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

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

v.

**No. 67420-0-1**

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

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**REPLY BRIEF OF  
PETITIONERS / CROSS RESPONDENTS**

**David E. Engdahl  
Diane M. Patterson  
Petitioners pro se  
1223 Shorewood Drive SW  
Burien, WA 98146  
(206) 243-8616**

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The administrative record of the Shorelines Hearings Board is paginated as transmitted to the Superior Court, and is cited herein as **SHBR [page]**

### ***INTRODUCTORY CLARIFICATION***

This case involves laws, regulations, and acts regarding the issuance by the City of Burien in 2010 of a permit to build a bulkhead. Confusion might arise, however, because Respondent Segale's brief mentions another bulkhead, built on different property in Burien in 1995, and then speaks of "*the* bulkhead" without making the distinction clear.

Nothing about the "1995 bulkhead" is at all material to this appeal.

### **I. THE "CENTRAL ISSUE IN THIS CASE"**

We begin by offering this outline, intended to resemble a simplified "decision tree." Several points require refinement, undertaken later in this brief; but this stark outline should help organize the issues and aid analysis.

A. **If Petitioners are correct** in maintaining that, in processing shoreline substantial development applications (SSDP's, or SDP's), Burien at all material times was required to directly apply and enforce the Department of Ecology (DOE) "guidelines" (Part II of WAC ch. 173-26 – and not only *other* DOE regulations), **then the SHB holding must be reversed because:**

1. Respondents never have claimed (and there is *no* evidence) that they

produced *any* of the *geotechnical* evidence required <sup>1</sup> by WAC 173-26-231(3)(a)(iii)(D) *and* either by WAC 173-26-231(3)(a)(iii)(B)(I) or (II) or else by WAC 173-26-231(3)(a)(iii)(C). (They have defended only by calling these “inapplicable.”) **And also because**

2. Respondents have never claimed, and there is *no* evidence, that the proposed bulkhead was “a similar structure” to the one it would replace, as required by WAC 173-26-231(3)(a)(iii)(C), or was the “minimum necessary” size, as required by WAC 173-26-231(3)(a)(iii)(E). (Again, “inapplicable” was their only defense.)

**Consequently**, under the guidelines the SHB holding was wrong **whether or not** the “new lands” argument (which we still do maintain) is credited.

B. **On the other hand, if the SHB was correct** in holding that the old King County SMP (including KCC Title 25) was in force for Burien at all material times, then:

1. **The same result would follow anyway, because** KCC 25.32.010 *explicitly prohibits* any shorelines development that is *not* “consistent with the *guidelines*” (that is, Part II of WAC ch. 173-26, *see* above), as well as with other DOE regulations. **And were that otherwise**,

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<sup>1</sup> The cited requirements are imposed using the word “should.” Lest one consider them merely precative, however, it is to be noted that “should” is defined in WAC 173-26-020(35) for purposes of that chapter to mean “that the particular action is required unless there is a demonstrated, compelling reason, based on policy of the Shoreline Management Act and this chapter, against taking the action.”

2. **The same result would follow anyway, because** – construed in light of the King County SMP’s “Goals, Policies, Objectives” document (as essential a part of the King County SMP, the SHB held, as KCC Title 25 was) – the “new lands” provisions of the latter *do* prohibit fills increasing the surface elevation of land to the possible detriment of existing flora and fauna. **And were that otherwise,**
3. **The same result would follow anyway, unless** *the evidence of record* “demonstrated” (as KCC 25.16.180(D) expressly demands) not merely that the old bulkhead was leaking and the new one would have the same alignment,<sup>2</sup> but that building the new one more than twice the existing one’s height from the beach, and spanning more than sixty yards to its extremity nearly 100 feet north of the only existing building (which stood in the southeast corner of the lot), was “necessary for the protection of existing legally established structures” (as KCC 25.16.180(D), again, demands).

The last of these paragraphs is the only one as to which there pertains any argument regarding burdens or evidentiary sufficiency.

If nothing else, this outline serves to emphasize the pervasive and essential nature of what the City has correctly described as “the central

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<sup>2</sup> Regarding footnote 12 on page 11 of the Segale Brief: Petitioners never disputed the deterioration and alignment points, but neither the Henderson declaration nor any other evidence attempted any “demonstration” (or even any pretense) that the oversized replacement proposed was “necessary for protection of” the existing structure. *See further infra.*

issue in this case”:<sup>3</sup> the legal question of “what regulations apply” to the City of Burien’s processing of SSDP applications under the Shoreline Management Act (SMA).

The Shorelines Hearings Board (SHB) ruled on this “central issue” that – aside from the Shoreline Management Act (SMA) itself and various provisions of WAC Chapter 173-27 (as distinguished from WAC Chapter 173-26) – the applicable regulations are the provisions of the King County Shoreline Master Program (SMP) as it stood when the City of Burien was incorporated in 1993. That SMP included the provisions of old KCC Title 25 that are in the record of this case at CP 269-310.

The Segale Brief asserts that the Brief of Petitioners offers only “a mishmash of arguments devoid of any anchor in Washington law” (Segale Brief at 1), and does “not come to grips with the legal basis for the Board’s rejection of their contention that Burien’s SMP was inapplicable,” (Segale Brief at 26). For its part, the City’s brief (at p. 9) disparages the whole of Part I A (pages 5-19) of our opening brief as “unsubstantiated argument.” We really thought we had done better; but it certainly is true that neither Respondent’s brief makes any show of coping with the argument put forward in the greater part of ours. We therefore will try to put it more simply, so that – if they ever peruse our earlier pages again – they

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<sup>3</sup> Respondent City of Burien’s Brief at p. 9. *See* likewise the Brief of Respondent/Cross-Appellant Segale at p. 23, subsec. (3)(a).

might find the message to be clearer.

Petitioners stated as their first assignment of error that in deciding “what regulations apply” the SHB erroneously interpreted and applied the law. We maintain that the City had (and has) *no* SMP legally in force, so that by virtue of RCW 90.58.140(2)(a) it may lawfully issue SSDPs (like the one issued to Mr. Segale) only insofar as consistent with “the *guide-lines* [set out as Part II of WAC ch. 173-26] and rules of the department” of Ecology (emphasis added). Petitioners do also maintain that, even if KCC Title 25 is found applicable, that Title itself specifically renders the DOE guidelines applicable, too; but in this first part of our Reply Brief, we focus on our contention that the short and sufficient answer to the central question of “what regulations apply” is: the DOE guidelines.

In calling for judicial “deference” to the SHB’s contrary ruling, Respondents misstate the settled law governing review under the Administrative Procedure Act (APA), RCW 34.05.570(3)(d). In reality, the cases are numerous and uniform in holding – as this Court did in 2000 – that

[w]ith respect to issues of law under RCW 34.05.570(3)(d), we review the [Board’s] legal conclusions *de novo*. Substantial weight is accorded the agency’s interpretation of the law where the agency has specialized expertise in dealing with such issues, but *we are not bound by the agency’s interpretation of a statute*.

*Bowers v. Pollution Control Hearings Board*, 103 Wn. App. 587, 596, 13 P.3d 1076 (Div. I, 2000) (emphasis added). *See also BD Lawson Partners, LP v. Growth Hrngs. Bd.*, 2011 WL 6778803 at ¶ 7 (Wn,App. Div. I, Dec. 27, 2011.)

For support of this proposition in the *Bowers* case, this Court cited and relied upon the opinion of Mr. Justice Talmadge for the Court in *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 46, 959 P.2d 1091 (Div. I, 1998),<sup>4</sup> which not only articulated the same rule but also elaborated it by quoting the following passage from an earlier Washington Supreme Court opinion:

Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's *construction of statutory words and phrases* and legislative intent should be accorded substantial weight when undergoing judicial review.... *We also recognize the countervailing principle that it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law.*

*Overton v. Washington State Econ. Assistance Auth.*, 96 Wash.2d 552, 555, 637 P.2d 652 (1981) (emphasis added). This *Overton* formulation conditions even the *substantiality* of such "weight" upon a reasoned *analysis* by the agency of "statutory words and phrases" (as well as "legislative intent"). It certainly does not countenance acquiescence in an agency's preference for what it believes "provides better management of the shorelines than"<sup>5</sup> what the statute expressly mandates; for it is fundamental that "an agency ... may not amend or change enactments of the

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<sup>4</sup> See also *Motley-Motley, Inc. v. Pollution Control Hearings Board*, 127 Wn. App.62,72, 110 P.3d 812 (Div. III, 2005) ("this court engages in de novo review of [a hearing board's] legal conclusions.")

<sup>5</sup> SHB Order on Summary Judgment at 14, SHBR at 412.

legislature,” *Kitsap-Mason Dairymen’s Assoc. v. Tax Comm’n*, 77 Wn 2d 812, 815, 467 P.2d 312 (1970).

Moreover, in 2000 the Supreme Court, reviewing and citing several of its prior cases (and with Mr. Justice Talmadge joining the Court’s opinion), further narrowed the rule regarding giving weight to agencies’ statutory construction by declaring:

Where a statute is within the agency’s special expertise, the agency’s interpretation is accorded great weight, *provided that the statute is ambiguous*. However, an agency’s view of the statute will not be accorded deference if it conflicts with the statute. Ultimately, it is for the Court to determine the meaning and purpose of a statute [citing Mr. Justice Talmadge’s opinion for the Court in the 1998 *City of Redmond* case, *supra*].

*Postema v. Pollution Control Hearings Bd.*, 142 Wn. 2d 68, 77, 11 P.3d 726 (2000) (emphasis added; other citations omitted).

This *ambiguity* prerequisite stated in *Postema* forces even sharper focus on the “statutory words and phrases.” Accordingly, in *Quadrant Corp. v. Growth Management Hearings Board*, 154 Wn.2d 224, 238-239, 110 P.3d 1132 (2005), the Court began with “the statute’s plain *language*” and worked to “harmoniz[e] its *provisions* by *reading* them in context with related *provisions* and the statute as a whole” (emphasis added).

The SHB has *never* – not in this case, nor in any cited by Respondents, nor in any other SHB decision we have found – attempted to support its “SMP carry-over” theory by invoking *any* statutory words,

phrases, language, or provisions. Instead, the SHB has acted upon its own policy judgment that, unless and until the successor municipality gets around to developing its own SMP, continuing to apply the SMP of its *predecessor* (whose regulatory jurisdiction over the area had otherwise *terminated* as a matter of law) “provides better management of the shorelines than applying ... the statewide guidelines and rules of Ecology,” Order on Summary Judgment, SHBR at 412, lines 5-9.

But the latter is the expedient which the *legislature* ordained! And there is no ambiguity in the relevant statutory provisions:

- RCW 90.58.080(1) provides (emphasis added) that “local governments *shall* develop or amend a master program for regulation of uses of the shorelines of the state consistent with the required elements of the guidelines adopted by the department” – doing so within the time limit prescribed by that section. (Until 2003 that limit was two years, by which date Burien – incorporated in 1993 – was *already* ten years delinquent, growing to sixteen years by the time the circumstances involved in this litigation occurred.)
- RCW 90.58.090(1) provides (emphasis added) that within the same time period “each local government *shall* have submitted a master program, either totally or by segments, for all shorelines of the state within its jurisdiction to the department for review and approval.” And,
- RCW 90.58.140(3) provides (emphasis added) that “the local government *shall* establish a program, consistent with rules adopted by the department, for the administration and enforcement of the [shoreline development] permit system provided in this section.”

Words matter; and notable omissions do, too. The word “shall” (here italicized for emphasis in each of the sections) seems plainly mandatory in its

intent; and in none of these provisions is there any language qualifying or diminishing the local governments' obligation by virtue of what some predecessor entity, when it governed the area, might have done.

Moreover, RCW 90.58.140(2) provides (emphasis added) that

a [substantial development] permit shall be granted: (a) ... until such time as an *applicable* master program has become effective, *only* when the development proposed is consistent with ... the *guidelines* and rules of the department; ... [and thereafter] (b) only when the development proposed is consistent with the *applicable* master program ....

Certainly where an “applicable” SMP for the area is legally in effect, the DOE guidelines are not to be “directly” applied; but to regard the SMP of a predecessor county or city as still “applicable” within a particular area after that area has been included within the boundaries of another municipal corporation, whether by incorporation or by annexation, would violate principles so well understood, and so deeply rooted in the law, that recent cases providing occasions to reiterate them are very difficult to find. But in the same decade when the old KCC Title 25 was drafted by King County and approved, our Supreme Court had occasion to observe:

We have long recognized and held that upon annexation of new territory to a city or town such territory immediately becomes an integral part of the municipality, and ipso facto becomes subject to all the laws and ordinances then in force regulating activities within the city limits.

*Hoops v. Burlington Northern, Inc.*, 83 Wn.2d 396, 401, 518 P.2d 707 (1974), citing several earlier Washington Supreme Court cases including *Seattle Lighting Co. v. City of Seattle*, 54 Wn. 9, 13, 102 Pac. 767 (1909)

(“general ordinances of the city immediately control the new as well as the old territory”). “[W]hen territory is annexed or brought into a city the authority of the city is ipso facto extended over the new territory, *Ettor v. City of Tacoma*, 77 Wn. 267, 273, 137 Pac. 820 (1914), *quoted and relied upon* in *Evergreen Trailways, Inc. v. City of Renton*, 38 Wn. 82, 86, 228 P.2d 119 (1951).

“[T]he City’s right to govern the new territory ... is an attribute of governmental power granted to the municipality by the state,” *Western Gas Co. of Washington v. City of Bremerton*, 21 Wn.2d 907, 909, 153 P.2d 846 (1944); and the county out of which the area was incorporated or annexed “did not have the power to prevent the exercise of the city’s authorized functions in such territory,” *id.* The reason, of course, is that “[i]t is a general rule that there cannot at the same time within the same territory exist two distinct municipal corporations exercising the same powers,” *Royer v. Public Utility Dist.*, 186 Wn. 142, 148, 56 P.2d 1302 (1936). Consequently, the former powers and rights of the county in that area “should be held to be extinguished by the act of annexation,” *Ettor, supra*, 77 Wn. at 273; “[t]he right of the county to control ... died with annexation ...,” *Peterson v. Tacoma Ry & Power Co.*, 60 Wn. 406, 414, 111 Pac. 338 (1910).

This is not a constitutional rule. It derives rather from the statutes

empowering and restricting counties, cities, and other creatures of the state; and therefore it is susceptible to modification, exception, or even abrogation by act of the state legislature. Our Supreme Court has held, however, that in order for that to be accomplished “it will be necessary for the legislature to pass an act to that effect which makes its meaning plain and unequivocal,” *In re Sound Transit*, 119 Wn. 684, 688, 206 Pac. 931 (1922), *quoted and relied upon* in *Evergreen Trailways, Inc. v. City of Renton*, *supra*, 38 Wn. at 85. In more recent times, responding to particular circumstances calling for interlocal collaboration, the legislature has enacted some limited exceptions or modifications to the general principle;<sup>6</sup> but the rule that this requires “plain and unequivocal” legislation remains firm. Certainly the mere preference of an agency (even a “quasi-judicial” one) for what it considers a more desirable policy – even if cast implausibly in the guise of “statutory interpretation” – cannot suffice.

Even DOE actively discredits the “SMP carry-over” doctrine. The evidence from Mr. Peter Skowlund has been sufficiently set forth at pages 10 and 20 of the opening brief of Petitioners. Skowlund is not just any-old “DOE staff person,”<sup>7</sup> or a simple clerk routinely filing copies of development permit documents forwarded to DOE by the City not for any sort of

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<sup>6</sup> See the second paragraph of footnote 26 in Petitioners’ opening Brief.

<sup>7</sup> So described on p. 13 of Respondent City of Burien’s Brief.

action but merely for information or records-keeping purposes.<sup>8</sup> Rather, he is the DOE's "*Policy Lead for Shoreline Management*" – an executive official of high and important rank. His evidence was hearsay, of course; but hearsay is good evidence in SHB proceedings unless excluded by the presiding officer, WAC 461-08-515(1); and this evidence was not excluded (or even objected to). Even on this appeal, Respondents deprecate but do not try to impeach the fact that Mr. Skowlund made the statements in question, or his knowledge or his grounds for saying what he said.

More powerful than the Skowlund statement, however, is the fact that DOE has actually disregarded SHB's "SMP carry-over" doctrine at least once in the course of its formal rule-making. DOE's Order 95-17, Wash. St. Reg. 96-20-075 (eff. 9/30/1996), not only added Burien (and several other new cities in King County) to the WAC 173-26-080 list of local governments "required to develop and administer a shoreline master program," but also promulgated an entirely new section prescribing that

When as a result of annexation, municipal incorporation, or change in shoreline jurisdiction, a city or town with shorelines of the state within its boundaries is not listed [in WAC 173-26-080], such local government *is required to develop* and administer a shoreline master program pursuant to chapter 90.58 RCW and this chapter.

WAC 173-26-040 (emphasis added). Just like the statutes quoted earlier, this 1996 regulation applies even though (as would typically be the case)

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<sup>8</sup> Cf. Brief of Respondent/Cross-Appellant Segale at p. 24 and at p. 27 n. 25; and *see* SHBR 60-61 and 67-108 (Johanson 6/1/10 Decl. and its Exhibits B-E).

cities containing shorelines would be newly forming out of (or annexing from) a county (or city) which already had an SMP in place.

Respondents think it significant that the SHB tried to support its holding by analogy to a different rule – WAC 173-26-160<sup>9</sup> – which articulates a similar “carry-over” notion for newly-*annexed* areas: the SHB opined that “this practical approach makes equal sense in the situation of incorporation,” Order on Summary Judgment, SHBR at 413, line 5. But WAC 173-26-160 requires the annexing local government to “develop or amend” its own SMP to cover the annexed area expeditiously enough to submit it “to the department for approval *no later than one year from the effective date of annexation*” (emphasis added). It therefore provides no analogy at all for the free-wheeling “SMP carry-over” doctrine the SHB espoused in this case, holding the old King County SMP to be still in force within Burien *sixteen years* (and counting) after the City’s incorporation had otherwise “extinguished” the county’s regulatory jurisdiction there.

Most devastating to the purported analogy, however, is the fact that WAC 173-26-160’s “practical approach” (as SHB characterized it) itself fails for lack of statutory foundation. The only statutory bases claimed for that regulation are RCW 90.58.140(3) and RCW 90.58.200. The former simply affirms the responsibility of local governments to establish and ad-

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<sup>9</sup> Brief of Respondent/Cross-Appellant Segale at 25; Respondent City of Burien’s Brief at 10-11.

minister permit systems consistent with DOE rules; and the latter is nothing but the general authorization for “such rules as are necessary and appropriate to carry out the provisions of” the SMA. No statutory provision has been identified – and Petitioners can find none – for the carrying out of which WAC 173-26-160 seems *either* necessary *or* appropriate. Indeed even a *one-year* “carry-over” rule – and even if confined only to *annexed* areas – is impossible to regard as *either* “necessary” *or* “appropriate” to carry out RCW 90.58.080(1), RCW 90.58.090(1), or RCW 90.58.140(3), quoted earlier; those statutory provisions plainly apply their mandates to newly incorporated cities (as well as newly-annexed areas) immediately upon their incorporation (or annexation).

Still another consideration discrediting SHB’s “SMP carry-over” doctrine is the great importance the SMA attaches to local community input and the solicitation, and full consideration, of all relevant local interests throughout the process of SMP development and adoption. *See*, for example, RCW 90.58.130, reproduced here in the footnote.<sup>10</sup> But during the sixteen years of Burien’s existence before the facts in this litigation occurred, *none* of this had occurred in this City. The old King County

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<sup>10</sup> “To insure that all persons and entities having an interest in the guidelines and master programs developed under this chapter are provided with a full opportunity for involvement in both their development and implementation, the department and local governments shall:

“(1) ... not only invite but actively encourage participation by all persons and private groups and entities showing an interest in shoreline management programs ....”

SMP had been prepared a generation earlier, during the 1970's, with input from a very *different* and much *larger* population of a vastly *greater* and *more diversified* geographic area presenting a much different mix of economic, social, and cultural interests and needs, and when there was a very different level of scientific information and public awareness concerning the stewardship of shorelines and their beneficial uses and preservation. Now this ancient relic from pre-incorporation days might remain in place for years or even decades more, if the "SMP carry-over" doctrine is sustained. And this is just one city in one county to which that legally unsupported doctrine (has been and) will be applied – making a mockery of the legislature's (and DOE's) best efforts to achieve the optimal protection, use, and preservation of what the legislature has identified as "among the most valuable and fragile of [this State's] natural resources."<sup>11</sup>

It is true, as Respondents point out, that in response to Burien's flagrant neglect of its mandated shoreline policy obligations, DOE could have (and arguably should have) undertaken by itself the solicitation of the requisite local input, assessment of localized conditions and needs, and drafting of suitable provisions, and then "adopted by rule"<sup>12</sup> a locality-specific SMP for Burien,<sup>13</sup> subject to supersession if and when the City

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<sup>11</sup> RCW 90.58.020.

<sup>12</sup> WAC 173-26-070(1)(a).

<sup>13</sup> See RCW 90.58.070(2).

eventually fulfills its duty.<sup>14</sup> But the budgetary and logistical impediments to DOE's thus compensating for every recalcitrant locality's refusal to perform its mandated tasks cannot be left to defeat the purposes of the Shoreline Management Act, because (as we documented at pages 14-19 of our opening brief) administration of the statewide DOE guidelines *directly* (even though they might not be perfectly tailored to every different locality's situation), *by the local government*, is the default solution specifically mandated by RCW 90.58.140(2)(a).

## **II. OTHER IMPORTANT ISSUES**

**>PREJUDICE:** Respondents say Petitioners have not satisfied the requirement that persons seeking review under the APA show "prejudice," see Burien brief at 8; Segale brief at 10. But SHB not only denied Petitioners' Partial Summary Judgment motion, but dismissed their entire case, notwithstanding their explicit reliance there upon (and SHB's rejection of) the points brought here on APA appeal. Having one's articulated claims specifically dismissed is pretty prejudicial. In this case, it cost the Petitioners the very interests the SHB had recognized as giving them standing: their legally-protected interests as persons who "walk in the area, use the shoreline frequently, and observe wildlife along the shoreline" (and also are "property owners in the area"), Order on Summary Judgment at 8,

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<sup>14</sup> RCW 90.58.090(6).

SHBR at 406. Without the relief that they sued for, they stand to suffer “injury to Petitioner’s esthetic enjoyment of this shoreline,” *id.* at 9, SHBR at 407, at and near the Segale property and potentially all along the shoreline within this City’s jurisdiction, contrary to the protections assured to them by the SMA.

In contrast, the appellant in the *Martin*<sup>15</sup> case cited at page 10 of the Segale brief sought to appeal on a point which he had yielded by waiver below; and the same was true in the *Buckley*<sup>16</sup> and *Hill*<sup>17</sup> cases on which *Martin* relied upon. In the *Brauhn* case<sup>18</sup> the Court held the appellant not to have been prejudiced by the claimed bias of a trial judge where she had gone through the trial and post-trial proceedings without ever raising the bias issue until her appeal. Neither Respondent in this case has cited any instance in which suffering a dismissal on specifically litigated substantive grounds has been held *not* to be substantially prejudicial.

>SEPA: One point about the pretended lack of “prejudice” requires further response. The Segale Brief at pages 7-8 asserts that Petitioners cannot demonstrate substantial prejudice because “they have conceded the issuance of the permit has *no* adverse environmental effects” (emphasis

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<sup>15</sup> *In re Martin*, 154 Wn. App. 252, 223 P.3d 1221 (Div. 3, 2009), *rev. denied*, 169 Wn.2d 1002 (2009).

<sup>16</sup> *Buckley v. Snapper Equip. Co.*, 61 Wn. App. 932, 813 P.2d 125 (Div. I, 1991).

<sup>17</sup> *Hill v. Dept. of Labor & Indus.*, 90 Wn. 2d 276, 580 P.2d 636 (1978).

<sup>18</sup> *Brauhn v. Brauhn*, 10 Wn. App. 592, 518 P.2d 1089 (Div. 1, 1974).

added), saying that because Petitioners did not appeal the City’s “determination of non-significance” (DNS) under the State Environmental Policy Act (SEPA) “they are now estopped to claim that Burien’s decision to grant the SDP to Segale has *any* significant environmental impact.”<sup>19</sup>

First, that brief stretches the truth when it says “Burien *thoroughly* reviewed the application under the State Environmental Policy Act,” *id.* at 4. In order to obviate redundant regulation, SEPA expressly provides that a DNS “is the proper threshold determination”<sup>20</sup> if

the local government considers the specific probable adverse environmental impacts of the proposed action and determines that these specific impacts are adequately addressed by the development regulations or other applicable requirements of the comprehensive plan ... or other local, state, or federal rules or laws; and [t]he local government bases or conditions its approval on compliance with these requirements ....<sup>21</sup>

Moreover, SEPA provides that where some

specific adverse environmental impact has been addressed by an existing rule or law of another agency with jurisdiction with environmental expertise with regard to a specific environmental impact, the county, city, or town ... may expressly defer to that agency. In making this deferral, the county, city, or town shall base or condition its project approval on compliance with these other existing rules or laws.<sup>22</sup>

That is precisely what Burien did in this instance: The “Environmental Review Report” by Burien’s Director of Community Development

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<sup>19</sup> Brief of Respondent/Cross-Appellant Segale at p. 5, n. 4 (emphasis added).

<sup>20</sup> RCW 43.21C.240(1), last sentence.

<sup>21</sup> *Id.*, subsections (2)(a) and (b)

<sup>22</sup> *Id.*, subsection (5).

Scott Greenberg<sup>23</sup> declares that the analysis

to determine if the project complies with all applicable requirements of the City shoreline master permit<sup>24</sup> is most appropriately addressed within the Type I land use decision report associated with the shoreline substantial development permit [SSDP].<sup>25</sup>

Therefore, limiting himself to such other matters as noise, storm water, vegetation and landscaping,<sup>26</sup> Mr. Greenberg deferred to the City's SSDP process on the other environmental issues raised; all of these, that Report declared, "will be included and addressed in the Type I land use decision report associated with the shoreline substantial development permit"; so they were not considered *at all* for purposes of the Environmental Review Report or the DNS. Moreover, as expressly prescribed by SEPA for when consideration of a "specific environmental impact" is thus deferred,<sup>27</sup> – Mr. Greenberg included the following caveat on the face of the DNS:

This Determination of Nonsignificance is specifically conditioned on compliance with the applicable regulations set forth in the Burien Municipal Code.<sup>28</sup>

In sum, nothing adverse to Petitioners happened in the SEPA process; they

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<sup>23</sup> Mr. Greenberg was listed by the City as a witness for the SHB hearing – which of course was obviated by the Board's Order on Summary Judgment.

<sup>24</sup> This of course embraces the *environmental* requirements of SMA and applicable shoreline regulations.

<sup>25</sup> Segale's counsel listed the Environmental Review Report on their SHB "preliminary witness list" SHBR at 279. It was referred to (along with the DNS now cited in Segale's brief) at page 6 of the City's "Type I Land Use Decision" SHBR at 164 (SHB's affirmation of which is the agency action here under review), and was appended thereto as an Attachment (along with the DNS itself). Both are appended to this brief.

<sup>26</sup> See Environmental Review Report at 2. The Report is appended to this brief.

<sup>27</sup> RCW 43.21C.240(2)(b) and (5), quoted in text accompanying notes 21-23 *supra*.

<sup>28</sup> A copy of the DNS, too, is appended to this brief.

neither should nor could have appealed; and their not doing so is irrelevant.

**>PURPOSE:** The Segale brief, at page 22, foolishly asserts that “what Segale intended to do in the future with the property was, in any event, irrelevant to the SDP request.” True, as the City’s brief notes at page 23, “there is always a possibility” that a structure might be “replaced in the future, whether due to damage, age, or other reasons”; but this does not mean that an applicant’s *present* plans for the immediate or *near* future use of his property does not matter. In fact, quite the contrary is true. Under DOE’s guidelines, whether the plan is to protect an existing building or instead to prepare for a new one makes all the difference as to which particular sub-subsection of WAC 173-26-231(3)(a)(iii) must be satisfied: subsection (B)(I) in the former case, and section (B)(II) in the latter (but sub-subsections (D) and (E) in either case). And under KCC Title 25 (if it applies), *if* the current plan is *anything other* than to protect an *existing* structure,<sup>29</sup> *no new or enlarged bulkhead is permissible at all*, unless by variance. Drafted at the height of 1970s-era environmental zeal, KCC Title 25 allows *no* bulkheads for *new* private, non-agricultural development without a variance. Thus it is foolish to say that what a permit applicant intends for the subject property is irrelevant; on the contrary, it is *crucial*.

Mr. Segale’s counsel at pages 21-22 of his brief recites a passage

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<sup>29</sup> Or for protection of “public improvements or the preservation of important agricultural lands,” KCC 25. 16.180(D).

from our Petition to the SHB indicating that the existing building on the Segale site – although it had been an occupied family residence for several decades until Mr. Segale’s acquisition – within weeks had been made “decrepit,” “a vacant shell,” “stripped to its studs,” and “now awaiting demolition to make way for a new residential structure”; and Segale’s counsel took this to mean “Engdahl/Patterson apparently knew [its replacement] was a possibility” (even though Segale, in the Environmental Checklist, *see* SHB 141, at 148, had disavowed under oath any intent to demolish it). Indeed, we say! And so must the City officials have known, when they pretended compliance with KCC 25.16.180(D) and then put over on the unsuspecting SHB their deception that the bulkhead replacement was to protect that existing structure! And no wonder the City could issue within less than a week the demolition permit applied for on the day after SHB entered its last Order, *see* Amended Petition for Review ¶ 39, CP 1, at 9; the inspection for toxic metals or asbestos-containing materials had been completed almost three years earlier, just a week after Segale had taken title! And the City officials who had shepherded the application could hardly have been surprised; indeed, the City Attorney declined Petitioners’ urgent written request to stay construction work on the bulkhead during the period required by statute (and by the terms of the City’s own permit) to allow time for securing a judicial stay, pending commencement of this

judicial appeal process. Most of the documentation supporting these statements was, we know, stricken by the Superior Court; but that Order to Strike is here under appeal; and Mr. Segale's counsel is accountable for opening the door to this recital.

If Mr. Segale was not the instigator of the deception of the SHB in this matter, perhaps it was the City itself that induced and coached the scam. Whoever bears the onus, it cannot be that such trickery to evade the laws and rules intended to protect the State's shorelines can be condoned.

**>GUIDELINES APPLICABILITY:** At pages 14, 18, and 19 of its brief, the City insists that "Ch. 173-26 WAC only applies to the promulgation of shoreline master programs, not to the issuance of shoreline development permits." But that is true for Burien *only* if it is legally accurate to say *both* (1) that KCC Title 25 is in force there, *and* (2) that it is permissible to simply ignore KCC 25.32.010(A). The latter section *itself* declares the "guidelines" applicable, and they of course constitute Part II of WAC ch. 173-26. Moreover if (as we maintain) *all* of KCC Title 25 *ceased* to operate in Burien upon the City's incorporation, the "guidelines" Part of WAC ch. 173-26 is made directly applicable by RCW 90.58.140(2)(a).

**>UNINCORPORATED AREAS ONLY:** The City at its brief page 14 parrots the SHB in saying that KCC Title 25's explicit limitation of its

own scope to areas “within the unincorporated portion of King County,” KCC 25.08.490, is immaterial because *prior to* incorporation “it was the applicable shoreline master program” for the area since incorporated. But that scope limitation was *an integral part of* that SMP as approved by the DOE; did only the *other parts* (or, maybe, *some of the other parts*) “carry over” to the city? Is it for the SHB to pick and choose? By what authority? This is not “construction”; it is invention.

**>ERRONEOUS KCC 25.16.180(D) DISMISSAL:** Moving the Superior Court to dismiss this issue, Segale’s counsel first argued falsely that Petitioners had “abandoned” their KCC 25.16.180(D) argument, and then – in a memorandum Petitioners received only after oral argument,<sup>30</sup> and orally in that argument itself<sup>31</sup> – shifted ground to assert falsely that Petitioners had not timely raised 25.16.180(D) *at all*. But the truth is that Petitioners had relied upon, and *quoted and emphasized the crucial words of* KCC 25.16.180(D),<sup>32</sup> on page 10 of their Petition for SHB Review, asserting it for two paragraphs and arguing that it should be construed in light of the mandatory “guidelines” requirements that Petitioners cited, relied upon, and discussed at length over the ensuing pages. It also was among the ex-

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<sup>30</sup> CP 230, at 232. As to the tardiness of service see CP 242-243.

<sup>31</sup> April 1, 2011, hearing transcript at 9-12.

<sup>32</sup> Petitioners there cited section 25-16-180(D) both by its proper label “KCC,” and by the City’s preferred (but tendentious) shorthand, “BSMP” (for “Burien Shoreline Master Program”) – an abbreviation which they never had utilized until these Petitioners asserted in this case that Burien legally has no SMP.

cerpts from KCC Title 25 selected for and attached to Petitioners' Motion to the SHB for Partial Summary Judgment, SHBR 220, at 232.

Moreover, counsel for Respondents were fully aware from the outset that KCC 25.16.180(D) was at issue this case; for it was cited and addressed in the City's "Type I Land Use Decision"<sup>33</sup> – which Respondents themselves produced and defended, *see* SHBR 159, at 167.

Petitioners' reliance upon KCC 25.16.180(D) in the SHB also is evident from subparagraphs e) and f) under the "Seventh Proposed Legal Issue" in their April 22, 2010 *Proposed Legal Issues* document.<sup>34</sup>

At the pretrial conference in SHB, all of the contemplated issues (including KCC 25.16.180(D)) were identified and discussed. Because the parties could not agree on a single issues statement, the AAJ composed a generalized list she deemed sufficient to embrace all that the parties had discussed, and set it out in her Amended Pre-Hearing Order, SHBR 254-255. In her letter to all counsel transmitting that Amended Pretrial Order, the AAJ explained:

I have dropped out some of the more specific issues in an effort to reduce the number of issues. *You may still make these more specific arguments* under the more general issues. [Emphasis added.]

Later in the SHB proceeding Respondents moved to dismiss sev-

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<sup>33</sup> This is the city decision upheld by SHB in the Orders here now for review.

<sup>34</sup> There, the material words of KCC 25.16.180(D) are quoted in subparagraph e); and subparagraph f) refers to the KCC provision in addition to the comparable WAC provisions.

eral issues as untimely raised, SHBR 111, at 123, 125, 127, saying the references to “applicable regulations” in the Amended Pretrial Order’s “legal issues” list failed to specifically identify any contemplated statutory or regulatory provisions. But SHB denied the motion; the AAJ herself had presided at the pre-hearing conference, and knew what had transpired there. As the Board’s Order on Summary Judgment explained,

the Petitioners identified these issues at the pre-hearing conference. ... The pre-hearing conference is the time set for identifying legal issues in the appeal. See WAC 461-08-455(1)(b) (issues to be identified at the pre-hearing conference)’ WAC 461-08-350 (providing that all pleadings shall be construed to do substantial justice). By raising their issues at the pre-hearing conference, the Petitioners were timely. ... Therefore the Respondents’ motion to dismiss several of the issues on this basis is denied.

Order on Summary Judgment at 9-10, SHBR at 407-408.

The Segale brief, in note 15 on p. 15, declares (again<sup>35</sup>) that Petitioners failed even to argue KCC 25.16.180(D) in opposition to Respondents’ speaking Motion to Dismiss in the SHB. But that is not true. Petitioners had filed a Motion for Partial Summary Judgment the same day Respondents filed their speaking Motion to Dismiss, and had discussed KCC 25.16.180(D) in their Memorandum supporting their own motion; and they incorporated by reference portions of that Memorandum into their Response to Respondents’ summary judgment dismissal Motion.

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<sup>35</sup> The same representation had been made to the Superior Court on page 8 of the Segale Motion to Dismiss Issues, CP 47, at 54.

It therefore is clear from the record that Petitioners not only raised KCC 25.16.180(D) at the outset of their SHB case, but maintained their reliance upon it. There is no suggestion that they ever explicitly abandoned it, and nothing from which any intent to do so can fairly be inferred.

But in its July 16, 2010 Order of Summary Judgment the SHB had failed to address *several* of the issues the parties had litigated; and one of those unaddressed issues was KCC 25.16.180(D). For that reason, Petitioners asked the Board to reconsider its Order so as to address the issues disregarded, reminding the Board of its duty under RCW 34.05.461(3) and WAC 461-08-555(2) to include findings, conclusions, and reasons on each material contested issue.<sup>36</sup> Among those that Petitioners asked the Board to address was KCC 25.16.180(D);<sup>37</sup> and that is the reason why almost one-third of the Board's Order Denying Reconsideration is devoted to discussing KCC 25.16.180(D).<sup>38</sup>

Eliminating KCC 25.16.180(D) from consideration in this case is extremely important to Respondents: Otherwise they stand to lose, even if KCC Title 25 is held to apply. This might explain (but it cannot justify) their repeated falsehoods as to its timeliness. The Superior Court's Order on Motion to Dismiss Certain Issues Only, CP 237 et seq., was un-

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<sup>36</sup> Petition to Reconsider Order of Summary Judgment, at 1 n. 2, SHBR 387.

<sup>37</sup> *Id.* at 4-7, SHBR at 245-248.

<sup>38</sup> SHBR at 378-379.

ported by substantial evidence, and so must be reversed at least insofar as it pertains to our claims and arguments relying upon KCC 25.16.180(D).

**>ERRONEOUS KCC 25.16.190(D) DISMISSAL:** The Segale brief, at page 16 (including note 16), also repeats<sup>39</sup> the argument that Petitioners' reliance on KCC 25.16.190(D) to support their claim that the proposed bulkhead would unlawfully create "new lands" was "a new issue raised for the first time on judicial review" and "never raised ... to the Board." (Indeed, Segale's counsel seems to believe the entire "new lands" argument depended solely upon KCC 25.16.190(D); but that was actually just one of several provisions supporting the argument.)<sup>40</sup> And the truth is that KCC 25.16.190(D) itself *was* cited<sup>41</sup> under the "Seventh Proposed Legal Issue" in Plaintiff's Proposed Legal Issues and Preliminary List of Witnesses and Exhibits filed and served very early in the SHB proceedings, on April 22, 2010, and never abandoned. Thus the Order on Motion to Dismiss below,

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<sup>39</sup> This argument had been made in the Superior Court, see, e.g., CP 225, at 226.

<sup>40</sup> E.g., WAC 173-26-020(14) (defines "fill" to include adding soil, sand, rock, etc. "on shorelands in a manner that raises the elevation"); WAC 193-16-060(11)(e) (prohibiting bulkheads "for the indirect purpose of creating land by filling behind the bulkhead") (this "still applies to jurisdictions that have not adopted a SMP," [www.ecy.wa.gov/programs/sea/sma/laws\\_rules/172-16.html](http://www.ecy.wa.gov/programs/sea/sma/laws_rules/172-16.html); cf. WAC 173-27-040(2)(c) (a bulkhead that otherwise would be exempt "is not exempt if constructed for the purpose of creating dry land").

<sup>41</sup> By typographical error, the cite was to KCC 15.16.190(D) instead of KCC 25.16.190(D). But the error was obvious to all counsel involved in the SHB proceedings, since there was no KCC Title 15 relevant at all to the case; and the correction was made in the course of the Pre-Hearing Conference, where all SHB issues were discussed, see SHBR at 408 lines 6-12. That sufficed; see p. 25 of this brief, *supra*.

CP 237 et seq., rests upon opposing counsel’s misrepresentation<sup>42</sup> as to KCC 25.16.190(D), and so in this respect, too, must be reversed as unsupported by substantial evidence.

**>THE KCC 25.32.010 ISSUE:** The Segale brief is wrong in saying that KCC 25.32.010 was not raised until being cited “in a footnote ... in the trial court.”<sup>43</sup> It was argued before the SHB, and because not addressed in the Board’s original Order, was included as the third argument in our reconsideration request, SHBR at 391. That argument then was addressed in the second of the Board’s Orders here under review, SHBR 374, at 377.

The Respondents’ attempt to evade KCC 25.32.010<sup>44</sup> is just a copy-cat version of the SHB’s bare *ipse dixit* that only the *other* DOE regulations (such as those in WAC ch. 173-27, and *not* those comprising the “guidelines” (which are in WAC ch. 173-26) “should be construed to be applicable to permitting decisions under the King County SMP.”

SHBR at 4, lines 17-19. This is not “construing”; it is unabashed *amend-*

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<sup>42</sup> Segale’s counsel claims Petitioner Engdahl “conceded in argument before the trial court” that we had not relied on 190(D) before the Superior Court review. The truth, however, is that the April 1, 2011 argument transcript at 26-28 shows that Judge White mistakenly read the wrong provision thinking it was subsection 190(D), and twice declared wrongly that 190(D) did not contain the words that it does (26 at lines 21-25; 28 at lines 1-3). This caused confusion between court and advocate; and in the end, Engdahl – at lines 14-18 of transcript page 28 – while repeating that “it was *not* raised [in Superior Court] for the *first* time” (emphasis added), agreed he had no objection “to that *form of the order* on that provision” (emphasis added). This was no concession on the substance.

<sup>43</sup> Segale Brief at 27-28 n. 26.

<sup>44</sup> *Id.*, n. 7.

*ing*, because subsection A of KCC 25.32.010 *as it is written* provides:

No development shall be undertaken by any person on the shorelines of the state unless such development is consistent with the policy of Section 2 of the Shoreline Management Act of 1971, and, after adoption and approval, the *guidelines* and regulations of the Washington Department of Ecology

as well as the King County SMP itself (emphasis added). There is nothing called “guidelines” in WAC ch. 173-27; and the specific word “guidelines” cannot be erased by any pretended “construction”! The best (if not the only credible) explanation for inclusion of the “guidelines” in KCC 25.32.010 is the one we suggested at pages 19-20 of our opening brief.

Respondent City of Burien might be embarrassed at the weakness of the SHB’s argument regarding KCC 25.32.010(A), for the City’s brief makes no attempt to address KCC 25.32.010(A) at all. It follows that, even if KCC Title 25 is considered to be in force as Burien’s SMP, shoreline development permits cannot lawfully be issued for developments not “consistent with the [current] guidelines” adopted by the DOE; and those guidelines are published as Part II of WAC c. 173-26.

**>BURDEN OF PROOF:** Both Respondents’ briefs persist in misstating burdens of proof in a summary judgment case challenging the issuance of an SSDP.<sup>45</sup> The SMA declares that an applicant is burdened to prove that the “proposed substantial development is consistent with the criteria that

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<sup>45</sup> Segale brief at 11-12, n. 12; Burien brief at 8.

must be met before a permit is granted,” RCW 90.58.140(7). On summary judgment, of course, showing this “prima facie” is sufficient to shift the burden; but that does not justify the applicant limiting his attention to only a few of the criteria that apply. If there are ten criteria, for example, it is not enough to make a prima facie showing of only five, or six, or nine. It is the professional obligation of the applicant’s lawyer to examine the law sufficiently to identify *all* of the criteria, and make a prima facie showing *as to each*. The burden as to any criterion shifts only when – and only if – satisfaction of *that particular* criterion is shown prima facie; an opponent need not run ahead and *disprove* satisfaction of criteria the movant has not prima facie shown (or the movant’s lawyers have simply overlooked).

The Segale brief claims in footnote 12 on pages 11-12 that it should suffice that Segale showed prima facie the facts of deterioration, leakage, erosion, and same alignment, and the fact of an existing building. But those (none of which Petitioners ever challenged) are *not all of* the criteria. There was not the slightest evidence that the deterioration, leakage, erosion, or anything else posed any risk to the existing building, as KCC 25.16.180(D) requires (let alone a “significant possibility that such a structure will be damaged within three years,” as WAC 173-26-231(3)(iii)(D) requires); and there was no prima facie showing that the massive proposed replacement was the “minimum necessary” size (as

WAC 173-26-231(3)(iii)(F) requires) to alleviate any such risk as might have been imagined. On the contrary, the Respondents' own evidence (on page 6 of the City's Findings of Fact and Conclusions on the Segale application) declared that "the application did not include an analysis specifically stating that the existing single-family residence is eminently [sic] threatened by erosion from waves or currents," SHBR at 322 (emphasis in original). *See also* pages 28-37 of our opening brief. Under these circumstances it defies both reason and law to assert, as the Segale brief does in its footnote 12, that "the question of substantial evidence is not whether Segale put forth substantial evidence, but whether Engdahl/Patterson presented substantial evidence to support the contention that the sea wall *was not necessary* to protect an existing structure" (emphasis in original).

For its part, the City's brief does no more than opine that the need to protect the existing residential structure was "clearly obvious," City's brief at 17. But obvious from what? From the fact that the house was forty feet from the shoreline (*see* SHBR at 160 & 139), which – according to the evidence before the SHB (*see* SHBR at 49 & 51) – was about twice as far from the shoreline as any of the neighboring houses? Obvious from the fact that the City's own "Findings of Fact and Conclusions" found no evidence of any "eminent" threat to the building? Obvious from the fact that that the engineer expert (in one sentence, consisting of twelve words)

said the bulkhead must be *either* repaired or replaced, but expressed no preference for one solution over the other and said nothing about risk to the building (and certainly nothing to support the huge proposed increase in height)? Had there been an evidentiary hearing, that witness could have been cross-examined (he was on Segale’s preliminary witness list, SHBR 277, at 279) as to how this hugely expanded bulkhead could be necessary if (as he said) mere repair of the far smaller original would have satisfied the needs that he saw. But the Plaintiffs were denied that opportunity for proof, because this case was decided on summary judgment. This nicely illustrates precisely why, on summary judgment, a court is not allowed to enhance or extrapolate from affidavits or declarations, but rather must consider the material evidence and all reasonable inferences therefrom in the light most favorably to the non-moving party, giving judgment summarily only if “reasonable minds could reach only” the conclusion urged by the movant, *Weatherbee v. Gustafson*, 64 Wn.App. 128, 131, 822 P.2d 1257 (Div. I, 1992).<sup>46</sup>

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<sup>46</sup> A word should be added about the misleading reference at page 21 of the Segale brief about “letting water pass to the road behind the bulkhead.” As explained at p. 37, n. 71 of our opening brief, the recording of the June 10, 2011, Superior Court hearing was of exceedingly poor quality and its professional transcription very difficult and very imperfect, with many misunderstood words and scores of “inaudible” gaps. What appears as “road” in the transcript was not the word spoken at all; it is a transcriber’s incorrect guess. There is no evidence in the record (or in fact) of water from the Sound ever having reached this road by Mr. Segale’s property or any other of the 25 homes on the road.

### **III. SEGALE'S CROSS APPEAL AND MOTION TO STRIKE**

**>THE MOTION TO STRIKE**: On March 23, 2011 Respondent Segale (*not* joined by the City) moved the Superior Court to strike four documents which the Petitioners had filed, CP 838. By his handwritten revisions on the order form proposed by counsel, however, Superior Court Judge White on April 1, 2010, granted that motion only “in part”: He struck only the Petitioners’ Opposition Declaration (with its attached exhibits) Against Dismissing Issues Purportedly Abandoned or Tardily Raised, CP 162 et seq., and “any portions of the opposition Memorandum [CP 175 et seq.] relying upon the [stricken] opposition declaration.” In contrast, however, Judge White expressly declared that “the court makes no formal ruling on” the two other targeted documents: the Trial Brief of Petitioners on Judicial Review (CP 534 et seq.) and the Declaration of David E. Engdahl Supporting Trial Brief of Petitioners *See* Order on Motion to Strike, CP 240-241. Petitioners’ Notice of Appeal to this Court included their appeal of both April 1, 2010, Orders.

The Opposition Declaration Against Dismissing Issues Purportedly Abandoned or Tardily Raised was, indeed, stricken; and is included as its Exhibit 4 (CP 174) a July 15, 2009, e-mail excerpt, a copy of which Petitioners had found in the City’s files on the Segale SSDP application. But that very same e-mail excerpt had *also* been submitted two weeks *earlier*

as Exhibit 6 to the Declaration of David E. Engdahl Supporting Trial Brief of Petitioners – and *that* is one of the documents targeted by Segale’s March 23<sup>rd</sup> Motion that Judge White *refused* to strike, as noted above. It therefore is at least uncertain whether Judge White actually intended to strike this particular e-mail excerpt. Moreover, this e-mail excerpt had been included on Petitioners’ List of Proposed Exhibits filed (and duly served on both Respondents) *eleven months earlier* in the SHB proceeding, *see* SHBR at 286. For that reason (and because either the original or a copy of it was *already* contained in *both* Respondents’ files), neither could have been caught by surprise.

In that e-mail excerpt, Mr. Segale’s employee managing the bulkheading project (Steve Nelson) had answered an Army Corps of Engineers’ inquiry as to “the minimum amount of material needed for erosion protection at this site” by writing, “the minimum amount of rock wall material would be to elevation 14, which is the top of the existing wall.” In contrast, the proposed *replacement* bulkhead was to reach elevation 21<sup>47</sup> – fully seven feet higher, and more than doubling the height of the bulkhead showing above the beach level at the site; these dimensions are deduced from the Henderson declaration, SHBR at 208, 209, and Site Plan, SHBR at 139. Consequently, this e-mail excerpt does tend to discredit any claim

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<sup>47</sup> The FEMA rationalization asserted in that e-mail excerpt had no merit, was later abandoned, and was not mentioned at all in any of the SHB Orders here under appeal.

that Mr. Segale's huge replacement was the minimum needed to halt erosion at the shoreline, or was to protect the structure then existing. Notice that Petitioners planned to introduce it as evidence might have contributed to Respondents' decision to prematurely file their speaking Motion to Dismiss – not only before a fair hearing on the merits, but while the agreed-upon and ordered period for discovery had only partially run.

Segale's counsel also had argued for striking the photographs comprising Exhibit 3 to the Opposition Declaration Against Dismissing Issues Purportedly Abandoned or Tardily Raised, on the ground (he said) that they were "offered to support Professor Engdahl's argument with respect to KCC 25.16.180(D), an issue which Segale argues has been abandoned."<sup>48</sup> We have already demonstrated above, however, that Petitioners' argument with respect to KCC 25.16.180(D) was never abandoned at all; and this vitiates the asserted ground on which Judge White ordered those revealing photographs stricken. To that extent,<sup>49</sup> therefore, the Order on Motion to Strike should be reversed,.

**>THE CROSS APPEAL:** But Segale's attorney, launched his most vituperative attacks in subsequent filings, making no further motions to strike

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<sup>48</sup> Respondent's Reply in Support of Motion to Strike Four Documents at 4 n. 1, CP 225, at 228.

<sup>49</sup> Petitioners do not maintain their objections to Judge White's striking of Exhibits 1 and 2 of the Opposition Declaration Against Dismissing Issues Purportedly Abandoned or Tardily Raised.

but instead threatening to pursue CR 11 sanctions:

- for Petitioners' alleged misconduct in "disregard of, and contempt for, the court's orders," Brief of Respondent at 41 (none of which Orders Petitioners actually disregarded or disobeyed);
- "for their [alleged] persistent effort to raise new issues or evidence on judicial review of the board's decision, efforts [Segale's counsel falsely claims] they now *concede* were improper," *id.* at 8 (whereas Petitioners have conceded no such thing, and have refuted this charge – again – in several respects in this reply brief);
- for allegedly filing motions one day late, *id.* at 36 (a false claim the truth about which is evident in the court's files and has been explained to counsel at least twice<sup>50</sup> before);
- for relying "on facts occurring after the Board's decision and outside of the administrative record" *id.* at 35 (although Mr. Talmadge mis-states the April 1 Order he cites, and the subsequent facts not-of-record were for purposes of RCW 34.05.562(2)(b));
- for seeking a remand allegedly "because Engdahl/Patterson merely

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<sup>50</sup> The Court's records show that these Motions to Reconsider both were timely filed in the office of the Superior Court Clerk during its open hours, less than five minutes after 4 p.m. on April 11, 2011. We informed Mr. Talmadge of this fact by e-mail the following day, when he first vented his accusation of untimeliness. The full e-mail string between us on this matter was attached as Exhibit 1 to the Declaration in Opposition to Motion for CR 11 Sanctions in the Court below, and is also appended to this brief. We are appalled that Mr. Talmadge persists in asserting this falsehood, and conclude that he is not sufficiently fastidious regarding truth.

- sought to relitigate their claims,” *id.* at 2 (which is patently untrue);
- for allegedly lacking any support for Petitioners’ “new land” argument “other than their obvious antagonism toward Segale’s bulkhead and home,” *id.* (notwithstanding the several relevant supporting provisions of law Petitioners invoked, and the cordial respect we have long and consistently maintained toward Mr. Segale);
  - for submitting “an amended trial brief [CP 557 et seq.] that again [allegedly] attempted to expand the record on review” *id.* at 36 (whereas that brief addressed no new issue or evidence – and the accompanying Declaration contained no attachment – other than SMP documents which the SHB had held to be applicable (although with at least one of them all Respondents’ counsel were unfamiliar) plus a more recent King County ordinance that was offered solely for comparison and argument regarding proper interpretation of KCC Title 25, and not for any point of fact);
  - and generally because Petitioners, he claimed (without particulars) had, “needlessly increased Segale’s litigation costs by requiring him to incur attorney fees and costs to respond to their [allegedly] improper pleadings,” *id.* at 41.

Apart from those pertaining to matters deemed probative of efforts to mislead the Board (as discussed in the paragraphs below), or otherwise justi-

fyng remand, these accusations all are conjectural, distorted, or misconceived; and they are all denied. None has been substantiated. Indeed, a number of examples of exaggeration and untruth in these accusations were examined and disposed of in particular detail in our twelve-page Opposition to Motion for CR 11 Sanctions, CP 813-824 – which, perhaps, was somewhat persuasive to Superior Court Judge White as he considered (and denied) the maledictory Segale demand for CR 11 sanctions).

Although Segale’s counsel denounced Petitioners’ request for remand to the SHB as “tardy,” CP at 227, “belated,”<sup>51</sup> and “belatedly” raised, CP at 229, in reality it was part of the relief requested in Petitioners’ very first pleading in the Superior Court: Count 2 of their original Petition for Judicial Review, SHBR 360, at 366 et seq., alleged several grounds for, and expressly requested, such remand; and their Amended Petition for Judicial Review, filed three days later, repeated the same Count 2 and added Counts 3 and 4, each of which likewise asked for relief in the form of a remand to SHB, SHBR 339, at 346-358. It thus is not apparent to us how Petitioners’ remand request could have been any *less* “tardy” or “belated.”

Apart from his tardiness complaint, Mr. Talmadge seems to have

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<sup>51</sup> Brief of Respondent/Cross-Appellant Segale at 13. Mr. Talmadge asserted falsely that “it was only upon Segale’s filing of the motion to strike Engdahl/Patterson’s effort to submit new issues and evidence to the trial court that they raised the issue of a possible remand to the Board.” *Id.* at 18.

been particularly incensed by Petitioners' temerity in setting forth the evidence which seemed to them to comprise a prima facie showing that Mr. Segale had misled the SHB on the crucial question whether the proposed replacement bulkhead really was necessary for the protection of the then-existing structure on the site. That evidence was of matters which had been unknown and unknowable to Petitioners before the SHB Orders were rendered, but strongly suggest that material deception of the Board had occurred while the matter was pending – as alleged in paragraphs 38, 39, 40, 41, and 43 of the Amended Petition for Judicial Review (SHBR at 347-348).<sup>52</sup>

Petitioners identified that evidence in good faith, albeit with a sober awareness of its gravity, and with an openness to persuasion that the actual circumstances might have been different than that evidence made them appear; for Plaintiffs understood that unless refuted this evidence would vitiate the SHB proceeding under RCW 34.05.562(2)(b), since “judgments as well as grants obtained by fraud or collusion are void,” *League v. DeYoung*, 52 U.S. 185, 203, 1850 WL 6836 (1850), and “void” certainly “relates to” the “validity of the agency action at the time it was

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<sup>52</sup> It is ironic that Mr. Talmadge claims Petitioners' remand request was “amorphous,” so that the Court “would have to guess as to what ‘new evidence’ they wanted the Board to generate,” Segale brief at 20-21, while at the same time denouncing Petitioners' identification of evidentiary items in reasonable detail, on the ground that they are not yet of record. But the law does not favor “catch-22.”

taken,” as contemplated by RCW 34.05.562(2)(b). The principles invalidating judicial proceedings for fraud on the forum “apply with equal logic to a decision of” an administrative agency, *Jones v. Willard*, 224 Va. 602, 607, 777 S.E.2d 504, 508 (1983); and furthermore, RCW 34.05.562 seems to be the administrative law near-equivalent of CR 60(b)(3), (4), and (11). Also, this Court has recognized that “FRCP 60(b)(3) is the federal counterpart to our CR 60(b)(4),” and that when Washington statutes or regulations have the same purpose as their federal counterparts, “we will look to federal decisions to aid us in reaching the appropriate construction,” *Peoples State Bank v. Hickey*, 55 Wn.App. 367, 371, 777 P.2d 1056, 1058 (Div I, 1989). This Court has also observed that

Wright & Miller, 11 Wright & Miller, *Federal Practice and Procedure* § 2864 (1973), review numerous cases giving relief under the federal rule analogous to our subsection (11) [of CR 60(b)] showing that it is not to be given a cramped or narrow reading.

*Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 312, 863 P.2d 1377, 1383 (Div. 1, 1993); and our CR 60 “contemplates a very broad definition of fraud” that “includes misrepresentation or other misconduct by an adverse party,” *id.*, 72 Wn.App. at 309, 863 P.2d at 1381.

It might be argued that Mr. Segale only cooperated with – or just followed the guidance and advice of – the City’s own officials, and that it actually was *they* who were responsible for misleading the Board. Indeed

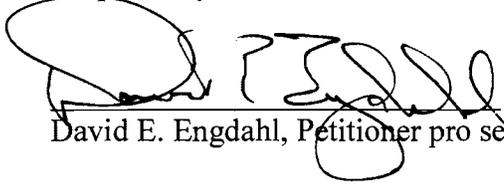
– inappropriately for what was supposed to be a de novo proceeding – the SHB does seem to have considered it significant that “during the initial permitting process” the *City had become convinced* that “the replacement bulkhead was necessary to protect an existing residential structure,” see SHBR at 378, lines 14-16. At least the very few specifics cited there by the Board (some unquantified deterioration and leakage at some unspecified place or places on the old bulkhead, and twelve words from an engineer about that bulkhead but mentioning no risk to the house) fall far short of what could support a summary judgment on that issue without wrongly supplementing the evidence with indulgent inferences favoring the *movant*, or else unduly deferring to the City’s own representations.

Mr. Segale’s counsel has utilized the threat of CR 11 sanctions in an evident attempt to intimidate Petitioners into abandoning their allegations of deception of the SHB. Believing his threat to be both high-handed and unprofessional, however, Petitioners have refused to yield; and they trust this Court now to leave undisturbed the Superior Court’s discretion in denying the demand for CR 11 sanctions. We note that no abuse of discretion in Judge White’s denial has been either alleged or shown, and that no substantial prejudice to Mr. Talmadge’s client has been accounted to any particular (alleged) misdeed.

*Conclusion*

For all of these reasons, Petitioners request the relief specified in the Conclusion to their opening brief.

Respectfully submitted,

   
David E. Engdahl, Petitioner pro se    Diane M. Patterson, Petitioner pro se

12233 Shorewood Drive SW  
Burien, WA 98146  
(206) 243-8616

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

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

v.

No. 67420-0-1

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

**FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 JAN -3 PM 2:34**

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**APPENDICES TO  
REPLY BRIEF OF  
PETITIONERS / CROSS RESPONDENTS**

DNS and Environmental Review Report	App. 1
E-mail string	App. 2
WAC 90-58-140	App. 3
KCC Title 25 excerpts	App. 4

# APPENDIX 1



# SEPA Determination of Nonsignificance (DNS) WAC 197-11-970

City of Burien 400 SW 152<sup>nd</sup> St, Suite 300 Burien, Washington 98166

Date January 25, 2010

Applicant Mario Segale, owner

Proposal The applicant requests a Shoreline Substantial Development permit for the reconstruction and addition of approximately 4 feet of height to an existing protective bulkhead.

File No. PLA 09-1225  
File is available for viewing at Burien City Hall during regular business hours.

Location 12701 Standring Lane SW Burien, WA 98146

Tax Parcel No. 788160-0005

Lead Agency City of Burien

Environmental Determination The lead agency for this proposal has determined that the proposal does not have a probable significant adverse impact on the environment. An environmental impact statement (EIS) is not required under RCW 43.21C.030(2)(c). This decision was made after a review of a completed environmental checklist and other information on file with the lead agency.

This Determination of Nonsignificance is specifically conditioned on compliance with the applicable regulations set forth in the Burien Municipal Code.

All information relating to this proposal is available to the public upon request.

Public Comment and Appeal Process This DNS is issued under 197-11-340 (2). The lead agency will not act on this shoreline substantial development permit for 14 days from the date above. Written comments must be submitted by **February 8, 2010**. There is a 21-day appeal period on this agency decision. An appeal of the decision requires that a Notice of Appeal form and a \$287.80 fee be submitted by **February 15, 2010**. Appeal forms are available at the Department of Community Development or the city's website [www.burienwa.gov](http://www.burienwa.gov). Questions regarding procedures for appealing this agency decision may be directed to David Johanson, AICP at 206-248-5522 or [DavidJ@burienwa.gov](mailto:DavidJ@burienwa.gov).

SEPA Responsible Official Scott Greenberg, AICP  
Community Development Director  
City of Burien  
400 SW 152<sup>nd</sup> Street (Suite 300)  
Burien, WA 98166

Signature: \_\_\_\_\_

CITY OF BURIEN  
DEPARTMENT OF COMMUNITY DEVELOPMENT  
400 SW 152<sup>nd</sup> Street, Suite 300  
Burien, WA 98166  
(206) 248-5520

**ENVIRONMENTAL REVIEW REPORT**

Segale Bulkhead Replacement

**DATE:** January 25, 2010

**FILE NO.:** PLA 09-1225

**APPLICANT:** Steven Nelson agent for Mario Segale

**REQUEST:** Re-construction and addition of approximately 3-5 feet of height to an existing protective bulkhead located on Puget Sound.

**LOCATION:** 3514 Standring Lane SW Burien, WA 98146

**PARCELS:** 788160-0005

**DECISION:** **Determination of Nonsignificance**

**Summary Recommendation**

After review of the environmental checklist and supporting information a Determination of Non-significance is issued for the project.

**Project Description**

The applicant proposes to repair and raise an existing rock sea wall located on Puget Sound. The proposed repair of the sea wall will be located in the same alignment as the existing rock wall however the height of the structure will be increased by an average of about 3 to 5 feet. The application states the proposed additional height of the sea wall is to meet the new FEMA flood elevation requirements. The FEMA flood zone designation is 'A', and located in Reach 19 with a base flood elevation of 20 feet (Burien Coastal Flood Hazard Zone Delineation). The plans indicate that existing rocks used for the current sea wall will be used to reconstruct the wall. In addition to restacking the existing wall, new rock will be added to the top along with backfill that will be placed behind the higher wall at a 2:1 slope.

Consistent with BMC 14.10, KCC 20.44 and WAC 197-11-800[3], environmental review of this project is required since the request will add an average of about 3 to 5 feet of height to the existing structure which is a material expansion of a structure on lands wholly or partially covered by water.

**Segale Seawall  
PLA 09-1225  
Attachment 6**

### **Regulatory Requirements**

The State Environmental Policy Act (SEPA) specifies that this environmental review is to focus only on potential significant impacts to the environment that could not be adequately mitigated through the City of Burien's regulations and policies (RCW 43.21C.240). At a minimum, the following Burien Municipal Code (BMC) chapters will be analyzed during permit review:

- BMC 9.105.400 addressing construction noise.
- BMC 13.10 addressing storm water standards and referencing the King County Surface Water Design Manual, 2005
- BMC 15 addressing buildings, construction and flood damage prevention
- BMC 19.40 addressing critical areas
- BMC 19.25 addressing tree retention and landscaping

It will be necessary to further analyze the proposal to determine if the project complies with all applicable requirements of the City shoreline master program. That analysis is most appropriately addressed within the Type I land use decision report associated with the shoreline substantial development permit.

### **Findings and Conclusions**

The following is an analysis of probable significant adverse environmental impacts which allows the City of Burien to issue a Determination of Non-Significance for the proposal. Only those elements of the environment that could be impacted by the proposal are analyzed.

#### **Earth**

The area of work is limited to location of the existing seawall which is adjacent to the Puget Sound. The proposal will excavate an approximate 20 foot wide area behind the seawall and replace the wall using existing and new boulders along with drainage rocks. Some backfill will be placed behind the new and heightened seawall. A biological evaluation report indicates that the new fill will consist of native rock from local sources but did not specifically state the source. The checklist states that the rock used for the replacement bulkhead will be obtained from Washington State Department of Transportation pit number A464.

During storm events additional wave energy resulting from the increased bulkhead height may be reflected back toward the beach. Scientific publications state that increased reflected wave energy of this nature can be detrimental to the beach environment, however it is not known what specific impacts may be associated with this proposal. Given the fact that there is an existing bulkhead currently located on the property, the increased height of 3 to 5 feet should not result in significant added wave energy reflection or alteration to water movement around the proposed structure during high tide and storm events which would create any probable significant impacts.

### Air

Short term impacts caused by construction of the project include dust associated with construction activities and exhaust emissions from heavy equipment. To mitigate any impacts of dust during construction the applicant will be required to use measures such as watering and spraying. All construction equipment will be required to meet regulatory standards for vehicle emissions.

### Water

There is no proposed alteration to natural or manmade drainage courses as a part of the proposed project. The site plans indicate that there is an existing 24-inch storm water conveyance pipe that is buried at the very north portion of the subject parcel.

It is anticipated that some sediment may enter the Puget Sound at the first high tide following construction. This should be a limited amount that will occur only at the first high tides and would depend on the relative elevation of the water level. All work will occur according to approved intertidal work windows to minimized impacts to marine life.

The biological evaluation states that there are no springs or other ground water sources on site or within the project area. The wall is designed with drain rock and filter fabric located landward of the proposed new wall. This design feature will allow any surface waters to pass through the fabric and the structure onto the beach. During storm events this required design will allow water that overtops the wall to return to the beach without disturbing the finer materials located landward of the filter fabric.

Temporary erosion and sediment control plans required to direct potential storm water runoff during construction away from adjacent properties will be reviewed at the time of building permit submittal.

The site abuts the outfall of Salmon Creek which according to the City of Burien Critical Area maps is classified as a Type 2 Stream (100 foot buffer). The outlet of the stream is located on a separate lot and contains boulders within the stream channel creating a waterfall feature down to the existing beach elevation. Based on the plans, the elevation change created by the boulders down to the beach is approximately three (3) feet. This feature is approximately 15 feet from the proposed construction area and no work is proposed in area where the stream outlets to the beach. No work is planned beyond the property limits of the subject parcel.

### Plants

The checklist and biological evaluation states that small amounts of landscaping, consisting of shrubs and grass along with two moderate sized pine trees (18 and 33 inch diameter), will be removed. According to the biological evaluation the existing plants have minimal value to aquatic habitat in Puget Sound. The application did not include a re-vegetation plan however the biological evaluation states that disturbed areas will be seeded with ground cover.

Energy and Natural Resources

Energy and natural resources will not be affected by this proposal.

Noise

The proposal will generate noise during the construction process and the applicant has indicated that construction will be limited to hours specified by the City of Burien to help mitigate this impact. Burien Municipal Code (BMC) 9.105.400[h] limits construction noise between 7:00am and 10:00pm on weekdays and 9:00am and 10:00pm on weekends.

Light and Glare

There will be no increased glare or light that will generated by the completed project.

Transportation

The completed project will not increase trips to and from the existing single-family residence.

Comment letters

Ten (10) persons submitted comments during the 30-day comment period associated with the shoreline substantial development permit notification, which ended October 16, 2009. The correspondence is available in the project file and is available upon request. The comments will be included and addressed in the Type I land use decision report associated with the shoreline substantial development permit.

Supporting Documents

Supporting documents for the recommendation include the following:

Burien Municipal Code

Burien Zoning Code (Title 18 and Chapter 19)

Burien Comprehensive Plan

Burien Shoreline Master Program

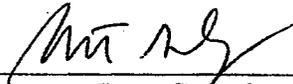
Biological Evaluation date June 2, 2009, prepared by Cedarock Consultants, Inc.

SEPA Checklist, received December 17, 2009

Site plan; includes proposed wall elevations, survey information and proposed grading, received August 26, 2009

Applicant response to SMP regulations, received August 26, 2009

Dated this 25<sup>th</sup> day of January, 2009

  
\_\_\_\_\_  
Scott Greenberg, AICP  
Director of Community Development

# APPENDIX 2

**RE: Motions to Reconsider**

From: **david engdahl** (shorewoodhome@hotmail.com)  
Sent: Tue 4/12/11 11:01 PM  
To: phil@tal-fitzlaw.com  
Cc: courtney@mhseattle.com; craigk@burienwa.gov

Mr. Talmadge:

The Clerk's time stamp on my file copy of the documents reads "Received 2011 APR 11 PM 4:03." The judge's working copy was filed (and stamped) just a couple of minutes earlier. The mailed copies were posted at the Kent main post office yesterday, received by postal clerk # 09 at the service window, who affixed the postage to each of the three packets as I watched, and gave me an official receipt. You should each receive the packet tomorrow, if it didn't arrive today, although as we know, sometimes the mail is delayed.

Good people sometimes do bad things, sometimes on bad advice. If you want to vindicate your client's behavior in this matter (incidentally, I do believe that he is a good and honorable man - even if a bit stubborn and impatient), then we should have a hearing on the evidence.

Sincerely, David Engdahl

---

From: phil@tal-fitzlaw.com  
To: shorewoodhome@hotmail.com  
CC: courtney@mhseattle.com; craigk@burienwa.gov  
Date: Tue, 12 Apr 2011 14:13:52 -0700  
Subject: RE: Motions to Reconsider

Coming from someone who accusing my client and me of fraud on the court or the like, you have a lot of gall in suggesting that we just "practice law instead of acrimony and bluster." If you tried to accomplish service on the Court by mail, please review CR 5 (b). Service by mail is deemed effective 3 days after placement of the pleading in the mailbox. Washington does not recognize the so-called mailbox rule. Your filing of your motion is untimely. CR 59 (b). My earlier email regarding CR 11 still stands. If you persist in pursuing this baseless, untimely motion, we will seek sanctions.

Phil Talmadge

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**From:** david engdahl [<mailto:shorewoodhome@hotmail.com>]  
**Sent:** Tuesday, April 12, 2011 1:07 PM  
**To:** Phil Talmadge; [craigk@burienwa.gov](mailto:craigk@burienwa.gov); [courtney@mhseattle.com](mailto:courtney@mhseattle.com)  
**Subject:** RE: Motions to Reconsider

Mr. Talmadge,

The motions to reconsider were filed and served by mail yesterday, the tenth day. The tardiness of the e-mail was an oversight attributable to exhaustion; I apologize.

Let's try to practice law instead of acrimony and bluster.

And please afford me the courtesy of addressing me as I request.

Mr. Engdahl

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From: [phil@tal-fitzlaw.com](mailto:phil@tal-fitzlaw.com)  
To: [shorewoodhome@hotmail.com](mailto:shorewoodhome@hotmail.com); [craigk@burienwa.gov](mailto:craigk@burienwa.gov); [courtney@mhseattle.com](mailto:courtney@mhseattle.com)  
Date: Tue, 12 Apr 2011 09:05:24 -0700  
Subject: RE: Motions to Reconsider

Professor: As we are required to do under the applicable case law, please be advised that we will seek CR 11 sanctions against you in the event you persist in submitting these frivolous motions. Your baseless allegations against Mr. Segale and his counsel are obviously the ploy of a desperate person who is simply over his head in pursuing this case. Plainly, your strategy is to delay and increase the legal expenses in this matter. While we are fully prepared to respond to all of your baseless arguments to justify your position, the clearest reason why your present motions are frivolous is that they are untimely under CR 59 (b). The court's order was entered on 4/1. The date the order was entered is not counted. The tenth day was yesterday.

Phil Talmadge

---

**From:** david engdahl [<mailto:shorewoodhome@hotmail.com>]  
**Sent:** Tuesday, April 12, 2011 8:17 AM  
**To:** Phil Talmadge; [craigk@burienwa.gov](mailto:craigk@burienwa.gov); [courtney@mhseattle.com](mailto:courtney@mhseattle.com)  
**Subject:** Motions to Reconsider

Please see motions attached.

# APPENDIX 3

WAC 173-26-231  
Shoreline modifications.

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

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

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

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

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

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

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

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

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

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

(3) **Provisions for specific shoreline modifications.**

(a) **Shoreline stabilization.**

(i) **Applicability.** Shoreline stabilization includes actions taken to address erosion impacts to property and dwellings, businesses, or structures caused by natural processes, such as current, flood, tides, wind, or wave action. These actions include structural and nonstructural methods.

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

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

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

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

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

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

- Exacerbation of erosion. The hard face of shoreline armoring, particularly concrete bulkheads, reflects wave energy back onto the beach, exacerbating erosion.
- Groundwater impacts. Erosion control structures often raise the water table on the landward side, which leads to higher pore pressures in the beach itself. In some cases, this may lead to accelerated erosion of sand-sized material from the beach.
- Hydraulic impacts. Shoreline armoring generally increases the reflectivity of the shoreline and redirects wave energy back onto the beach. This leads to scouring and lowering of the beach, to coarsening of the beach, and to ultimate failure of the structure.
- Loss of shoreline vegetation. Vegetation provides important "softer" erosion control functions. Vegetation is also critical in maintaining ecological functions.
- Loss of large woody debris. Changed hydraulic regimes and the loss of the high tide beach, along with the prevention of natural erosion of vegetated shorelines, lead to the loss of beached organic material. This material can increase biological diversity, can serve as a stabilizing influence on natural shorelines, and is habitat for many aquatic-based organisms, which are, in turn, important prey for larger organisms.
- Restriction of channel movement and creation of side channels. Hardened shorelines along rivers slow the movement of channels, which, in turn, prevents the input of larger woody debris, gravels for spawning, and the creation of side channels important for juvenile salmon rearing, and can result in increased floods and scour.

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

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

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

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

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

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

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

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

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

(I) To protect existing primary structures:

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

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

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

- The erosion is not being caused by upland conditions, such as the loss of vegetation and drainage.

- Nonstructural measures, such as placing the development further from the shoreline, planting vegetation, or installing on-site drainage improvements, are not feasible or not sufficient.

- The need to protect primary structures from damage due to erosion is demonstrated through a geotechnical report. The damage must be caused by natural processes, such as tidal action, currents, and waves.

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

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

- The erosion is not being caused by upland conditions, such as the loss of vegetation and drainage.

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

- The need to protect primary structures from damage due to erosion is demonstrated through a geotechnical report.

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

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

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

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

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

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

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

- Where a net loss of ecological functions associated with critical saltwater habitats would occur by leaving the existing structure, remove it as part of the replacement measure.

- Soft shoreline stabilization measures that provide restoration of shoreline ecological functions may be permitted waterward of the ordinary high-water mark.

- For purposes of this section standards on shoreline stabilization measures, "replacement" means the construction of a new structure to perform a shoreline stabilization function of an existing structure which can no longer adequately serve its purpose. Additions to or increases in size of existing shoreline stabilization measures shall be considered new structures.

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

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

- Limit the size of stabilization measures to the minimum necessary. Use measures designed to assure no net loss of shoreline ecological functions. Soft approaches shall be used unless demonstrated not to be sufficient to protect primary structures, dwellings, and businesses.

- Ensure that publicly financed or subsidized shoreline erosion control measures do not restrict appropriate public access to the shoreline except where such access is determined to be infeasible because of incompatible uses, safety, security, or harm to ecological functions. See public access provisions; WAC 173-26-221(4). Where feasible, incorporate ecological restoration and public access improvements into the project.

- Mitigate new erosion control measures, including replacement structures, on feeder bluffs or other actions that affect beach sediment-producing areas to avoid and, if that is not possible, to minimize adverse impacts to sediment conveyance systems. Where sediment conveyance systems cross jurisdictional boundaries, local governments should coordinate shoreline management efforts. If beach erosion is threatening existing development, local governments should adopt master program provisions for a beach management district or other institutional mechanism to provide comprehensive mitigation for the adverse impacts of erosion control measures.

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

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

New pier or dock construction, excluding docks accessory to single-family residences, should be permitted only when the applicant has demonstrated that a specific need exists to support the intended water-dependent uses. If a port district or other public or commercial entity involving water-dependent uses has performed a needs analysis or comprehensive master plan projecting the future needs for pier or dock space, and if the plan or analysis is approved by the local government and consistent with these guidelines, it may serve as the necessary justification for pier design, size, and construction. The intent of this provision is to allow ports and other entities the flexibility necessary to provide for existing and future water-dependent uses.

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

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

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

Fills waterward of the ordinary high-water mark shall be allowed only when necessary to support: Water-dependent use, public access, cleanup and disposal of contaminated sediments as part of an interagency environmental clean-up plan, disposal of dredged material considered suitable under, and conducted in accordance with the dredged material management program of the department of natural resources, expansion or alteration of transportation facilities of statewide significance

currently located on the shoreline and then only upon a demonstration that alternatives to fill are not feasible, mitigation action, environmental restoration, beach nourishment or enhancement project. Fills waterward of the ordinary high-water mark for any use except ecological restoration should require a conditional use permit.

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

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

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

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

Coastal dune modification shall be allowed only consistent with state and federal flood protection standards and when it will not result in a net loss of shoreline ecological functions or significant adverse impacts to other shoreline resources and values.

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

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

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

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

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

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

Master programs should include provisions fostering habitat and natural system enhancement projects. Such projects may include shoreline modification actions such as modification of vegetation, removal of nonnative or invasive plants, shoreline stabilization, dredging, and filling, provided that the primary purpose of such actions is clearly restoration of the natural character and ecological functions of the shoreline. Master program provisions should assure that the projects address

legitimate restoration needs and priorities and facilitate implementation of the restoration plan developed pursuant to WAC 173-26-201 (2)(f).

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

# **APPENDIX 4**

## KCC Title 25 excerpts

**25.08.490 Shorelines.** "Shorelines" means all of the water areas within the unincorporated portion of King County, including reservoirs, and their associated wetlands together with the lands underlying them; except:

A. Shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments;

B. Shorelines on lakes less than twenty acres in size and wetlands

**25.16.180 Shoreline protection.** Shoreline protection may be permitted in the urban environment, provided:

A. Shoreline protection to replace existing shoreline protection shall be placed along the same alignment as the shoreline protection it is replacing, but may be placed waterward directly abutting the old structure in cases where removal of the old structure would result in construction problems;

B. On lots where the abutting lots on both sides have legally established bulkheads, a bulkhead may be installed no further waterward than the bulkheads on the abutting lots, provided that the horizontal distance between existing bulkheads on adjoining lots does not exceed one-hundred feet. The manager may, upon review, permit a bulkhead to connect two directly adjoining bulkheads, for a distance up to one hundred fifty feet. In making such a determination the manager shall consider the amount of inter-tidal land/or water bottom to be covered, the existence of fish or shellfish resources thereon, and whether the proposed use or structure could be accommodated by other configurations of bulkhead which would result in less loss of shoreland, tideland, or water bottom;

C. In order for a proposed bulkhead to qualify for the RCW 90.58.030(3) (e) (iii) exemption from the shoreline permit requirements and to insure that such bulkheads will be consistent with this program as required by RCW 90.58.141(1), the Building and Land Development Division shall review the proposed design as it relates to local physical conditions and the King County shoreline master program and must find that:

1. Erosion from waves or currents is imminently threatening a legally established residence or one or more substantial accessory structures, and

2. The proposed bulkhead is more consistent with the King County shoreline master program in protecting the site and adjoining shorelines than feasible, non-structural alternatives such as slope drainage systems, vegetative growth stabilization, gravel berms and beach nourishment, are not feasible or will not adequately protect a legally established residence or substantial accessory structure, and

3. The proposed bulkhead is located landward of the ordinary high water mark or it connects to adjacent, legally established bulkheads as in subsection B. above, and

4. The maximum height of the proposed bulkhead is no more than one foot above the elevation of extreme high water on tidal waters as determined by the National Ocean Survey published by the National Oceanic and Atmospheric

Administration or four feet in height on lakes;

D. Shoreline protection shall not be considered an outright permitted use and shall be permitted only when it has been demonstrated that shoreline protection is necessary for the protection of existing legally established structures and public improvements or the preservation of important agricultural lands as designated by the Office of Agriculture.

E. Shoreline protection shall not have adverse impact on the property of others.

F. Shoreline protection shall not be used to create new lands, except that groins may be used to create a public Class I beach if they comply with all other conditions of this section.

G. Shoreline protection shall not significantly interfere with normal surface and/or subsurface drainage into the water body.

H. Automobile bodies or other junk or waste material which may release undesirable material shall not be used for shoreline protection.

I. Shoreline protection shall be designed so as not to constitute a hazard to navigation and to not substantially interfere with visual access to the water.

J. Shoreline protection shall be designed so as not to create a need for shoreline protection elsewhere.

K. Bulkheads on Class I beaches shall be located no farther waterward than the bluff or bank line;

L. Bulkheads must be approved by the Washington State Department of Fisheries;

M. Bulkheads shall be constructed using an approved filter cloth or other suitable means to allow passage of surface and groundwater without internal erosion of fine material;

N. Groins are permitted only as part of a professionally designed community or public beach management program. (Ord. 5734 § 5, 1981; Ord. 3688 § 413, 1978).

**25.16.190 Excavation, dredging and filling.** Excavation, dredging and filling may be permitted in the urban environment, only as part of an approved overall development plan not as an independent activity provided:

A. Any fill or excavation regardless of size, shall be subject to the provisions of K.C.C. 16.82.100;

B. Landfill may be permitted below the ordinary high water mark only when necessary for the operation of a water dependent or water related use, or when necessary to mitigate conditions which endanger public safety;

C. Landfill or excavations shall be permitted only when technical information demonstrates water circulation, littoral drift, aquatic life and water quality will not be substantially impaired;

D. Landfill or disposal of dredged material shall be prohibited within the floodway;

E. Wetlands such as marshes, swamps, and bogs shall not be disturbed or altered through excavation, filling, dredging, or disposal of dredged material unless the manager determines that either:

1. The wetland does not serve any of the valuable functions of wetlands identified in K.C.C. 20.12.080 and U.S. Army Corps of Engineers 33 CFR 320.4(b), including but not limited to wildlife habitat and natural drainage functions, or

2. The proposed development would preserve or enhance the wildlife habitat, natural drainage, and/or other valuable functions of wetlands as discussed in K.C.C. 20.12.080 or U.S. Army Corps of Engineers 33 CFR 320.4(b) and would be consistent with the purposes of this Title;

F. Class I beaches shall not be covered by landfill except for approved beach feeding programs;

G. Excavations on beaches shall include precautions to prevent the migration of fine grain sediments, disturbed by the excavation, onto adjacent beach areas and excavations on beaches shall be backfilled promptly using material of similar composition and similar or more coarse grain size;

H. No refuse disposal sites, solid waste disposal sites, or sanitary fills of putrescible or non-putrescible material shall be permitted within the shorelines of the state;

I. Excavation or dredging below the ordinary high water mark shall be permitted only:

1. When necessary for the operation of a water dependent or water related use, or

2. When necessary to mitigate conditions which endanger public safety or fisheries resources, or

3. As part of and necessary to roadside or agricultural ditch maintenance that is performed consistent with best management practices promulgated through administrative rules pursuant to the sensitive areas provisions of K.C.C. chapter 21A.24 and if:

a. the maintenance does not involve any expansion of the ditch beyond its previously excavated size. This limitation shall not restrict the county's ability to require mitigation, pursuant to K.C.C. chapter 21A.24, or other applicable laws;

b. the ditch was not constructed or created in violation of law;

c. the maintenance is accomplished with the least amount of disturbance to the stream or ditch as possible;

d. the maintenance occurs during the summer low flow period and is timed to avoid disturbance to the stream or ditch during periods critical to salmonids; and

e. the maintenance complies with standards designed to protect salmonids and salmonid habitat, consistent with K.C.C. chapter 21A.24; provided, that this paragraph shall not be construed to permit the mining or quarrying of any substance below the ordinary high water mark;

J. Disposal of dredged material shall be done only in approved deep water disposal sites or approved upland disposal sites;

K. Stockpiling of dredged material in or under water is prohibited;

L. Maintenance dredging not requiring a shoreline permit(s) shall conform to the requirements of this section;

M. Dredging shall be timed so that it does not interfere with aquatic life;

N. The county may impose reasonable conditions on dredging or disposal operations including but not limited to working seasons and provisions of buffer strips, including retention or replacement of existing vegetation, dikes, and settling basins to protect the public safety and shore users' lawful interests from unnecessary adverse impact;

O. In order to insure that operations involving dredged material disposal and maintenance dredging are consistent with this program as required by RCW 90.58.140(1), no dredging may commence on shorelines without the responsible person having first obtained either a substantial development permit or a statement of exemption; PROVIDED, that no statement of exemption or shoreline permit is required for emergency dredging needed to protect property from imminent damage by the elements;

P. Operation and maintenance of any existing system of ditches, canals, or drains, or construction of irrigation reservoirs, for agricultural purposes are exempt from the shoreline permit requirement. (Ord. 13247 § 3, 1998; Ord. 5734 § 6, 1981; Ord. 3688 § 414, 1978).

25.32.010 Substantial development - permit required - exemption. A. No development shall be undertaken by any person on the shorelines of the state unless such development is consistent with the policy of Section 2 of the Shoreline Management Act of 1971, and, after adoption and approval, the guidelines and regulations of the Washington State Department of Ecology and the King County shoreline master program.

B. No substantial development shall be undertaken by any person on the shorelines of the state without first obtaining a substantial development permit from the director; provided, that such a permit shall not be required for the development excepted from the definition of substantial development in RCW 90.58.030 and for developments exempted by RCW 90.58.140(9) and (10).

C. Any person claiming exception from the permit requirements of this chapter as a result of the exemptions described in subsection B. of this section may make an application to the director for such an exemption in the manner prescribed by the director. Development within the shorelines of the state which does not require a permit shall conform to the master program. Conditions requiring such conformance may be imposed prior to granting exemption from the permit requirement. (Ord. 3688 § 801, 1978).

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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

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

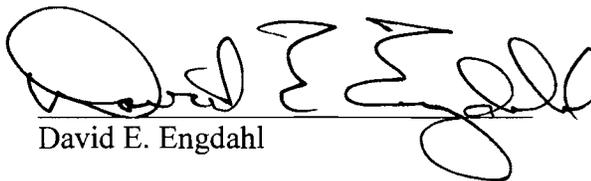
**DECLARATION  
OF SERVICE**

I, David E. Engdahl, under penalty of perjury under the laws of the State of Washington, declare that I served the REPLY BRIEF OF PETITIONERS / CROSS RESPONDENTS upon the following by hand delivery to an adult person employed at the offices of each – as follows:

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661  
[Phil@tal-fitzlaw.com](mailto:Phil@tal-fitzlaw.com)  
FAX 206.575.1397  
Attorney for Respondent Mario A. Segale

Craig Knutson, WSBA #7540  
Burien City Attorney  
400 SW 152<sup>nd</sup> St. Ste 300  
Burien, WA 98166  
(206) 248-5535  
[craigk@burienwa.gov](mailto:craigk@burienwa.gov)  
FAX 206.248-5539  
Attorney for Respondent City of Burien

on this date, January 3, 2012.

  
David E. Engdahl