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NO. 67420-0-I

IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DIANE M. PATTERSON and  
DAVID D. ENGDAHL,

ORIGINAL

Petitioners,

vs.

MARIO A. SEGALE and  
THE CITY OF BURIEN,

Respondents.

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RESPONDENT CITY OF BURIEN'S BRIEF

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**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. COUNTER STATEMENT OF THE ISSUES ..... 2

III STATEMENT OF THE CASE ..... 3

    A. General Background..... 3

    B. Relevant Facts ..... 4

IV. STANDARD OF REVIEW..... 7

V. ARGUMENT ..... 9

    A. The Petitioners have failed to meet their burden of demonstrating the Shorelines Hearing Board (SHB) erroneously interpreted or applied the law, in ruling that the applicable SMP in this case is the King County SMP in effect at the time the City incorporated and that the DOE guidelines in Ch. 173-26 WAC are not applicable. ....9

    B. The Petitioners have failed to meet their burden of demonstrating the SHB erroneously interpreted or applied the law, in ruling that the Respondents met their initial burden of showing sufficient prima facie facts to support summary judgment upholding the validity of the shoreline permit for the replacement bulkhead ..... 15

    C. The Petitioners have failed to meet their burden of demonstrating the SHB’s decision was not supported by substantial evidence that the replacement bulkhead was necessary to support an existing residence. .... 16

    D. The Petitioners have failed to meet their burden of demonstrating the SHB’s decision was not supported by substantial evidence that the replacement bulkhead does not create new land in violation of the SMP. .... 18

E. The Petitioners have failed to meet their burden of demonstrating the SHB's decision was not supported by substantial evidence that the replacement bulkhead conforms to applicable height requirements. ....20

F. The Superior Court correctly denied Petitioners' attempt to introduce new evidence outside of the SHB's record and correctly refused to remand this case to the SHB..... 22

VI. CONCLUSION .....23

## TABLE OF AUTHORITIES

### Washington Court Cases

<i>Buechel v. Department of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994).	-7-, -11-
<i>Citizens for Rational Shoreline Planning v. Whatcom County</i> , 155 Wn. App. 937, 230 P.3d 1074 (Div. 1, 2010)	-14-
<i>Diehl v. Western Washington Growth Management Hearings Board</i> , 153 Wn.2d 207, 103 P.3d 193 (2004)	-20-
<i>Homestreet, Inc. v. State, Dept. of Revenue</i> , 166 Wn.2d 444, 210 P.3d 297 (2009)	-20-
<i>Orion Corp. v. State</i> , 109 Wn.2d 621, 747 P.2d 1062 (1987)	-14-
<i>Quadrant Corp. v. State Growth Mgmt. Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005)	-11-
<i>Waste Mgmt. of Seattle v. Utilities and Trans. Comm.</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994)	-8-

### Shorelines Hearings Board Cases

<i>Greater Duwamish Neighborhood Council v. City of Seattle</i> , SHB No. 89-25 (1989)(COL X)	-13-
<i>Lux Homes v. Ecology</i> , SHB No. 04-025 (2005)(COL 2)	-10-
<i>Maple Valley Citizens for Responsible Growth v. City of Maple Valley</i> , SHB No. 03-014 (2004)(COL IX)	-12-, -13-
<i>Toskey v. City of Sammamish</i> , SHB No. 07-008 (2007)(COL 4)	-10-

### Washington Statutes

RCW 34.05 (APA)	-1-
RCW 34.05.570	-1-
RCW 34.05.570(1)(a)	- 8 -

RCW 34.05.570(1)(d)..... -8 -

RCW 34.05.570(3) ..... - 8 -

RCW 34.05.570(3)(a)..... -8 -

RCW 34.05.570(3)(d)..... - 8 -

RCW 34.05.570(3)(e)..... - 8 -

RCW 90.58.020.....-10,-12-

RCW 90.58.030(3)(e).....-3-

RCW 90.58.140(1) .....-3-

RCW 90.58.140(2).....-3,-12-

RCW 90.58.140(2)(a).....-21,-22-

RCW 90.58.180 ..... -4-

RCW 90.58.180(3) ..... -8-

RCW 4.94.370 .....-24-

**Washington Administrative Regulations**

WAC Chapter 173-26..... -2,-9,-16,-18-

WAC 173-26-020(14).....-19-

WAC 173-26-160.....-10,-12-

WAC 173-26-171..... -13,-18-

WAC 173-26-231(3).....-16-

WAC 173-27.....-5,-13-

WAC 173-27-040(2) .....-19-

WAC 461-08-500(3) .....-15-

**Shoreline Master Program Provisions**

KCC Title 25 .....-5-, -14-

KCC 25.16.....-4-

## I. INTRODUCTION

Respondent City of Burien (“Respondent” or “City”), by and through its City Attorney Craig D. Knutson, files this Brief pursuant to Title 10 of the Rules of Appellate Procedure in response to Petitioners’ Brief.

Petitioners seek review of two preliminary orders of King County Superior Court Judge Jay White, dismissing certain issues and striking certain documents. Petitioners also seek review of Judge White’s final order, dismissing the petition for judicial review of decisions of the Shorelines Hearings Board (SHB).

The challenged SHB decisions upheld the validity of the City’s issuance of a shoreline substantial development permit to Respondent Segale for a replacement bulkhead to protect a single family residence and denied Petitioners’ motion for reconsideration.

The City’s position is that the decisions of the Superior Court and SHB are well supported by the applicable law and relevant facts and should be granted deference under the Administrative Procedures Act, Ch. 34.05 RCW, (APA) and the court decisions applying the APA. In contrast, the Petitioners’ Brief fails to cite any SHB decisions, apposite court decisions, or other applicable legal authority supporting its argument and fails to meet the APA’s standard of review as set forth in RCW 34.05.570.

## II. COUNTER STATEMENT OF ISSUES

- A. Have Petitioners met their burden of demonstrating the SHB erroneously interpreted or applied the law, in ruling that the applicable SMP in this case is the King County SMP in effect at the time the City incorporated in 1993 and that the DOE guidelines in Ch. 173-26 WAC are not applicable?
- B. Have Petitioners met their burden of demonstrating the SHB erroneously interpreted or applied the law, in ruling that the Respondents met their initial burden of showing sufficient prima facie facts to support summary judgment upholding the validity of the shoreline permit for the replacement bulkhead?
- C. Have Petitioners met their burden of demonstrating the SHB's decision was not supported by substantial evidence that the replacement bulkhead was necessary to support an existing residence?
- D. Have Petitioners met their burden of demonstrating the SHB's decision was not supported by substantial evidence that the replacement bulkhead does not create new land in violation of the SMP?
- E. Have Petitioners met their burden of demonstrating the SHB's

decision was not supported by substantial evidence that the replacement bulkhead conforms to applicable height requirements?

- F. Did the Superior Court correctly deny Petitioners' attempt to introduce new evidence outside the SHB's record and correctly refuse to remand this case to the SHB?

### III. STATEMENT OF THE CASE

#### A. General Background

This case is an appeal of a shoreline substantial development permit issued pursuant to the Shoreline Management Act (SMA) by the Respondent City of Burien to the Respondent Mario Segale.

The SMA requires all use or development on Washington's shorelines to conform to the act. RCW 90.58.140(1), (2). The SMA also requires a person to first obtain a permit before undertaking any "substantial development" on a Washington shoreline. RCW 90.58.140(2). "Substantial development" includes "any development of which the total cost or fair market value exceeds five thousand dollars or any development which materially interferes with the normal public use of the water or shorelines of the state." RCW 90.58.030(3)(e). The local

government may grant a substantial development permit only if the proposal is consistent with the SMA and the applicable local shoreline master program. RCW 90.58.140(2)(b).

Persons aggrieved by the local government's denial or grant of a shoreline development permit can seek review by the Shorelines Hearings Board (SHB). RCW 90.58.180. The SHB is a quasi-judicial body that specializes in de novo review of the denial or grant of a shoreline substantial development permit. A party can seek superior court review of the SHB's denial or grant of a shoreline development permit. RCW 90.58.180.

#### B.Relevant Facts

The relevant facts of this case are fairly summarized in the SHB's Order on Summary Judgment, from which the summary below is largely derived. CP 108-111.

The City of Burien incorporated in 1993. The City's western boundary is the shoreline of Puget Sound. Prior to incorporation, the King County Shoreline Master Program (SMP) applied to the area. Upon incorporation, the City continued to utilize the King County Code (KCC) Chapter 25.16, as its SMP. The City considered KCC Chapter 25.16 to be its SMP then and still does today. AR Declarations of City Planner David

Johanson, CP 108.

In August 2009, Respondent Segale applied for a shoreline permit to replace an existing bulkhead on his property, which is located in the City of Burien on the shoreline of Puget Sound. The Segale property contained a single-family residence set back from a preexisting bulkhead extending the length of the property. The proposed reconstruction of the bulkhead was to be located in the same footprint and alignment as the existing rock bulkhead; however the height was to be increased by several feet. AR Declarations of Courtney Kaylor and Gary Henderson. CP 108-109.

The City reviewed the shoreline permit application under the State Environmental Policy Act (SEPA) and issued a Determination of Nonsignificance (DNS). The City considered the proposal's compliance with the SMA, the Department of Ecology's WAC Chapter 173-27, and Title 25 of the King County Code, which the City considered to be its applicable SMP. The City concluded that the proposal to restore and replace the bulkhead complied with all of these requirements and approved the shoreline permit. The Petitioners did not appeal the SEPA DNS, but they did appeal the City's approval of the shoreline permit. AR Declaration of Courtney Kaylor, CP 109.

In support of their motion for summary judgment to the SHB, the Respondents submitted the declaration of Gary Henderson, a civil engineer experienced with shoreline bulkheads. Mr. Henderson stated that in his opinion the increase in height resulting from the proposed replacement bulkhead would have no significant adverse impacts to the Petitioners' property and the existing bulkhead needed to be replaced. The Petitioners introduced no controverting evidence in response to the Henderson declaration. AR Declaration of Gary Henderson, CP 110-111.

The SHB decided to uphold the shoreline permit for the bulkhead by granting summary judgment to Respondents and denying Petitioners' motion for reconsideration. This decision was based on the SHB's own prior decisions that a county SMP continues to apply to newly incorporated areas until the city adopts a new SMP. The SHB's decision was also based on the clear wording and intent of the King County SMP regarding the allowable height of the bulkhead and the lack of newly created land. Finally, the SHB's decision was based on its determination that Petitioners did not meet their burden of proving that the bulkhead does not comply with the policies of the SMP or the Shoreline Management Act (SMA). CP 107-129, 131-138.

Petitioners appealed the SHB's decision to King County Superior Court. Judge Jay White ruled that Petitioners' new evidence that the single

family residence had been demolished following the SHB's decision was irrelevant and ordered this evidence stricken. CP 237-239. The Judge also ruled that under the APA Petitioners had not met their burden of establishing error by the SHB and the SHB's decision was entitled to great weight. Finally, the Judge ordered the petition for review to be denied and dismissed. CP 520-522.

The Petitioners then filed their appeal and submitted their brief to which this brief responds.

#### IV. STANDARD OF REVIEW

Judicial review of the validity of a shoreline permit decision is of the Shorelines Hearings Board's decision, not the decision of the local government or of the superior court. *Buechel v. Department of Ecology*, 125 Wn.2d 196 at 202, 884 P.2d 910 (1994). The standard of review is whether the SHB's decision was "arbitrary and capricious" or "clearly erroneous" in light of the entire record and public policy contained in the Shoreline Management Act. *Id.* at 201-02, 884 P.2d 910. The reviewing court may not substitute its judgment for that of the SHB and should give "due deference ... to the SHB's specialized knowledge and expertise." *Id.* at 202-03, 884 P.2d 910.

The APA governs judicial review of agency actions, including the Shorelines Hearings Board's decisions. *Id.* at 201, 884 P.2d 910; *see* RCW

90.58.180(3). “[R]eview by an appellate court is to be on the agency record without consideration of the findings and conclusions of the superior court.” *Waste Mgmt. of Seattle v. Utilities and Trans. Comm.*, 123 Wn.2d 621 at 633, 869 P.2d 1034 (1994).

Under the APA, the “burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a). Also under the APA, there are nine possible bases on which a party may challenge an agency's or tribunal's actions. RCW 34.05.570(3)(a).

As discussed below, Petitioners have failed to meet their burden under the APA and have failed to cite the provision(s) of RCW 34.05.570(3) on which their case is based. They have also failed to establish that they have been substantially prejudiced by the action complained of, as required by RCW 34.05.570(1)(d).

However, in attempting to sort out Petitioners' arguments, it appears that they most nearly equate to RCW 34.05.570(3)(d) and (e), as to whether the SHB erroneously interpreted or applied the law and whether its decision was supported by substantial evidence. Accordingly, for the purposes of this brief, the City has re-stated the issues and organized its argument in terms of the APA's standard of review.

## V. ARGUMENT

A. The Petitioners have failed to meet their burden of demonstrating the SHB erroneously interpreted or applied the law, in ruling that the applicable SMP in this case is the King County SMP in effect at the time the City incorporated in 1993 and that the DOE guidelines in Ch. 173-26 WAC are not applicable.

The central issue in this case is what regulations apply to the shoreline permit application submitted to the City of Burien by Respondent Segale. Petitioners argue the City had no SMP, so the Department of Ecology (DOE) guidelines apply. The Respondents concur with the Superior Court and the SHB that the applicable regulations are the King County SMP that Burien inherited when it incorporated in 1993. CP 107-113, 132-134, 520-522.

The SHB's Order on Summary Judgment at CP107-113 sets forth the SHB's reasoning and legal authorities that support its ruling that the applicable SMP in this case is the King County SMP that was in effect at the time the City incorporated in 1993. The key part of the SHB's ruling is at CP 111-113 and reads as follows:

“The Board has also ruled in prior decisions that the SMP that applied to a shoreline area prior to its incorporation within a city,

continues to apply after incorporation, until the city adopts a new SMP and Ecology approves it. See *Toskey v. City of Sammamish*, SHB No. 07-008 (2007)(COL 4); *Lux Homes v. Ecology*, SHB No. 04-025 (2005)(COL 2). This result is most consistent with the purposes and policies of the SMA, which are to “provide for the management of the shorelines of the state” which are considered to be “among the most valuable and fragile” of the state's natural resources. RCW 90.58.020. Applying a complete, fully adopted and approved SMP, drafted to meet the requirements of a specific shoreline area albeit when it was governed by another governmental entity, provides better management of the shorelines than applying only the policies of the RCW 90.58.020 (which apply anyway), the statewide guidelines and rules of Ecology, and whatever portions of a new SMP sufficiently through the drafting process to be ascertainable.

The Board's prior decisions in *Toskey* and *Lux* are also consistent with WAC 173-26-160. ...

While WAC 173-26-160 specifically refers only to annexation, and annexation is not technically the same legal process as incorporation, for shoreline purposes the affect is the same. Upon the occurrence of either annexation or incorporation, an area of a shoreline, covered under a SMP adopted by one legal entity, becomes subject to the control of a different legal entity. If the second entity does not take action to adopt an SMP for the area newly added to its jurisdiction, should the area be deemed to be without a local SMP? WAC 173-26-160 directs that upon annexation, until a new SMP is adopted, the SMP for the area that was previously in affect remains in effect. This practical approach makes equal sense in the situation of incorporation.<sup>8</sup>

The Board concludes that because the City has not properly adopted an SMP and/or had it approved by Ecology, the applicable SMP in this case is the King County SMP that was in effect at the time the City incorporated in 1993. This SMP included the goals, policies, and objectives of the King County SMP, as well as KCC Title 25.”

In summary, the SHB applied its own prior decisions, the purposes and policies of the SMA, and a closely analogous DOE guideline and determined that the King County SMP in effect when Burien incorporated is the applicable SMP in this case. Accordingly, under the well settled rule of APA court decisions, the reviewing court should give deference to the SHB's specialized knowledge and expertise and uphold its determination. *Buechel v. DOE, supra*, 125 Wn.2d at 202-203; *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.* 154 Wn.2d 224 at 233, 110 P.3d 1132 (2005).

By contrast, the Petitioners' Brief at pages 5-19 contains essentially the same unsubstantiated argument they made to the Superior Court and SHB as to their contention that the City did not properly adopt the 1993 King County SMP. However, given that the SHB's ruling acknowledges that the City failed to properly adopt the King County SMP and bases its ruling on other factors, Petitioners' continued criticisms in this regard are irrelevant and redundant.

What is relevant, and fatal to Petitioners' case, is that they have still presented no citations to SHB decisions or other applicable precedent to counter the SHB's above stated analysis, which relies on the applicable SMA policies, WAC guidelines, and SHB decisions. Under the above cited and well established principle in APA cases, the City urges this

Court to accord deference to the SHB's determination on this issue. The City also points out to the Court, as it did to the SHB, that numerous shoreline permits have been issued in Burien based on the 1993 King County SMP, a factor which further supports the practicality of the SHB's ruling. AR Johanson 6/1/10 Decl, Ex B-E.

Alternatively, at pp 20-21 of their Brief, Petitioners attempt to rely on a "suggestion" they apparently received from a DOE staff person regarding use of the City's unfinished, still in process, draft SMP update, pursuant to RCW 90.58.140(2). However, Petitioners fail to rebut the SHB's direct ruling on the applicability of this section of the SMA. As stated in the SHB's Order on Summary Judgment at CP 112,

Petitioners contend, based on this statute, that because the City did not adopt an SMP, the appropriate criteria to apply to this SDP are the policies of RCW 90.58.020, the guidelines and rules of the department, and the City's draft SMP. Respondents, on the other hand, argue that in this situation, the SMP in affect (sic) prior to annexation should remain in effect until a new SMP is adopted and approved.

The Board concludes that the result advocated for by Respondents is most consistent with its own prior case decisions, the policies of the SMA, and WAC 173-26-160. The Board has already ruled, in past decisions, that RCW 90.58.140(2)(a) does not apply once an SMP has been adopted for an area. *Maple Valley Citizens for Responsible Growth v. City of Maple Valley*, SHB No. 03-014 (2004)(COL IX). Here, since the King County SMP was adopted and approved for this shoreline area prior to its incorporation as the City of Burien, the Board concludes that RCW 90.58.140(2)(a) is not applicable.

As the SHB further pointed out in *Maple Valley, supra*, applying the adopted SMP, rather than an unfinished draft of an update, is consistent with Washington's vested rights doctrine, a point completely ignored by the Petitioners. Thus, Petitioners have not only failed to acknowledge or rebut the SHB's directly on point prior *Maple Valley* ruling, but the ruling's stated rationale as well.

Similarly, the SHB's Order Denying Reconsideration at CP 132-134 confirms the legal basis for the SHB's ruling on this issue and goes on to explain the legal basis as to why the SMP rather than the WAC guidelines argued by Petitioners should be applied to the replacement bulkhead. Again, the SHB cites one of its prior decisions and carefully explains its interpretation of the WAC guidelines in this context.

However, the Board has already concluded on summary judgment that once an SMP is in effect for an area, WAC Ch. 173-26 Part III Guidelines (WAC 173-26-171 through 173-251) are not directly applicable to applications for substantial development permits. WAC 173-26-171(3)(c); *Greater Duwamish Neighborhood Council v. City of Seattle*, SHB No. 89-25 (1989)(COL X)(Concluding that WAC Ch. 173-16, the precursor to WAC Ch. 173-26, is not directly applied to substantial development permits after the adoption of a local SMP). Instead, this chapter of the rules is intended to be used by Ecology when reviewing local shoreline master programs. This chapter is not applicable directly to this permitting decision, and the reference in the King County SMP to consistency with the "guideline and regulations of the Washington State Department of Ecology" does not make it so. Other chapters of the Ecology regulations do apply directly to the permit, such as WAC Ch. 173-27, and it is these applicable regulations that should

be construed to be applicable to permitting decisions under the King County SMP.

In opposition to this well reasoned and supported explanation by the SHB, Petitioners fail to offer any legal authority or persuasive reasoning as to why this Court should grant deference to their interpretation rather than the SHB's as is required by APA case law.

Instead, Petitioners' Brief at pp 12-14 makes out of context references to the City's SMP and to dicta from two Washington court cases for the proposition that DOE's guidelines should override the provisions of the SMP. *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 444, 950, 230 P.3d 1074 (Div. 1, 2010); *Orion Corp. v. State*, 109 Wn.2d 621, 644, 747 P.2d 1062 (1987). However, as pointed out by the SHB, "the fact that the King County SMP says it doesn't apply to incorporated areas of King County is immaterial, because at the relevant time (prior to incorporation) it was the applicable shoreline master program." Also, the dicta Petitioners try to rely on has nothing to do with the applicability of DOE guidelines. Rather, both cases are merely stating that the usual process is for shoreline master programs to be approved by DOE, a truism which in no way rebuts the Superior Court's and SHB's holding in this case that the City's SMP is Title 25 KCC.

B.The Petitioners have failed to meet their burden of demonstrating the SHB erroneously interpreted or applied the law, in ruling that the Respondents met their initial burden of showing sufficient prima facie facts to support summary judgment upholding the validity of the shoreline permit for the replacement bulkhead.

The SHB's Order on Summary Judgment sets forth the SHB's determination that Respondent Segale submitted sufficient evidence in the permitting process and in the SHB appeal to make a prima facie showing of compliance with the polices of the SMA. The Order on Summary Judgment also points out that the burden of proof on this issue was the Petitioners' and that they failed to come forward with either legal arguments or the necessary factual material that would refute the prima facie showing made by Respondents. The SHB's ruling on the burden of proof in this case is clearly supported by its duly adopted rules of procedure as set forth in WAC 461-08-500(3). CP 126-127.

Petitioners argue at pp 21-28 of their brief that the SHB's Order on Summary Judgment was improper, because Respondent Segale's shoreline permit application did not include a geotechnical analysis documenting that the existing residence was in danger from tidal action, currents, or waves. Petitioners state at p 23 that the basis for this alleged requirement

of a geotechnical analysis is WAC 173-26-231(3). However, as discussed above, Ch. 173-26 WAC only applies to the promulgation of shoreline master programs, not to the issuance of shoreline development permits.

Thus, this argument simply compounds Petitioners' mistaken effort to rely on DOE guidelines that aren't applicable in this context, rather than the applicable provisions of the King County SMP. Since the SMP has no such requirement of a geotechnical analysis, Petitioners' burden of proof argument must fail.

C.The Petitioners have failed to meet their burden of demonstrating the SHB's decision was not supported by substantial evidence that the replacement bulkhead was necessary to support an existing residence.

The SHB's Order Denying Reconsideration at CP 135-137 reconfirms its ruling on the burden of proof issue and addresses the Petitioners' failure to meet their burden of contravening the only expert witness declaration in this case, which was the Henderson Declaration as to the necessity for, and lack of impacts caused by, the replacement bulkhead. The SHB found that the Petitioners' declaration about their own lay observations and conclusions was insufficient evidence and that the Petitioners were required to have submitted their own expert testimony to refute that of Mr. Henderson. CP 135-137.

The Petitioners' Brief at pages 28-38 attempts to discount the evidence in the record that was relied upon by the City in approving the shoreline permit for the replacement bulkhead and by the Superior Court and the SHB in upholding the permit's legality. However, rather than trying to demonstrate how the Petitioners have met their burden of proof in this case, their Brief makes incomplete and out of context mischaracterizations of the evidence in the record. Of particular note is their Brief's absurd speculation at page 36 that the Respondent Segale's expert engineer Gary Henderson may have meant that the reason the deteriorated bulkhead needed to be replaced was because it was "ugly" rather than the clearly obvious need to protect the property and the single family residence located thereon.

Additionally, Petitioners' Brief fails to point out that the Environmental Checklist at AR 142 and 148 clearly indicates the property is used as a single family residence and the bulkhead is needed to protect the residence. Petitioners also fail to point out that the shoreline application and land use decision clearly demonstrate the close proximity (40 ft) of the residence to the bulkhead. AR 160.

What is readily apparent from Petitioners' failure to acknowledge and rebut these factual references to the record is that Petitioners have been forced to rely on mischaracterizing the record because of their own failure to

present sufficient evidence to the SHB or the Superior Court that the bulkhead did not need to be replaced. As the SHB stated in its Order Denying Reconsideration at CP 136, the personal observations offered by Petitioners were insufficient not only to counter the Declaration of the Respondent's expert witness but also to demonstrate a material issue of fact sufficient to overcome summary judgment by the SHB.

Instead of meeting their own burden of proof, Petitioners' Brief at page 35 again incorrectly attempts to rely on a section from Ch. 173-26 WAC. As previously discussed and as set forth in WAC 173-26-171, this chapter of the Department of Ecology guidelines is to be used only to guide the preparation of shoreline master programs, not to regulate development within the shorelines. Thus, Petitioners have not only failed to meet their burden of proof, they have cited inapplicable DOE guidelines in a misguided attempt to fill this crucial gap in their case.

D.The Petitioners have failed to meet their burden of demonstrating the SHB's decision was not supported by substantial evidence that the replacement bulkhead does not create new land in violation of the SMP.

The SHB's Order on Summary Judgment at CP 126 sets forth the SHB's reasoning for its ruling that the replacement bulkhead does not

create new land in violation of the SMP. The key part of the SHB's reasoning reads as follows:

“Because the replacement bulkhead will be located along the same alignment as the existing bulkhead, and the amount of residential property landward of the bulkhead will remain unchanged after filling behind the bulkhead is complete, the Board concludes that this replacement bulkhead does not create new land.”

In reaching this determination, the SHB specifically rejected the absurd result of Petitioners' argument that no fill material be allowed landward of a bulkhead, in favor of the clear intent of the SMP to prohibit the location of a bulkhead where it would expand the amount of dry land waterward.

Attempting to counter the plain meaning of the SMP on appeal, Petitioners' Brief at pp 38-40 again resorts to inapplicable DOE guidelines. Petitioners' reference to WAC 173-26-020(14) is inapplicable, because this section is from the chapter of the guidelines that only applies to promulgation of SMPs, not to shoreline development permits. Petitioners' reference to WAC 173-27-040(2) is inapplicable, because this section applies to bulkheads that are exempt from permit requirements, not to bulkheads for which a shoreline development permit is obtained, such as in the instant case.

E.The Petitioners have failed to meet their burden of demonstrating the SHB’s decision was not supported by substantial evidence that the replacement bulkhead conforms to applicable height requirements.

The SHB’s Order on Summary Judgment at CP 121-123 sets forth the SHB’s reasoning and legal authorities in support of its ruling that the height of the replacement bulkhead does not violate any applicable law. The SHB’s reasoning relies on the plain language and meaning of the SMP, which does not contain a height limit for bulkheads approved by a shoreline permit. As set forth at CP `122 of its Order on Summary Judgment, the SHB relies on a well established rule of statutory construction and states as follows:

“Absent ambiguity, the Washington Court has stated that:

[A] statute's meaning must be derived from the wording of the statute itself without judicial construction or interpretation. When statutory language is clear and unequivocal courts must assume that the legislature meant exactly what it said and apply the statute as written. *Id.*

*Diehl v. Western Washington Growth Management Hearings Board*, 153 Wn.2d 207, 214, 103 P.3d 193, 196 (2004) (citations deleted), *rev. denied* 153 Wn.2d 207 (2006). A statute is ambiguous if “susceptible to two or more reasonable interpretations,” but “a statute is not ambiguous merely because different interpretations are conceivable.” *Homestreet, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297, 301 (2009) (quoting *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)). ... Therefore, based on the plain language of KCC 25.16.180.C, the Board concludes that the height requirement contained in this subsection applies only to exempt bulkheads.

In other words, the SHB is applying its specialized knowledge and expertise in interpreting and applying shoreline master programs and concludes that the bulkhead height as allowed by the shoreline permit is supported by the plain meaning of the SMP.

The SHB also points out at CP 123 that this conclusion is good policy, because a permitted bulkhead must undergo the rigor of the shoreline permitting process and be subject to additional restrictions in order to qualify for a permit. Accordingly, the City asks the Court to grant deference to the SHB's determination as to allowable bulkhead height and as to which SMP policies are applicable to this proceeding.

Additionally, Petitioners' Brief at pp 42-43 is incorrect and misleading in its statements regarding the bulkhead height provision in the City's currently pending draft of an SMP update being applicable to this case pursuant to RCW 90.58.140(2)(a). This section of the SMA only allows application of a draft SMP, when there is no SMP in effect for an area. In this case, as discussed above, there has been an SMP in effect for this shoreline area since it was part of King County, and that same SMP

has continued in effect since Burien incorporated in 1993. Accordingly, RCW 90.58.140(2)(a) is not applicable here.

F.The Superior Court correctly denied Petitioners' attempt to introduce new evidence outside the SHB's record and correctly refused to remand this case to the SHB.

Although the City does not concede that Petitioners have correctly preserved this issue on appeal, Petitioners' Brief at pages 43-48 argues that the Superior Court should have remanded this case to the SHB based on new information to the effect that Respondent Segale demolished the existing family residence immediately after the SHB's final ruling. As Judge White pointed out in his oral ruling on this issue (see RP, April 1, 2011, at p 47, line 20 - p 48, line1 and June 10, 2010, at p 53, lines 20-21), the obvious problem with Petitioners' attempt to present this new information is that they have made no showing that anything in the SMA or the SMP mandated a different outcome, whether the existing residence was to be demolished and replaced at some future point in time or not.

In fact, despite Petitioners' repeated accusations and misinformation to the contrary, the Environmental Checklist does clearly

state, “There is a possibility that the existing single family residence will be replaced.” AR 143.

Thus, contrary to Petitioners’ contentions, there was clearly no fraudulent deception on the part of Respondent Segale in this regard. If any deception has occurred, it is the Petitioners’ references to out of context statements in the Environmental Checklist without referencing the one statement that directly counters their argument.

Another flaw in Petitioners’ argument is that there is always a possibility that a residential structure can be replaced in the future, whether due to damage, age, or other reasons. However, there is simply nothing in the SMA, the SMP, or the shoreline permit decisions of the City and the SHB in this matter, nor have Petitioners cited anything, which prohibits or prevents the eventual removal of an existing residence in these circumstances.

## VI. CONCLUSION

The Final Orders of the Superior Court and SHB in this case are fully supported by the applicable law and relevant facts and should be accorded deference under the APA and well established case law. The Petitioners’ Brief fails to cite any SHB decisions, apposite court decisions, or other applicable legal authority that support overturning the Superior Court’s and

SHB's decisions under the APA's standard of review. Accordingly, the City respectfully requests that this appeal be dismissed with prejudice.

Additionally, pursuant to RCW 4.94.370, if the Court of Appeals does dismiss this appeal, the City requests that it be awarded its reasonable attorneys' fees and costs as a prevailing party whose shoreline permit decision has been upheld.

RESPECTFULLY SUBMITTED this 2nd day of  
December, 2011.

CITY OF BURIEN

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**DECLARATION OF SERVICE**

I, Cynthia Schaff, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 2nd day of December, 2011, I served a true copy of the foregoing *Respondent City of Burien's Brief* on the following counsel of record using the method of service indicated below:

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

DATED this 2nd day of December, 2011, at Burien, Washington.

  
Cynthia Schaff