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STATE OF WASHINGTON

NO. 39861-3-II

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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

REBECCA JULIAN and GRETCHEN BROOKS,

Appellants,

vs.

CITY OF VANCOUVER, a municipal corporation, and WAYNE and
DOLORES MONROE, individually and as a marital community,

Respondents.

BRIEF OF RESPONDENT CITY OF VANCOUVER

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I. INTRODUCTION

This is a case under the Land Use Petition Act, (LUPA), RCW Chapter 36.70C, in which this Court is asked to determine whether the environmental protections of the City of Vancouver's Critical Areas Ordinance should be applied to require riparian buffers for portions of a culverted, cement-encased 256 foot watercourse that runs through a proposed new subdivision in the City of Vancouver. Every prior decision-maker who has reviewed this case has concluded that no such riparian buffers are required for most of the watercourse. The City of Vancouver requests that this Court affirm those prior decisions.

"Garden Creek" is the proposed four-lot short subdivision in the City of Vancouver. The City of Vancouver issued a preliminary short subdivision approval with conditions on April 1, 2008. Rebecca Julian and Gretchen Brooks, neighbors of the proposed subdivision, filed an appeal of the subdivision approval on April 15, 2008. On September 10, 2008, the Hearings Examiner for the City of Vancouver issued his Final Order denying the appeal and approving the subdivision. The neighbors filed a LUPA petition, and on September 2, 2009, Clark County Superior Court denied the LUPA petition.

Julian and Brooks now appeal to this Court under the Land Use Petition Act (LUPA), RCW Chapter 36.70C. Under LUPA, the neighbors

bear the burden of establishing that the City of Vancouver Hearings Examiner committed some specific error in applying the City's code to the facts of this case. No such error has occurred.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Respondent City of Vancouver [hereinafter "City", unless context indicates otherwise] does not assign error to any order of the trial court or the Hearing Examiner.

Issues Pertaining to Assignments of Error

The City disputes Julian's statement of the issues. The issues presented are more appropriately framed as follows:

Issue 1. LUPA standards of review require that petitioners bear the burden of establishing that the decision was clearly erroneous.

Issue 2. The Vancouver Municipal Code permits reduction of the riparian buffer when the regulated riparian area is functionally isolated from the waterbody.

Issue 3. Reduction of the riparian buffer when the regulated riparian area is functionally isolated from the waterbody is determined based upon the particular facts of each portion of the waterbody and the adjacent regulated riparian area.

III. STATEMENT OF THE CASE

Garden Creek is a proposed short plat that would divide a 0.96 acre lot in a low-density residential zone into four smaller lots, demolishing the existing single-family residence. A watercourse that is of disputed origin, nature, and habitat value flows through the existing 0.96 acre lot. The City of Vancouver determined that the watercourse was functionally isolated in terms of fish and wildlife habitat value. AR (Appeal Record) 1.10. On April 1, 2008, the City granted preliminary approval to the proposed short plat, subject to a number of specific conditions. AR 1.

Neighboring property owners Julian and Brooks are opposed to the proposed short plat. They filed an administrative appeal challenging the City of Vancouver's determination, arguing that the project failed to meet certain requirements of the City's development code, primarily concerning fish and wildlife habitat. AR 2.

After extensive hearing and argument, the City of Vancouver Hearings Examiner determined that the proposed short plat should be approved under the City's development code, subject to certain modified conditions imposed by the Hearings Examiner. CP 16. The Hearings Examiner made three rulings concerning riparian buffer requirements to be imposed to protect the 256 foot watercourse, summarized as follows:

1. For the 178 feet of the approximately 256 feet of watercourse on the site that is confined by culverts or

otherwise impounded by an impervious layer, in which the impervious areas extend to, and in the case of culverts and the plastic lined channel, beyond, the banks of the watercourse, the impervious areas separate the watercourse from the abutting riparian areas. A majority of the watercourse on the site is completely functionally isolated from the adjacent Riparian Management Area and Riparian Buffer. A Riparian Management Area is not required.

2. The remaining 78 feet of “open” watercourse on the site occurs in three discrete sections; between the north boundary of the site and the northernmost culvert, between the south end of the culvert and the parking area abutting the shop and house, and in the portion of the area between the southern driveway and Lieser Point Road where the watercourse is not lined with culverts, plastic, concrete or other “armoring.” The riparian area abutting the section of the watercourse between the northernmost culvert and the north boundary of the site is not “completely functionally isolated.” The applicants are required to modify the preliminary plat to provide a 100-foot Riparian Management Area and a 50-foot buffer adjacent to that segment of the watercourse. Given the location of this segment of the watercourse, it appears to be feasible to retain the current layout of the development.
3. The remaining two sections of the watercourse on the site that are not physically isolated by impervious surfaces from the adjacent Riparian Management Area and Riparian Buffer, are completely functionally isolated. These riparian areas are relatively small. The northern section, between the northern culvert and the driveway abutting the shop, is roughly 30 feet long. The southern section is much shorter. A Riparian Management Area and Riparian Buffer should not be required consistent with sound science.

CP 41-44.

The developer of the project does not appeal the modified conditions of approval. The neighbors appealed the approval, under the Land Use Petition Act, LUPA. CP 1. Clark County Superior Court approved the project, denying the LUPA petition on September 2, 2009. CP 460.

These facts properly frame the issues of this case. Although the neighbors' Statement of the Case has provided this Court with an extended discussion of the disputed *evidence* in this case, the issues presented by this case are simply these. The Court must review any disputed evidence based on the legal standards of review imposed by LUPA, not based on a rehearing of the evidence.

IV. SUMMARY OF THE ARGUMENT

The neighbors are required to meet LUPA standards of review by establishing that the Hearings Examiner's decision was clearly erroneous. No such error has occurred. The Hearings Examiner correctly determined appropriate riparian buffers and reduced buffers under the relevant Vancouver Municipal Code, based upon the particular facts for each portion of the waterbody.

V. ARGUMENT

A. City of Vancouver Issues

Issue 1. LUPA standards of review require that petitioners bear the burden of establishing that the decision was clearly erroneous.

The Land Use Petition Act, LUPA, is the exclusive means of judicial review of a land use decision in the State of Washington. RCW 36.70C.030. The statutory standards for granting judicial relief explicitly place the burden of establishing the right to relief on the LUPA petitioner. That burden is much greater than the neighbors' brief might lead the Court to believe. What the statute says is:

The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met.

RCW 36.70C.130(1) (emphasis added). The plain words of the statute make clear that it is the neighbors' burden to establish that they are entitled to relief under one or more of the specified subsections of the LUPA statute. It is the neighbors' burden, not the City's or the developer's, to establish the right to relief under LUPA.

On review of a LUPA decision, this Court stands in the shoes of the superior court and reviews the Hearing Examiner's action on the basis of the administrative record. *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 525 (2004).

Although the neighbors argue that they are entitled to relief under a number of the LUPA review standards, what the Hearings Examiner was really required to do in this case was to apply law (the applicable Vancouver Municipal Code sections) to facts (the undisputed physical circumstances of the property that is the subject of the proposed short plat, and of the proposed short plat itself). When a petitioner challenges the application of the law to the facts, LUPA requires that the Hearings Examiner's decision be upheld unless it is clearly erroneous. RCW 36.70C.130(1)(d); *Willapa Grays Harbor Oyster Growers v. Moby Dick Corp.*, 115 Wn. App. 417, 428-429 (2003). When a decision is clearly erroneous, it leaves the reviewing court with " 'the definite and firm conviction that a mistake has been committed.' " *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999) (quoting *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997)). Review under this standard is deferential to factual determinations by the highest forum below that exercised fact-finding authority. The Court must view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Davidson v. Kitsap County*, 86 Wn. App. 673, 680, 937 P.2d 1309 (1997). This Court must view the evidence in a light favorable to the City of Vancouver, must consider whether the law has been correctly

applied to the facts, and then must affirm the Hearings Examiner's decision unless the Court comes away with a definite and firm conviction that the Hearings Examiner has made a mistake.

These are the standards that the Court must apply in reviewing this LUPA challenge to the proposed Garden Creek subdivision. It is the City's position they are outcome-determinative in this case. No mistake has been made.

Issue 2. The Vancouver Municipal Code permits reduction of the riparian buffer when the regulated riparian area is functionally isolated from the waterbody.

The neighbors argue that the Hearings Examiner misinterpreted the law by applying the current version of the City's riparian buffer and riparian management area ordinance, VMC 20.740.110.A.1.e(A). Under either the current or the former version of the City's riparian buffer and riparian management area ordinance, applying the law to the physical facts of this case results in a conclusion that the portions of the drainage channel that are bordered by impervious surfaces, and the portions that are functionally isolated, do not retain function as fish and wildlife habitat, and are therefore not subject to buffer protection.

On June 18, 2007, the Vancouver Planning Official determined that no critical areas permit would be required for the Garden Creek development, because the drainage channel's riparian buffer was

functionally isolated due to previous development. AR 1.10. At that time, the ordinance addressing functional isolation of riparian areas read as follows:

When impervious surfaces from previous development completely functionally isolate the Riparian Management Area or the Riparian Buffer from the lake, stream or river, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. An example would be an existing industrial paved area and warehouses in the Riparian Management Area and Buffer.

VMC 20.740.110.A.1(4) (04/29/05 version of the ordinance).

However, based on staff experience in attempting to apply the ordinance to the Garden Creek property, the City determined that clarification of the ordinance was necessary. New language was added to the ordinance that controls this case, “clarifying and refining” it, on October 1, 2007. AR 27, attached Exhibit 1. The current ordinance reads as follows:

When impervious surfaces from previous development completely functionally isolate the Riparian Management Area or the Riparian Buffer from the waterbody, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. If the water body is not completely physically isolated, but is completely functionally isolated, the Planning Official may adjust the regulated riparian area to reflect site conditions and sound science.

VMC 20.740.110.A.1.e(A)(11/01/07 version of the ordinance (current language)) (emphasis added).

The Hearings Examiner concluded that because the project's application was not fully complete until after the October 1, 2007 effective date of the change in the ordinance, the current version of the ordinance also mandates a determination that the majority of the drainage channel is completely functionally isolated from its riparian area. CP 38, 41.

Whichever version of this ordinance is applied to the Garden Creek short plat, the Garden Creek short plat planning process is completely consistent with it. In this situation, the Court may apply the prior version of the ordinance, as the neighbors urge, and reach the identical conclusion reached by the Planning Official: The watercourse is completely functionally isolated and does not require a buffer. AR 1.10.

In the alternative, the Court may consider the current ordinance as evidence of the intent of the original ordinance and uphold the Hearings Examiner's decision, which applies the current ordinance, based upon its fulfillment of that original intent. This approach is approved by the courts in Washington. In determining the scope of an administrative decision made by a local governing board or council, a court may consider a later-enacted clarifying ordinance if the ordinance evidences the board's or council's original intent and does not plainly contradict the law as it existed at the time the administrative decision was made. *Hale v. Island County*, 88 Wn. App. 764 (1997). The *Hale* case is a clear statement that

is directly on point in allowing consideration of subsequent enactments in interpretation of environmental regulations, and it is supported by a long line of cases that approve retroactive application of remedial legislation:

[W]here that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive. This is particularly so where an amendment is enacted during a controversy regarding the meaning of the law.

Tomlinson v. Clarke, 118 Wn.2d 498, 510-11, 825 P.2d 706 (1992).

Using this approach, interpreting the City's original ordinance in light of a clarifying amendment, this Court can conclude that the Hearings Examiner properly considered currently-identified factors, and determined that no riparian buffer was required because the watercourse is functionally isolated.

Finally, this Court could simply apply the current code, as the Hearings Examiner did in reaching his conclusion that the majority of the stream is functionally isolated. CP 38, 41.

The Superior Court that reviewed the case specifically determined that both versions of the ordinance reach the same result, and affirmed the Hearings Examiner's decision, saying:

No matter which version of the ordinance is used, the result is the same. Applying the terms of the ordinance to the physical facts on the ground at the Monroe property, only one conclusion is possible. Once the watercourse enters the first culvert on the Monroe property, it loses its character as

a stream capable of providing habitat. It becomes completely functionally isolated from that purpose.

CP 469.

The neighbors attempt to recast the evidence to create habitat functions under the 2005 ordinance, Petitioners' Brief pp. 23-34, but it is far too late for that. Review must be deferential to findings of facts that support the local jurisdiction's application of the law to the facts, *Davidson v. Kitsap County*, 86 Wn. App. 673, 680, 937 P.2d 1309 (1997), and here the developer's expert witness provided clear testimony supporting the Hearings Examiner's finding. A site assessment done by Daniel Covington, Environmental Scientist/Wetland Biologist from Parati-LDC Design Group, reached conclusions summarized as follows:

The watercourse traversing the Monroe Property can be best described as a conduit for stormwater and ground water originating from upstream sources. This conduit and adjacent land area are characterized by unnatural structures, dimensions, and vegetation composition. The drainageway, lawn area, and large circular driveway fail to function biologically and structurally as critical fish and wildlife habitat as defined by Washington State and the City of Vancouver.

A system may display beneficial habitat and functional attributes for species that may not be present. Therefore, "values" should not imply "use." However, the Monroe property does not display sufficient FWHCA functional attributes or use by fish and wildlife species. SR-14, the railroad, significant development in the area, neighborhood activity, and the effective fish passage barriers have

interrupted biological connectivity to the Columbia River and surrounding terrestrial habitat.

AR 4, p. 6. This is substantial evidence in the record to support the findings and conclusion that the majority of the watercourse is functionally isolated and does not perform habitat functions.

Issue 3. Reduction of the riparian buffer when the regulated riparian area is functionally isolated from the waterbody is determined based upon the particular facts of each portion of the waterbody and the adjacent regulated riparian area.

1. The City's riparian buffer and riparian management area ordinance, VMC 20.740.110.A.1.e(A), was applied to this project.

The neighbors assert, at their Issue 1, that the watercourse affected by this project is a critical area subject to the City's riparian buffer and riparian management area ordinance, VMC 20.740.110.A. In fact, the Hearing Examiner agreed with this assertion, and engaged in an extremely detailed 7-page analysis as to exactly how VMC 20.740.110.A.1.e(A) applies to this project. CP 38-45. As noted above, the identical analysis would apply to the earlier version of the ordinance, VMC 20.740.110.A.1(4).

The City does not disagree with, and has not appealed, the Hearings Examiner's conclusions that the watercourse affected by this project is a critical area subject to the City's riparian buffer and riparian management area ordinance. However, that does not lead to a conclusion

that the entire watercourse is subject to the maximum buffer requirement. The neighbors appear to assert that the City previously concluded that the entire watercourse required a 100-foot Riparian Management Area and a 50-foot Riparian Buffer. Petitioners' Brief constructs a straw man argument by consolidating two unrelated sections of the Hearings Examiner's decision into a single quotation, and relying on language in the Staff Report at AR 1, pp.12-13. Petitioners' Brief at 16, last paragraph. However, the neighbors misread the Staff Report. The bulleted paragraphs of AR 1, p. 11 under the heading "Designation" merely summarize the Code requirements for a particular type of stream, stating that "There are established *in the city* the following Fish and Wildlife Areas..." AR 1, p. 11 (emphasis added). The Staff Report goes on to state that, "The watercourse traversing the Monroe Property can be best described as a conduit for stormwater and ground water originating from upstream sources." AR 1, p. 11. The City never makes an affirmative finding that the entire watercourse on the site is subject to the 150-foot buffer requirement.

2. The Hearings Examiner correctly determined buffer requirements based upon the particular facts of each portion of the waterbody.

As set forth in the Statement of the Case above, the Hearings Examiner made three determinations as to the required buffers for the

watercourse, based upon the particular facts of each segment of the watercourse. CP 41-44. This is the correct approach to applying the controlling law to the undisputed physical facts of this case. VMC 20.740.110.A.1.e(A) specifically requires a review of the particular facts related to each area:

(A) When impervious surfaces from previous development completely functionally isolate the Riparian Management Area or the Riparian Buffer from the waterbody, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. If the waterbody is not completely physically isolated, but is completely functionally isolated, the Planning Official may adjust the regulated riparian area to reflect site conditions and sound science.

VMC 20.740.110.A.1.e(A)

a. For the 178 feet of watercourse on the site that is confined by culverts or otherwise impounded by an impervious layer, a riparian management area is not required.

The Hearings Examiner correctly concludes that the majority of the watercourse on the site is completely functionally isolated from the adjacent Riparian Management Area and Riparian Buffer areas by existing impervious surfaces: pavement, culverts, gravel, and plastic lining of the watercourse. CP 41; *see* AR 4 and 38.

This conclusion is based on substantial evidence in the record. As noted at p. 1 of AR 4, of the approximately 256 feet of watercourse on the site, 178 feet is “confined by culverts... [or] otherwise impounded by an

impervious layer...” These impervious areas extend to, and in the case of culverts and the plastic lined channel, beyond, the banks of the watercourse. These impervious areas separate the watercourse from the abutting riparian areas. There is no land area between the ordinary high water mark of the watercourse and these impervious surfaces.

The neighbors and WDFW correctly note that even the culverted watercourse itself retains some functions, such as conveyance and attenuation of floodwaters, filtering of pollutants by aquatic vegetation, infiltration and nutrient transfer where the watercourse contacts the natural substrate, presence of macro-invertebrates within the watercourse, and providing a source of cool clean water. AR 21, Attachment 7, AR 17. However, all of these functions occur within the aquatic system/watercourse, below the ordinary high water mark of the watercourse and outside of the riparian Management Area and Riparian Buffer. The cited functions are largely unaffected by the existence of impervious surfaces abutting the watercourse. There is no substantial evidence that the portions of the riparian management area that are covered or otherwise separated from the watercourse by impervious surfaces retain any riparian functions.

For these portions of the on-site watercourse, no buffer is required because impervious surfaces from previous development

completely functionally (and physically) isolate any riparian management area or the riparian buffer from the waterbody. VMC 20.740.110.A.1.e(A).

b. The riparian area abutting the section of the watercourse between the northernmost culvert and the north boundary of the site is not “completely functionally isolated.” A 100-foot riparian management area and a 50-foot buffer are required adjacent to that segment of the watercourse.

The Hearings Examiner correctly concludes that the riparian area abutting the section of the watercourse between the northernmost culvert and the north boundary of the site is not “completely functionally isolated,” and imposes a new buffer requirement on the northernmost segment of the watercourse.

This conclusion is based on substantial evidence in the record. Based on the photographs in the record, this segment of the watercourse and associated riparian area extend onto the adjacent property to the north for quite some distance. *See* AR 38 and the photos attached to AR 18 and AR 29, Attachment 1. The contiguous riparian area appears large enough to allow the interaction and mutual influence between the watercourse and the riparian area that the riparian management area and riparian buffer are intended to protect. While there is evidence of “rock armoring” along a portion of the on-site section of this watercourse segment, *see* AR 28,

Attachment 3, there is no substantial evidence that these piles of rock constitute an “impervious surface” sufficient to isolate the watercourse from the abutting riparian area. Because impervious surfaces from previous development do not completely functionally isolate the riparian management area or the riparian buffer from the waterbody, buffer reduction is not appropriate for this segment of the watercourse under VMC 20.740.110.A.1.e(A).

Based on this conclusion, the developer was required to modify the preliminary plat to provide a 100-foot riparian management area and a 50-foot buffer adjacent to the segment of the watercourse between the northern end of the northern culvert and the north boundary of the site. Given the location of this segment of the watercourse, the proposed layout of the development could be retained. The developer would need only to reduce the size of the building footprints on Lots 1 and 2 to accommodate the riparian management area and riparian buffer areas.

Neither the City nor the developer appealed the Hearings Examiner’s new riparian management area and buffer requirement.

c. The remaining two sections of the watercourse on the site are completely functionally isolated. A riparian management area is not required.

Finally, the Hearings Examiner correctly concludes that the remaining two sections of the watercourse on the site that are not

physically isolated by impervious surfaces from the adjacent riparian management area and riparian buffer, are completely functionally isolated, so that the buffer may be adjusted to zero based upon site conditions and sound science.

This conclusion is also based on substantial evidence in the record. These areas may serve some limited riparian function because the lack of abutting impervious surfaces allows contact, interaction and mutual influence between the watercourse and the adjacent riparian area. However, these riparian areas are relatively small. The northern section, between the northern culvert and the driveway abutting the shop, is roughly 30 feet long. The southern section is much shorter. These small riparian areas are physically isolated from upstream and downstream riparian areas by existing culverts and other impervious surfaces. *See* AR 38. In addition, “the entire length of the watercourse traversing the Monroe property has structurally altered banks which impede the area’s ability to form and maintain proper fish and wildlife habitat.” AR 4, p. 2; *see also* AR 28, Attachment 3, which illustrates the constraints on the site. Given the small size and physical isolation of these riparian areas and based on the multiple environmental analyses in the record, including those provided by the neighbors, Petitioners’ Brief, pp. 28-30, site conditions and sound science permit adjustment of the buffer to zero.

For these portions of the on-site watercourse, because these portions are not completely physically isolated but are completely functionally isolated, the riparian management area and riparian buffer may be adjusted to zero, consistent with site conditions and sound science. VMC 20.740.110.A.1.e(A).

3. The project complies with the policies of the critical areas ordinance, even where no riparian buffer is required.

The Vancouver critical areas ordinance includes language that has caused some confusion in this case. The section of VMC 20.740.030 that allows exemptions from critical areas permits also includes a requirement that even exempt projects comply with the critical areas ordinance:

However, all exempt activities are still subject to the policies and regulations of this Chapter.

VMC 20.740.030.B.1.

Based on this requirement, the City's Appeal Staff Report carefully analyzed the requirements of the applicable ordinance, VMC 20.740.060, section by section. AR 3, pp. 3-4. The Hearings Examiner also made a detailed analysis of these code sections for the buffered area. CP 45-47. Both City staff and the Hearings Examiner concluded that this project complies with the ordinance. The neighbors do not present anything that establishes that these conclusions are clearly erroneous. The conclusions should be upheld on review.

B. Responses to Petitioners' Issues

Petitioners' Issue 1. City of Vancouver/Hearing Examiner made unappealed finding that garden creek was a critical area subject to Vancouver's CAO, VMC 20.740.110.

The neighbors here argue that the Hearings Examiner correctly determined that the project is subject to a portion of the City's Critical Areas Ordinance, VMC 20.740.110. The City does not dispute this assertion, but as noted in the City's Issue 3 discussion above, this does not necessarily mean that the watercourse is subject to a riparian buffer requirement.

Petitioners' Issue 2. Vancouver code requires a riparian buffer for this class of creeks.

The neighbors here argue that a riparian buffer is always required under the City's riparian buffer and riparian management area ordinance, VMC 20.740.110. To make this argument, the neighbors quote a portion of the Hearings Examiner decision that requires a buffer for *only the northernmost* segment of the watercourse, as if it required a buffer for the entire watercourse. Petitioners' Brief, pp. 17-18; CP 45. The City does not disagree with the imposition of a buffer requirement on the northernmost segment of the watercourse, but as noted in the City's Issue 3 discussion above, this does not necessarily mean that the entire watercourse is subject to a riparian buffer requirement.

Petitioners' Issue 3. Vancouver CAO has a buffer size reduction, not a CAO exemption, for sites that are "completely functionally isolated".

The neighbors here argue that the Hearings Examiner incorrectly "exempted" the project from the City's riparian buffer and riparian management area ordinance, VMC 20.740.110.A.1.e(A). This argument is simply factually incorrect. As noted by the neighbors in their Issue 1, and in the City's Issue 3 discussion above, the Hearings Examiner correctly concluded that the Critical Areas Ordinance applies to this project, and then correctly applied appropriate Critical Areas Ordinance evaluation criteria to the protected buffered area. CP 44-46. To make this argument, the neighbors incorrectly conflate the Hearings Examiner decision, which is under review, with an "exemption" discussion concerning fish and wildlife in City's first staff report on the project, which was not the City's final decision and is not under review, Petitioners' Brief, pp. 19-20; AR 1, p. 12, 13; and which the neighbors have misinterpreted, as discussed above at City's Issue 3.1.

Petitioners' Issue 4. Hearing Examiner properly overruled City of Vancouver's use of the "completely functionally isolated" exception and required a proper CAO buffer for the northern portion of Garden Creek's creek.

The neighbors here argue that the Hearings Examiner correctly imposed a riparian buffer requirement on buffer on the northernmost

portion of the watercourse. As noted in the City's Issue 3 discussion above, neither the City nor the developer disputes this determination by the Hearings Examiner.

Petitioners' Issue 5. The Hearing Examiner erred by ruling that the "remaining portions" of Garden Creek's creek was "completely functionally isolated" and did not need a CAO buffer under the 2008 cao code.

The neighbors here argue that the 2008 [*sic* 2007] version of the City's riparian buffer and riparian management area ordinance, VMC 20.740.110.A.1.e(A), should not have been applied, and that the 2005 version, VMC 20.740.110.A.1(4), does not permit buffer reduction when a riparian area is functionally isolated from its adjacent waterbody. As noted in the City's Issue 2 discussion above, whether the 2005 or 2007 version of the VMC applies, the result is the same: the riparian buffer may be reduced in appropriate factual circumstances.

Petitioner's Issue 6: Standard of review supports petition for review.

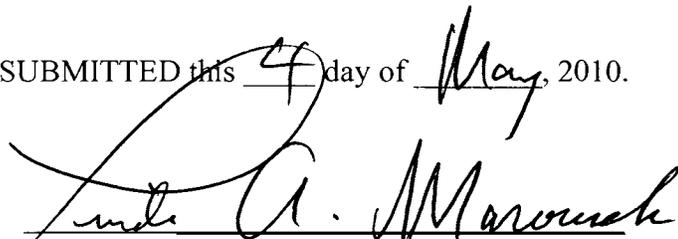
The neighbors here argue that LUPA review standards support its position on appeal. As noted in the City's Issue 1 discussion above, when a petitioner is actually challenging the application of the law to the facts, as in this case, the burden is on the petitioner to establish that the Hearings Examiner's decision is clearly erroneous. RCW 36.70C.130(1)(d). When

a decision is clearly erroneous, it leaves the reviewing court with the definite and firm conviction that a mistake has been committed. *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). This Court must affirm the Hearings Examiner's decision unless the Court comes away with a definite and firm conviction that the Hearings Examiner has made a mistake.

VI. CONCLUSION

The neighbors are required to meet LUPA standards of review by establishing that the Hearings Examiner's decision was clearly erroneous. No such error has occurred. The Hearings Examiner correctly determined appropriate riparian buffers and reduced buffers under the relevant Vancouver Municipal Code, based upon the particular facts for each portion of the waterbody. This Court should affirm the Hearings Examiner's decision.

RESPECTFULLY SUBMITTED this 4 day of May, 2010.



Linda A. Marousek, WSBA #12045
Assistant City Attorney
Attorney for Respondent
City of Vancouver

APPENDIX A

VMC 20.740.110.A.1(4) (04/29/05 version)

When impervious surfaces from previous development completely functionally isolate the Riparian Management Area or the Riparian Buffer from the lake, stream or river, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. An example would be an existing industrial paved area and warehouses in the Riparian Management Area and Buffer.

VMC 20.740.110.A.1.e(A) (11/01/07 current version)

When impervious surfaces from previous development completely functionally isolate the Riparian Management Area or the Riparian Buffer from the waterbody, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. If the water body is not completely physically isolated, but is completely functionally isolated, the Planning Official may adjust the regulated riparian area to reflect site conditions and sound science.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the date identified below, I mailed the original and one copy of the foregoing BRIEF OF RESPONDENT, via U.S. mail, postage prepaid, to:

MR. DAVID PONZOHA
COURT CLERK
COURT OF APPEALS DIVISION II
950 BROADWAY STE 300
TACOMA WA 98402-4454

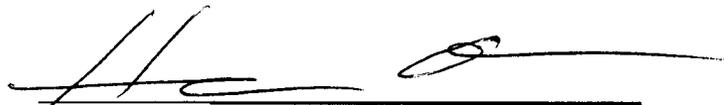
I further certify that on the date identified below, I mailed one copy of the foregoing BRIEF OF RESPONDENT, via U.S. mail, postage prepaid, to counsel for all parties, as identified below:

JOHN S KARPINSKI
LAW OFFICES OF JOHN S KARPINSKI
2612 E 20TH STREET
VANCOUVER WA 98661

STEVE C MORASCH
SCHWABE WILLIAMSON & WYATT
700 WASHINGTON STREET STE 701
VANCOUVER WA 98660

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct to the best of my knowledge.

EXECUTED this 5TH day of MAY 2010, in Vancouver, WA.



Heidi Ondler, Legal Secretary II
For Linda A, Marousek, WSBA #12045
City of Vancouver, Washington