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No. 67420-0-I

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

DIANE M. PATTERSON and DAVID E. ENGDahl,

Appellants,

v.

MARIO A. SEGALE,

Respondent/Cross-Appellant,

and

CITY OF BURIEN, WASHINGTON,

Respondent.

BRIEF OF RESPONDENT/CROSS-APPELLANT SEGALE

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COURT OF APPEALS, DIV I
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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii - iv
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	2
C. STATEMENT OF THE CASE.....	3
D. SUMMARY OF ARGUMENT	7
E. ARGUMENT	8
(1) <u>Principles Applicable to an APA Judicial Review Proceeding</u>	9
(2) <u>The Trial Court Did Not Abuse Its Discretion in Refusing to Remand the Case to the Board</u>	13
(3) <u>The Board Correctly Determined as a Matter of Law that Engdahl/Patterson Failed to Demonstrate that Burien Erred in Granting the SDP to Segale</u>	23
(a) <u>Burien Properly Applied King County’s SMP Here</u>	23
(b) <u>The Permit Does Not Violate KCC 25.16.180 as to the Bulkhead’s Height</u>	28
(c) <u>The Bulkhead Does Not Create “New Land”</u>	32
(4) <u>The Trial Court Erred in Failing to Impose CR 11 Sanctions Against Engdahl/Patterson</u>	35
(5) <u>Segale Is Entitled to Fees on Appeal Pursuant to RCW 4.84.370</u>	41
F. CONCLUSION.....	42

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Asarco, Inc. v. Air Quality Coalition</i> , 92 Wn.2d 685, 601 P.2d 501 (1979).....	11
<i>Ault v. Wash. State Highway Comm’n</i> , 77 Wn.2d 376, 462 P.2d 546 (1969).....	9
<i>Batchelder v. City of Seattle</i> , 77 Wn. App. 154, 890 P.2d 25, <i>review denied</i> , 127 Wn.2d 1022 (1995).....	9
<i>Bellevue Farm Owners Ass’n v. State Shorelines Hearings Bd.</i> , 100 Wn. App. 341, 997 P.2d 380, <i>review denied</i> , 142 Wn.2d 1014 (2000).....	42
<i>Biggers v. City of Bainbridge Island</i> , 162 Wn.2d 683, 169 P.3d 14 (2007).....	42
<i>Biggs v. Vail (Biggs II)</i> , 124 Wn.2d 193, 876 P.2d 448 (1994).....	38
<i>Bowers v. Pollution Control Hearings Bd.</i> , 103 Wn. App. 587, 13 P.3d 1076 (2000), <i>review denied</i> , 144 Wn.2d 1005 (2001).....	17
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	37
<i>Buechel v. State Dep’t of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994).....	16
<i>Chuckanut Conservancy v. Dep’t of Nat. Resources</i> , 156 Wn. App. 274, 232 P.3d 1154 (2010).....	5
<i>Citizens for Mount Vernon v. City of Mount Vernon</i> , 133 Wn.2d 861, 947 P.2d 1208 (1997).....	21
<i>Den Beste v. State Pollution Control Hearings Bd.</i> , 81 Wn. App. 330, 914 P.2d 144 (1996).....	17
<i>Diehl v. W. Wash. Growth Mgmt. Hearings Board</i> , 153 Wn.2d 207, 109 P.3d 193 (2004), <i>review denied</i> , 161 Wn.2d 1018 (2007).....	29
<i>Eastlake Community Council v. City of Seattle</i> , 64 Wn. App. 273, 823 P.2d 1132, <i>review denied</i> , 119 Wn.2d 1005 (1992).....	11
<i>Erickson & Assocs., Inc. v. McLerran</i> , 123 Wn.2d 864, 872 P.2d 1090 (1994).....	31

<i>Hama Hama Co. v. Shorelines Hearings Bd.</i> , 85 Wn.2d 441, 536 P.2d 157 (1975).....	12
<i>Harrington v. Pailthorp</i> , 67 Wn. App. 901, 841 P.2d 1258 (1992), review denied, 121 Wn.2d 1018 (1993).....	37
<i>Herman v. Wash. State Hearings Bd.</i> , 149 Wn. App. 444, 204 P.3d 928, review denied, 166 Wn.2d 1029 (2009).....	20
<i>In re Martin</i> , 154 Wn. App. 252, 223 P.3d 1221, review denied, 169 Wn.2d 1002 (2009).....	10
<i>Lewis County v. Pub. Employ. Relations Comm'n</i> , 31 Wn. App. 853, 644 P.2d 1231, review denied, 97 Wn.2d 1034 (1982).....	20
<i>Madden v. Foley</i> , 83 Wn. App. 385, 922 P.2d 1364 (1996).....	37
<i>Magula v. Benton Franklin Title Co., Inc.</i> , 131 Wn.2d 171, 930 P.2d 307 (1997).....	8
<i>Miller v. Badgley</i> , 51 Wn. App. 285, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988).....	38, 39, 41
<i>Motley-Motley, Inc. v. State</i> , 127 Wn. App. 62, 110 P.3d 812 (2005), review denied, 156 Wn.2d 1004 (2006).....	17, 20
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000).....	13
<i>Quadrant Corp. v. State Growth Management Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).....	12
<i>Sanders v. Woods</i> , 121 Wn. App. 593, 89 P.3d 312 (2004).....	21
<i>Skilcraft Fiberglass, Inc. v. The Boeing Co.</i> , 72 Wn. App. 40, 863 P.2d 573 (1993) <i>abrogated on other grounds</i> , <i>Morin v. Burris</i> , 160 Wn.2d 745, 161 P.3d 956 (2007).....	38, 39, 40
<i>Suarez v. Newquist</i> , 70 Wn. App. 827, 855 P.2d 1200 (1993).....	38, 39, 40,
<i>Talbot v. Gray</i> , 11 Wn. App. 807, 525 P.2d 801 (1974), review denied, 85 Wn.2d 1001 (1975).....	36
<i>Wash. Phys. Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	41
<i>Wash. State Dep't of Health Unlicensed Practice Program v. Yow</i> , 147 Wn. App. 807, 199 P.3d 417 (2008), review denied, 166 Wn.2d 1017 (2009).....	16
<i>Watson v. Maier</i> , 64 Wn. App. 889, 827 P.2d 311, review denied, 120 Wn.2d 1015 (1992).....	37
<i>West Main Assocs. v. City of Bellevue</i> , 106 Wn.2d 47, 720 P.2d 782 (1986).....	31
<i>Weyerhaeuser Co. v. King County</i> , 91 Wn.2d 721, 592 P.2d 1108 (1979).....	12
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	8

Statutes

RCW 4.84.370	2, 3, 8, 41
RCW 34.05.554	16
RCW 34.05.558	17
RCW 34.05.562	16, 31
RCW 34.05.562(1).....	17
RCW 34.05.562(2).....	<i>passim</i>
RCW 34.05.570	9, 11, 13, 20
RCW 34.05.570(1).....	19
RCW 34.05.570(1)(a)	1, 7, 10
RCW 34.05.570(1)(d).....	10
RCW 34.05.570(3).....	8, 10, 11
RCW 34.05.570(3)(d).....	12
RCW 43.21C.030.....	5
RCW 43.21C.040.....	5
RCW 43.21C.075.....	5
RCW 90.58.140	9, 11
RCW 90.58.140(2)(a)	24, 26
RCW 90.58.140(5)(b).....	22
RCW 90.58.180(3).....	9

Codes, Rules and Regulations

CR 11	<i>passim</i>
KCC 25.16.180	28, 29
KCC 25.16.180A	33
KCC 25.16.180C.....	29
KCC 25.16.180D	6, 15
KCC 25.16.180F.....	32, 33, 34
KCC 25.16.180L.....	35
KCC 25.16.190D	6
RAP 2.5(a)	9
RAP 10.3(a)(5).....	3
RAP 18.1(a)	41
WAC 173-26-020(14).....	34
WAC 173-26-160.....	25
WAC 173-26-171.....	25, 28
WAC 173-26-231.....	28, 30
WAC 173-26-231(3)(a)(iii)(E)	30

A. INTRODUCTION

This is an appeal in a judicial review proceeding under the Administrative Procedures Act, RCW 34.05 (“APA”). The trial court affirmed the decision of the Shorelines Hearings Board (“Board”) which had summarily affirmed the decision of the City of Burien (“Burien”) to grant respondent Mario Segale a shoreline substantial development permit (“SDP”) to replace an existing, deteriorating bulkhead at his Burien property.

The appellants, Professor David Engdahl¹ and Diana Patterson (“Engdahl/Patterson”), offer a mishmash of arguments devoid of any anchor in Washington law. Most specifically, failing to discern the difference between their burden of proof before the Board, their burden on judicial review, and the standard of review on appeal, they have not borne their burden of demonstrating that the Board committed any error necessitating reversal of its decision. RCW 34.05.570(1)(a). Instead, Engdahl/Patterson continue to offer a variety of complaints about the permit not supported by applicable law. The Board’s decision to reject Engdahl/Patterson’s complaints was correct and that decision is entitled to deference by this Court.

¹ David Engdahl is a Professor of Law at Seattle University. CP 500.

Engdahl/Patterson failed to comprehend that APA judicial review is confined to the record and issues developed and presented to the Board. They now concede that the trial court properly rejected their efforts to raise new issues and evidence not presented to the Board by confining their present appeal to the trial court's refusal to remand the case to the Board to accept new evidence. The trial court did not abuse its discretion in doing so because Engdahl/Patterson merely sought to relitigate their claims. Because Engdahl/Patterson persisted in raising issues and evidence not presented to the Board, the trial court should have imposed sanctions against them pursuant to CR 11.

Respondent Segale is entitled to an award of fees and costs on appeal under RCW 4.84.370.

B. ASSIGNMENTS OF ERROR

Segale acknowledges Engdahl/Patterson's assignments of error,² but believes the issues pertaining to them are more correctly formulated as follows:

1. Under RCW 34.05.562(2), did the trial court abuse its discretion in denying Engdahl/Patterson a remand of the case to the Board?

² Engdahl/Patterson do not make clear assignments of error in their brief, br. of appellants at 1-2, but it is clear that they have not assigned error to the trial court's orders finding certain issues abandoned or raised for the first time on judicial review, and striking evidence not in the Board record, CP 237-41, or the orders denying reconsideration of those decisions. CP 262-65.

2. Was the Board correct in determining that Burién correctly applied the King County shorelines master plan (“SMP”) to Segale’s request for a SDP?

3. Was the Board correct in determining Segale’s former bulkhead qualified for replacement; that the replacement bulkhead was not too high, and that the Segale replacement bulkhead did not create “new land” behind it?

4. Is Segale entitled to a fee award under RCW 4.84.370?

With respect to Segale’s cross-appeal, Segale assigns error to the trial court’s July 27, 2011 order denying CR 11 sanctions against Engdahl/Patterson. The issue pertaining to that assignment of error is:

Did the trial court err in refusing to impose monetary sanctions against Engdahl/Patterson for their repeated violations of CR 11 where they persisted in raising spurious, unsupported arguments and filing declarations containing evidence not before the Board, they were notified of the potential violations, and they refused to withdraw the offending pleadings?

C. STATEMENT OF THE CASE³

Rather than provide a statement of the case consistent with RAP 10.3(a)(5), Engdahl/Patterson offer a one-sided, argumentative discussion of the facts that omits key aspects of the case and yet again discusses evidence not argued to the Board. Long passages in their statement of the case are argument, without citations to the record. It is important to note that below, Engdahl/Patterson did not take issue with the facts set forth in

³ In referencing the record, Segale refers both to the clerk’s papers (“CP”) and the Board’s certified administrative record (“AR”) where appropriate.

the Board's order on summary judgment. CP 557-59. A more proper statement of the case follows.

Segale owns a single-family residential property at 12701 Standring Lane SW on Puget Sound located within the City of Burien. CP 326. The property has an existing rock bulkhead extending the length of the property. *Id.* That bulkhead was deteriorated, allowing erosion to occur on Segale's property. *Id.*⁴

In August 2009, Segale applied to Burien for a shoreline substantial development permit to replace the existing bulkhead and accompanied that application with a site plan and environmental checklist. AR – Kaylor 5/17/10 decl., exs. A-C. The environmental checklist specifically advised Burien in a section denominated "Future Plans": "There is a possibility that the existing single family residence will be replaced." *Id.*, ex. C at 2. The new bulkhead was to be located along the same alignment as the existing bulkhead, but built to a higher elevation. *Id.*, exs. A-C.

Burien issued a notice of application on September 16, 2009. CP 327. Thereafter, Burien thoroughly reviewed the application under the State Environmental Policy Act, RCW 43.21C ("SEPA"), CP 513-17, and

⁴ Engdahl/Patterson complained to the Board about Segale's 1995 construction of the bulkhead. AR – Patterson 5/31/10 decl. at 1-2; Engdahl 5/31/10 decl. at 2.

issued a determination of nonsignificance (“DNS”) on January 25, 2010. *Id.*⁵ Burien also considered the bulkhead project’s compliance with its shoreline master program, as required under the Shorelines Management Act, RCW 90.58 (“SMA”), and issued the SPD for the Segale project on March 8, 2010. CP 327, 346-57. That permit contained extensive findings of facts and conclusions. AR – Kaylor decl., ex. D. *See* Appendix.

Engdahl/Patterson appealed Burien’s decision on the permit to the Board, complaining not only about the issuance of the SDP, but Segale’s 1995 work on the bulkhead.⁶ CP 327. Segale moved to dismiss the appeal because it was baseless as a matter of law, and Burien joined in the motion. *Id.*⁷ The Board agreed, dismissing the appeal in a unanimous 23-page order on summary judgment issued on July 16, 2010. CP 107-29. *See* Appendix. Thereafter, Engdahl/Patterson filed a motion for reconsideration. CP 327. That motion for reconsideration was denied by

⁵ A DNS means that there is no probable significant adverse environmental impacts for the project under SEPA that require assessment in an environmental impact statement. RCW 43.21C.030, .040; *Chuckanut Conservancy v. Dep’t of Nat. Resources*, 156 Wn. App. 274, 285-86, 232 P.3d 1154 (2010). Engdahl/Patterson did not appeal the DNS under RCW 43.21C.075. They are now estopped to claim that Burien’s decision to grant the SPD to Segale has any significant environmental impact.

⁶ The Board rejected Engdahl/Patterson’s complaints about the 1995 work on the Segale bulkhead, CP 127-28, and they did not seek review of that aspect of the decision by the trial court, thereby waiving the issue.

⁷ Engdahl/Patterson also moved for partial summary judgment, which the Board effectively denied.

the Board on August 23, 2010 in a unanimous 7-page order. CP 131-38.

See Appendix.

Engdahl/Patterson filed an initial petition for judicial review to the King County Superior Court, later filed an amended petition. CP 1-21. In their initial brief, CP 534-56, Engdahl/Patterson raised issues that were either abandoned or not raised before the Board. They based that brief on a declaration from Engdahl containing evidence never presented to the Board. CP 162-74. Segale moved to strike the brief as to the issues and evidence not presented to the Board. CP 47-57. Engdahl/Patterson's response to the motion to dismiss contained yet another declaration from Engdahl containing materials not submitted to the Board. CP 193-221. The trial court granted Segale's motion on April 1, 2011, finding the issues under KCC 25.16.180D and .190D that had been abandoned before the Board or were raised for the first time on judicial review. CP 237-39.⁸ The court also granted Segale's motion to strike the evidentiary material submitted by Engdahl/Patterson that was not in the Board record. CP 240-41. The court also rejected Engdahl/Patterson's motions for reconsideration of those orders. CP 262-65.

Engdahl/Patterson filed a revised hearing brief, CP 557-77, but then re-submitted at least some of the objectionable evidentiary materials

⁸ At argument on the motion, Engdahl *conceded* that the KCC 25.16.190D issue should be dismissed. RP (4/1/11):27-28.

previously stricken by the trial court. CP 266-323. They again raised issues not offered to the Board. After a hearing on the merits on June 10, 2011, in which Burien joined in Segale's position, CP 472-81, the trial court entered an order that day affirming the Board's decision. CP 520-22.

The trial court did not address Segale's request for CR 11 sanctions, but instead indicated that Segale could file a separate sanctions motion. CP 521. Segale did so. CP 761-68. The trial court, however, denied CR 11 sanctions. CP 831-32.

Engdahl/Patterson appealed from the trial court's orders on the merits. CP 523-33. Segale cross-appealed on the CR 11 issue. CP 833-37.

D. SUMMARY OF ARGUMENT

Engdahl/Patterson did not preserve any alleged error regarding the trial court's rejection of a remand to the Board pursuant to RCW 34.05.562(2) for new evidence. The trial court correctly rejected Engdahl/Patterson's efforts to remand the case to the Board for the taking of irrelevant evidence.

Engdahl/Patterson did not meet their burden under RCW 34.05.570(1)(a) to demonstrate that the Board erred in granting summary judgment to Segale and Burien. They cannot demonstrate substantial

prejudice from Burien's grant of a SDP to Segale where they have conceded the issuance of the permit has no adverse environmental effects.

Engdahl/Patterson fail to meet their burden of demonstrating that any of the criteria in RCW 34.05.570(3) are met. Burien properly applied Burien's SMP that carried over from King County. That local SMP, not the regulations adopted by the Department of Ecology ("DOE"), control here. Burien's grant of a SDP to Segale to replace an existing, deteriorated bulkhead along the same configuration was consistent with its SMP.

The trial court erred in not sanctioning Engdahl/Patterson under CR 11 for their persistent effort to raise new issues or evidence on judicial review of the Board's decision, efforts they now *concede* were improper.

Segale is entitled to fees on appeal pursuant to RCW 4.84.370.

E. ARGUMENT⁹

⁹ Summary judgment is proper when there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307, 313 (1997). Under traditional summary judgment principles articulated in *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), after Segale provided sufficient information to prove a prima facie entitlement to the SDP, Engdahl/Patterson had the burden of coming forward with specific evidence as to how the proposed bulkhead violated the SMA's policies or purpose. They failed to do so. Engdahl/Patterson presented no evidence to support their claim and reliance on the allegations in their pleadings alone was not sufficient. *Id.* ("In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings"). Before the Board, they focused on their contention that Segale had not met his burden of establishing a need for the bulkhead's replacement. CP 85-88. The Board properly found that Engdahl/Patterson did not refute Segale's prima facie showing of the project's consistency with the SMA policies. CP 127, 136-37.

(1) Principles Applicable to an APA Judicial Review Proceeding

As was true before the trial court,¹⁰ Engdahl/Patterson do not comprehend, or are oblivious to, the legal principles governing judicial review of the Board's decision. They neglect to even discuss the APA standards for judicial review until page 21 of their brief and then they seem to argue that they are not bound by RCW 34.05.570.¹¹ *Nowhere* do they discuss the standard of review employed by Washington appellate courts.

The Board's decision, encompassed in its order granting summary judgment and its order denying reconsideration, is thorough and complete. Engdahl/Patterson had their opportunity to litigate factual issues before the Board but the Board determined as a matter of law that their appeal was groundless. CP 107-38. Under the APA, judicial review of administrative decisions is limited in scope. The courts act in an appellate capacity reviewing the record established before the administrative agency. *Ault v. Wash. State Highway Comm'n*, 77 Wn.2d 376, 378, 462 P.2d 546 (1969).

¹⁰ Engdahl/Patterson's trial court brief was silent on their burden for an APA judicial review. CP 557-77.

¹¹ Their argument that RCW 90.58.140 somehow supersedes RCW 34.05.570 is raised for the first time on appeal; it was never raised below before the board or the trial court. It should be disregarded. RAP 2.5(a). In any event, their contention is contrary to RCW 90.58.180(3) that states the APA applies to judicial review of Board decisions, and governing case law. *Batchelder v. City of Seattle*, 77 Wn. App. 154, 158, 890 P.2d 25, *review denied*, 127 Wn.2d 1022 (1995) ("Judicial review of a decision of the SHB is governed by the Administrative Procedures Act, RCW 34.05.").

First, Engdahl/Patterson bear the burden of demonstrating that the Board erred. RCW 34.05.570(1)(a); *In re Martin*, 154 Wn. App. 252, 260, 223 P.3d 1221, *review denied*, 169 Wn.2d 1002 (2009).

Second, they bear the burden of demonstrating that they were “substantially prejudiced” by Burien’s granting of the permit. RCW 34.05.570(1)(d); *Martin*, 154 Wn. App. at 260. Engdahl/Patterson have offered no arguments, let alone any evidence, to even attempt to prove they were substantially prejudiced. They do not address this key feature of the statute anywhere in their brief. Their failure to do so alone compels affirmance here. Engdahl/Patterson’s failure in this regard is not surprising given that Engdahl/Patterson have *conceded* there is no significant adverse environmental impact under SEPA resulting from the granting of SDP by their failure to appeal Burien’s DNS for this permit. Nor did they rebut with expert testimony engineer Gary Henderson’s conclusion that any height increase in the bulkhead had no significant adverse impact, CP 359, a point on which the Board relied. CP 110, 137. Segale is only replacing an existing, deteriorating bulkhead. Engdahl/Patterson did not and cannot meet this test of demonstrating substantial prejudice.

Third, as this is an appeal from the Board’s adjudicative decision, Engdahl/Patterson must prove one of the provisions of RCW 34.05.570(3)

applies to the Board's decision. Their argument that RCW 90.58.140 somehow supersedes RCW 34.05.570 is *nowhere* supported by any authority, because there is none. *See* n.10 *supra*.

Engdahl/Patterson fail to meet any of the criteria of RCW 34.05.570(3). Engdahl/Patterson cannot contend there are genuine issues of material fact that preclude the Board's decision or that the Board lacked authority to grant summary judgment. *Eastlake Community Council v. City of Seattle*, 64 Wn. App. 273, 276, 823 P.2d 1132, *review denied*, 119 Wn.2d 1005 (1992). Indeed, they *concede* that courts grant summary judgment in administrative proceedings, citing *Asarco, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 697, 601 P.2d 501 (1979). Br. of Appellants at 25-26.¹²

¹² Engdahl/Patterson make an elaborate argument regarding summary judgment when a party fails to present any evidence in support of its position. Br. of Appellants at 26-28. The *glaring* flaw in this argument is that Segale presented evidence to Burien and the Board supporting the fact that the bulkhead was deteriorating, the bulkhead would be replaced by a new bulkhead located along the same alignment as the old bulkhead. AR -- Kaylor decl., exs. C, D. The request for the permit was supported by Henderson's testimony (the existing bulkhead was "in a deteriorated condition and needed to be replaced."). CP 359. The Board agreed:

The evidence established that the lot contained an existing residence, that the bulkhead would be a replacement bulkhead, and that it would be located in the same alignment as the existing bulkhead.

CP 136. The Board further noted Segale's SEPA checklist, which indicated that the bank behind the existing bulkhead was eroding and the deteriorated bulkhead allowed erosion. *Id.*

Engdahl/Patterson offered no expert testimony to the contrary, and they conceded in oral argument below that the bulkhead was deteriorating and needed replacement. RP (6/10/11):19-20. Engdahl/Patterson, not Segale, bore the burden of

Similarly, they do not claim the Board acted unconstitutionally, outside its authority, with unlawful procedures, inconsistently with its own rules, or in an arbitrary or capricious manner. The central focus of Engdahl/Patterson's appeal is that the Board erred in interpreting the law. RCW 34.05.570(3)(d). A court reviews a legal decision by the Board de novo, *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). But it has long been a black letter rule in administrative law that if the legal issue falls within the agency's expertise, this Court must accord the agency's interpretation of that issue "great weight," particularly where the agency is acting in a quasi-judicial capacity. Thus, decisions of the Board on the SMA are entitled to great weight by the courts. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975); *Weyerhaeuser Co. v. King County*, 91 Wn.2d 721, 736, 592 P.2d 1108 (1979) ("the Board draws on its special knowledge and experience as the entity charged with administering and enforcing the [SMA].").

proof before the Board. 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. The answer to that question is very clearly "no." It was Engdahl/Patterson, not Segale, that failed to offer credible evidence on the issues before the Board, as the Board itself observed. CP 137.

Finally, as this is appellate review, this Court sits in the same position as the trial court and reviews the Board decision by applying the standards of RCW 34.05.570 directly to the Board's record. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

(2) The Trial Court Did Not Abuse Its Discretion in Refusing to Remand the Case to the Board

Engdahl/Patterson's presentation of their case to the Board, the trial court, and now this Court, has been frustrating as it continues to be a moving target. In order to understand why the trial court did not abuse its discretion in rejecting Engdahl/Patterson's belated claim for a remand of the case to the Board under RCW 34.05.562(2), it is necessary to place the issue in appropriate context.

In the trial court, Engdahl/Patterson attempted to raise several issues that were never raised to, or abandoned before, the Board.¹³ They sought to offer evidence never presented to the Board.

¹³ When Segale challenged the two new issues raised by Engdahl/Patterson below, CP 47-57, Engdahl/Patterson claimed during the Board hearing that it was unclear which law should apply, and that raising these issues then would have been "perilous" because they might have lost:

[D]isagreement and uncertainty [about what laws applied] made it perilous to cite one or another specific regulation...*because the authority cited might be held inapplicable and the point therefore lost....* Confusion and surprise was best avoided when propositions common to competing regulatory sets were recited without slavish attachment to one or another citation.

Engdahl/Patterson's initial "trial brief" was accompanied by a declaration with four exhibits. CP 162-74. It relied heavily upon that declaration and exhibits thereto. CP 534, 536, 546, 548, 549, 552, 555. Engdahl/Patterson's amended brief was similarly reliant on Engdahl's declaration, but they merely deleted specific references to the Engdahl improper declaration. CP 557-77. The attached exhibits *were not part of the administrative record below*. In fact, Exhibit 4 is dated December 3, 2010, CP 167, which is *after* the Board issued its summary judgment order.

Engdahl/Patterson also submitted an "opposition memorandum" to Segale's trial court motion to dismiss the new issues not raised to the Board. CP 181-92. That memorandum relied upon yet another Engdahl declaration that also introduced new evidence that was not part of the administrative record below. CP 182, 188, 190, 191, 192, 193-206.¹⁴

CP 185. They further claimed that citing actual laws is nothing more than a "magic numbers game," *id.*, and that other issues raised below were mere "shorthand" for other issues not raised. CP 186, 187. For example, "new lands" as defined in KCC 25.16.190 was "shorthand" for "landfill in a floodway" under KCC 25.16.190D. CP 186. Apparently, in their view, their only responsibility was to make abbreviated complaints about Burien's actions, and then leave it to the Board and the courts to hunt for all of the potential regulations that Burien might have violated.

¹⁴ The declaration had four exhibits. Exhibit 1 is a copy of Engdahl's oral argument notes from the Board hearing. CP 196-97. Exhibit 2 is a "Notice of Ongoing Litigation" that Professor Engdahl claims to have posted at the Segale property after the SHB decision. CP 198-99. Professor Engdahl also stated in paragraph 4 of his declaration that Segale saw and read the notice, and discussed it with his family. CP 193. The Professor seems to be clairvoyant. None of his statements were based on his personal knowledge. If they are based on what others told him, they are hearsay. ER

Most remarkably, Engdahl submitted his oral argument notes from the hearing before the Board as “evidence.” CP 196-97.

The bulk of Engdahl/Patterson’s argument before the trial court centered on Segale’s post-SDP use of his property and language in KCC 25.19.180D relating to the requirement that any bulkhead be necessary to protect “existing legally established structures and public improvements.” But they had abandoned that issue before the Board,¹⁵ as the trial court ruled. CP 237. They improperly relied on evidence not before the Board to support their claim of Segale’s noncompliance with that ordinance. Apparently acknowledging that their development of the record before the Board was insufficient, Engdahl/Patterson attempted to introduce new evidence to support their contentions, but the trial court disallowed this effort to introduce new evidence. CP 240-41. The trial court’s action was proper because the evidence at issue relates to facts occurring *after* the

801(c). In any event, his statements are irrelevant to the legal issues, and are also new evidence that was not before the Board. Exhibits 3.1-3.6 are a series of photographs of the bulkhead construction which took place after the Board’s decision issued. CP 200-05. Finally, Exhibit 4 is an email from the Army Corps of Engineers that was not in the record below. CP 206. The trial court properly struck this evidence.

¹⁵ Engdahl/Patterson’s petition for review to the Board briefly indicated that they intended to argue compliance with KCC 25.16.180D. CP 54. The Board entered a pre-hearing order requiring the parties to set forth the legal issues to be resolved at the hearing. *Id.* Engdahl/Patterson’s submission of proposed legal issues made no mention of KCC 25.16.180D. *Id.* The Board’s amended hearing notice did not list compliance with KCC 25.16.180D was an issue. *Id.* Moreover, in the face of Segale’s motion to dismiss before the Board, Engdahl/Patterson did not argue that ordinance in response to Segale’s motion. *Id.* Engdahl/Patterson belatedly attempted to resuscitate this issue only in their motion for reconsideration before the Board, which it rejected. CP 137-38.

Board decision. RCW 34.05.562 makes clear that the focus of the statute is on “the validity of the agency action at the time it was taken.” *Wash. State Dep’t of Health Unlicensed Practice Program v. Yow*, 147 Wn. App. 807, 828-29, 199 P.3d 417 (2008), *review denied*, 166 Wn.2d 1017 (2009).

They further contended that Segale’s SDP issued by Burién violated KCC 25.16.190D by creating “new land.” This was a new issue raised for the first time on judicial review.¹⁶

Given its limited appellate capacity, it is a well-recognized legal principle that the courts may not review an issue abandoned by a party before the administrative decisionmaker. *Buechel v. State Dep’t of Ecology*, 125 Wn.2d 196, 201 n.4, 884 P.2d 910 (1994) (in a Shorelines Hearings Board case, Supreme Court stated “an issue not raised in a contested case before the Shorelines Hearings Board may not be raised for the first time on review of the Board’s decision.”). Similarly, issues not raised before an administrative agency may not be raised for the first time on appeal in an APA judicial review proceeding. RCW 34.05.554;

¹⁶ Engdahl/Patterson never raised this issue to the Board. CP 55-56. It was not raised in amended pre-hearing order nor was it articulated anywhere in Engdahl/Patterson’s pleadings in response to Segale’s motion to dismiss at the Board. Their contention that any fill used by Segale for the new bulkhead somehow violated the county ordinance is both unsupported, as nothing in the ordinance prohibits the use of fill within a floodplain, but it was certainly a new issue they never before raised and it was not considered by the Board in its decisions below. Ultimately, Professor Engdahl *conceded* in argument before the trial court that KCC 25.16.190D should not be considered. RP (4/1/11):27-28. Now, Engdahl/Patterson *revive* that very same argument in the guise of discussing DOE regulations. Br. of Appellants at 38-40.

Motley-Motley, Inc. v. State, 127 Wn. App. 62, 110 P.3d 812 (2005), review denied, 156 Wn.2d 1004 (2006); *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 597-98, 13 P.3d 1076 (2000), review denied, 144 Wn.2d 1005 (2001).

For the limited APA judicial review, such review is generally confined to the agency record. RCW 34.05.558; *Den Beste v. State Pollution Control Hearings Bd.*, 81 Wn. App. 330, 914 P.2d 144 (1996) (with limited exceptions, facts pertinent to review of administrative proceedings are established at administrative hearing).¹⁷ In fact, RCW 34.05.558 and .562 prohibit the consideration of facts occurring *after* the agency decision. *Bowers*, 103 Wn. App. at 611 (Challenger of coal-fired power plant before PCHB argued, but had no evidence, that studies the PCHB relied upon were insufficient. Court declined to “take judicial notice” of an EPA study issued *after* the PCHB issued its decision.).

Recognizing that they failed to present the issues or the evidence to the Board and that they did not meet the criteria of RCW 34.05.558 or .562(1) to remedy their failure, Engdahl/Patterson now seek to circumvent those failed efforts by arguing that the trial court abused its discretion in rejecting their tardy effort under RCW 34.05.562(2) to secure a remand of

¹⁷ As with new issues, there are exceptional situations where new evidence may be considered. RCW 34.05.562(1) sets forth those exceptional circumstances. None is present here.

the case to the Board to raise yet another new issue – their newly found belief that Segale committed “fraud.” Br. of Appellants at 43-48. In support of this tawdry and belated claim, Engdahl/Patterson do not provide this Court any factual context nor a discussion of any authority under RCW 34.05.562(2). That is not surprising. Both the facts and the law here are against them.

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. They made brief reference to RCW 34.05.562(2) in their pleadings, but offered no case authority on the statute. CP 212. Moreover, *they never filed a motion to bring the issue before the trial court.*¹⁸ Segale contended that Engdahl/Patterson failed to demonstrate that their new evidence fell within RCW 34.05.562(2). CP 228. Engdahl/Patterson amplified on their remand argument in their motion for reconsideration of the trial court’s order striking the new evidence they sought to introduce. CP 255-61. Nevertheless, the trial court denied their motion to reconsider. CP 264-65.

¹⁸ Engdahl/Patterson did not mention RCW 34.05.562(2) anywhere in their argument on the motions to strike new evidence and issues. In oral argument, Professor Engdahl asked the trial court about a possible “motion to expand the record.” RP (4/1/11):48. The trial court declined to give him legal advice. *Id.* at 49. No request for remand was made by Engdahl/Patterson in the June 10, 2011 hearing.

The Court should deny Engdahl/Patterson's request for a remand for two reasons. First, Engdahl/Patterson *nowhere* specifically assign error to the trial court's order striking the new evidence they sought to introduce or the order denying their motion for reconsideration. Br. of Appellants at 1-2. As they made no separate remand motion, the *only* orders addressing possible remand under RCW 34.05.562(2) were those orders. They have not preserved the remand issue for review.

Second, even if the Court decides to reach this issue, Engdahl/Patterson have not met their burden under RCW 34.05.570(1) to show that the trial court abused its discretion. By its terms, RCW 34.05.562(2) is *discretionary* ("The court *may* remand a matter to the agency, before the final disposition of a petition for review...").¹⁹ However, in order to secure a remand, Engdahl/Patterson had to address the criteria of the rule:

- (a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

¹⁹ Engdahl/Patterson contend that RCW 34.05.562(2) is akin to CR 60. Br. of Appellants at 47-48. They offer no authority for this proposition because there is none. By its terms, RCW 34.05.562(2) applies to a court acting in its appellate capacity in an APA judicial review proceeding and is available to a court *before* final disposition of the petition for review. A more apt analogy is RAP 9.11. By its terms, CR 60 relates to the authority of a trial court to provide relief post-judgment. Engdahl/Patterson did not file a CR 60 motion before the Board.

(b) The court finds that (i) new evidence has become available that related to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;

(c) The agency improperly excluded or omitted evidence from the record; or

(d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

Only (b) appears to be at issue. Our courts are *exceedingly* reluctant to abrogate the principle that RCW 34.05.570 judicial review is confined to the administrative agency's record. Remand is not available merely to supplement an incomplete record. *Herman v. Wash. State Hearings Bd.*, 149 Wn. App. 444, 445, 204 P.3d 928, *review denied*, 166 Wn.2d 1029 (2009); *Lewis County v. Pub. Employ. Relations Comm'n*, 31 Wn. App. 853, 861, 644 P.2d 1231, *review denied*, 97 Wn.2d 1034 (1982).

It is not an abuse of discretion to reject remand under the statute where the evidence sought is irrelevant, not newly discovered, or involves an effort by a party to simply relitigate its case. *Motley-Motley*, 127 Wn. App. at 76-77.

Here, Engdahl/Patterson's remand request to the trial court was amorphous. The trial court, as this Court, would have to guess as to what

“new evidence” they wanted the Board to generate.²⁰ They really want a second chance to make a record they failed to initially make before the Board, and to renew, yet again, their argument that the Segale bulkhead was not designed to protect an existing structure, in the hope of delaying resolution of this case.²¹ Their present rationalization for remand, that Segale allegedly engaged in fraud on the Board, is tawdry and untrue. At the time of the SDP application, a house existed on the Segale property. The replacement of the bulkhead was necessary for the preservation of that home. Engdahl/Patterson *conceded* below that the bulkhead was deteriorating, was letting water pass to the road behind the bulkhead, and needed to be replaced. RP (6/10/11):19-20. They did not object to the rebuilding of the bulkhead along the same line as the original. *Id.* at 28.

It can hardly be said that Segale misrepresented anything to Buriem *when he stated in the environmental checklist that there was a possibility the existing residence would be replaced in the future.* Engdahl/Patterson apparently knew this was a possibility when they argued in their petition

²⁰ To defeat Segale’s motion, Engdahl/Patterson were required to submit specific, detailed evidence in support of their position. *Sanders v. Woods*, 121 Wn. App. 593, 600, 89 P.3d 312 (2004); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997) (for an issue to be properly raised before administrative agency, there must be more than hint or slight reference to issue in the record). They did not do so before the Board and they were not entitled to resuscitate that issue before the trial court.

²¹ In any event, that argument was abandoned before the Board, as the trial court ruled. CP 237.

to the Board: “the decrepit existing ‘residence’ is in fact a vacant shell, stripped to its studs and never occupied since being acquired by this applicant, and now awaiting demolition to make way for a new residential structure.” AR – Engdahl/Patterson pet. for review at 12.

The question properly before the Board, and now subject to review by this Court, is whether Segale’s proposed bulkhead met the requirements for issuance of a SDP under Burien’s SMP. What Segale intended to do in the future with the property was, in any event, *irrelevant* to the SDP request to Burien and reviewed by the Board.²² Any post-SDP actions by Segale required permits. To demolish any existing structure required a permit from Burien to build a new structure. Those actions had to be consistent with SEPA and SMA and were subject to Burien’s review on their own merits. Permissible actions taken by Segale *after* the SDP was issued do not alter the facts as they existed at the time the permit decision was made and have no bearing on this Court’s review of the Board’s decision.

If the issue was properly preserved, the trial court did not abuse its discretion in denying remand under RCW 34.05.562(2). This issue is

²² Not content to confine their case to issues before the Board, Engdahl/Patterson assert that Segale violated the terms of the SDP itself and RCW 90.58.140(5)(b) in beginning construction on the bulkhead after the Board denied reconsideration. Br. of Appellants at 44-45. By its terms, the statute allows construction pursuant to a SDP to proceed. The burden was on Engdahl/Patterson to ask the trial court to halt any construction. RCW 90.58.140(5)(b). They failed to do so.

nothing more than an opportunity for Engdahl/Patterson to reargue irrelevant evidence that they now concede was properly stricken by the trial court with respect to an abandoned issue.

(3) The Board Correctly Determined as a Matter of Law that Engdahl/Patterson Failed to Demonstrate that Burien Erred in Granting the SDP to Segale

Engdahl/Patterson's lengthy, legal arguments in their brief are a hash of factual asides and legal contentions that are often difficult to follow. The Board ruled against Engdahl/Patterson on all of these issues, as should this Court.

(a) Burien Properly Applied King County's SMP Here

The central legal argument offered by Engdahl/Patterson is that Burien's SMP that carried forward from King County's SMP that applied prior to Burien's incorporation is inapplicable. Br. of Appellants at 5-21. Their position on this issue has also morphed. The Board addressed this issue at length. CP 378-83. KCC 25.16 was approved as King County's SMP for the area in which Segale's home is located prior to Burien's incorporation. As noted in the Johanson declaration submitted to the Board, Burien incorporated in 1993. On incorporation, Burien continued to utilize KCC 25.16 as its SMP and continues to do so today. Burien adopted the SMP in its comprehensive plan and the SMP is referenced in several ordinances. AR -- Johanson 6/1/10 decl. at 1-2. Thus, as of the

time of Segale's SDP application, Burien's SMP had been the former King County SMP for at least 16 years, and decisions on shorelines activities in Burien had been made in accordance with those decisions, as DOE was aware because it received notice of those decisions. DOE has never indicated that Burien's use of the former King County SMP as its own was improper.

The Board concluded Burien did not formally adopt King County's SMP as the city's own SMP, CP 118, but that where a SMP was in place prior to a city's incorporation, the city incorporates, but then does not adopt its own SMP, the former SMP remains in place. CP 118-19. Moreover, the Board determined RCW 90.58.140(2)(a), argued by Engdahl/Patterson, is inapplicable, citing its ruling in *Maple Valley Citizens for Responsible Growth v. City of Maple Valley*. CP 119. As the Board stated:

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.

CP 120.

The Board further rejected Engdahl/Patterson's contentions that DOE regulations controlled in this case, noting that WAC 173-26 does not apply to an SDP application where an SMP is in place, citing its decision in *Greater Duwamish Neighborhood Council v. City of Seattle*. CP 124. Moreover, WAC 173-26-171 unequivocally states: "The guidelines do not regulate development on shorelines of the state in counties and cities where approved master programs are in effect."

On reconsideration, the Board again rejected Engdahl/Patterson's arguments that DOE regulations control. In particular, DOE had not adopted an SMP for Burien. CP 134-35.

In reaching its conclusion, the Board relied by analogy on WAC 173-26-160 which provides, "[u]ntil a new or amended master program is adopted by the department, any decision on an application for a shoreline permit in the annexed shoreline area shall be based upon compliance with the master program in effect for the area prior to annexation." WAC 173-26-160 applies specifically to situations where an area is newly added to a jurisdiction as a result of annexation. Although the guidelines provide no direction for situations involving incorporation, relying on its past practice, the Board found that the same approach is equally practical in the situation of incorporation. CP 120-21.

Ultimately, the Board's interpretation of Burien's SMP is consistent with several of its decisions on the "carry over" effect of former SMPs. In *Maple Valley Citizens for Responsible Growth v. City of Maple Valley*, SHB No. 03-014 (2004), CP 400-13, the Board ruled that RCW 90.58.140(2)(a), the statute on which Engdahl/Patterson rely, does not apply once an SMP is in place for area. Further, a pre-incorporation SMP remains in place after incorporation until the city adopts its own SMP. *Toskey v. City of Sammamish*, SMP No. 07-008 (2007), CP 414-31; *Lux Homes v. Ecology*, SHB No. 04-025 (2005), CP 432-61. This only makes sense as it ensures that a local decision on the applicable SMP remains "seamless."

Engdahl/Patterson recite SMA provisions and DOE regulations at great length, they do not come to grips with the legal basis for the Board's rejection of their contention that Burien's SMP was inapplicable. They resort to blatant hearsay to try to bootstrap their meritless arguments.²³ They repeat former factual contentions that are simply erroneous, as has been pointed out to them.²⁴

²³ They cite to Engdahl's repetition of an alleged conversation he had with a DOE official, for example. Br. of Appellants at 10, 20.

²⁴ KCC 25.16 has been approved by DOE for King County and continues to be applicable in Burien. The fact of KCC 25.16's applicability was not invalidated by Burien's incorporation. KCC 25.16 is not made ineffective simply because the DOE register does not list Burien as one of the cities for which it has approved an SMP. Notably, the register referred to Engdahl/Patterson in their brief at 9-10 is a list of all

Engdahl/Patterson have *no answer* to the fact that the Board, being the agency with expertise in administering the SMA, is entitled to deference in its interpretation and Engdahl/Patterson have not met the high burden of proving the Board's decision was erroneous.

Further, the practical implications of Engdahl/Patterson's argument are staggering. Engdahl/Patterson would invalidate virtually every shoreline-related decision Burien has made over the last 16 years because it allegedly applied the wrong SMP.²⁵

Finally, in a desperate attempt to validate their claims, Engdahl/Patterson come full circle arguing in their brief at 19, 20, that DOE's regulations are applicable because KCC 25.32.010 requires its application. CP 564-65.²⁶ Engdahl/Patterson correctly acknowledge the

state-approved SMPs categorized by the city that requested approval. CP 565. *The list includes the King County SMP referred to herein as KCC 25.16.* It is found under the listing for King County and not Burien. Burien has not submitted an SMP for approval by DOE, but there was no need for Burien to request DOE approval of a plan that had already been approved. That KCC 25.16 is effective within Burien is no "secret," as its applicability was ludicrously been characterized by Engdahl/Patterson in their trial brief. CP 565. Burien has uniformly applied KCC 25.16 to all projects within its shoreline area since incorporation.

²⁵ Burien approved *numerous* SDPs with apparent approval of Burien's use of its SMP. AR – Johanson 6/1/10 decl., exs. B-E. Ironically, this would include a building permit for their property at 12237 Shorewood Lane SW on July 30, 2010, a property located on the water about a mile from Segale. They did not complain in that case that King County's SMP did not apply with respect to their permit when Burien reviewed it for its consistency with Burien's SMP derived from King County. Permit No. BLD-10-0683. Burien maintains an online register of all issued permits. <https://transact.mybuildingpermit.com/permitsearch/AdvanceSearch.aspx>.

²⁶ It can hardly be said the Board erred in with respect to their particular issue given that Engdahl/Patterson did not raise compliance with KCC 25.32.010 as an issue

application of the KCC, but are wrong otherwise. KCC 25.32.010 does not require application of WAC 173-26; it simply states that the development activity shall be consistent with the SMA policy, the guidelines, DOE regulations, and the King County shoreline master program.²⁷ Engdahl/Patterson would like KCC 25.32.010 to give WAC 173-26 full force and effect, even when, as is the case here, an approved SMP is in effect for the area. However, such a result is inconsistent with WAC 173-26-171, *supra*. In light of WAC 173-26-171, to apply WAC 173-26-231 directly to SMPs in Burien, as encouraged by Engdahl/Patterson, would be inconsistent with the guidelines and thus in violation of KCC 25.32.010.

In sum, the Board correctly ruled that King County's SMP applied to the analysis of Segale's SDP application to Burien. That application was consistent with King County's SMP for Burien. The Board did not err in summarily determining that Burien applied the correct law in granting Segale's SDP.

(b) The Permit Does Not Violate KCC 25.16.180 as to the Bulkhead's Height

before the Board. CP 61-63. This issue was first raised in a footnote in their motion for reconsideration of the dismissal of new or abandoned issues in the trial court. CP 246-47.

²⁷ WAC 173-26 is not directly applicable to Burien's SDP decision, but that does not render KCC 25.32.010 meaningless. WAC 173-27, unlike WAC 173-26, is still applicable after an SMP is in effect for an area.

As further evidence of their ever-changing arguments, Engdahl/Patterson abandon most of the arguments they offered below to contend that the height of the Segale bulkhead was excessive. They again rely on “evidence” stricken by the trial court. Br. of Appellants at 41-43. This Court should reject Engdahl/Patterson’s complaint about the height of the Segale bulkhead as the Board correctly resolved the issue. CP 121-23.

Engdahl/Patterson argued below that KCC 25.16.180C applied to the bulkhead. By its terms, KCC 25.16.180C applies only to bulkheads that are *exempt* from the requirement for a SDP. *See* Appendix.²⁸ Segale’s bulkhead was not “exempt.” He obtained a permit for it. The Board correctly determined that Segale’s bulkhead was not exempt. Now, Engdahl/Patterson abandon that argument.

KCC 25.16.180 does not set a particular height limit. Segale made a particularized showing to Burien to justify the height of the bulkhead he sought to install in replacement of the older, deteriorating bulkhead. That small increase in height was necessary, as Gary Henderson, a respected engineer, testified. CP 359-60. The Board specifically ruled that

²⁸ The application of KCC 25.16.180C only to exempt bulkheads was clear from its language. *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 214, 109 P.3d 193 (2004), *review denied*, 161 Wn.2d 1018 (2007) (“When statutory language is clear and unequivocal, courts must assume that the legislature meant exactly what it said and apply the statute as written.”).

Engdahl/Patterson “have not made any showing that the height of the proposed bulkhead violates any other applicable law . . .” CP 123. The Board was correct. Engdahl/Patterson do not like any bulkheads (except perhaps their own). They failed to establish error by the Board or Burien on this issue. This is likely why they abandoned the issue before this Court.

Now, Engdahl/Patterson instead focus on WAC 173-26-231 as the latest rationale for their meritless argument regarding bulkhead height. That argument, too, is meritless. Engdahl/Patterson’s arguments regarding WAC 173-26-231(3)(a)(iii)(E) are unpersuasive. First, as discussed *supra*, WAC 173-026-231 is not directly applicable to this permit. Second, even if WAC 173-26-231 were applicable, Engdahl/Patterson failed to meet their burden of proving that the height of the Segale bulkhead is not the minimum necessary to protect his property from tidal, wave or current erosion. As stated in the Henderson declaration and as Engdahl/Patterson conceded in the trial court, the replacement bulkhead is necessary. Replacing the bulkhead without increasing the height would do little to increase the protection to the residence. Further, the increase height of the bulkhead will have no significant adverse impacts to the surrounding waterfront properties, nor will it cause any significant change

in wave reflection. CP 358-59. Engdahl/Patterson offered no expert testimony to the contrary.

Finally, Engdahl/Patterson make reference to a SMP *draft* recently considered by Burien's City Council. Br. of Appellants at 42-43. The trial court *excluded* a similar draft King County ordinance from the record that was exhibit 4 to Engdahl's trial court summary judgment brief. CP 240-47.²⁹ The draft Burien ordinance is, in any event, irrelevant, just like the draft King County ordinance excluded by the trial court. The record is confined to evidence as it existed as of the time of the Board's decision. RCW 34.05.562. Post-SDP decisionmaking by Burien or King County is *irrelevant*, under Washington's vested rights doctrine. Segale's permit was governed by the law in force at the time of the application, not any later-adopted ordinance. *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986); *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994). Thus, Engdahl/Patterson's request in their brief at 43 to apply Burien's *draft* SMP ordinance is essentially frivolous.

This Court should reject Engdahl/Patterson's bulkhead height argument.

²⁹ Undeterred by the trial court's order, Engdahl/Patterson cited that draft ordinance to this Court. Br. of Appellants at 7 n.13.

(c) The Bulkhead Does Not Create “New Land”

Engdahl/Patterson contend that Burien should not have issued the SDP to Segale because the bulkhead would create “new land” behind it because there would be “fill” in violation of DOE regulations. Br. of Appellants at 38-40. This meritless argument only further reinforces the disingenuous nature of Engdahl/Patterson’s arguments. They framed essentially the same argument to the trial court, relying on KCC 25.16.190D that relates to fill. The trial court struck the issue because it was not raised to the Board and was offered to the trial court for the first time in the case. Now, they offer the same argument, not proffered to the trial court, based on DOE regulations. They cannot argue through the back door an issue they cannot offer through the front door. And, of course, the DOE regulations are again inapplicable where Burien’s specific SMP controls.

What Engdahl/Patterson argued to the Board was that the bulkhead would create “new land” in violation of KCC 25.16.180F. But the Board rejected this argument in its order because Engdahl/Patterson *conceded* that the replacement bulkhead was to be located along the same alignment as the existing bulkhead and any fill was to be placed landward of the existing bulkhead to match the elevation of the replacement bulkhead. CP 126. The Board properly concluded no new land was created because “the

amount of residential property landward of the bulkhead will remain unchanged after filling behind the bulkhead is complete.” *Id.*

KCC 25.16.180.F directs that shoreline protection not create “new lands.” Here, as the Board noted, the replacement bulkhead will be located *along the same alignment as the existing bulkhead*. AR -- Kaylor decl., ex. B. Replacement of a bulkhead along the existing alignment is specifically permitted by KCC 25.16.180A. In other words, the bulkhead will not create any “new land” behind it that does not already exist today. Engdahl/Patterson fault the Board for not relying on a “multi-dimensional” definition of “land” but have set forth no explanation or example of when the term “land” has been used to mean anything other than “surface” or “area.” They offered no expert testimony to the Board on this issue. Land is measured in square feet or acres, not cubic yards.³⁰ Further, the definition of fill is irrelevant given that KCC 25.16.180F, the provision at issue here, says nothing regarding fill. The prohibition of KCC 25.16.180F applies to situations where a bulkhead is placed waterward of the ordinary high water mark and fill is placed behind the bulkhead – a situation which would “create” land by converting a submerged area into a dry area. To sustain their argument,

³⁰ Engdahl/Patterson’s reliance on WAC 173-16-020(14)’s definition of “landfill” is misplaced as land and landfill are clearly not the same. Moreover, it is inapplicable where Burien’s SMP controls. CP 127 n.10.

Engdahl/Patterson miscite and misquote WAC 173-26-020(14). They fail to provide this Court the language in the rule that states fill is anything *waterward* of the ordinary highwater mark.³¹

While fill will be placed landward of the existing (and replacement) bulkhead to match the bulkhead elevation, *the amount of Segale's residential property landward of the bulkhead will remain unchanged*. The purpose of the fill is simply to raise the elevation, not create new land or to make any previously "unusable" tidal land now useable. KCC 25.16.180F does not prohibit increases in elevation of existing land; it only prohibits creation of new land.

Finally, contrary to Engdahl/Patterson's unsubstantiated arguments, br. of appellants at 38-40, placing fill landward of the bulkhead does not violate the SMP's policies. No habitat will be eliminated, no animal life or breeding and spawning grounds will be covered. They have *conceded* that there is no significant adverse environmental impact to Segale's SDP under SEPA. Engdahl/Patterson rely on their personal opinions alone, as they did before the Board, to try to convince the Court

³¹ WAC 173-26-020(14) states:

Fill means the addition of soil, sand, rock, gravel, sediment, earth retaining structure, or other materials to *an area waterward of the OHWM*, in wetlands, or on shorelands in a manner that raises the elevation or creates dry land.

(emphasis added).

that the policies cited in their brief will be violated, but such a conclusion is hardly plausible given that the bulkhead project was subject to careful review both by Burien and by the Washington Department of Fish and Wildlife.³²

Again, Engdahl/Patterson have not borne their burden on judicial review of the Board's decision under the APA. Their "new land" argument is unsupported by evidence other than their obvious antagonism toward Segale's bulkhead and home. That is insufficient to overturn the Board's reasoned decision.

(4) The Trial Court Erred in Failing to Impose CR 11 Sanctions Against Engdahl/Patterson

As previously noted, Segale moved to dismiss certain issues raised in Engdahl/Patterson's amended petition because they either abandoned or did not raise them before the Board. He also moved to strike Engdahl/Patterson's initial trial brief because they relied on facts occurring after the Board's decision and outside of the administrative record. The trial court granted both motions on April 1, 2011, striking Engdahl/Patterson's supporting declaration, the exhibits attached thereto, and any portion of the trial brief relying upon that declaration, and

³² The Washington Department of Fish and Wildlife has jurisdiction over the project and issued a hydraulic project approval consistent with condition 3 of the SDP. CP 346. *See also*, KCC 25.16.180L.

directing Engdahl/Patterson to file an amended brief consistent with the court's order. CP 237-41.

Undeterred by Segale's motion or the court's order, Engdahl/Patterson submitted an amended trial brief that again attempted to expand the record on review. For example, the Engdahl May 9, 2011 declaration included an ordinance enacted by the King County Council on December 3, 2010 long after the Board's decisions here. CP 316-23. Such an ordinance is *irrelevant*, as Segale's SDP vested in the law applicable when his SDP application was filed. *See Talbot v. Gray*, 11 Wn. App. 807, 525 P.2d 801 (1974), *review denied*, 85 Wn.2d 1001 (1975) (vesting doctrine applies to SDPs under SMA). Rather than bring another motion to strike, Segale asked the Court to impose CR 11 sanctions for Engdahl/Patterson's continued efforts to raise arguments and evidence not before the Board. CP 340-42.

Engdahl/Patterson filed motions for reconsideration of the order dismissing certain issues and the order striking his declaration. CP 242-61. The motions were untimely because they were one day late. Shortly after receiving the motions, Segale notified Engdahl/Patterson via email of their potential CR 11 violations and provided them with an opportunity to cure or mitigate them. CP 785. Engdahl/Patterson did not withdraw the motions for reconsideration. Nevertheless, the trial court denied both of

those motions on April 15, 2011 without requesting a response from Segale. CP 262-65. Nevertheless, the trial court denied Segale's renewed motion for CR 11 sanctions. CP 831-32. Engdahl/Patterson have now conceded that the trial court properly struck the issues and new evidence by not assigning error to any of the trial court's orders.

CR 11 was adopted "to deter baseless filings and to curb abuses of the judicial system." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992) (noting the rule addresses two separate problems: baseless filings and filings made for an improper purpose). It applies to every pleading, written motion, and legal memorandum filed or served during the litigation. CR 11. It allows the imposition of penalties against a pro se party. *Harrington v. Pailthorp*, 67 Wn. App. 901, 910, 841 P.2d 1258 (1992), *review denied*, 121 Wn.2d 1018 (1993). At a minimum, CR 11 "requires attorneys to stop, think, and investigate more carefully before serving and filing papers." *Bryant*, 119 Wn.2d at 219. The rule is intended to deter the "shoot-first-and-ask-questions-later" approach to the practice of law. *Watson v. Maier*, 64 Wn. App. 889, 898, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992). The policies underlying CR 11 are best served when the rule is interpreted broadly, enabling a court to fashion a penalty that deters litigation abuses efficiently and effectively. *See Madden v. Foley*, 83 Wn. App. 385, 922 P.2d 1364 (1996).

The party moving for CR 11 sanctions bears the burden of justifying the request. *See Biggs v. Vail (Biggs II)*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). The party seeking the sanctions should notify the offending party of the objectionable conduct and provide that person with an opportunity to mitigate the sanction by amending or withdrawing the paper. *Id.* at 198. Sanctions may be imposed if any one of three conditions are met: (1) the attorney failed to conduct a reasonable inquiry into the facts supporting the paper; (2) the attorney failed to conduct a reasonable inquiry into the law to ensure that the pleading filed is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; or (3) the attorney filed the pleading for an improper purpose such as delay, harassment, or to increase the costs of litigation. *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530, *review denied*, 111 Wn.2d 1007 (1988).

Specifically, CR 11 sanctions are warranted if an attorney files a pleading for an improper purpose. *Suarez v. Newquist*, 70 Wn. App. 827, 855 P.2d 1200 (1993); *Skilcraft Fiberglass, Inc. v. The Boeing Co.*, 72 Wn. App. 40, 863 P.2d 573 (1993) *abrogated on other grounds*, *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). In *Suarez*, the attorney attempted to file multiple affidavits of prejudice. After the trial court rejected the affidavits, the attorney then attempted to file an affidavit of

his own. After the trial judge rejected that affidavit, the attorney admitted he was unprepared to argue the summary judgment motion. Nevertheless, the trial court did not impose CR 11 sanctions. This Court determined that the attorney misused the affidavits to improperly delay the proceeding, held that the trial court abused its discretion in not imposing sanctions, and remanded to the trial court to impose sanctions for the attorney's violations of CR 11. *Suarez* permits the imposition of sanctions for an attorney's ill-motivated actions without regard to the three conditions enunciated in *Miller*.

In *Skilcraft*, a supplier obtained, without notice, a default judgment against the primary contractor and the owner of the property where the construction project had taken place. The contractor and the property owner filed a motion to vacate the default judgment and to impose sanctions against the supplier. The trial court granted the motion after concluding that the supplier's attorney had obtained the default judgment against the property owner improperly because the contractor's bond had released the lien on the property. The court also concluded that the supplier's attorney failed to serve the default motion on the contractor and the property owner, even though they were entitled to notice of the default proceedings. The court awarded sanctions based on the attorney's breach of his duty to conduct a reasonable inquiry into the law and the facts and

his duty not to interpose the motion for purposes of delay or harassment or to increase the costs of litigation. This Court affirmed the sanctions award after concluding that the attorney's actions were interposed for an improper purpose. As both *Suarez* and *Skilcraft* confirm, the "improper purpose" element of CR 11 is a separate and independent justification for an award of sanctions.

Driven by personal motivations, Engdahl/Patterson sought to harass and delay Segale's construction of a new bulkhead to replace an existing, deteriorated bulkhead that was allowing erosion to occur on his property. Although the trial court granted Segale's motions to strike reference to non-record materials and to dismiss certain issues improperly raised in their petition, Engdahl/Patterson filed a second equally defective amended brief that continued to refer to matters outside of the administrative record and to raise issues not brought before the Board. Engdahl/Patterson's harassment of Segale persisted when they filed baseless motions to reconsider the court's orders. The May 9, 2011 Engdahl declaration attached to their revised brief sought, yet again, to raise issues and offer evidence not before the Board. Their KCC 25.32.010 argument (CP 564-65) had never before been raised in this case. This is true as well for their backfill argument (CP 570-71), their argument

on the draft King County SMP (CP 571, 575-76), or their reference to a 9/30/10 Burien City Council decision. CP 572-73.

Their misconduct wasted the trial court's valuable time and undermined that court's authority. It also needlessly increased Segale's litigation costs by requiring him to incur attorney fees and costs to respond to their improper pleadings. Their disregard of, and contempt for, the court's orders was sanctionable. A CR 11 sanction award against Engdahl/Patterson be payable to Law Fund³³ should have been imposed by the trial court.

(5) Segale Is Entitled to Fees on Appeal Pursuant to RCW 4.84.370

RAP 18.1(a) indicates that a party may recover attorney fees on appeal where the law supports such an award. RCW 4.84.370 specifically authorizes a party that prevails or substantially prevails on appeal in specified land use cases to recover fees so long as the party prevailed

³³ Washington courts have broad discretion to tailor an appropriate sanction and to determine against whom such a sanction should be imposed. *Miller*, 51 Wn. App. at 303. As our Supreme Court stated:

The purposes of sanctions are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award To avoid the appeal of sanctions motions as a profession or profitable specialty of law, we encourage trial courts to consider requiring that monetary sanctions awards be paid to a particular court fund or to court-related funds.

Wash. Phys. Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 356, 858 P.2d 1054 (1993).

before the Board and in any subsequent judicial proceedings. Decisions on shoreline substantial development permits qualify under the statute. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 701-02, 169 P.3d 14 (2007); *Bellevue Farm Owners Ass'n v. State Shorelines Hearings Bd.*, 100 Wn. App. 341, 365, 997 P.2d 380, *review denied*, 142 Wn.2d 1014 (2000), Segale has prevailed before the Board and below. He is entitled to his fees on appeal.

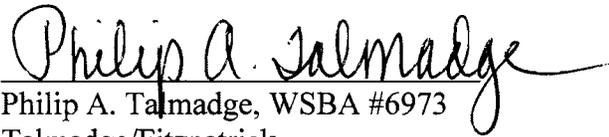
F. CONCLUSION

Engdahl/Patterson's arguments are a mishmash of rants and complaints about the actions of Segale, Burien, and the Board. But at their most basic, Engdahl/Patterson's arguments fail to address or meet the applicable APA judicial review standards and they fail to articulate how the Board, whose interpretation of the SMA is entitled to deference by this Court, erred in concluding as a matter of law that Burien properly issued a SDP to Segale to replace an already existing, deteriorating bulkhead on his Burien property.

The Court should affirm the Board's decision, and award costs on appeal, including reasonable attorney fees, to Segale. The Court should reverse the trial court's CR 11 decision and impose CR 11 sanctions against Engdahl/Patterson, payable to the Law Fund.

DATED this 28 day of December, 2011.

Respectfully submitted,

A handwritten signature in black ink that reads "Philip A. Talmadge". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Philip A. Talmadge, WSBA #6973

Talmadge/Fitzpatrick

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(206) 574-6661

Attorneys for Respondent/Cross-Appellant

Segale

APPENDIX

CR 11:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) It is well grounded in fact; (2) it is warranted by existing law . . . (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

RCW 4.84.370:

(1) Notwithstanding any other provisions of this chapter, reasonable attorney's fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

RCW 34.05.570(3):

Review of agency orders in adjudicative proceedings. The court should grant relief from any agency order in an adjudicative proceeding only if it determines that:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) The order is arbitrary or capricious.

RCW 90.58.140(2):

A permit shall be granted:

(a) From June 1, 1971, until such time as an applicable master program has become effective, only when the development proposed is consistent with: (i) The policy of RCW 90.58.020; and (ii) after their adoption, the guidelines and rules of the department; and (iii) so far as can be ascertained, the master program being developed for the area;

(b) After adoption or approval, as appropriate, by the department of an applicable master program, only when the development proposed is consistent with the applicable master program and this chapter.

KCC 25.16.180C:

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:

* * *

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

KCC 25.16.180D:

Shoreline protection may be permitted in the urban environment provide:

...

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.

KCC 25.16.190D:

Excavating, dredging and filling may be permitted in the urban environment, only as part of an approved overall development plan not as an independent activity, but only in accordance with the following:

...

D. Wetlands such as marshes, swamps and bogs shall not be disturbed or altered through excavating, filling, dredging or disposal or 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 United States 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 any or all of the wildlife habitat, natural drainage and other valuable functions of wetlands as discussed in K.C.C. 20.12.080 or United States Corps of Engineers 33 CRF 320.4(b) and would be consistent with the purposes of this title;



CITY OF BURIEN, WASHINGTON

Department of Community Development
400 SW 152nd Street, Suite 300, Burien, Washington 98166
Phone: (206) 241-4647 Fax: (206) 248-5539

TYPE I LAND USE DECISION

- DATE:** March 8, 2010
- FILE NO.:** PLA 09-1225
- APPLICANT:** Mario Segale, owner
- REQUEST:** Shoreline Substantial Development Permit for construction of a shoreline stabilization structure for a single-family residence.
- LOCATION:** 12701 Standring Lane SW Burien, WA 98146
- PARCEL:** 778160-0005
- APPLICATION SUBMITTED:** August 26, 2009
- APPLICATION COMPLETE:** September 10, 2009
- DECISION:** Approved, subject to the following conditions:
- A. The Applicant is responsible for ensuring compliance with all provisions contained in the Burien Municipal Code (including but not limited to the Zoning Code, Building Code and Fire Code), the 2005 King County Surface Water Design Manual and the 2008 Burien Road Standards (see Conclusion D.1).
 - B. Prior to or in conjunction with applying for any development permits, the Applicant shall:
 1. Prior to issuance of a construction permit the applicant shall specifically state what surface water, erosion and sedimentation controls will be implemented during construction. A sedimentation plan detailing the proposed measures is required (see Conclusion D.4).
 2. Include additional details in the plans specifying how the wall will be reconstructed in the area adjacent to the property to the south (12705 Standring Lane SW) and a boat ramp (see Conclusion D.4).
 3. Obtain a Hydraulic Project Approval permit from the Washington State Department of Fish and Wildlife prior to issuance of a construction permit by the City of Burien (see Conclusion D.4).
 4. Construction pursuant to this permit shall not begin or be authorized until 21 days from the date the permit decision was filed with the Department of Ecology or until all review proceedings are terminated. (see Conclusion D.4).
 5. The applicant shall prepare a stream-buffer mitigation plan in accordance with 19.40.370 (see Conclusion D.5).

FINDINGS OF FACTS & CONCLUSIONS

A. SITE DESCRIPTION

Location: 12701 Standring Lane SW, City of Burien (see Attachment 1)

Zoning: RS-12,000

Shoreline Designation: Urban

Critical Areas on or within 100 feet of site:

Landslide Hazard Area Erosion Hazard Area Wetland Stream
 Frequently Flooded Area

Project history: The application was filed on August 26, 2009 and was determined to be complete on September 11, 2009, complying with the 28-day target for completeness determination. On November 5, 2009 additional information was requested, and the applicant provided responses on December 17, 2009. The application was processed in 96 days, meeting the 120-day target for a Shoreline Substantial Development Permit approval.

B. SUMMARY OF PROPOSAL

The applicant proposes to ~~repair and raise an existing rock seawall~~ located on Puget Sound (see Attachment 2). The proposed project is on ~~a lot that currently contains a single-family residence~~ and addressed as 12701 Standring Lane SW (see Attachment 2). The subject parcel was the result of a recent lot consolidation (Burien file no. PLA 09-1031), where two lots were combined into one single-family lot containing a residence on the southernmost portion.

The proposed repair of the seawall 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 approximately 3 feet~~ to 5 feet. The application states the proposed additional height of the seawall is to meet the new FEMA flood elevation requirements. The FEMA flood zone designation is 'A', and is located in Reach 19 with a base flood elevation of 20 feet (Burien Coastal Flood Hazard Zone Delineation). The plans (see Attachment 2) indicate that existing rocks used for the current seawall 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.~~ The proposed new rock will be obtained from Washington State Department of Transportation Pit #A464. Filter fabric will be installed behind the wall.

The existing residence is approximately 40 feet from the face of the existing seawall. The approximate length of the existing seawall is 195 lineal feet. New stairs accessing the beach are proposed at the northwestern portion of the lot.

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. The plans do not show the existing boulders that retain the uplands located on the southern portion of the stream and that connect to the proposed reconstructed seawall. No work is planned beyond the property limits of the subject parcel.

C. PUBLIC NOTICE AND COMMENTS

Public notice of this application was posted on the site, published in the Seattle Times and mailed to all property owners within 500 feet of the site on September 16, 2009. Ten (10) persons submitted comments on the application during the 30-day comment period, which ended October 16, 2009 (see Attachment 10). Below is a summary of the comments received followed by a staff response.

- 1) Concern was expressed regarding the noise and vehicle traffic associated with this proposed construction project.

Response: Some construction noise and traffic is expected for this project however it will only occur during the construction period. 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.

- 2) The area east of the proposed project in Salmon Creek has been targeted to re-introduce salmon spawning however the man made barriers at the mouth of the creek are preventing this from happening.

Response: The proposal is to reconstruct an existing seawall which is not located on the parcel that contains Salmon Creek and the reported fish barrier. While the height of the seawall will be increased, the footprint and alignment of the wall will not be altered and will not be located any nearer to the mouth of the creek. There is no indication on the plans that obstructions in the mouth of the creek, which are on a separate parcel, will be altered or removed.

- 3) Concern regarding the proposed construction creating additional interference with salmon trying to enter the stream. The proposed bulkhead should not be allowed to reinforce the existing barriers at the stream mouth and should not reduce the width of the creek.

Response: There is no indication on the plans provided that the proposed reconstruction of the seawall will connect to any other existing structures in the mouth of Salmon Creek. Since the proposed seawall will be located in the same alignment the width of the creek mouth will not be reduced. The applicant submitted a biological evaluation prepared by Carl Hadley of Cedarock Consultants Inc. (see Attachment 8). The evaluation states "There will be no long term effects of the proposed action on salmonid habitat or forage fish spawning habitat".

- 4) Any interference from the bulkhead construction should be mitigated to allow for future restoration activities.

Response: The applicant is required to obtain a Hydraulic Projects Approval (HPA) from the Washington State Department of Fish and Wildlife (WDFW). WDFW may attach conditions of approval on such a permit to mitigate any anticipated impacts associated with the construction. The biological assessment provided by the applicant states "to

ensure that his project has a minimal impact on the surrounding environment, work will only be completed during low tides with equipment staged and operated from the adjacent lot. The work will be done within work windows designated by the Washington Department of Fish and Wildlife (WDFW) and the Army Corps." (see Attachment 8, page 2).

- 5) A question wondering why the seawall needs to be raised 4 feet with associated backfill behind it. Flooding has never occurred to that height.

Response: The applicant has stated in the application materials that the proposal is to "repair and raise an existing rock seawall to meet to the new FEMA flood elevation requirements." The FEMA flood maps for Burien show the site is located in flood zone "A" with a base flood elevation of 20 feet. ~~The local shoreline master program does not limit the height of bulkheads.~~

- 6) The additional height has the potential to alter how water moves around the creek mouth and how debris is collected which will hinder any future recovery of animal life to the creek.

Response: It is reasonable to assume during storm events that additional wave energy 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.

- 7) Fish bearing creeks such as Salmon Creek are not to be blocked I hope that state and federal agencies will work to open this creek and allow animal life to use it.

Response: The proposed project is located on an adjacent lot which does not contain the stream or stream blockages. The project is being reviewed by State and Federal agencies with jurisdiction, specifically WDFW, DOE and the Army Corps of Engineers. Those agencies may condition the project to ensure compliance will all applicable regulations and policies.

The Burien Comprehensive Plan does include a goal to remove fish blockages and return fish to Salmon Creek (Goal NE 8.1, page 18). In addition, a report on prioritization of marine shoreline of Water Resource Inventory Area (WRIA) prepared in May 2006 identified the mouth of Salmon Creek as a potential restoration project. However it should be noted that this specific project is located on a separate parcel and previous rulings by the Burien Hearing Examiner on a project with very similar circumstances in 1995 (APL 95-02) determined that there was not a clear nexus between the project and requirement to remove fish blockages (see Attachment 11, Hearing Examiner Conclusion 7).

- 8) A comment was provided that states the applications filed with other agencies requested a shoreline exemption however the local Burien notice states that the permit is for a Shoreline Substantial Development Permit.

Response: The application to the City of Burien is for a Shoreline Substantial Development permit. The application will be reviewed in accordance with the local shoreline master program for consistency with those evaluation criteria. Please see sections of this report below which contain analysis of the applicable review criteria.

- 9) The project does not comply with the bulk and dimensional, and performance standards of the local master program.

Response: ~~There is no specific bulk and dimensional requirements for seawalls in the local shoreline master program,~~ there are however criteria associated with an application for a Shoreline Substantial Development Permit. Please see sections below for analysis of those criteria.

- 10) Concern that the rock material that is identified will be of a "bright" color and aesthetically result in an eyesore. Material is not consistent with other material in the area.

Response: ~~The local shoreline master program does not contain specific review criteria addressing the type or color of material to be used in constructing walls.~~

- 11) Request a study of the anticipated consequences of constructing the bulkhead to determine the appropriate remediation.

Response: A SEPA determination of non-significance was issued on January 25, 2010, which was partially based a biological evaluation that concluded there will be no impacts to the beach. The SEPA determination was circulated to agencies with jurisdiction and the City did not receive any comments from those agencies. The City has consulted with the Department of Fish and Wildlife and in addition has conditioned that a Hydraulic Project Approval permit be obtained from the Department of Fish and Wildlife. Mitigation with monitoring may be an option to be considered by WDFW.

- 12) Concern that the design will include cement in between the boulders thereby increasing wave energy that will be reflected back onto the beach.

Response: Section B-B of the project plans indicate that concrete mortar is proposed between the boulders. The applicant is encouraged to consider construction methods and techniques to reduce wave energy however ~~the current SMP does not specify construction methods or contain provisions that require bulkhead designs to minimize reflected wave energy.~~

D. COMPLIANCE WITH REQUIRED DEVELOPMENT STANDARDS

1. General Requirements

- a. Facts: This application is subject to the applicable requirements contained in the Burien Municipal Code (including but not limited to the Zoning Code, Building Code and Fire Code), the 2005 King County Surface Water Design Manual as adopted by the City of Burien (ref. BMC 13.10.020 and 13.10.025) and the 2008 Burien Road Standards.
- b. Conclusion: ~~It is the responsibility of the applicant to ensure compliance with the various provisions contained in the Burien Shoreline Master Program, Burien Municipal Code (including but not limited to the Zoning Code, Building Code and Fire Code), the 2005 King County Surface Water Design Manual as adopted by the City of Burien (ref. BMC § 13.10.020 and § 13.10.025) and the 2008 Burien Road Standards.~~

2. State Environmental Policy Act (SEPA) review

- a. Facts: Washington State SEPA rules WAC 197-11-800[3] state that material expansions of structures on lands wholly or partially covered by water are not categorically exempt from the SEPA process. Because the proposal will add an average of about 3 to 5 feet of height to the existing structure is not categorically exempt from a SEPA review.

A Determination of Nonsignificance (DNS) was issued for this project on January 25, 2010. Per BMC 19.65.075.2, if the Director's decision is consolidated with a threshold determination of non-significance under the State Environmental Protection Act for which a comment period pursuant to WAC 197-11-340 must be provided, the comment period for the DNS shall be 14 days and the appeal period for the DNS shall be 21 days. The city received four comment letters from Burien residents during the 14 day comment period which ended on February 8, 2010 (see Attachment 12). One of the four comment letters was received after 5 pm. The SEPA responsible official prepared memo on February 10, 2010 that retained the DNS that what issued on January 25, 2010 (see Attachment 13). The appeal period ended on February 15, 2010 and there were no appeals filed. The Environmental Review Report, Environmental Checklist and Determination of Nonsignificance are included as Attachments 5, 6 and 7.

- b. Conclusion: The Applicant and City of Burien have complied with the requirements of the State Environmental Policy Act.

3. Surface Water Design Manual

- a. Facts: The Development Engineer reviewed the proposal and did not have any comments on the proposal, however all projects are subject to erosion and sediment controls required in accordance with Appendix D, 2005 King County Surface Water Design Manual.
- b. Conclusions: Prior to or in conjunction with the building permits submitted for the proposed project the Applicant shall comply with the erosion and sediment controls may be required in accordance with Appendix D, 2005 King County Surface Water Design Manual.

4. Shoreline Management Regulations

- a. Facts: The proposed development is considered a "substantial development" in a shoreline area as defined by the Shoreline Management Act since the substantial development dollar threshold of \$5,718.00 will be exceeded. In addition, Section 25.16.180[6] states specific requirements for bulkheads to qualify for an exemption from the shoreline substantial development permit process. Specifically the project must show that "erosion from waves or currents is eminently threatening a legally established residence or one or more substantial accessory structures, and the proposed bulkhead is more consistent with the King County shoreline master program in protecting the site and adjoining shoreline that feasible non-structural alternatives...". The application did not include an analysis, specifically stating that the existing single-family residence is eminently threatened by erosion from waves or currents. Shoreline protection to protect an existing single-family residence is not listed as an exempt

shoreline activity in RCW 90.58.030. Washington Administrative Code (WAC), section 173-27-150(1) outlines review criteria for substantial development permits. A substantial development permit shall be granted only when the development proposed is consistent with the criteria listed below in italics.

- i. *The policies and procedures of the Shoreline Management Act of 1971, as amended.*
- ii. *The provisions of the WAC, Chapter 173-27 Shoreline Management Permit and Enforcement Procedures.*
- iii. *The applicable master program adopted or approved for the area. The City of Burien has adopted Title 25, Shoreline Management of the King County Code, which is the shoreline master program for the area.*

Discussion: The project is located in the Urban Environment, as defined in the 1987 King County Shoreline Management Plan Chapter 25.16 as adopted by the City of Burien. The project proposes "shoreline protection" and must therefore comply with ~~KCC 25.16.030 and KCC 25.16.180~~. The proposal shall address the following applicable requirements shown in italics below.

- (a) *Nonwater related, water related and residential development shall not be permitted waterward of the ordinary high water mark (25.16.030.A).*

Response: The proposed project will replace an existing seawall along the same alignment and will not project further waterward as indicated on the project plans (see Attachment 2).

- (b) *No structure except agricultural structures may exceed a height of thirty-five feet above average grade level (25.16.030.B).*

Response: The project will not exceed thirty-five feet above average grade.

- (c) *All development shall be required to control runoff and to provide adequate surface water and erosion and sediment control during the construction period (25.16.030.C) and water quality treatment shall be required where stormwater runoff would materially degrade or add to the pollution of recipient waters or adjacent properties (25.16.030.F).*

Response: The applicant states in his response that the project plans to contain measures to control runoff including; no work in the water, clean up before the tide comes in, don't allow stormwater runoff, use WSDOE BMP's from Western Washington Stormwater Management Manual including

- C233: Silt fences
- C230: Straw Bale Barrier
- C231: Brush Barrier
- C232: Gavel Filter Berm
- C105: Stabilized construction entrance.

This information was not included on the plans, however descriptive sheets were provided as attachments to the application (see Attachment 4). Prior to issuance of a construction permit the applicant shall specifically state what surface water, erosion and sedimentation controls will be implemented during construction. A sedimentation plan detailing the proposed measures should be required.

- (d) *Development shall maintain the first fifty feet of property abutting a "natural environment" as required open space (25.16.030.D).*

Response: The project does not abut an area with the shoreline designation of "natural environment"; the project is located in area designated as "urban environment".

- (e) *Parking facilities except parking facilities associated with detached single-family and agricultural development shall conform to specified conditions of 25.16.030.E.*

Response: The proposal does not include areas for vehicular parking.

- (f) *Shoreline protection to replace existing shoreline protection shall be placed along 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 (25.16.180.A).*

Response: The proposed reconstructed seawall will be placed along the same alignment of the existing rock structure.

- (g) *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 the 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 manger 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 structure could be accommodated by other configurations of bulkhead which would result in less loss of shoreland, tideland, or water bottom (25.16.180.B);*

Response: The plans do not propose to extend the replacement seawall further north and beyond the subject parcel. The plans indicate that the seawall will terminate at the property line at the south property line which is adjacent to an existing single-family residence. In this location there is an existing access ramp extending waterward and it is not clear how the wall will integrate the ramp in the design. Additional detail will be needed to determine how the wall will be reconstructed in this location.

- (h) *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(f), 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 eminently 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 not 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 for lakes;*

Response: The proposal does not qualify for a shoreline exemption and therefore is being reviewed using the shoreline substantial development permit process and approval criteria.

- (i) *Shoreline protection shall not be considered an outright permitted use and shall be permitted only when it has been demonstrated that the shoreline protection is necessary for the protection of existing legally established structures and public improvements.... (25.16.180.D).*

Response: The project will reconstruct an existing seawall on a lot that contains a single-family residence.

- (j) *Shoreline protection shall not have adverse impact on the property of others (25.16.180.E).*

Response: The proposal should not have an adverse impact on the adjacent property to the south because it is currently armored. The lot to the north is currently vacant and contains the outlet to Salmon Creek. The lot to the north also contains shoreline and stream bank armoring and is not proposed to be altered as a part of this proposal. It is not known if there will be an impact to the stream given the proposed addition to the height of the reconstructed seawall. The property to the north is owned by the applicant. On page 5 of the biological evaluation prepared by Cedarock Consultants Inc. it states "There will be no long term effects of the proposed action on salmonid habitat or forage fish spawning habitat".

- (k) *Shoreline protection shall not be used to create new lands.... (25.16.180.F).*

Response: No new lands will be created.

- (l) *Shoreline protection shall not significantly interfere with normal surface and/or subsurface drainage into the water body (25.16.180.G).*

Response: The surface water drainage will not be disturbed.

- (m) *Automobile bodies or other junk or waste material which may release undesirable material shall not be used for shoreline protection.*

Response: The proposed design uses rock.

- (n) *Shoreline protection shall be designed as not to constitute a hazard to navigation and to not substantially interfere with visual access to the water (25.16.180.I).*

Response: The location of the proposed rock wall will be in the same alignment of the existing seawall and will not hinder or obstruct visual access to the water from Standing Lane SW.

- (o) *Shoreline protection shall be designed so as not to create a need for shoreline protection elsewhere (25.16.180.J).*

Response: Both adjacent parcels are currently armored and therefore there will not be a need for shoreline protection on adjacent lands.

- (p) *Bulkheads on Class I beaches shall be located no farther waterward than the bluff or bank line (25.16.180.K).*

Response: The existing bulkhead is being replaced in the same alignment.

- (q) *Bulkheads shall be approved by the Washington State Department of Fisheries (25.16.180.L).*

Response: This requirement should be included as a condition of approval. The applicant has filed a Joint Aquatics Permit Application (JARPA) and is pursuing permits through those agencies. This requirement will be added as a condition of the construction permit

- (r) *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 (25.16.180.M).*

Response: The project design includes the use of filter cloth.

- (s) *Groins are permitted only as a part of a professionally designed community or public beach management program (25.16.180.M).*

Response: Not applicable.

- (t) *Pursuant to RCW 90.58.140(5), construction pursuant to this permit shall not begin or be authorized until 21 days from the date the permit decision was filed with the Department of Ecology or until all review proceedings are terminated.*

Response: The project has been specifically conditioned as required by RCW 90.58.140(5).

- b. Conclusions: Prior to issuance of a construction permit the applicant shall specifically state what surface water, erosion and sedimentation controls will be implemented during construction. A sedimentation control plan detailing the proposed measures is required (KCC 25.16.030.F).

Additional details shall be included in the plans specifying how the wall will be reconstructed in the area adjacent to the property to the south (12705 Standing Lane SW) and a boat ramp (KCC 25.16.180.B).

Pursuant to the KCC 25.16.180.L the project shall obtain an HPA permit from the Washington State Department of Fish and Wildlife prior to issuance of any development permit.

Pursuant to RCW 90.58.140(5), construction pursuant to this permit shall not begin or be authorized until 21 days from the date the permit decision was filed with the Department of Ecology or until all review proceedings are terminated.

As conditioned, the proposal is consistent with the policies and procedures of the Shoreline Management Act of 1971, as amended; the provisions of the WAC, Chapter 173-27 Shoreline Management Permit and Enforcement Procedures; and Title 25, Shoreline Management of the King County Code, which is the master program for the area.

5. Stream Buffer Alterations

- a. **Facts:** A portion the existing bulkhead that is proposed to be replaced is located within the 100 foot stream buffer of Salmon Creek. The proposal does not include a vegetation management plan specifying how the proposal will comply with BMC 19.40.360 (Streams – Permitted Alterations).
- b. **Conclusion:** Burien Municipal Code 19.40.360[2] states that alterations to stream buffers may occur subject to a mitigation plan prepared in accordance with BMC 19.40.370. Prior to the issuance of any construction permits the applicant shall prepare a stream buffer mitigation plan in accordance with 19.40.370.

EXPIRATION OF APPROVALS

Pursuant to WAC 173-27-090 construction activities shall be commenced or, where no construction activities are involved, the use or activity shall be commenced within two years of the effective date of a substantial development permit. A single extension may be granted for a period not to exceed one year based on reasonable factors, if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record on the substantial development permit and to the department.

Authorization to conduct development activities shall terminate five years after the effective date of a substantial development permit. However, local government may authorize a single extension for a period not to exceed one year based on reasonable factors, if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and to the department.

APPEALS AND JUDICIAL REVIEW

The following is a summary of the deadlines and procedures for appeals and judicial review. Any person wishing to file or respond to an appeal should contact the Department of Community Development for further procedural information.

SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT

1. Appeals

RCW 90.58.180 outlines procedures for appeals of local government shoreline permit decisions. Any person aggrieved by the granting, denying or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 may seek review from the shorelines hearings board by filing a petition for review within **twenty-one (21) days** of the date of filing, as defined in RCW 90.58.140(6). The date of filing means the actual date the City decision is received by the Department of Ecology. Construction pursuant to this permit shall not begin and is not authorized until 21 days from the date of filing or until all review proceedings initiated within 21 day of the date of filing are terminated.

2. Judicial Review

Judicial review of proceedings of the shorelines hearings board is governed by chapter 34.05 RCW.

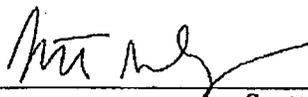
ATTACHMENTS

1. Vicinity Map
2. Project plan (1 sheet), received August 26, 2009
3. Applicant's Responses to Shoreline Review criteria, received August, 26, 2009
4. Best Management Practices, C105, C230, C231, C232, C233
5. SEPA checklist, received December 17, 2009
6. Environmental Review Report
7. Determination of Nonsignificance
8. Biological Evaluation, dated June 2, 2009, prepared by Cedarock Consultants, Inc.
9. Joint Aquatic Resources Permit, signed June 5, 2009
10. Public Comments (6)
11. Appeal 95-02, Hearing Examiner Findings, Conclusions and Decision, dated August 9, 1995.
12. SEPA determination comment letters
13. Response memo to SEPA comment letters.

PARTIES OF RECORD

Name	Address
Ardie & Jerry Johnson	12628 Shorewood Dr SW Burien, WA 98146
Jean & Tom Spoon	11925 Marine View Dr. SW Burien, WA 98146
Gary Gibson	Shorewood on the Sound Community Club 12109 24 th Place SW Burien, WA 98146
Robert Edgar	12674 Shorewood Dr. SW Burien, WA 98146
Chestine Edgar	12674 Shorewood Dr. SW Burien, WA 98146
Roger Patterson	12723 Standring Lane SW Burien, WA 98146
Merle Patterson	12723 Standring Lane SW Burien, WA 98146
Diane Patterson	12233 Shorewood Dr. SW Burien, WA 98146
David Engdahl	12233 Shorewood Dr. SW Burien, WA 98146
Mario Segale	P.O. Box 88046 Tukwila, WA
Steve Nelson	P.O. Box 88046 Tukwila, WA
Karen Walter, Mukleshoot Indian Tribe Fisheries Division	39015 172 nd Ave SW Auburn, WA 98092

Dated this 6th day of March, 2010



Scott Greenberg, AICP
 Director of Community Development

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BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

DAVID ENGDAHL and DIANE
PATTERSON,

Petitioners,

v.

CITY OF BURIEN, MARIO SEGALE,

Respondents.

SHB NO. 10-007

ORDER ON SUMMARY JUDGMENT

This matter comes before the Shorelines Hearings Board (Board) on a motion for partial summary judgment filed by Petitioners David E. Engdahl and Diane M. Patterson (Petitioners) and a motion for complete summary judgment filed by Respondent Mario Segale (Segale), and joined in by the City of Burien (City). Petitioners move for summary judgment on issues three and four in the Amended Pre-Hearing Order. Respondents move for complete summary judgment on their contention that the Petitioners lack standing (issue 11), or in the alternative, that they are entitled to summary judgment on the issues two through seven, and issue nine.

The Board was comprised of William H. Lynch, Simon Kihia, and O'Dean Williamson.¹ Administrative Appeals Judge Kay M. Brown presided for the Board. Petitioner Engdahl, who is an attorney, represented himself and Co-Petitioner Patterson. Attorney Courtney A. Kaylor represented Respondent Segale. City Attorney Craig Knutson represented the City.

In rendering its decision, the Board considered the following submittals:

¹ This case is being heard by a three member panel pursuant to RCW 90.58.185.

- 1 1. Petition for Review with attachments;
- 2 2. Petitioners' Motion for Partial Summary Judgment, Petitioners' Memorandum in
Support of their Motion for Partial Summary Judgment, Declaration of David E.
Engdahl Supporting Partial Summary Judgment with Attachments 1 through 5;
- 3 3. Permittee's and City's Joint Response to Motion for Partial Summary Judgment, and
Declaration of David Johanson in Support of Response to Motion for Summary
4 Judgment with Exhibits A through E;
- 5 4. Petitioners' Reply to Joint Response to Petitioners' Motion for Partial Summary
Judgment;
- 6 5. Permittee's Motion to Dismiss, Declaration of Courtney A. Kaylor with Exhibits A
through G, Declaration of David Johanson with attached Exhibit A, and Declaration
of Gary W. Henderson with Exhibit A;
- 7 6. City of Burien's Joinder in Permittee's Motion to Dismiss;
- 8 7. Petitioners' Response to Motion to Dismiss, Declaration of Diane M. Patterson
Opposing Motion to Dismiss, Declaration of David E. Engdahl Opposing Motion to
Dismiss with Exhibits A through K;² and,
- 9 8. Permittee's and City's Reply to Petitioners' Response to Motion to Dismiss.

10 Having fully considered the record in this case and being fully advised, the Board enters
11 the following ruling.

12 FACTUAL BACKGROUND

13 The City of Burien, located in King County, incorporated in 1993. Prior to its
14 incorporation, the King County Shoreline Master Program (SMP) applied to the area. Upon
15 incorporation, the City continued to utilize the King County Code (KCC) Chapter 25.16, as its
16 SMP. The City considered KCC Chapter 25.16 to be its SMP then, and still does today.

17 *Johanson Decls., (May 17, 2010 and June 1, 2010).*

18 In August 2009, Mario Segale applied for a shoreline substantial development permit
19 (SDP) to replace an existing bulkhead on his property at 12701 Standing Lane SW (hereinafter

20
21 ² Respondents moved to strike the allegations about the 1995 Bulkhead contained in the Patterson and Engdahl
Declarations as well as Exhibits A to K of the Engdahl Declaration as irrelevant. The Presiding Officer denied the

1 referred to as "The Property") in the City of Burien. The Property is located on the Puget Sound
2 and contains a single-family residence approximately 40 feet from the face of the existing
3 bulkhead. The existing rock bulkhead is approximately 195 lineal feet long and is deteriorating,
4 allowing erosion to occur behind the bulkhead. The proposed reconstruction of the bulkhead
5 will be located in the same footprint and alignment as the existing rock bulkhead; however the
6 height will be increased by several feet. *Kaylor Decl., Exs. A-D; Henderson Decl.*

7 The City reviewed the application for an SDP under the State Environmental Policy Act
8 (SEPA) and issued a Determination of Nonsignificance (DNS) on January 25, 2010. The City
9 considered the proposal's compliance with the Shoreline Management Act (SMA), the
10 Department of Ecology's WAC Chapter 173-27, and Title 25 of the King County Code, which
11 the City considers to be its Shoreline Master Program (SMP). The City concluded the proposal
12 to restore and replace the bulkhead complied with all of these requirements, and approved the
13 SDP. One of the conditions on the approved permit is that prior to proceeding with the bulkhead
14 restoration work, the permittee must obtain a hydraulic project approval from the Washington
15 State Department of Fish and Wildlife. The Petitioners did not appeal the SEPA DNS, but they
16 did appeal the City's approval of the SDP. *Kaylor Decl., Exs. C, D.*

17 The parcel immediately to the north of The Property is also owned by Mr. Segale. This
18 parcel contains the outlet for Salmon Creek. In 1995, the existing bulkhead on this parcel was
19 replaced with a tall bulkhead made up of large rocks cemented together (hereinafter referred to
20

21 motion to strike on the record at the oral argument on the motions, on the basis that the evidence was relevant on the
issue of standing.

1 as the "1995 bulkhead"). *Kaylor Decl., Exs. C, D, F; Patterson Decl.; Engdahl Decl. (May 31,*
2 *2010) with Exs. A-K.*

3 The Petitioners own, and reside at, beachfront property located approximately one quarter
4 of a mile north of The Property. Diane Patterson's parents also own beachfront property
5 approximately 200 feet southwest of the Property, which the Petitioners visit on a regular basis.
6 Both of the Petitioners enjoy beach walking, and they frequently walk the beach in this area.
7 They have an interest in, and concern for the natural environment in the vicinity of The Property.
8 *Patterson Decl.; Engdahl Decl. with Exs. A-K.*

9 Over the years since the 1995 bulkhead was constructed, the Petitioners have observed an
10 accumulation of earth and sand in front of the 1995 bulkhead, and have noticed that Salmon
11 Creek has been diverted out of its banks and across the tidelands because of this accumulation.
12 They believe that the 1995 bulkhead has caused the changes in the beach that they have
13 observed, and they are concerned that the proposed bulkhead replacement on the other side of
14 Salmon Creek will have a similar effect. *Patterson Decl.; Engdahl Decl. with Exs. A-K.*

15 In support of their motion for summary judgment, the Respondents submitted the
16 declaration of Gary Henderson, a civil engineer experienced with shoreline bulkheads. Mr.
17 Henderson states that in his opinion the increase in height resulting from the proposed bulkhead
18 replacement will have no significant adverse impacts to either the Petitioners property or Diane
19 Patterson's parents' property. He also states that it is a natural characteristic of a beach to
20 change over time, and that in the location of The Property, events occurring in the upper reaches
21 of Salmon Creek are likely contributors to any historic changes to the beach. In particular, he

1 notes that during the Nisqually earthquake there was a landslide that deposited large amounts of
2 sand and other material into the upper reaches of Salmon Creek, which then flowed down to the
3 beach. *Henderson Decl.*

4 ANALYSIS

5 A. Summary Judgment Standard

6 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
7 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
8 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152, 1155 (1977). The party
9 moving for summary judgment must show there are no genuine issues of material fact and the
10 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.,*
11 *Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307, 313 (1997). A material fact in a summary judgment
12 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
13 451, 456, 824 P.2d 1207, 1210 (1992).

14 The trier of fact must construe the evidence and consider the material facts and all
15 reasonable inferences therefrom in the light most favorable to the nonmoving party. *Weatherbee*
16 *v. Gustafson*, 64 Wn. App. 128, 131, 822 P.2d 1257 (1992). If the moving party is a Respondent
17 and meets this initial showing, then the inquiry shifts to the party with the burden of proof at
18 trial. If, at this point, the non-moving party fails to make a showing sufficient to establish the
19 existence of an element essential to that party's case, and on which that party will bear the burden
20

1 of proof at trial, then the trial court should grant the motion. *Young v. Key Pharmaceuticals,*
2 *Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989).

3 The pre-hearing order in the case establishes the following issues:³

- 4 1. Was the Notice of Application dated September 16, 2009, legally
adequate?
- 5 2. Does the shoreline substantial development permit (SDP) at issue comply
with applicable legal requirements regarding the height of the bulkhead?
- 6 3. Is the City of Burien Shoreline Master Program, Shoreline Advisory
Committee Draft of November 2009, applicable to the SDP at issue?
- 7 4. Do the provisions of the former King County Code ch. 25.16 constitute the
City of Burien's Shoreline Management Program applicable to the SDP at
8 issue?
- 9 5. Does the approved SDP comply with the Shoreline Management Act and
applicable regulations?
- 10 6. Does the approved SDP impermissibly allow the use of a bulkhead to
create new lands by filling behind the bulkhead?
- 11 7. Should the City have required the permit applicant to make a showing, as a
prerequisite to permit issuance, that the proposal complied with WAC 173-
12 26-231(3)(a)(ii) and (iii), and the stated purposes and policy of the
Shoreline Management Act?
- 13 8. Who has the burden of proof pursuant to RCW 90.58.140(7)?
- 14 9. Should the bulkhead erected by the same applicant on adjacent property in
1995 ("1995 bulkhead") be considered in assessing the consistency of the
SDP at issue with the Shoreline Management Act and regulations, and the
15 need for additional conditions on that SDP?
- 16 10. Does the Shoreline Hearings Board (Board) have jurisdiction to address
impacts from the 1995 bulkhead?
- 17 11. Do Petitioners have standing to bring this action?
- 18 12. Did Petitioners fail to exhaust their administrative remedies with regard to
their claims that the proposal will result in environmental impacts?
- 19 13. Are Petitioners precluded from raising issues not identified in their Petition
for Review?

20 _____
21 ³ Petitioners withdrew issue one. See *Petitioners' Response Brief*, p. 22. A grant of summary judgment to
Respondents on issues two through seven, and issue nine, would result in dismissal of the appeal, because the
remaining issues are affirmative defenses, or relate solely to the burden of proof which is not contested.

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14. Do several of Petitioners' issues fail to state a claim upon which relief may be granted?

Here, the Board concludes there are no contested issues of material fact related to these motions, and therefore summary judgment is appropriate.

B. Standing (Issue 11)

Respondents contend that Petitioners lack standing to bring this appeal. A person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state may seek review from the Shorelines Hearings Board. RCW 90.58.180. In order to maintain such a petition, parties must show they are aggrieved persons within the meaning of RCW 90.58.180. The term "person aggrieved" has been interpreted to include persons with standing to sue under existing law. *Anderson v. Pierce County*, 86 Wn. App. 290, 299, 936 P.2d 432 (1997); *Alexander v. Port Angeles*, SHB Nos. 02-027, 02-028 (2003).

To establish standing to bring an appeal, a Petitioner must demonstrate: (1) the governmental action at issue causes a specific and perceptible injury-in-fact that is immediate, concrete, and specific; (2) the interest the Petitioner seeks to protect falls within the zone of interest that the environmental statute is designed to protect; and (3) the Board must have within its legal power the ability to impose a remedy that will redress the injury. *Save a Valuable Environment v. Bothell*, 89 Wn.2d 862, 865-68, 576 P.2d 401 (1978); *Kutschkau v. Ecology*, PCHB Nos. 07-061, 07-067 (Summary Judgment, December 3, 2007); *Advocates For Responsible Development v. Mark and Kim Maree Johannessen*, SHB No. 05-014 (2005). The Petitioner bears the burden of proof on this issue. *Alexander v. City of Port Angeles*, SHB Nos.

1 02-027, 02-028 (2003); *Center for Environmental Law & Policy v. Ecology, et al.*, PCHB No.
2 96-165 (Order on Motion to Dismiss, January 7, 1997).

3 “To show an injury in fact, the Petitioner must allege specific and perceptible harm.”
4 *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 829, 965 P.2d 636 (1998). The
5 “injury in fact” test requires more than an injury to a cognizable interest. It requires that the party
6 seeking review be among the injured. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563, 112 S.
7 Ct. 2130, 119 L. Ed. 2d 351 (1992). A party asserting general enforcement of a statute does not
8 have standing unless he or she is “perceptibly affected by the unlawful action in question.” *Id.* at
9 566. Moreover, no standing is conferred to a party alleging a conjectural or hypothetical injury.
10 *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wash. App. 44, 53, 882
11 P.2d 807 (1994).

12 In this case, the Petitioners have asserted sufficient factual allegations to establish
13 standing in light of the broad construction the Board has given the SMA when parties attempt to
14 bring legitimate environmental issues before it. *Brown v. Snohomish Co.*, SHB No. 06-035
15 (Order Granting Summary Judgment, May 11, 2007). The Petitioners have asserted an interest
16 in the shoreline in this area because they are property owners in the area. They also walk in the
17 area, use the shoreline frequently, and observe wildlife along the shoreline. These types of
18 interests have been sufficient to justify standing in past shoreline appeals. *See Brown v.*
19 *Snohomish Co.*, SHB No. 06-035 (Order Granting Summary Judgment, May 11, 2007); *West &*
20 *Dierker v. City of Olympia*, SHB No. 08-013 (Order on Motions for Summary Judgment, Nov.
21 17, 2008)(holding that Petitioners had standing to bring a shoreline appeal because they lived

1 and recreated in the area impacted by the project, used the shoreline area frequently, and
2 observed wildlife along the shoreline).

3 Respondents argue that Petitioners have not offered expert testimony in support of their
4 conclusions that the 1995 bulkhead caused the changes they have observed in the beach, nor that
5 the proposed replacement bulkhead will cause similar changes. While it is true that a
6 scientifically based causal connection has not been supported by expert testimony, the
7 declarations based on the Petitioners' personal observations are sufficient to support the
8 conclusion that the beach in the area of "The Property" is deteriorating, that this deterioration has
9 had a negative effect on the Petitioners esthetic enjoyment of the shoreline in this area, that the
10 replacement of the 1995 bulkhead resulted in injury to Petitioner's esthetic enjoyment of this
11 shoreline, and that the current proposal has a similar potential for injury. This type of evidence
12 is sufficient to overcome the relatively low hurdle to establish standing under the SMA.

13 Respondents' motion to dismiss for lack of standing is denied, and summary judgment is granted
14 to the Petitioners on Legal Issue 11.

15 C. Timeliness (Issue 13)

16 Respondents contend that the Petitioners did not timely raise several of the issues in the
17 case because they were not asserted in the petition for review.⁴ It is undisputed, however, that
18 the Petitioners identified these issues at the pre-hearing conference.

21 ⁴ The Respondents make this argument to support their motion to dismiss issues 2, 3, 4, and 5.

1 The Board does not generally allow an expansion of the scope of the issues after the pre-
2 hearing conference, absent a showing of good cause. *See Janos v. Ecology*, SHB 00-015, (Order
3 Granting Respondents Motion for Summary Judgment and Dismissal, Dec. 29, 2000); *Save*
4 *Flounder Bay v. Harold M. Mousel*, SHB No. 81-15 (April 27, 1982). However, the Board has
5 not typically required a sophisticated level of presentation in the petition for review. *Redman v.*
6 *Mason County*, SHB No. 99-01 (Order on Motions, July 30, 1999). The pre-hearing conference
7 is the time set for identifying legal issues in the appeal. *See* WAC 461-08-455(1)(b)(issues to be
8 identified at the pre-hearing conference), WAC 461-08-350 (providing that all pleadings shall be
9 construed to do substantial justice). By raising their issues at the pre-hearing conference, the
10 Petitioners were timely. *Oppenheimer v. City of Seattle*, SHB No. 06-026 (Order on Summary
11 Judgment, Dec. 13, 2006). Therefore, the Respondents' motion to dismiss several of the issues
12 on this basis is denied.

13 D. What SMP, if any, is applicable? (Issues 3, 4)

14 A key question in this controversy is what SMP is applicable to this proposal. Petitioners
15 contend that the City of Burien does not have a legally adopted SMP in effect, and therefore the
16 SDP must comply with the Department of Ecology's guidelines and rules, and the City's draft
17 SMP. Respondents' contention is that the City's SMP is King County Code (KCC) Title 25,
18 which they contend the City adopted after incorporation. Further, the Respondents argue that
19 even if the City did not properly adopt KCC Title 25, and obtain Ecology's approval, the SMP
20 that was in affect for this shoreline area at the time of the City's incorporation is now the
21 effective SMP.

1 As a threshold argument, Respondents argue that this Board lacks jurisdiction to rule on
2 the question of what SMP is applicable, because the City of Burien is a City that plans under the
3 Growth Management Act (GMA), and therefore challenges to the City's SMP belong at the
4 Growth Management Hearings Board (GMHB) and not this Board. While it is true that the
5 GMHB has jurisdiction to review Ecology's decision on a proposed SMP or master program
6 amendment by a local government planning under the GMA pursuant to RCW 90.58.190(2),⁵
7 this appeal is not that type of appeal. Instead, it is an appeal of an SDP approved by the City,
8 and the Legislature has charged this Board with the task of reviewing whether a proposed SDP is
9 consistent with applicable criteria. RCW 90.58.180(1). In order to make this determination, the
10 Board must necessarily have the jurisdiction to determine what criteria is the applicable criteria.
11 *See Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958
12 P.2d 962 (1998)(Holding that an administrative agency may exercise only the power expressly
13 granted to it by statute or necessarily implied from the statutory grant of jurisdiction). This
14 includes a determination about what SMP, if any, applies to a shoreline application under appeal.
15 Therefore, the Board concludes it has jurisdiction to determine for purposes of this appeal, what
16 SMP is applicable to this SDP.⁶

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19 ⁵ RCW 90.58.140, 180, and 190 were all changed by 2010 Wash. Laws Ch. 210 §38, effective July 1, 2010. The
changes are immaterial to this case.

20 ⁶ The Respondents' also argue that this appeal is untimely because, pursuant to RCW 36.70A.290(2), an appeal of
21 the adoption of an SMP must be made within 60 days of the date of adoption. This argument fails for the same
reason as respondents' jurisdictional argument: this appeal is of a SDP, not of an Ecology decision adopting or
rejecting an SMP.

1 Turning then to the issue of what SMP is applicable, the Respondents contend that the
2 applicable SMP is the former KCC Title 25. They argue that the City adopted former KCC Title
3 25, and offer as evidence to support this contention, two declarations from the City's Senior
4 Planner, with various City documents attached. While these documents lend support to the
5 argument that the City adopted former KCC Title 25, they do not directly evidence a formal
6 adoption by the City. Based on the evidence presented with the two Johanson declarations, the
7 Board is not persuaded that the City did actually adopt KCC Title 25 as its SMP. However, it is
8 not necessary for the Board to rule on this question, because, even if it had adopted KCC Title
9 25, there is no evidence that the City ever submitted the plan to Ecology for approval. Ecology's
10 approval of an SMP is a necessary step before the plan becomes effective. RCW 90.58.090(7).⁷
11 Therefore, the Board concludes that the KCC Title 25 is not effective as the Burien SMP based
12 upon adoption by the City and approval by Ecology.

13 The question then becomes what SMP is effective in an area that (1) had an SMP prior to
14 incorporation, (2) incorporates, and (3) then fails to adopt an SMP following incorporation
15 and/or submit it to Ecology for approval. The parties advance different arguments as to what
16 happens in this situation.

17 _____
18 ⁷ Respondents argue that submission to Ecology was not necessary because Ecology had already approved the King
19 County SMP for use in unincorporated King County. However, the need for Ecology's review of every proposed
20 SMP for an area is highlighted by this situation. Here, the City purports to have adopted KCC Title 25 as their
21 entire SMP. The actual King County SMP, however, includes a separate document, adopted by ordinance, which
constitutes the goals, policies, and objectives portion of the King County SMP. This separate section, combined
with KCC Title 25, constitute the complete King County SMP. See KCC 25.04.010 (referencing Ord. 3688 § 101,
1978). KCC Title 25, without the required goals, policies, and objectives, does not meet the minimum requirements
for SMPs. See RCW 90.58.030(3)(b); WAC 173-26-191(2).

1 Petitioners argue that RCW 90.58.140(2)(a) controls. This statute provides that:

2 (2) A substantial development shall not be undertaken on shorelines of the state without
3 first obtaining a permit from the government entity having administrative jurisdiction
4 under this chapter.

4 A permit shall be granted:

5 (a) From June 1, 1971, until such time as an applicable master program has become
6 effective, only when the development proposed is consistent with: (i) The policy of RCW
7 90.58.020; and (ii) after their adoption, the guidelines and rules of the department; and
8 (iii) so far as can be ascertained, the master program being developed for the area;

7 Petitioners contend, based on this statute, that because the City did not adopt an SMP, the
8 appropriate criteria to apply to this SDP are the policies of RCW 90.58.020, the guidelines and
9 rules of the department, and the City's draft SMP. Respondents, on the other hand, argue that in
10 this situation, the SMP in affect prior to annexation should remain in effect until a new SMP is
11 adopted and approved. The Board concludes that the result advocated for by Respondents is
12 most consistent with its own prior case decisions, the policies of the SMA, and WAC 173-26-
13 160.

14 The Board has already ruled, in past decisions, that RCW 90.58.140(2)(a) does not apply
15 once an SMP has been adopted for an area. *Maple Valley Citizens for Responsible Growth v.*
16 *City of Maple Valley*, SHB No. 03-014 (2004)(COL IX). Here, since the King County SMP was
17 adopted and approved for this shoreline area prior to its incorporation as the City of Burien, the
18 Board concludes that RCW 90.58.140(2)(a) is not applicable.

19 The Board has also ruled in prior decisions that the SMP that applied to a shoreline area
20 prior to its incorporation within a city, continues to apply after incorporation, until the city
21

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

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

12 WAC 173-26-160 states:

13 [I]n the event of annexation of a shoreline of the state, the local government assuming
14 jurisdiction shall notify the department of such annexation and develop or amend a
15 master program to include the annexed area. Such master program development or
16 amendment shall be consistent with the policy of RCW 90.58.020 and the applicable
17 guidelines and shall be submitted to the department for approval no later than one year
18 from the effective date of annexation.

19 Until a new or amended master program is adopted by the department, any decision on an
20 application for a shoreline permit in the annexed shoreline area shall be based upon
21 compliance with the master program in effect for the area prior to annexation.

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

1 adopted by one legal entity, becomes subject to the control of a different legal entity. If the
2 second entity does not take action to adopt an SMP for the area newly added to its jurisdiction,
3 should the area be deemed to be without a local SMP? WAC 173-26-160 directs that upon
4 annexation, until a new SMP is adopted, the SMP for the area that was previously in affect
5 remains in effect. This practical approach makes equal sense in the situation of incorporation.⁸

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

10 E. Bulkhead Height (Issue 2)

11 Petitioners contend that the height of the proposed bulkhead violated KCC 25.16.180.C.
12 Respondents move to dismiss this issue because they argue that KCC 25.16.180.C, the provision
13 of the SMP that the Petitioners contend is violated by the height of this bulkhead, is not
14 applicable to a bulkhead subject to a shoreline permit. KCC 25.16.180.C states:

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

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

⁸ The Petitioners also argue that a different rule, WAC 173-26-040, should be controlling because it specifically addresses incorporation. The rule requires local governments that acquire shorelines "as a result of annexation, municipal incorporation, or change in shoreline jurisdiction" to develop and administer a shoreline master program. Notably, this rule treats annexation and municipal incorporation the same. This rule does not, however, answer the question raised by this appeal, which is what happens if the incorporating City fails to adopt an SMP.

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

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

8 4. The maximum height of the proposed bulkhead is no more than one foot above the
9 elevation of extreme high water on tidal waters as determined by the National Ocean
10 Survey published by the National Oceanic and Atmospheric Administration or four feet
11 in height on lakes;

12 KCC 25.16.180.C (emphasis added).

13 Respondents' position is that the language of KCC 25.16.180.C, emphasized in the
14 quoted subsection above, limits the application of this subsection to bulkheads that are exempt
15 from the requirement for a substantial development permit. The Board agrees that this is the
16 result mandated by a plain reading of this subsection.

17 Absent ambiguity, the Washington Court has stated that:

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

22 *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)). While the Petitioners have offered in their briefing

1 another interpretation of this subsection that is conceivable, it is based on a strained reading of
2 the language and the Board concludes that it is unreasonable. Therefore, based on the plain
3 language of KCC 25.16.180.C, the Board concludes that the height requirement contained in this
4 subsection applies only to exempt bulkheads.

5 Furthermore, this approach, which the Board concludes is dictated by the language of
6 KCC 25.16.180.C, makes good sense as a matter of policy. King County has chosen to subject
7 bulkheads which do not undergo the rigor of shoreline permitting to additional restrictions in
8 order to qualify for the permit exemption. This approach is consistent with the SMA's policies
9 of protection of the shorelines of the state. RCW 90.58.020.

10 The Board concludes that the Respondents have made their legal case for the conclusion
11 the KCC 25.16.180.C is not applicable to the Segale replacement bulkhead because it is subject
12 to an SDP. In response to Respondents motion to dismiss Issue 2, Petitioners have not made any
13 showing that the height of the proposed bulkhead violates any other applicable law, and therefore
14 the Board awards summary judgment in Respondents favor on Issue 2.

15 F. SDP's compliance with SMA and other applicable regulations (Issue 5)

16 As Respondents observe, Issue 5 is a very broadly worded: "Does the approved SDP
17 comply with the SMA and applicable regulations?" In their motion for summary judgment on
18 this issue, Respondents methodically go through all of the provisions of the SMA and the
19 Ecology shoreline rules that Petitioners have called out either in their petition for review, or their
20 statement of the issues, and list them. The Respondents then put forth their arguments as to how
21 these requirements are not applicable to the approved SDP. The laws Petitioners have listed in

1 their issues statements and petition for review are RCW 90.58.030(3)(c), the general policies of
2 the SMA, and WAC 173-26-231 and 173-27-040(2)(c).⁹

3 Respondents argue with regard to the Ecology shoreline rules (WAC Ch. 173-26 and Ch.
4 173-27), that once a shoreline master program has been adopted in an area, applications for
5 shoreline substantial permits are no longer evaluated for compliance with the Ecology shoreline
6 rules. Instead applications for shoreline substantial developments are evaluated for compliance
7 with the SMA and the SMP. See RCW 90.58.140 (2)(a) and (b).

8 The Board agrees that once an SMP is in effect for an area, WAC Ch. 173-26, Part III
9 Guidelines (WAC 173-26-171 through 173-251) are not directly applicable to applications for
10 substantial development permits. WAC 173-26-171(3)(c); *Greater Duwamish Neighborhood*
11 *Council v. City of Seattle*, SHB No. 89-25 (1989)(COL X)(Concluding that WAC Ch. 173-16,
12 the precursor to WAC Ch. 173-26, is not directly applied to substantial development permits
13 after the adoption of a local SMP). Therefore, Petitioners argument that the approved SDP does
14 not specifically comply with WAC 173-26-231 is not meritorious, given that the Board has
15 concluded that the King County SMP is in effect in this area.

16 Petitioners also argue, however, that the SDP does not comply with WAC 173-27-
17 040(2)(c). The purpose of this chapter of the Ecology shoreline rules is to implement the
18 shoreline permitting system. Therefore the rules in this chapter continue to apply even after the
19 adoption of an SMP. However, the only rule cited by Petitioners, WAC 173-27-040(2)(c)

21 ⁹ The arguments pertaining to violations of the KCC 25.16.180.C and 25.16.180.F are addressed in other sections of
this decision under the analysis on issue 2 (§E) and issue 6 (§G).

1 addresses the requirements for bulkheads being constructed pursuant to an exemption from the
2 requirements of a SDP. The bulkhead at issue here is being constructed pursuant to an SDP, and
3 therefore this rule is not applicable.

4 Petitioner's final argument pertaining to this general issue is that the bulkhead violates
5 the policies of the SMA, in particular that portion of RCW 90.58.020 that states:

6 In the implementation of this policy the public's opportunity to enjoy the physical and
7 aesthetic qualities of natural shorelines of the state shall be preserved to the greatest
8 extent feasible consistent with the overall best interest of the state and the people
generally.

9 The SMA goes on to state, however, that

10 Alterations of the natural condition of the shorelines of the state, in those limited
11 instances when authorized, shall be given priority for single family residences and their
appurtenant structures

12 RCW 90.58.020.

13 Here the shoreline at issue is not in its natural state. In fact, it is currently protected by a
14 bulkhead, and this permit is merely to replace the deteriorating bulkhead. The Board concludes
15 that in light of the fact that this is a replacement bulkhead, that it was approved by the City, and
16 that the Petitioner has failed to come forward with any evidence to show that it violates any
17 specific provision in the King County SMP in place at the time the City incorporated, the
18 proposed bulkhead replacement is consistent with the policies of the SMA.

19 Because the Respondents have refuted, as a matter of law, all of the arguments the
20 Petitioners have put forward on issue 5, the Board grants summary judgment to Respondents on
21 this issue.

1 G. Prohibition against creation of new land (Issue 6)

2 Petitioners contend that the proposed replacement bulkhead will create “new land” in
3 violation of KCC 25.16.180(F). Petitioners refer the Board to Landfill General Policy 8 and
4 Shoreline Protection General Policy 3, the policy section of the King County SMP, for further
5 clarification as to what is meant by the creation of new land.¹⁰

6 Respondents move for summary judgment in this issue, primarily on the basis that the
7 replacement bulkhead will be located along the same alignment as the existing bulkhead. *Kaylor*
8 *Decl., Ex. B*. Fill will be placed landward of the existing (and replacement) bulkhead to match
9 the elevation of the replacement bulkhead. *Id.* These facts are undisputed by Petitioners.

10 Respondents contend that these facts establish that no new land is being created by the fill
11 associated with the bulkhead replacement project. The Board agrees with Respondents on this
12 issue. Because the replacement bulkhead will be located along the same alignment as the
13 existing bulkhead, and the amount of residential property landward of the bulkhead will remain
14 unchanged after filling behind the bulkhead is complete, the Board concludes that this
15 replacement bulkhead does not create new land.

16 H. Compliance with WAC 173-26-231(3), and the purposes and policies of the SMA
17 (Issue 7)

18 In issue 7, Petitioners contend that the City failed to require a sufficient showing from the
19 Respondents regarding whether their proposal complies with WAC 173-26-231 and various
20 SMA purposes and policies prior to approval of the SDP. Respondents move for summary
21

1 judgment on this issue, contending that Petitioner, the party with the burden of proof, must come
2 forward with evidence to support their contention to survive summary judgment. Respondents
3 also argue that Petitioners are attempting to shift the burden of proof.¹¹

4 With regard to the claim that the City did not require a showing from the applicant of
5 compliance with WAC 173-26-231, as previously discussed, WAC Ch. 173-26, Part III
6 Guidelines is not applicable directly to an application once a local SMP is established for the
7 permit area. As to the remainder of this issue, the applicant put forth sufficient material during
8 the permitting process to convince the City that the SDP for this replacement bulkhead complied
9 with the policies of the SMA. The applicant has also included sufficient evidence with its
10 summary judgment motion to make a prima facie showing that the approved SDP complies with
11 the SMA policies. See *Kaylor Decl., Exs. A, B, C, D, and F; and Henderson Decl. with attached*
12 *Ex. A*. Petitioners have not come forward with any legal arguments supported by the necessary
13 factual material that would refute this prima facie showing of consistency with the SMA policies.
14 Therefore, the Board grants summary judgment to the Respondents on issue 7.

15 I. Role of the 1995 Bulkhead in this proceeding (Issue 9)

16 The 1995 bulkhead, also owned by Mr. Segale, is located on property immediately to the
17 North of The Property. It is the look and perceived impacts from the 1995 bulkhead that are at
18 the root of much of the Petitioners concern about the proposed replacement bulkhead.

19

20 ¹⁰ Petitioners also cite WAC 173-16-060, however, as discussed in the preceding section of this order, WAC Ch.
173-16 is not applicable to an SDP in an area where a SMP is in effect.

21 ¹¹ The burden of proof in this appeal is on the Petitioners because they are the party challenging the City's decision
on the SDP. WAC 461-08-500(3).

1 Petitioners contend that the Board should consider the facts surrounding the 1995
2 bulkhead and their conclusions that the 1995 bulkhead has damaged the beach as evidence
3 justifying their concerns regarding this current bulkhead replacement. Respondents move for
4 summary judgment on this issue because they contend (1) the Board lacks jurisdiction over the
5 1995 bulkhead; and (2) there is no remedy that the Board can provide regarding the 1995
6 bulkhead. The Board agrees with the Respondents. There is no action subject to appeal related
7 to the 1995 bulkhead, and the Board does not have jurisdiction to award damages.

8 The Petitioners have not offered any evidence other than their own non-expert opinions
9 that the 1995 bulkhead caused the changes to the beach that they have described in their
10 declarations. Furthermore, the Petitioners have not offered any evidence that increasing the
11 height of the replacement bulkhead, which is the subject of this appeal, will cause any damage to
12 the beach. The only evidence in the record on these points comes from the declaration of Gary
13 Henderson, a civil engineer who is expert in the design of bulkheads. He offers the opinion that
14 increasing the height of the replacement bulkhead will not cause any significant change in wave
15 reflection because the existing bulkhead already reflects waves in the same manner. He further
16 observes that the changes in this beach that have occurred over time may be the result of changes
17 in the upper reaches of the stream adjacent to the property.

18 The Board concludes that the 1995 bulkhead should not be considered in assessing the
19 correctness of the City's approval of the SDP at issue here for the replacement bulkhead, and
20 therefore the Board grants summary judgment to the Respondents on issue 9.

21 Based on the above analysis, the Board enters the following order:

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ORDER

Summary judgment is granted to Petitioners on Issues 11 and 13. Summary judgment is granted to Respondents on Issues 2 through 7, and Issue 9. Having fully resolved all issues on summary judgment necessary to decide this matter, the petition for review is dismissed.

SO ORDERED this 16th day of July, 2010.

SHORELINES HEARINGS BOARD

WILLIAM H. LYNCH, Member

SIMON KIHIA, Member

O'DEAN WILLIAMSON, Member

Kay M. Brown
Administrative Appeals Judge

EXHIBIT E

Pollution Control Hearings Board
Shorelines Hearings Board
Forest Practices Appeals Board
Hydraulic Appeals Board
Environmental and Land Use Hearings Board



Telephone: (360) 459-6327
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STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

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August 23, 2010

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Re: SHB No. 10-007
**DAVID ENGDAHL and DIANE PATTERSON v. CITY OF BURIEN and MARIO
SEGALE**

Dear Parties:

Enclosed please find the Order Denying Reconsideration in this matter.

This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days. See WAC 461-08-570 and 575, and RCW 34.05.542(2) and (4).

Sincerely,

Kay M. Brown,
Administrative Appeals Judge, Presiding

KMB/dj/S10-007

Enc.

Cc: Don Bales, Ecology
City of Burien, Dept of Community Development

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the parties of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED Aug 23 2010, at Lacey, WA

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BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

DAVID ENGDAHL and DIANE
PATTERSON,

Petitioners,

v.

CITY OF BURIEN, MARIO SEGALE,

Respondents.

SHB NO. 10-007

ORDER DENYING RECONSIDERATION

Petitioners David E. Engdahl and Diane M. Patterson (Petitioners) challenged the City of Burien's (City) approval of a shoreline substantial development (SDP) permit allowing Mario Segale (Segale) to replace an existing bulkhead on his residential property. Both sides filed motions for partial or complete summary judgment. The Board, comprised of William H. Lynch, Simon Kihia, and O'Dean Williamson, granted summary judgment to the City and Segale and dismissed the appeal.

Petitioners filed a motion requesting that the Board reconsider its decision dismissing their appeal. The Board reviewed the following submittals in deciding the motion:

1. Petition to Reconsider Order on Summary Judgment; and
2. Permittee's and City's Response to Motion for Reconsideration.

Based on the record in this case and the materials submitted in the Motion for Reconsideration, the Board makes the following ruling.

ORDER DENYING RECONSIDERATION
SHB NO. 10-007

1 in WAC 173-26-080. The Board agrees with the Petitioners that the statute allows Ecology to
2 act if a local government fails to adopt a shoreline master program, but disagrees with its
3 conclusion that Ecology has acted.

4 Contrary to Petitioners' argument, WAC 173-26-080 constitutes a list of all local
5 governments that are required to develop and administer shoreline master programs, whether
6 they have adopted shoreline master programs or not.¹ This rule does not distinguish between
7 entities that have adopted shoreline master programs, and those that have not.

8 WAC 173-26-070(2), on the other hand, is the rule that would contain a list of local
9 governments which have not adopted shoreline master programs and for which Ecology has
10 adopted shoreline master programs. This subsection states:

11 As set forth in subsection (1)(a) and (b) of this section, the department has adopted by
12 rule a master program, alternative master program or portion thereof for the local
13 governments listed below. This listing shall be updated periodically so as to remove
14 reference to local governments who have complied with the requirements of chapter
15 90.58 RCW and this chapter, having prepared and submitted a shoreline master program
16 that has been approved by the department.

17 WAC 173-26-070(2)(emphasis added).

18 WAC 173-26-070 does not currently list any local governments for which Ecology has acted
19 through rulemaking to adopt a master program.² Therefore, Ecology has not adopted a shoreline
20

21 ¹ The City Attorney stated during oral argument, and the Board takes official notice of the fact, that many local
governments included in the list have in fact adopted shoreline master programs. See WAC 461-08-525(allowing
the Board to take official notice of (a) notorious facts and (d) technical knowledge.)

² This interpretation of WAC 173-26-070(2) is confirmed by a 2008 filing by Ecology in the Washington State
Register regarding proposed rulemaking. In this notice, Ecology states that it was considering rulemaking to adopt a
shoreline master program for Spokane County. WSR 08-16-117. In this filing, Ecology states that "This rule would
add 'Spokane County' and the adoption date, to a list of ecology adopted SMPs in WAC 173-26-070(2). This will
be the first ecology-adopted SMP added to this list." (Emphasis added).

1 master program for the City of Burien. In the absence of Ecology's adoption of a shoreline
2 master program for the City, and or the City's adoption itself of a shoreline master program, the
3 Board stands by its decision that the applicable shoreline master program is the one that was in
4 place prior to the City's incorporation.

5 Petitioners third and fourth arguments are aimed at the same end result: the Petitioners
6 contend that WAC 173-26-231 should be applied directly to the review of the shoreline
7 substantial development permit at issue. However, the Board has already concluded on summary
8 judgment that once an SMP is in effect for an area, WAC Ch. 173-26 Part III Guidelines (WAC
9 173-26-171 through 173-251) are not directly applicable to applications for substantial
10 development permits. WAC 173-26-171(3)(c); *Greater Duwamish Neighborhood Council v.*
11 *City of Seattle*, SHB No. 89-25 (1989)(COL X)(Concluding that WAC Ch. 173-16, the precursor
12 to WAC Ch. 173-26, is not directly applied to substantial development permits after the adoption
13 of a local SMP). Instead, this chapter of the rules is intended to be used by Ecology when
14 reviewing local shoreline master programs. This chapter is not applicable directly to this
15 permitting decision, and the reference in the King County SMP to consistency with the
16 "guideline and regulations of the Washington State Department of Ecology" does not make it so.
17 Other chapters of the Ecology regulations do apply directly to the permit, such as WAC Ch. 173-
18 27, and it is these applicable regulations that should be construed to be applicable to permitting
19 decisions under the King County SMP. The Board declines to reconsider its decision not to
20 apply WAC 173-26-231 to this permitting decision, either directly, or as an aid to construction of
21 KCC 25.16.080.

ORDER DENYING RECONSIDERATION
SHB NO. 10-007

1 Petitioners' final arguments focus on their contention that the SDP approved by the City
2 for this replacement bulkhead violates KCC 25.16.180 D, especially when KCC 25.16.180 D is
3 interpreted in light of the policies of the King County SMP. KCC 25.16.180 D states:

4 Shoreline protection . . . shall be permitted only when it has been demonstrated that
5 shoreline protection is necessary for the protection of existing legally established
6 structures . . .

6 The King County SMP policies in place at the time the City of Burien incorporated provide,
7 among other things, that structural solutions to reduce shoreline damage should be allowed only
8 after it is demonstrated that non-structural solutions would not be able to reduce damage, and
9 that the burden of proof on the need for shoreline protection to protect existing or proposed
10 development rests on the applicant. King County SMP, Goals, Policies and Objectives,
11 Shoreline Protection, General Policies 1 and 8.

12 The Board does not see anything in Petitioners final arguments, including their arguments
13 on the burden of proof, which would persuade it to reconsider the summary judgment decision.
14 The applicant presented sufficient evidence to the City during the initial permitting process to
15 convince the City that the replacement bulkhead was necessary to protect an existing residential
16 structure. The evidence established that the lot contained an existing residence, that the bulkhead
17 would be a replacement bulkhead, and that it would be located in the same alignment as the
18 existing bulkhead. The evidence included an environmental checklist stating that the bank
19 behind the existing bulkhead was eroding, and that the deteriorating bulkhead is allowing the
20 erosion to occur. *Kaylor Decl., Exs. B, C, Ex. D.* The City approved the SDP, and on appeal,
21 and in support of their motion for summary judgment, the applicant offered the declaration of an

1 expert engineer who states that the existing bulkhead is in a deteriorated condition and must be
2 repaired or replaced. The engineer also offers the opinion that the increased height of the
3 bulkhead, which is the Petitioners' primary point of contention with the replacement bulkhead,
4 will not cause any significant change in wave reflection from the action of the existing bulkhead
5 which is being replaced. *Henderson Decl.* In light of this record, the Board concludes that the
6 applicant has come forward with sufficient evidence to meet the requirement that the applicant
7 demonstrate the need for the bulkhead. *See RCW 90.48.140(7); KCC 25.16.180 D.*

8 At this point, the burden of coming forward with evidence to controvert the applicant's
9 showing shifts to the Petitioners. Petitioners have failed to meet this burden. They have not
10 offered any expert testimony to refute the engineer's statement that the existing bulkhead is
11 deteriorated and must be replaced.

12 What the Petitioners have offered is their own testimony regarding their observations of
13 changes in the beach in front of the existing bulkheads, their own conclusions as to the causes of
14 these changes, and their own reactions to the last replacement bulkhead built by this same
15 applicant that the Petitioners describe as an "enormously tall, white bulkhead " which is an
16 "extravagant and offensive eyesore." *Engdahl Decl.*, May 31, 2010, p. 2. This type of evidence
17 is insufficient to establish that the replacement bulkhead is not necessary and therefore violates
18 KCC 25.16.180 D.

19 The Petitioners have not put forth any argument that persuades the Board that the basis
20 for its original decision was incorrect. The Board concluded on summary judgment that when an
21 area has been subject to a shoreline master program, and then the area incorporates and doesn't

1 adopt a new shoreline master program, the existing shoreline master program continues to be
2 applicable. The Board rejected the Petitioners' theory that in this situation, instead of applying
3 the existing shoreline master program, a vacuum should occur, during which only the generic
4 statewide shoreline policies, guidelines, and rules should be applicable until a new shoreline
5 master program is adopted. This decision is consistent with the Board's past precedent, and
6 provides the best protection for the states valuable and fragile shoreline resources.

7 **ORDER**

8 Petitioners' motion for reconsideration is DENIED.

9 SO ORDERED this 23rd day of August 2010.

10 **SHORELINES HEARINGS BOARD**

11
12 William H. Lynch
13 WILLIAM H. LYNCH, Member

14 Simon Kihia
15 SIMON KIHIA, Member

16 O'Dean Williamson
17 O'DEAN WILLIAMSON, Member

18
19 Kay M. Brown
20 Kay M. Brown
21 Administrative Appeals Judge

DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Brief of Respondent/Cross-Appellant Segale in Court of Appeals Cause No. 67420-0-I the following:

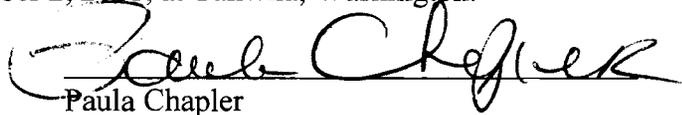
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Original sent by ABC Legal Messengers for filing with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

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

DATED: December 2, 2011, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick