Schencks to demonstrate they did not develop within the shoreline, or they obtained all necessary permits, exemption determinations, and other approvals.

C. Exemptions

The issue is whether the hearing examiner erred in concluding the Schencks failed to meet their burden in challenging the NOV. Specifically, the Schencks contend the dock, boat lift, and concrete wall and fence did not violate any codes or statutes.

LUPA governs judicial review of Washington land use decisions. *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). Relief from a land use decision may be granted if the petitioner carries its burden in establishing one of six standards of relief:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). Standards (a), (b), (e) and (f) present questions of law we review

de novo, but under (b) we defer to the hearing examiner's construction of local land use regulations based on his or her specialized knowledge and expertise. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Standard (c) involves factual determinations this court reviews for supporting substantial evidence. *Id.* We consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Id.*

"When reviewing a superior court's decision on a land use petition, the appellate court stands in the shoes of the superior court.'" *HJS Dev.*, 148 Wn.2d at 468 (quoting *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001)). "'An appellate court reviews administrative decisions on the record of the administrative tribunal, not of the superior court.'" *HJS Dev.*, 148 Wn.2d at 468 (quoting *King County v. Boundary Review Bd.*, 122 Wn.2d 648, 672, 860 P.2d 1024 (1993)).

The Schencks argue the land use decision was an erroneous interpretation of the law and not supported by substantial evidence (RCW 36.70C.130(1)(b) and (c)). They point to the dock, boat lift, and concrete wall.

First, regarding the dock, in 1999, the Schencks obtained an exemption to install a dock. The exemption, however, stated, "Any changes should *be reviewed* by this department to ensure continued compliance with goals, policies and requirements of the shoreline management act and master program, and that the exemption is still valid.

The applicant is responsible for obtaining and complying with all federal, state and local permits required." CP at 495. Further, the DFW warned the Schencks they were responsible to see that "all provisions within this HPA permit are strictly followed at all times." CP at 435. Paragraph 6 of the HPA sets forth the specifics of the dock including the size, ramp, pilings, and anchors. Additionally, "*Any modifications to this project or future work within, below or over the OHWL will require a separate HPA from the Washington Department of Fish and Wildlife.*" CP at 369. Further still, the Corps application acknowledgement stated, "Since a Department of the Army permit is necessary for this work, do not commence construction before the permit has been issued." CP at 524.

The Schencks installed a different dock and related structures than the one proposed during the application process. The new dock did not conform to the exemption issued by the County and the HPA issued by the DFW. The Schencks knew they had not obtained a required federal permit from the Corps. While the Schencks allege the County and DFW had full knowledge of their changed plans and the County allegedly gave oral approval, the County denied this and the hearing officer decided credibility for the County. We consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Cingular Wireless*, 131 Wn. App. at 768.

Given all, we conclude substantial evidence supports the County's NOV. The Schencks have failed to meet their burden of proof under RCW 36.70C.130(1)(b) and (c). The hearing examiner did not err.

Second, the Schencks argue the boat lift did not warrant an NOV because they were orally told a permit was not necessary. Again, the County refutes this. Mr. Williams, a county senior planner, denies this and states that it has never been the policy to orally grant exemptions. Again, the hearing officer found credibility for the County.

Under the WAC's shoreline permit and enforcement procedures, local entities are required "to establish a program, consistent with rules adopted by the department of ecology, for the administration and enforcement of the permit system for shoreline management." WAC 173-27-020. But, under WAC 173-27-040 several exemptions exist to the permit requirement. The exemption is granted after application. No application exists for the boat lift. Indeed, Mr. Williams declared that boat lifts required a permit or an exemption determination in 1999-2001 and "[i]f a lift was to be added as part of pending dock construction, the dock exemption/permit plans on file with the County would need to be revised." CP at 492. They were not. Accordingly, substantial evidence supports the County's NOV.

Third, the Schencks argue the concrete retaining wall and fence were exempt from the SMA because it was landward and the cost was minimal. The SMA requires developers to obtain a substantial development permit before building a structure.

RCW 90.58.140(2). However, an exemption may be allowed under WAC 173-27-040(2)(g) for "[c]onstruction on shorelands by an owner . . . of a single-family residence for their own use or for the use of their family" or under former RCW 90.58.030(3)(e) (1996), which exempts any development of which the total cost or fair market value is below "two thousand five hundred dollars." Former RCW 90.58.030(3)(e) (1996). The County concedes the wall and fence were landward of the OHWM. Resp't Br. at 45, n.14. However, exemptions under the SMA are not self-executing. WAC 173-27-040(1)(a). WAC 173-27-040(2) does not eliminate the requirement to apply for and obtain an exemption from the County.

The Schencks would need to establish that the wall and fence cost less than $2,500 and was a "normal appurtenance" to a single-family residence. *See* WAC 173-27-040(2)(g) ("'Single-family residence' . . . [includes] structures . . . which are a normal appurtenance.") Because the Schencks did not apply for any exemption under the SMA, the County was denied an opportunity to review their plans, determine whether "fair market value" and/or "normal appurtenance" was a basis for issuing an exemption, or to provide for shoreline mitigation required by the development. As stated in the NOV, the Schencks will be required to submit the appropriate paperwork for a permit or exemption. Accordingly, the NOV was justified.

Given all, the Schencks have failed to meet their burden of proof under RCW 36.70C.130(1)(b) and (c). The hearing examiner did not err in concluding likewise. And, the trial court correctly dismissed the Schencks' LUPA petition.

D. Attorney Fees

The County argues the Schencks' appeal is frivolous and requests attorney fees under RAP 18.1 and RCW 4.84.185 for defending against a frivolous appeal. "An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised." *Johnson v. Mermis*, 91 Wn. App. 127, 137, 955 P.2d 826 (1998). While the Schencks have not established a basis to reverse the hearing examiner's decision, we cannot say their issues are so meritless that reasonable minds could not differ. Thus, the County's request is denied.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, A.C.J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.