

Court of Appeals No. 41992-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MIKE & SUSAN SHAW and GEORGE & PATRICIA LANE,

*Respondents,*

vs.

CLALLAM COUNTY and UPPER ELWHA RIVER  
CONSERVATION COMMITTEE

*Petitioners.*

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**OPENING BRIEF OF PETITIONER CLALLAM COUNTY**

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- A. Illustrative Exhibit: CCC 27.12.050, -.410, -.900; RCW 36.70A
- B. Clallam County Code (CCC) 27.12.410
- C. Clallam County Resolution 79, 2009 (09/22/09)
- D. Clallam County Resolution 55, 2010 (06/15/10)
- E. Clallam County Hearing Examiner Decision (06/17/09)

## I. INTRODUCTION

Petitioners to this appeal are Clallam County (County) and the Upper Elwha River Conservation Committee (Upper Elwha). Clallam County issued a pre-permit, mapping designation opinion under the erosion hazard language of its Growth Management Act (GMA) critical areas ordinance regulations, which was then appealed by Respondent-mine owners. Upper Elwha, a Washington non-profit comprised of members with standing, was an appellate-intervenor.

This is a pre-project (pre-application), critical areas designation appeal which centers on a portion of County's critical areas code, CCC 27.12.410(1)(b)(iii) (erosion hazards) and solely on the phrase "composed of consolidated rock" as applied to erosions hazards on slopes of 40 % or greater at a proposed rock quarry site. 40% slopes wholly 'composed of consolidated rock' are exempt from critical areas designation under Code. Uniquely in Clallam County, the Department of Community Development has an elected Director under the County Charter, who serves (or appoints her 'designee' to serve) as the "Administrator" under the County Code sections discussed herein.<sup>1</sup>

Both the County Hearings Examiner and the Board of County Commissioners upheld the Director's (Administrator's) plain reading, dictionary interpretation of the phrase in applying the erosion hazard regulations. However, the superior court, having found a plain reading of

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<sup>1</sup> Clallam County Charter, Article IV p. 8.

the phrase “composed of consolidated rock” as scientifically unsound, ordered the County’s planning department on remand to adopt a ‘best available science’ re-examination of erosion hazards, based upon presentations by the parties’ experts, and recommend a new definition for erosions hazards under its critical areas code. The superior court would then review and decide this scientifically-sound, amendment to County’s critical areas regulations.

As previously discussed in the County’s *Motion for RAP 17.4(b) Emergency Stay* and in its request for discretionary review, this ‘new’ definition of “composed of consolidated rock” would arbitrarily affect other sections of the erosion hazard code in CCC 27.12.410(1)(b)(iv) and the landslide hazard code in CCC 27.12.410 (1)(a), sections (iv), (v) & (vi)—all which utilize the same phrase. In addition, such adoption(s) become immediately applicable countywide to any property owner or to any party abutting an affected owner with erosion hazards or landslides.

As further discussed in said *Motion*, this arbitrary and *ultra vires* implementation of the County’s police power authority by superior court, forcing administrative and court-approved amendments to County planning and development regulations, invites administrative due process challenges and lawsuits by other, affected landowners, and challenge from the Growth Management Hearings Board (Growth Board) for non-legislative, non-public amendments of the County’s GMA laws.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. Superior court erred in its Order that “composed of consolidated rock” is vague, unscientific and therefore void, and requires re-definition.

2. Superior court erred in its Order that “composed of consolidated rock” is vague, unscientific and therefore void, and requires re-definition because it is not based on best available science.

3. Superior court erred in its Order that “composed of consolidated rock” is vague, unscientific and therefore void and this can be remanded for re-definition and amendment by the Administrator and then be argued before superior court by the parties to this LUPA.

4. Superior court erred in its Order that “composed of consolidated rock” is vague, unscientific and therefore void and the court could retain jurisdiction under LUPA and that the court would make the final decisions as to best available science and a new definition.

5. Superior court erred its Order that upon its finding “composed of consolidated rock” is vague, unscientific and therefore void, the court did not also dismiss the RCW 36.70C.130(1)(f) challenges which are based upon prior applications of “composed of consolidated rock”.

6. Superior court erred its Order, since regardless of whether or not it found “composed of consolidated rock” was vague, unscientific and therefore void, the court should have dismissed the RCW 36.70C.130(1)(f) challenges relying on prior quarry approvals by County.

**B. Issues Pertaining to Assignments of Error**

1. Is the phrase “composed of consolidated rock”, when reviewed *de novo* as an issue of law, reasonably understandable to a person of common intelligence for purposes of its plain meaning in evaluating erosion hazards associated with soils on the 40 percent slopes of a proposed rock quarry? (Assignments of Error 1, 2, 3 and 4).

2. Is the pending challenge and review of the phrase “composed of consolidated rock” a belated, collateral attack of valid GMA regulations, and the proposed remand and retention of jurisdiction by the superior court beyond the appellate authority of the court under LUPA? (Assignments of Error 1, 2, 3 and 4).

3. Should the RCW 36.70C.130(1)(f) challenges, which rely on examples of quarries previously approved by County, have been dismissed regardless of whether or not there was an appeal of the phrase “composed of consolidated rock”? (Assignments of Error 5 and 6).

**III. STATEMENT OF CASE**

This matter originates from two, consolidated LUPA cases<sup>2</sup> which, in turn, factually originated from a single ‘open record’, land use hearing before a County Hearings Examiner (Examiner) and a ‘closed record’ local appeal to the County Board of Commissioners (Board), who rendered the final, local decision on appeal to this Court.

Respondents Shaw and Lane (collectively as Shaw) had appealed a

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<sup>2</sup> Consolidated Clallam County Superior Court Nos. 09-2-01106-3 and 10-2-00704-3.

pre-permit, critical areas review of a quarry claiming the County's GMA critical area regulations needed to utilize "best available science" when applied, and thereby exempt the sloped lands at Shaw's quarry from erosion hazard regulation.<sup>3</sup> That appeal was morphed by superior court into a remand to the Department of Community Development (Department) for administrative amendment of the phrase "composed of consolidated rock" under Clallam County Code (CCC), to wit:<sup>4</sup>

CCC 27.12.410(1)(b) Erosion Hazard Areas. . . .

(iii) Any slope forty (40) percent or steeper with a vertical relief of ten (10) or more feet, except areas *composed of consolidated rock*. [*Emphasis added*]

As addressed below, this case has followed a meandering and uncertain procedural course through superior court, in what should have been a Land Use Petition Act (LUPA) proceeding "that value[d] efficiency, certainty, and notice." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 420, 120 P.3d 56 (2005)(J. Chambers/J. Owens, concurring).

### **1. Adoption of Critical Areas Code**

County's critical areas regulations, the erosion hazard areas section therein, and the specific phrase "composed of consolidated rock", though legislatively adopted many years ago, were the subject of an express, mandatory review in 2007 pursuant to GMA and RCW 36.70A.130(1)(c).<sup>5</sup>

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<sup>3</sup> See, *infra*, **2009 LUPA and 2010 LUPA filings**.

<sup>4</sup> CP 126, pt. 1, *Memorandum Opinion* (03/04/11); CP 119, pt. 1, *Supplemental Memorandum Opinion* (03/19/11); CP 115, pt. 1 (03/29/11) *Order of Remand*; See, also, *Illustrative Exhibit*, based on previous presentations to this Court at oral argument, at Appendix A; and see Clallam County Code 27.12.410 (attached hereto as Appendix B)

<sup>5</sup> See discussion in *Clallam County v. Dry Creek Coalition, et al.*, (Dry Creek), 161 Wn.App. 366, 255 P.3d 709 (Div 2., 2011).

County was required to conduct a very-public reconsideration of its critical areas regulations, including the erosion hazard areas section and “composed of consolidated rock”—all pursuant to “Best Available Science” (BAS) application under the mandates of RCW 36.70A.172(1) (“...counties ... shall include the best available science in developing policies and development regulations to protect . . . critical areas”).<sup>6</sup> A portion of County’s review determination was appealed to the Growth Management Hearings Board (Growth Board) as violating GMA, but not as to the erosion hazard language contested by Shaw and not by Shaw.<sup>7</sup> County’s next periodic review occurs pursuant to RCW 36.70A.130(5)(a).

## **2. Hearings Examiner and Commissioner Appeals**

Shaw’s rock quarry proposal first came before the County in 1998, wherein the County issued a SEPA Declaration of Significance or “DS”, requiring the preparation of a full Environmental Impact Statement or “EIS”.<sup>8</sup> References to this record, as well as other below-cited administrative records are hereinafter noted by their “administrative record” exhibit numbers before the Hearings Examiner as “AR \_\_”, which record was transmitted to this Court. After proceeding with an EIS study through their engineering experts, Shaw withdrew their mining permit application in March of 2001.<sup>9</sup> Shaw then applied to the Washington

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<sup>6</sup> See discussion in *Dry Creek Coalition and Futurewise v. Clallam County*, WWGMHB Case no. 07-2-0018c, Final Decision and Order, (April 23, 2008).

<sup>7</sup> *Id.*

<sup>8</sup> AR 10: letter of Toby Thaler for Lower Elwha to County Administrator (05/20/09).

<sup>9</sup> *Id.*

Department of Natural Resources (“DNR”) for a forest practices act (“FPA”) permit for construction of a haul road and exploratory mining, whereupon Upper Elwha appealed.<sup>10</sup> Shaw voluntarily withdrew the FPA application in February of 2008, while an appeal was pending.<sup>11</sup>

Shaw then re-submitted the quarry proposal to the County for permitting in November of 2008, which review necessitated a critical areas evaluation. *See*, attached Hearing Examiner decision, Appendix “E”. Shaw and consultants worked and met with County staff on the proposal for the remainder of 2008 and into the spring of 2009.<sup>12</sup>

On March 30, 2009, the Planning Manager (designee for the Director), issued a determination that although Shaw’s site was not a “landslide hazard” area under County critical areas designations and CCC 27.12.050 and -.410(1)(a), the site was an “erosion hazard” area pursuant to CCC 27.12.050 and -.410(1)(b).<sup>13</sup> Further, the Administrator found:

. . . [Shaw has] not satisfactorily demonstrated to the Administrator that all portions of the study site do not meet the designation of criteria of erosion hazard pursuant to C.C.C. 27.12.410(1)(b).<sup>14</sup>

On May 27, 2009, Shaw appealed the Hearings Examiner for “reversal of the Administrator’s decision designating the 40 acre parcel referred to as the Little River Quarry as an erosion hazard area pursuant to C.C.C. 27.12.410(1)(b)(iii) of the Clallam County Critical Areas Ordinance”.<sup>15</sup>

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<sup>10</sup> *Id.*; FPAB (Forest Practice Appeals Board) No. 07-005

<sup>11</sup> AR 21, pg 3: letter of Shaw & Lane to DNR (02/12/08).

<sup>12</sup> AR 7-15: correspondence and consultant studies

<sup>13</sup> AR 5: critical area determination under CRI 2008-165 (03/30/09)

<sup>14</sup> *Id.* p. 4.

<sup>15</sup> AR Ex. 39, p. 1, *Findings of Fact, Conclusions of Law and Decision*, Hearings Examiner (06/17/09), attached hereto as Appendix E.

Following an open hearing and argument on interpreting and applying the exemption-phrase “composed of consolidated rock” in CCC 27.12.410(1)(b), the Hearing Examiner issued her *Decision*, relying in part on CCC 27.12.900, which directs use of common dictionary meanings on undefined terms:<sup>16</sup>

The Clallam County Critical Areas Code states that lands meeting certain classifications **shall** be designated as erosion hazard areas (emphasis added). One of those classifications is ‘any slope 40% or steeper with a vertical relief of ten or more feet except areas composed of consolidated rock’. CCC 27.12.410(1)(b)(iii) The Ordinance’s use of the word “shall” requires that unless the slope is composed of consolidated rock . . .

According to the Oxford American Dictionary, the word ‘composed’ means to ‘to form, to make up’. Here the Critical Areas Ordinance specifically states ‘except areas composed of consolidated rock’. It does not say ‘except areas composed of consolidated rock and shallow soils’. Accordingly, as stated by the County, the erosion hazard classification addressing slopes greater than 40 percent provides no exemption for areas of consolidated rock with shallow soils at the surface. . . .

With regard to the County’s interpretation of the ordinance finding that there is no exemption for shallow soil at the surface, the appellants have not met their burden. The ordinance is clear, there is no exemption for areas composed of rock covered by shallow soil.

Shaw, however, filed a Request for Reconsideration, re-arguing that shallow soils overlying rock are an acceptable ‘scientific’ exemption erosion hazards within the phrase “composed of consolidated rock”, relying on opinions of Shaw’s experts.<sup>17</sup> The Hearing Examiner on August 18, 2009, denied reconsideration, noting that even if the Examiner

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<sup>16</sup> *Id.* pp. 6-7

<sup>17</sup> AR Ex. 42.

considered Shaw's 'science' as qualifying the plain meaning of "composed of consolidated rock", the Examiner remained unconvinced on the challenge of erosion hazards regulation for this quarry:<sup>18</sup>

At the time of the initial decision, the pro tem hearing examiner reviewed the definitions provided, and did so again for purposes of this request to reconsider. A review of the definitions reveals that there is nothing to indicate that the term "consolidated rock" includes surface soils. In the documentation provided by Mr. Shaw and Mr. Lane, "consolidated rock: is described as "the compact or solid hard rock beneath or exposed at the surface of the earth or overlain by surface waters". In a glossary provided by Mr. Shaw and Mr. Lane, the term "bedrock" (highlighted by Mr. Shaw and Mr. Lane), is listed as the "general term for consolidated (solid) rock that underlies soils or other unconsolidated material."

Based on the documentation provided, it appears that when there is both consolidated and unconsolidated material, "consolidated rock" refers only to the solid rock below the unconsolidated material.

Having failed to convince the Administrator or Hearings Examiner that County failed to apply "Best Available Science" (BAS) in crafting CCC 27.12.410, Shaw appealed to the Board of Commissioners (Board) to overturn (in closed record proceedings) the prior decisions on "consolidated rock".<sup>19</sup> Specifically, Shaw argued to the Board:<sup>20</sup>

**Point Number 1:** The classification standard used by *[the Department]* to designate the *[Little River Quarry]* as an Erosion Hazard area, CCC 27.12.410(1)(b)(iii), is, verbatim, the standard proposed by the Legislature and CTED as a Landslide Hazard classification. Its appropriateness as an Erosion Hazard standard has not been addressed by *[Department]* in the record.

The county certainly has the right to employ any standard it chooses, so long as it is based on Best Available Science (BAS). The Growth Management Act and the Critical Area Ordinance, 27.12.050, are very explicit that designations of critical areas must

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<sup>18</sup> AR Ex. 43, p. 1

<sup>19</sup> CP 583, Ex. A: *Resolution 55, 2010*, attached hereto as Appendix D

<sup>20</sup> AR Ex. 45

be based on “best available information from qualified professional sources” (Best Available Science) in making an Official Designation of a critical area. No such BAS is included in the record dealing with the appropriateness of 27.12.410(1)(b) iii as an Erosion Hazard standard. *[Department]*’s statement in Conclusion 2, “no overlying soil” is only their interpretation, unsubstantiated in the record by BAS. . .

**Point Number 2:** There is no dispute that some slopes on the site exceed 40%. As issue is the meaning of the phrase “area composed of consolidated rock”. CCC 27.12.410(1)(b)(iii) does not preclude shallow, overlying soils. Three independent, professional application of this phrase are included in the supplemental exhibits provided to the Hearing Examiner but the Examiner only considered the definition of “consolidated rock” without considering the context in which it was used. It must be remembered that this standard was drafted as a Landslide hazard designation. The qualified professional opinions we submitted make it very clear that the phrase “areas composed of consolidated rock” does not preclude the presence of overlying shallow soils.

We contend that *[Department]* is not qualified to dispute the formal opinions and interpretations of qualified professionals. If *[Department]* was qualified there would be little need for qualified professional opinions and evaluations as mandated by GMA.

The failure to apply Best Available Science is perhaps the most frequent theme of cases brought before the Growth Management Hearings Boards. Dozens of BAS citations are included in our record. . . . We submit that, in addition to Points 1 and 2 above, the standard “to the satisfaction of the administrator is a vague, unenforceable and “ad hoc” standard . . . Similar wording has been found non-compliant with GMA by the Growth Management Hearings Boards.

At hearing, the Board dismissed the appeal for failing to state any bases for relief on appeal, finding that: <sup>21</sup>

The [Board] is without jurisdiction and the appellants have failed to state a basis for relief to apply current GMA laws and Growth Management Hearings Board rulings on “Best Available Science” to erosion hazard areas under CCC 27.12.410(1)(b)(iii), as such authority resides with the state Growth Management Hearings Boards under Ch. 36.70A RCW.

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<sup>21</sup> See FNs 19-20, *supra*, and Appx. D

The Board of Commissioners is without jurisdiction and the appellants have failed to state a basis for relief to require the Department to supplement the undefined terms of “consolidated rock” under CCC 27.12.410(1)(b)(iii) with the meaning and definition supplied by appellants’ “qualified professional opinions”, and by appellants’ assertions of GMA laws and Growth Board rulings on “Best Available Science”— rather than applying the plain, dictionary meanings provided and intended under the original Ordinance.

The Board of Commissioners is without jurisdiction and the appellants have failed to state a basis for relief to require the Department to alter the County’s ‘classification and designation’ criteria for this critical areas site under CCC 27.12.410, adopted pursuant to the Growth Management Act and subject to timely Growth Board review under Ch. 36.70A RCW, and is without jurisdiction to require County’s “Administrator” under CCC 27.12.050 to depart from those classification and designation criteria, and instead utilize the “qualified professional opinions” submitted by appellants and recent “Best Available Science” rulings in evaluating this critical areas site.

As discussed below, the 2009 decision was appealed to the superior court, which reversed the dismissal and remanded the matter for full hearing.

At the post-remand, closed record hearing, the Board upheld the findings and rulings of both Hearings Examiner and Administrator that the land use decision “...is not an erroneous interpretation of the law [*and*] ...is not a clearly erroneous application of the law to the facts.”<sup>22</sup> The Board further ruled that “[t]he determination and decision of the Hearing Examiner and supporting findings and conclusion are affirmed.”<sup>23</sup>

### **3. 2009 LUPA and 2010 LUPA Hearings.**

As discussed above, the Board dismissed Shaw’s first in-county appeal on jurisdictional bases, for failure to raise an appealable issue—where

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<sup>22</sup> CP 740, Ex. A: *Resolution 79, 2009*, attached hereto in Appendix C

<sup>23</sup> *Id.*

Shaw argued site-specific “best available science” (“BAS”) controlled application of the erosion hazard regulations to the quarry—as an untimely, collateral challenge under the GMA and RCW 36.70A.290(2).<sup>24</sup>

During the 2009 LUPA, the superior court not only reversed dismissal, it denied County’s motion to dismiss for failure to raise an appealable issue.<sup>25</sup> The court also declined to rule (pre-remand) on Shaw’s “as applied”<sup>26</sup> constitutional challenges on applications of “composed of consolidated rock” to other quarries:

MR. FREEDMAN: . . . As it relates to the constitutional issues and the application of it, I think this Court would be totally justified in directing or at least giving guidance to the commissioners saying look, you can’t give yourself something that you are not willing to give to other people in the community. You can’t deny equal protection, and in this case where you have granted 3 permits with identical slopes and so forth on the properties, you can’t turn around –

THE COURT: Of course the commissioner (*sic*) never really dealt with that. . . .<sup>27</sup>

The court remanded back to the County to decide the appeal<sup>28</sup> – which decision triggered the second LUPA.<sup>29</sup> Over County’s objections<sup>30</sup>, the superior court then consolidated the 2009 and 2010 LUPAs.<sup>31</sup>

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<sup>24</sup> CP 563, pt. 1; see FN 12, *supra*.

<sup>25</sup> CP 628

<sup>26</sup> See, e.g., *Young v. Pierce County*, 120 Wn.App. 175, 84 P.3d 927 (2004)(denying LUPA appeal of ‘as applied’ challenge of landowner to county critical area regulations as unconstitutionally ‘vague’); and see RCW 34.05.570: (3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an 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** [emphasis added].

<sup>27</sup> CP 556, pp. 3-4 (Transcript of Proceedings (01/08/10))

<sup>28</sup> See FNs 19-20, *supra*, and Appx. D

<sup>29</sup> CP 58, pt. 1

<sup>30</sup> CP 576

<sup>31</sup> CP 595

a. **Bifurcation and dismissal motions.** In the 2010-LUPA, County again sought dismissal for failure to raise appealable issues,<sup>32</sup> and moved to bifurcate Shaw’s “as applied” constitutional challenge from the challenge of “composed of consolidated rock”.<sup>33</sup> As noted above, Shaw’s RCW 36.70C.130(1)(f), constitutional appeal was based upon claims that prior quarries with slopes had been allowed without erosion hazard conditions.<sup>34</sup> Although presented with conflicting positions from Shaw’s respective counsels on dismissal and mootness, superior court ultimately deferred decisions on both County’s dismissal and mootness arguments:<sup>35</sup>

THE COURT: All right, the next issue then would be discovery and since it’s going to take so long to do this if the Court makes a – you know, I don’t know if the Court will even make a ruling on the 26<sup>th</sup>. You know, I may take in under advisement so it could be into February or March before the Court makes a ruling. So, then if the Court upholds the County then you won’t need to get into the ...

MR. MILLER: No, then we would need to.

THE COURT: Then you would need to get into it?

MR. MILLER: Correct. If the Court reverses the County then we would not need to reach the Constitutional issues, because you would have ...

MR. FREEDMAN: Well, I don’t agree with that.

MR. MILLER: Oh, okay.

MR. FREEDMAN: . . . If it was shown that others have [*sic*] done differently than this was done, that Equal Protection was denied and that it should have been granted to be treated the same as the others, it could be...dispositive which is why I’m anxious to keep that on track.

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<sup>32</sup> CP 563

<sup>33</sup> CP 556

<sup>34</sup> *Id.*

<sup>35</sup> CP 47 *Clallam County’s Memo in Support*, at 48-49 and Ex. 1 (Transcript of Proceedings, 11/05/11 pp 4-5).

THE COURT: Okay.

THE COURT: Well, I don't find any real prejudice to any party by allowing you to go ahead with your discovery, since it's only going to be depositions at this point. I am going to grant the State's [*sic*] motion obviously and bifurcate the two issues . . .

**b. LUPA hearing.** In the 2010 LUPA case, Shaw continued to argue “Best Available Science” or BAS as justification to re-write and re-interpret the provisions County’s erosion hazard regulations—which triggered the following prompting from the bench at hearing:<sup>36</sup>

MR. MILLER (counsel for Shaw): I think, Your Honor, that I’m going to stop at that point and --

THE COURT: Well, let me ask you one more question here.

MR. MILLER: Of course.

THE COURT: You raised the issue of consolidated rock under the classification under [Clallam County Code (CCC) 27.12.410(b)(3)] that says except areas of consolidated rock, and that seemed to be a big issue with regard to the hearings examiner at as to what that means and she asked for definitions and we get Webster’s dictionary [*sic*] and so forth. And I want to hear what you have to say about that particular phrase.

MR. MILLER: Okay, I have a couple of things to say about that. Number 1, Your Honor, consolidated rock is an alternative argument. Our primary argument is that it needs to be interpreted under [CCC 27.12.050 (“best available information”)<sup>37</sup>]. Our alternative argument would be that there was an improper definition of consolidated rock. . . .

Shaw had argued that its expert opinions to allow some soils on slopes

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<sup>36</sup> RP (01/26/10) pp. 24-26.

<sup>37</sup> See AR Appendix A, Illustrative Exhibit:

**Clallam County Code 27.12.050 Official designation of critical areas.**

The location and extent of critical areas shall be designated by Clallam County based upon best available information from qualified professional sources. Clallam County shall develop, and make available to the public, maps or other data bases, as appropriate, which show the location, extent, and classification of regulated critical areas as accurately as feasible. This information shall be advisory and used by the Administrator in determining the applicability of the standards of this chapter to a particular location or development proposal site.

under BAS presented to the Hearings Examiner should be deemed as controlling in requiring the “composed of consolidated rock” exemption for the quarry, in lieu of rules of construction and plain reading:<sup>38</sup>

One should also look at not just the definitional (sic) -- dictionary definitions because I would submit that the dictionary definitions aren't particularly helpful. You need to look at the fact that there were comments in the expert reports which talked about what constituted consolidated rock. The dictionary definition, Webster's 12<sup>th</sup>, doesn't help us at all. ...

I think the remedy, Your Honor, would be that you would look at the expert opinions given to you under 050 or that the administrator should have looked at those expert opinions as to what consolidated rock – you'll find that they say consolidated rock except over-lain by very shallow soils, and they still talk about it being consolidated rock.

After the LUPA hearing, the superior court issued its *Memorandum Opinion*.<sup>39</sup> County and Lower Elwha then filed the written objections to the *Opinion* and Shaw's proposed *Order* of remand as exceeding the scope of LUPA, appellate authority, thus portending the motion for discretionary review and appeal.<sup>40</sup> The superior court then issued what it monikered as a “*Supplemental Memorandum Opinion*”<sup>41</sup>, which amended earlier findings and conclusions—though did not address the objections—and issued its *Order of Remand*.<sup>42</sup>

Neither the *Opinion* nor the *Supplemental...Opinion* addressed County's dismissal filings or that reversing the County would moot Shaw's constitutional “as applied”, LUPA claims—being ‘equally’ flawed

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<sup>38</sup> FN 36, *supra*, pp 14-15.

<sup>39</sup> CP 126

<sup>40</sup> CP 123

<sup>41</sup> CP 119

<sup>42</sup> CP 115

with earlier quarry decisions—and regardless, prior errors in permitting are not controlling.<sup>43</sup> The County expressly requested a decision at hearing:<sup>44</sup>

MR. JENSEN: Thank you, Your Honor. Couple of housekeeping measures; Court said it would also roll into its opinion the County's motion to dismiss—just wanted to remind the Court of that.

In its *Memorandum*, the court (in apparent confusion) did exhume County's challenge of 2009 and 2010 LUPAs consolidation, declaring (erroneously) it could not “reconsider” the decision of “Court Commissioner Skelec” who “upheld” the court's “prior ruling”— the Commissioner ruling of an insufficient showing of probable prejudice under RAP 2.3(b) to warrant a pre-decision review of consolidation.<sup>45</sup>

County then filed a *Motion to Modify*, once again asking superior court to decide whether remand for re-definition of County's “composed of consolidated rock” provisions mooted Shaw's ‘same-as’ LUPA constitutional issue.<sup>46</sup> The *Motion* was summarily denied.<sup>47</sup>

### **3. Order of Remand and Appeal.**

The *Order of Remand Regarding Land Use Petition* overturned the County's final decision on a pre-project, critical areas determination for this rock quarry. The superior court ruled that the phrase “composed of consolidated rock” under the slope exemptions of CCC 27.12.410 (erosion

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<sup>43</sup> CP 75 (04/29/11).

<sup>44</sup> RP (01/26/11) p. 28

<sup>45</sup> CP126, p.9

<sup>46</sup> CP 106 & attached Exhibit 1 (Transcript of Proceedings, 11/05/11), pp. 4-5, 14-15; and Exhibit 2 (Transcript of Proceedings, 03/25/11) pp. 19-20, thereto.

<sup>47</sup> CP 35

hazard) was ill-defined in County Code. The court determined it was:<sup>48</sup>

. . . incumbent upon the Administrator to apply a meaning based upon the definition commonly used by qualified professionals in the field . . . [and that the] Administrator must define the phrase . . . in consulting with qualified professionals and qualified sources . . . [including those] provided by the parties hereto and to allow meaningful input by the parties as to the definition of the phrase.

The court ruled this new “definition” for erosion hazard exemptions under CCC 27.12.410 would then be submitted to the superior court, which would decide “whether or not the definition is substantially supported by the scientific community”.<sup>49</sup> In adopting a new definition, the Department was directed to develop *ad hoc* rulemaking, or to:<sup>50</sup>

. . . employ whatever procedures he [(sic) ‘she ’] believes appropriate” to review the best available science on erosion hazards, except that the parties to this lawsuit must specially be afforded “meaningful input into the formulation of a definition.

Finally, adoption must “be accomplished within 90 days” of the *Order*.<sup>51</sup>

There is a definitions section in CCC 27.12.900, first adopted in Clallam County Ordinance No. 471, (1992), which will be amended by the superior court’s directives to adopt a new code definitions.<sup>52</sup> As noted by the Director and the Hearings Examiner, CCC 27.12.900 requires (except for the words and the phrases expressly defined therein) that “[a]ll other words in this chapter shall carry the meanings as specified in the latest edition of Webster’s New Collegiate Dictionary.”<sup>53</sup>

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<sup>48</sup> CP 115 pp. 2-4

<sup>49</sup> CP119 pp. 3-4

<sup>50</sup> *Id.*, p. 3

<sup>51</sup> *Id.*

<sup>52</sup> Discussed in *Motion for RAP 17.4(b) Emergency Stay*

<sup>53</sup> *See also*, Appendix A, *Illustrative Exhibit*

County and Lower Elwha objected, arguing the *Order* for review and amendment of the erosion hazard exemption for sloped lands was a belated and collateral GMA challenge, beyond the purview of superior court and its LUPA authority. Specifically, County argued its critical areas regulations, and the erosion hazard areas provisions, and the specific phrase “composed of consolidated rock” were publicly vetted and legislatively adopted many years ago—and had been specifically and publicly re-reviewed in 2007 under GMA and RCW 36.70A.130(1)(c), rendering this phrase compliant for purposes of both GMA and BAS.<sup>54</sup>

On May 9, 2011, the Court Commissioner ruled that the superior court’s rulings were appealable. On June 9, 2011, the superior court signed an *Order* granting Petitioners’ motion to stay the superior court remand.<sup>55</sup> However, the appeal was reconstituted as discretionary review under RAP 2.3(b), and the superior court vacated its stay on August 16, 2011. This prompted the County to petition this Court for an emergency stay of the superior court vacating its stay on remand—which was granted on September 13, 2011. Shaw’s motion to overturn the emergency stay was denied on October 11, 2011. On October 28, 2011, having “[concluded] that the County has shown probable error that substantially alters the status quo” Court Commissioner Schmidt granted discretionary review of the superior court decisions and this LUPA appeal.<sup>56</sup>

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<sup>54</sup> See, pp. 5-6 and FNs 5-7, *supra*.

<sup>55</sup> CP 11

<sup>56</sup> *Ruling Granting Review*, p. 1 (10/28/11)

## IV. ARGUMENT

### A. Standard of Review.

1. LUPA Review. LUPA governs judicial review of Washington “land use decisions”, as defined in RCW 36.70C.020(2). *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). Appellate courts review questions of law *de novo* to determine whether the facts and law supported a land use decision. *HJS Dev.*, 148 Wn.2d at 468; *Satsop Valley Homeowners Ass'n, Inc. v. Nw. Rock, Inc.*, 126 Wn.App. 536, 541, 108 P.3d 1247 (2005) (on review of a superior court's land use decision, Court of Appeals stands in the shoes of superior court and reviews the administrative decision on the record before the administrative tribunal, not the superior court record, reviewing the record and the questions of law *de novo* to determine whether facts and law support the decision). When conducting further LUPA review, appellate courts grant no deference to findings of the superior courts. *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 54–55, 196 P.3d 141 (2008).

The superior court partially ruled on Shaw’s Petition allegations under RCW 36.70C.130, focusing apparently on: (b) (“[t]he land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise”) and (d) (“[t]he land use decision is a clearly erroneous application of the law to the facts”).<sup>57</sup>

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<sup>57</sup> CP 583, pp. 2-5 (07/01/10); CP 740, pp. 3-6 (10/12/09)

Shaw's challenges under standard (b) presents questions of law to be reviewed *de novo* by the Court of Appeals, after giving deference to the County's interpretation and application of its local regulations. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc's.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004) (citing *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002)); see also *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wn.App. 756, 768, 129 P.3d 300 (2006) (citing *HJS Dev., Inc.*, 148 Wn.2d at 468)).

Shaw's challenges under standard (d)'s "clearly erroneous application" requires application of local land use law to the facts, where the land use decision can be overturned only with a "definite and firm conviction" that the decision maker committed a mistake. *Citizens to Pres. Pioneer Park, L.L.C. v. City of Mercer Island*, 106 Wn.App. 461, 473, 24 P.3d 1079 (2001) (citing *Schofield v. Spokane County*, 96 Wn.App. 581, 586, 980 P.2d 277 (1999)).

On appeal, the party who filed the LUPA petition bears the burden of establishing one of the errors set forth in RCW 36.70C.130(1). *Tahoma Audubon Soc'y v. Park Junction Partners*, 128 Wn.App. 671, 681, 116 P.3d 1046 (2005) (citing *Pinecrest*, 151 Wn.2d at 288).

2. Regulatory Interpretation. Under LUPA, the appellate court has the final word on regulatory interpretation. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003). The aim of regulatory interpretation is to discern and implement the intent of the legislative body which created the

regulations. *Id.*, at 450; *DOE v. Campbell & Gwinn, LLC.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). A reviewing “court is required, whenever possible, to give effect to every word in the statute.” *Dennis v. Dept. L&I.*, 109 Wn.2d 467, 479, 745 P.2d 1295 (1987). Where the language of the statute is “plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent”. *Campbell*, 146 Wn.2d at 9-10.

Under LUPA, the appellate courts shall grant such deference as is due the construction of a law by a local jurisdiction with expertise, “so long as that interpretation is not contrary to the statute's **plain language**” (*emphasis added*). *Sylvester v. Pierce County*, 148 Wn.App. 813, 823, 201 P.3d 381 (Div. 2, 2009) (citing RCW 36.70C.130(1)(b) and *Port of Seattle v. Pollution Control Hrgs Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004)). Ultimately, the aim of regulatory interpretation under LUPA is to effectuate the local legislative intent. *Bosteder v. City of Renton*, 155 Wn.2d 18, 42, 117 P.3d 316 (2005). To help discern such intent, the appellate court begins by looking at the plain language and ordinary meaning of the text, but then considers the legislative enactment and process as a whole. *Id.*; *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238–39, 110 P.3d 1132 (2005).

3. LUPA vs. GMA Appeals. Growth management hearings boards have exclusive jurisdiction to determine compliance with the GMA. *Woods*, 162 Wn.2d at 614-15. Failure to exhaust administrative remedies by timely filing a challenge of development regulations to the

Growth Board is a question of law. *Woods*, 162 Wn.2d at 607-08. A party fails to exhaust its remedies under GMA by failing to timely appeal development regulations within (60) days of the adoption or amendment by the local jurisdiction. RCW 36.70A.290(2); *Peste v. Mason County*, 133 Wn.App. 456, 136 P.3d 140 (Div. 2, 2006), *rev. den.* 159 Wn.2d 1013 (2007). A party may not file under LUPA to collaterally attack development regulations, having failed to timely appeal under GMA and thereby also having waived the right to challenge under GMA standards. *Peste*, 133 Wn.App at 467-469.

**B. The phrase “composed of consolidated rock is reasonably understandable to a person of common intelligence for purposes of its plain meaning in evaluating erosion hazards associated with soils on the 40 percent slopes of a proposed rock quarry.”**

During the critical areas designation challenge on Shaw’s quarry, Department staff and Hearings Examiner considered Shaw’s expert presentations, but expressly rejected Shaw’s arguments to expand the “composed of consolidated rock” exemption to erosion hazards to allow for soils on 40% or greater slopes. In fact, during the course of Examiner and court proceedings, the County repeatedly sought to overcome Shaw’s blurring of facts and legal argument as between LUPA and GMA for purposes of “best available science” (BAS), and application of existing development regulations to erosion hazards at Shaw’s quarry.

For more than twenty (20) years, the GMA has mandated and county legislative bodies have adopted (as opposed to administrator rule-making) the “classification and designation” regulation of critical areas. RCW

36.70A.170. See, e.g., *Pilchuck, et al., v. Shohomish County*, CPSGMHB

No. 95-3-0047 (FDO, Dec. 6, 1995):

The [Growth] Board's evaluation of what lands are required to be designated and protected must begin with the definitions of "designate" and "protect." Neither of these words is defined in the Act. The Board has previously addressed the meaning of the word "designate." The Board held that:

**When a statute does not define a material term, the word should be given its ordinary meaning. In ascertaining common meaning, resort to dictionaries is acceptable.** *TLR, Inc. v. Town of La Center*, 68 Wn.App. 29, 33, 841 P.2d 1276 (1992). To "designate" means:

To indicate, select, appoint, nominate, or set apart for a purpose or duty, as to designate an officer for a command. To mark out and make known; to point out; to name; indicate. *Black's Law Dictionary* 402 (5th ed. 1979).

In recognition of these common concerns, **classification and designation of natural resource lands and critical areas** is intended to assure the long-term conservation of natural resource lands and to preclude land uses and developments which are incompatible with critical areas.... [Citation omitted, emphasis added]

And see, *Victor & Roberta Moore v. Whitman County*, EWGMHB No. 95-1-0002, (FDO, Aug. 16, 1995):

**Pursuant to RCW 36.70A.170, critical areas are to be designated based upon the County's defined classification.** Designation establishes the planning purposes...the classification scheme; the general distribution, location, and extent of the critical areas. **Inventories and maps can indicate designations of critical areas. In the circumstances where critical areas cannot be readily identified, these areas should be designated by performance standards or definitions, so they can be specifically identified during the processing of a permit or development authorization.** WAC 365-190-040(1). [Emphasis added]

As is clear from these Growth Board discussions, counties must first, legislatively adopt designation and classification regulations, and then apply designation and classification criteria to specific critical areas determinations. Staff discretion in re-evaluating critical areas designation

is limited to those areas where lands were either erroneously omitted or included during mapping—discretion does not extend to amendment or variance from these regulations. There is no authority to administratively supplement or restrict critical area standards for a particular site.

County adopted critical area criteria within the overall statutory framework of Ch. 27.12 CCC, and specifically as to CCC 27.12.050—which allows discretion by the Administrator to consider “best available *information*” in delineating a particular critical area site. CCC 27.12.050 specifies that critical area maps generated by the County may only generally identify critical area locations and are advisory. The Administrator may require additional information prepared by qualified professionals to determine the exact location and scope of critical areas. CCC 27.12.050 authorizes the Administration to seek “best available *information*” from qualified professionals to assist on evaluating a particular site, utilizing County-created classification and designation criteria. If this information establishes a particular area does not qualify under County’s critical area criteria, CCC 27.12.050 allows Administrator to exclude or include areas in previously identified critical areas.

CCC 27.12.050 nor GMA grants authority for the Administrator to ignore critical areas classification and designation. This limitation is acknowledged within the ‘catch-all’ provisions of CCC 27.12.050:

**Any land, water, or vegetation that meets the criteria of critical area designation under this chapter which is not identified on maps or other publically available documents shall be subject to the provisions of this chapter [emphasis added].**

In other words, areas that qualify under adopted classification and designation criteria *are* critical areas, whether or not so mapped.

Consequently, the Administrator possesses fine-tuning authority under CCC 27.12.050, applying “best available **information**” [*emphasis added*], to County’s ‘classification and designation’ erosion hazard criteria in CCC 27.12.410—but no authority to tailor critical area classification and designation decisions using “best available **science**” supplied by experts hired by the landowner for a single, site-specific designation.

As noted above, statutory construction review under LUPA requires both that the reviewing court recognize the entire statutory scheme and the local regulations together when reviewing legislative construction, giving due deference to the construction of local laws by the local jurisdiction. Further, appellate court should seek to give full effect to the intentions of the legislative body which enacted the statute or ordinance. *Grant v. Spellman*, 99 Wn.2d 815, 818, 664 P.2d 1227 (1983); *TLR, Inc., supra* at 33. Unless the ordinance is ambiguous, its meaning must be derived from its wording and judicial construction is unnecessary. *ITT Rayonier, Inc. v. Dalman*, 67 Wn.App. 504, 509, 837 P.2d 647 (1992), *aff’d*, 122 Wn.2d 801 (1993) (citing *Crown Cascade, Inc. v. O’Neal*, 100 Wn.2d 256, 262, 668 P.2d 585 (1983)).

Both County staff and Hearings Examiner were able to apply plain, dictionary meanings to the challenged phrase (pursuant to CCC 27.12.900) and designate erosion hazards on Shaw’s quarry. Specifically, the County interpreted its critical areas regulations more narrowly than argued by

Shaw, and did not exempt soil-covered, 40% slopes at the quarry from erosion hazards designation under the phrase “composed of consolidated rock”. As noted above, this phrase was recently the subject of the GMAs mandatory and public ‘re-review’ of local critical areas regulations, and was not challenged by any party—including Shaw.

For a term not expressly defined in legislation, appellate courts refer to a dictionary to give meaning to the word(s). *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 564, 29 P.3d 709 (2001). A regulatory term that is left undefined is to be given its “...usual and ordinary meaning and courts may not read into a statute a meaning that is not there.” *State v. Hahn*, 83 Wn.App. 825, 832, 924 P.2d 392 (1996).

As noted in the attached illustrative exhibit in Appendix A, the phrase “composed of consolidated rock” is part of a statutory scheme for both erosion hazard and landslide hazard critical areas regulations. Related regulations should be considered and harmonized whenever possible. *State v. Walter*, 66 Wn.App. 862, 870, 833 P.2d 440 (1992).

**C. The pending challenge and review of the phrase “composed of consolidated rock” is a belated, collateral attack of valid GMA regulations, and the proposed remand and retention of jurisdiction by the superior court is beyond the appellate authority of the court under LUPA.**

As discussed above, County’s erosion hazard regulations and the specific phrase “composed of consolidated rock” were legislatively adopted years ago, and more recently subject to mandatory re-review under the GMA. A portion of that review was challenged before the

Growth Board, but not as to the sections now contested by Shaw and not by Shaw. *Clallam County v. Dry Creek Coalition, et al. (Dry Creek)*, 161 Wn.App. 366, 255 P.3d 709 (Div 2., 2011). The County’s next legislative review will occur pursuant to RCW 36.70A.130(5)(a).

Despite the comprehensive, statutory overlay of GMA on local legislative and appellate decisions, the superior court nevertheless felt empowered to review, adjudge and order amendment of County’s critical areas regulations under a LUPA proceeding. In crafting its ‘remand’ to the County’s planning “Administrator”, the superior court determined that based upon Shaw’s general portending of harms from any regulatory delays, combined with the language of RCW 36.70.090 on “expedited review of petitions”, that it had “a duty to fashion relief in such a way as to expedite a final resolution.”<sup>58</sup>

The superior court further determined that, in addition to an obligation to provide “timely review”, RCW 36.70C.140 gave the court inherent authority to “make such order as it finds necessary”, and therefore inherent “flexibility to the [court] in fashioning [*its particular form of*] relief upon remand.”<sup>59</sup> The court rebuffed County’s argument as to the remand limitations of a superior court, operating in its appellate capacity, as this would “force [Shaw] to renew again the lengthy administrative process”—and generally being “contrary to the fundamental intent of RCW 36.70C to

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<sup>58</sup> CP 115, p.2

<sup>59</sup> *Id.*

provide a speedy and expedited review of local land use decisions”.<sup>60</sup>

In reviewing the challenged phrase, “composed of consolidated rock”, the superior court expressly rejected any “plain meaning” analyses and consideration of “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole”, opting instead to alchemy a ‘science-based’ process.<sup>61</sup> The superior court ruled that “composed of consolidated rock” could only be given a “meaning that is based upon the definition commonly used by qualified professionals in the field when addressing [*an*] erosion issue.”<sup>62</sup> In justifying its approach, superior court ‘logically’ surmised that since erosion was the ultimate focus of the “composed of consolidated rock” exemption from critical areas how could “property ‘composed of consolidated rock’ [*where the slope is 40% or steeper and*] overlain by a shallow veneer of soil cease to be ‘composed of consolidated rock’ merely because of the soil?”<sup>63</sup>

Of course, County’s planning staff, Hearings Examiner and Board had already answered this court’s *non sequitur* soliloquy in that a plain, dictionary reading of this exemption phrase would mean that “where the slope is 40% or steeper and there is soil on top of it, it would meet the criteria” quarry of a erosion hazard in Clallam County.<sup>64</sup>

The superior court, in remanding the matter, ordered the County to

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<sup>60</sup> *Id.*, pp. 2-3

<sup>61</sup> CP 128, p.5

<sup>62</sup> *Id.* p. 8

<sup>63</sup> *Id.*, p. 7

<sup>64</sup> *Id.*, p. 6

administratively adopt a new “...**definition** of the phrase [*composed of consolidated rock*] ... after consultation with qualified professionals and qualified sources”, by “**whatever procedures ... appropriate**” [*emphasis added*].<sup>65</sup> Thereafter, in ninety (90) days, the new definition would be presented by the Administrator to the superior court, which had retained jurisdiction to decide a definition “substantially supported by the scientific community”.<sup>66</sup>

The remand concocted by superior court would allow only the handful of participants to an adversarial, LUPA appeal to weigh-in on administratively amending County’s critical areas laws. In addition to separation of powers concerns, this approach bludgeoned the local, public participation mandates under GMA and legislated development regulation adoptions. Such public, legislative processes allow the County’s discretion choosing BAS and experts in adopting critical area regulations. There is no mandatory, ‘best’ science which must be adopted by counties under GMA. See, *Swinomish Indian Tribal Community v. Western Washington Growth*, 161 Wn.2d 415, 430, 166 P.3d 1198 (2007):

The legislature has expressly delegated to counties and cities the function of developing the specific means for protecting critical areas. See RCW 36.70A.3201. Under the GMA, counties and cities “ ‘have broad discretion in developing...[development regulations] tailored to local circumstances.’ ” King County, 142 Wn.2d at 561, 14 P.3d 133 (alteration in original) (quoting Diehl v. Mason County, 94 Wn.App. 645, 651, 972 P.2d 543 (1999)). Moreover, the *GMA* does not require the county to follow BAS; rather, it is required to “include” BAS in its record. RCW 36.70A.172(1) [*emphasis added*].

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<sup>65</sup> CP 119, p. 3.

<sup>66</sup> CP119 pp. 3-4

In the present matter and under the superior court remand, County's critical areas regulations and "composed of consolidated rock" will be re-defined administratively, out of the public eye, and ultimately by superior court's vision of 'best' regulations.

Because the phrase "composed of consolidated rock" is also contained within the landslide hazard regulations of CCC 27.12.410(1)(a) under sections (iv), (v) and (vi), and contained in a separate section of the erosion hazard regulations under CCC 27.12.410(1)(b)(iv), the superior court's remedy exceeds the scope of the subject of its appellate review.

Further, because any 'amendments' to Ch. 27.12 CCC triggered by the superior court remedies in for Shaw's quarry will be immediately applicable countywide, the injury and impact to County from this collateral attack on GMA regulations will be both immediate and long-lasting. This remand-approach invites further, record-convoluting appeals and lawsuits from affected, third parties, who have standing before the Growth Board to challenge *de facto* amendments to multiple sections of critical area code, or who will suffer 'injury' to use and enjoyment of their property by these *ultra vires* amendments.

**D. The RCW 36.70C.130(1)(f) challenges, which rely on examples of quarries previously approved by County, should have been dismissed regardless of whether or not there was an issue as to the phrase "composed of consolidated rock".**

The court erred by repeatedly refusing to consider County's requests for dismissal of the bifurcated RCW 36.70C.130(1)(f), constitutional claims—which are based upon "equal protection" arguments that since

prior quarries with slopes may have been approved despite being subject to the County's interpretation of "composed of consolidated rock, that Shaw's quarry should receive the same considerations.

Whether there is constitutional claim in use of police power regulation is an issue of law to be reviewed *de novo* by the appellate courts. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005). "A duly enacted ordinance is presumed constitutional, and the party challenging it must demonstrate that the ordinance is unconstitutional **beyond a reasonable doubt.**" *Mattress Outlet*, 153 Wn.2d at 509.

The actions (inactions) of this superior court in evaluating Shaw's RCW 36.70C.130(1)(f) claims fall well short of its legal obligations to endeavor to first resolve land use appeals on non-constitutional grounds (or on statutory or factual grounds) and "refrain from deciding constitutional issues". *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752, 49 P.3d 867 (2002). As noted above, courts presume constitutionality in land use laws, and should seek final dispositions by other means. *HJS Dev. Inc., supra*, 148 Wn.2d at 477.

On the one hand, if County's interpretation of "composed of consolidated rock" *is not* valid for critical areas designation then:

1. All prior erosion hazard area reviews or approvals—including those involving prior quarries—would subject to the same 'flawed' interpretation and remand for correction, and prior approvals would never support Shaw's equal protection demand for 'same as' treatment in "composed of consolidated rock" determinations.

It must follow that any prior erosion hazard areas determination on other quarries, based on the now, superior court-invalidated erosion hazard provisions, would be as equally ‘flawed’ as Shaw’s determination—since the court has ordered “composed of consolidated rock” be defined before it can be legally used for erosion hazard determinations. While previous quarry approvals may or may not be physically similar to Shaw’s quarry for purposes erosion hazard determinations, the mere fact of such approvals is insufficient for Shaw’s equal protection claims under RCW 36.70C.130(1)(f). *See, e.g., Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1(2002) (challenged boundary line adjustment not timely appealed under LUPA becomes a final approval—even if unlawful).

If, on the other hand, County’s plain meaning application of “composed of consolidated rock” *is* valid for critical areas regulation then:

2. All prior erosion hazard area reviews or approvals—including those involving prior quarries where it could be demonstrated the County erred in its interpretation and application of the regulation based upon the County’s rulings in the Shaw appeal—would never support equal protection claims for ‘same as’ treatment for “composed of consolidated rock” determinations Shaw’s quarry.

It is well settled in Washington that prior, erroneous land use decisions cannot be used to demand ‘same as’ treatment in subsequent land use decisions. *Buechel v. Department of Ecology*, 125 Wn.2d 196, 211, 884 P.2d 910 (1994). Under LUPA, a land use decision is be adjudged only under regulations as lawfully interpreted and applied at the time—even

where it can be shown these same regulations may have been unlawfully, erroneously or improperly applied in the past—based upon the overriding public interest in proper enforcement of land use regulations. See, *Dykstra v. Skagit Cy.*, 97 Wn.App. 670, 985 P.2d 424 (1999), *rev. den.* 140 Wn.2d 1016 (2000). In *Dykstra*, 97 Wn.App at 677, the court noted:

Governmental entities are not precluded from enforcing ordinances even though they may have been improperly enforced in the past. As the court stated in *Mercer Island v. Steinmann*, 9 Wn.App. 479, 483, 513 P.2d 80 (1973):

The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance. The public has an interest in zoning that cannot thus be set at naught. The plaintiff landowner is presumed to have known of the invalidity of the exception and to have acted at his peril.

(quoting *Zahodiakin Eng'g Corp. v. Zoning Bd. of Adj.*, 8 N.J. 386, 396, 86 A.2d 127 (1952).

In *Buechel v. Department of Ecology* [*supra*], the Supreme Court cited *Mercer Island* with approval, stating: “The proper action on a land use decision cannot be foreclosed because of a possible past error in another case involving different property.” *Buechel*, 125 Wn.2d 196, 211, 884 P.2d 910 (1994) (holding that Board’s denial of permit and variance, despite its previous grant of permit in similar situation, was not arbitrary and capricious). More recently, the Supreme Court applied this rationale in the context of water rights. See *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998) (where Department originally acted *ultra vires* in measuring a water right, Department did not act arbitrarily and capriciously in abandoning unlawful practice and switching to new practice).

The mere existence of prior quarry approvals may or may not be physically similar to Shaw’s quarry for purposes erosion hazard determinations, does not support Shaw’s equal protection claims under RCW 36.70C.130(1)(f). As noted above, even potentially ‘unlawful’ land use approvals must have been timely challenged under LUPA, or thereafter cannot be appealed.

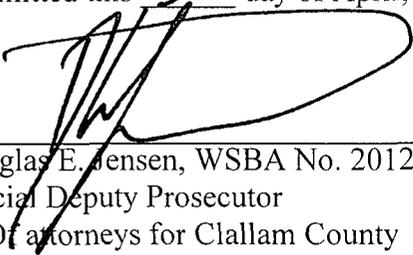
*Nykreim v. Chelan County*, 146 Wn.2d 904, 931-32, 52 P.3d 1 (2002)  
(citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169,  
180-82, 4 P.3d 123 (2000).]

In the present matter, County's express interpretation and application of "composed of consolidated rock" and erosion hazard regulations on Shaw's quarry, whether or not valid, moots and renders irrelevant Shaw's equal protection, LUPA claims based upon how the erosion hazard regulations were applied (or not applied) to prior quarry reviews.

#### V. CONCLUSION

For the foregoing reasons, the County respectfully requests that this Court uphold County's interpretation of its erosion hazard regulations, and remand this matter for further proceedings on the County's decision. The County respectfully requests that this Court reverse the superior court's rulings on remand, which directs the Administrator to issue a new definition(s) on the erosion hazard regulations, and remand this matter for further proceedings on the County's decision. The County respectfully requests that this Court dismiss Shaw's LUPA, constitutional claims.

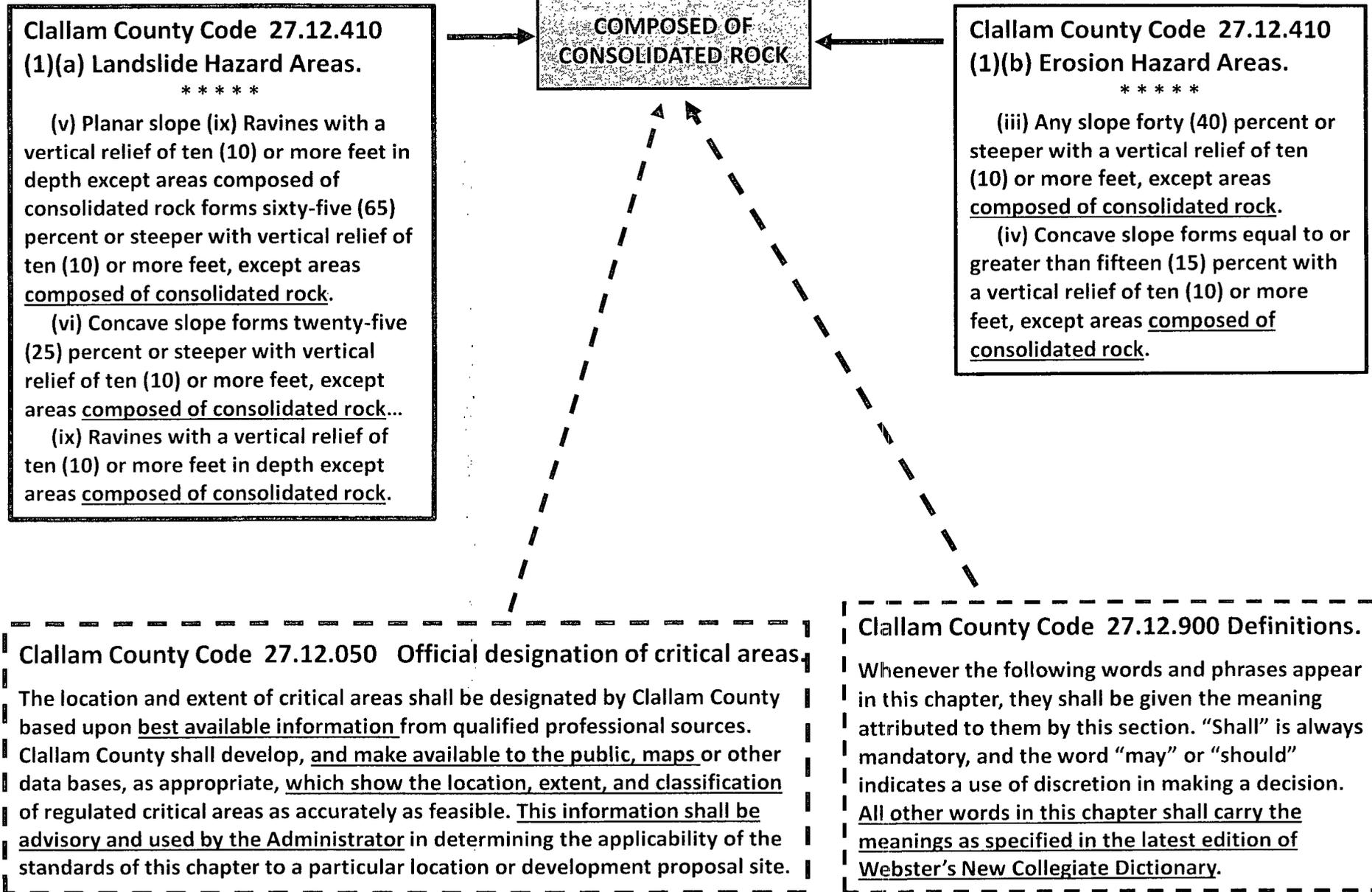
Respectfully submitted this <sup>3RD</sup> day of April, 2012.



\_\_\_\_\_  
Douglas E. Jensen, WSBA No. 20127  
Special Deputy Prosecutor  
Of attorneys for Clallam County

## APPENDIX A

# Shaw & Lane v. Clallam County, No. 41992-1-II



Shaw & Lane v. Clallam County, No. 41992-1-II

CRITICAL AREAS — LOCAL LEGISLATIVE ADOPTION & GROWTH BOARD APPEAL

**RCW 36.70A.172 Critical areas — Designation and protection — Best available science to be used.**

(1) In designating and protecting critical areas under this chapter, **counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.** *[emphasis added]*

**RCW 36.70A.035 Public participation — Notice provisions.**

(1) The public participation requirements of this chapter **shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation.** Examples of reasonable notice provisions include: . . . *[emphasis added]*

**RCW 36.70A.130 Review procedures and schedules — Amendments.— Development regulations.**

(1)(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. Except as otherwise provided, a **county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the deadlines in subsections (4) and (5) of this section.** . . . *[emphasis added]*

(c) The review and evaluation required by this subsection shall include, but is not limited to, **consideration of critical area ordinances** . . . *[emphasis added]*

**RCW 36.70A.290 Growth management hearings board — Petitions .**

- (1) All requests for review to the growth management hearings board shall be initiated by filing a petition that includes a detailed statement of issues presented for resolution by the board . . .
- (2) **All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication as provided in (a) through (c) of this subsection;** . . . *[emphasis added]*

## APPENDIX B

## **Clallam County Code (CCC) 27.12.410 - Classification and designation.**

(1) Classification. The following definitions and terms shall be used in classifying geologically hazardous areas:

- (a) Landslide Hazard Areas. Lands potentially subject to mass movement due to a combination of geologic, topographic, and hydrologic factors. The following classifications shall be designated as landslide hazards and are subject to the requirements of this chapter:
  - (i) Areas of historic, existing or ongoing landslide activity as evidenced by downslope movement of a mass of materials including rock, soils, fills, and vegetation.
  - (ii) Glaciolacustrine silt and clays on terraces.
  - (iii) Slopes fifteen (15) percent or steeper with a combination of: slowly permeable silt and clay interbedded sand and gravel, and sidehill springs or seeps from perched water tables.
  - (iv) Soils mapped and described by the Soil Survey of Clallam County, Washington, issued February 1987, as amended, classified as having a severe or very severe erosion hazard potential.
  - (v) Planar slope forms sixty-five (65) percent or steeper with vertical relief of ten (10) or more feet, except areas composed of consolidated rock.
  - (vi) Concave slope forms twenty-five (25) percent or steeper with vertical relief of ten (10) or more feet, except areas composed of consolidated rock.
  - (vii) Any slopes greater than eighty (80) percent subject to rockfall during seismic shaking.
  - (viii) Marine coastlines including marine bluffs potentially unstable due to wave action or mass wasting and littoral dune systems which border the ordinary high water mark.
  - (ix) Ravines with a vertical relief of ten (10) or more feet in depth except areas composed of consolidated rock.
  - (x) Channel meander hazard. Areas subject to the natural movement of stream channel meanders associated with alluvial plains where long-term processes of erosion and accretion of the channel can be expected to occur. Such meander hazards are characterized by abandoned channels, ongoing sediment deposition and erosion, topographic position, and changes in the plant community, age, structure and composition. These areas do not include areas protected from channel movement due to the existence of permanent levees or infrastructure improvements such as roads and bridges constructed and maintained by public agencies. These areas also do not include areas outside the meander hazard which may be subject to rapid movement of the entire stream channel or avulsion.
  - (xi) Any area located on or adjacent to an active alluvial fan or debris flow, presently or potentially subject to inundation by debris or deposition of stream-transported sediments.
  - (xii) Slopes that are parallel or sub-parallel to planes of weakness, such as bedding planes, joint systems and fault planes in subsurface materials.
- (b) Erosion Hazard Areas. Lands meeting the following classifications shall be designated as erosion hazard and are subject to the requirements of this chapter:
  - (i) Landslide hazard areas.
  - (ii) Areas of existing erosion activity which causes accelerated erosion, sedimentation of critical areas, and/or threatens public health, safety, and welfare.
  - (iii) Any slope forty (40) percent or steeper with a vertical relief of ten (10) or more feet, except areas composed of consolidated rock.
  - (iv) Concave slope forms equal to or greater than fifteen (15) percent with a vertical relief of ten (10) or more feet, except areas composed of consolidated rock.
  - (v) Soils classified by the soil survey of Clallam County as having a moderate, severe, or very severe erosion hazard potential.
- (c) Seismic Hazard Areas. Lands meeting the following classifications shall be designated as seismic hazard and are subject to the requirements of this chapter.
  - (i) Landslide hazard areas and materials.

- (ii) Artificial fills especially on soils listed in subsection (1)(c)(iii) of this section and areas with perched water tables.
- (iii) The following soil types described within the Clallam County soil survey as beaches, Mukilteo muck, Lummi silt loam, Sequim-McKenna-Mukilteo complex, and Tealwhit silt loam.
- (iv) Other areas as determined by the Clallam County Building Official pursuant to 1997 Washington State Uniform Building Code, Chapter 18, as amended.

(2) Designation. Lands classified as landslide, erosion or seismic hazards are hereby designated as geologically hazardous areas and are subject to the procedures and standards of this chapter and section. Geologically hazardous areas shall be mapped whenever possible. These maps shall be advisory and used by the Administrator to provide guidance in determining applicability of the standards to a property. Sites which include geologically hazardous areas which are not mapped shall be subject to the provisions of this section and chapter. These maps may be based on the following information sources:

- (a) Sweet Edwards/EMCOM Hazard Rating Maps;
- (b) Coastal Zone Management Atlas;
- (c) Soil Survey of Clallam County;
- (d) U.S.G.S. Topographic Maps;
- (e) Aerial photos; and
- (f) Recent geologic events.

## APPENDIX C



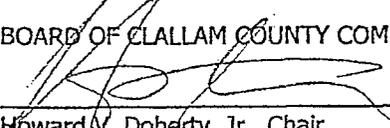
- 10 The Board of Commissioners is without jurisdiction and the appellants have failed to state a basis for relief to require the Department to alter the County's 'classification and designation' criteria for this critical areas site under CCC 27.12.410, adopted pursuant to the Growth Management Act and subject to timely Growth Management Hearings Board review under Ch. 36.70A RCW, and is without jurisdiction to require County's "Administrator" under CCC 27.12.050 to depart from those classification and designation criteria and instead utilize the "qualified professional opinions" submitted by appellants and recent "Best Available Science" rulings in evaluating this critical areas site.

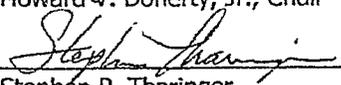
NOW, THEREFORE, BE IT RESOLVED by the Board of Clallam County Commissioners, in consideration of the above findings of fact:

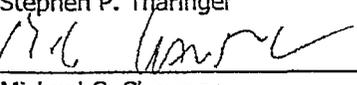
1. The Board of County Commissioners is without jurisdiction and the appellants have failed to state a basis for relief on appeal of the Critical Areas Determination issued on March 30, 2009 and the decision of the Hearing Examiner upholding this Determination.
2. The Determination and decision of the Hearing Examiner are affirmed.

PASSED AND ADOPTED this twenty-second day of September 2009

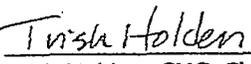
BOARD OF CLALLAM COUNTY COMMISSIONERS

  
Howard W. Doherty, Jr., Chair

  
Stephen P. Tharinger

  
Michael C. Chapman

ATTEST:

  
Trish Holden, CMC, Clerk of the Board

## APPENDIX D

36  
06/15/10



RESOLUTION 55, 2010

FINDINGS AND CONCLUSIONS ON CLOSED RECORD APPEAL OF CRITICAL AREA DETERMINATION (CRI2008-00165, SHAW/LANE) ON REMAND FROM CLALLAM COUNTY SUPERIOR COURT CAUSE N<sup>o</sup> 09-2-01106-3

THE BOARD OF CLALLAM COUNTY COMMISSIONERS finds as follows:

1. Mike and Susan Shaw and George and Patricia Lane ("Appellants") filed an open record appeal of the Clallam County Department of Community Development's ("Department") March 30, 2009 administrative decision on CRI2008-00165 critical areas determination to the Clallam County *Pro Tem* Hearing Examiner ("Examiner") on April 13, 2009. The Hearing Examiner heard the appeal on May 27, 2009 and issued a decision June 17, 2009 upholding the decision of the Department. The Appellants filed a request for reconsideration on June 29, 2009, which was denied by the Examiner on July 9, 2009.
2. The Appellants filed a closed record appeal of the Examiner's decision to the Board of Commissioners ("Board") on July 17, 2009. Thereafter, the Department filed a Motion to Dismiss the appeal. The Department's Motion to Dismiss asserted that the Appellants had failed to: (1) establish jurisdiction for the matters appealed and (2) adequately articulate relief. The Board heard the appeal on September 8, 2009, deliberated on September 15, 2009, and reached the decision memorialized in Resolution 79, 2009 ("Resolution").
3. The Resolution found that the Board was without jurisdiction and that the Appellants failed to timely state a basis for Growth Hearings Board relief on appeal of the Department's March 30, 2009 administrative decision on CRI2008-00165 critical areas determination. The Resolution also upheld the Examiner's decision.
4. The Appellants filed an appeal of the Board's decision in Clallam County Superior Court. The Court found the Appellants had raised reviewable issues and remanded the case to the Board for a decision on CRI2008-00165.
5. The Board held a pre-hearing conference with the Appellants, the Department, and the Upper Elwha River Conservation Committee (Intervenor) on April 12, 2010. The Board heard argument from the parties on May 25, 2010, deliberated on June 1, 2010, and reached the decision memorialized below.
6. Pursuant to CCC 26.10.630(2)(b) in making a decision on the appeal, the Board is required to find that one of the following standards has been met:
  - (i) The land use decision is an erroneous interpretation of the law
  - (ii) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record
  - (iii) The land use decision is a clearly erroneous application of the law to the facts
  - (iv) The land use decision is outside the authority or jurisdiction of the Hearing Examiner

NOW, THEREFORE, BE IT RESOLVED by the Board of Clallam County Commissioners, in consideration of the above findings of fact:

1. The land use decision is not an erroneous interpretation of the law.
2. The land use decision is not a clearly erroneous application of the law to the facts.

3. The determination and decision of the Hearing Examiner and supporting findings and conclusions are affirmed.

PASSED AND ADOPTED this fifteenth day of June 2010

BOARD OF CLALLAM COUNTY COMMISSIONERS

Howard V. Doherty, Jr.

Howard V. Doherty, Jr., Chair

Stephen P. Tharinger

Stephen P. Tharinger

Michael C. Chapman

Michael C. Chapman

ATTEST:

Trish Holden  
Trish Holden, CMC, Clerk of the Board

## APPENDIX E

BEFORE THE PRO TEM HEARING EXAMINER  
FOR CLALLAM COUNTY

RECEIVED

JUN 18 2009

Clallam County  
DCD

In the Matter of the Appeal of	)	NO. CRI2008-00165
	)	
<b>Mike and Susan Shaw</b>	)	
<b>George and Patricia Lane</b>	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Administrator's Critical Areas Determination	)	AND DECISION
Determination	)	

CLALLAM COUNTY DCD  
EXHIBIT 39  
DATE 8/18/09

SUMMARY OF DECISION

The Administrator's Critical Areas Determination that the 40 acre Little River Quarry site is designated Erosion Hazard area pursuant to C.C.C. 27.12.410(1)(b)(iii) is AFFIRMED.

SUMMARY OF RECORD

**Request:**

The appellants seek reversal of the Administrator's decision designating the 40 acre parcel referred to as the Little River Quarry as an erosion hazard area pursuant to C.C.C. 27.12.410 (1)(b)(iii) of the Clallam County Critical Areas Ordinance.

**Hearing Date:**

An open record hearing on the application was conducted on May 27, 2009 before the Pro Tem Hearing Examiner. The public hearing portion was closed. However, the record remained open until 4:30 p.m. on June 5, 2009, in order to allow submittals by either the County or appellants regarding the definition of "consolidated rock". The pro tem hearing examiner also indicated that she would allow admission of a news article published in the Peninsula Daily News that was referred to by Gerry Lane during the hearing.

**Testimony:**

At the open record hearing the following individuals presented testimony under oath:

- Steve Gray, Planning Manager
- Greg Ballard, Planner III
- Mike Shaw, Appellant
- Gerry Lane, Appellant
- Josephine Pedersen
- Bruce Moorhead
- William Flint
- Keith Peters
- Carmen Germain

**Exhibits:**

- Exhibit 1** Exhibit Log
- Exhibit 2** Staff Report regarding the Mike Shaw & George Lane Appeal, dated May 20, 2009
- Exhibit 3** The Notice of Application mailed to adjacent property owners of parcels 073033-120000 & 073028-440500 of the subject property on May 11, 2009 regarding this appeal
- Exhibit 4** Appeal of Critical Areas Determination filed by Mike Shaw & George Lane, with Puget Sound Surfacers, Inc., on April 13, 2009
- Exhibit 5** Critical Area Determination issued March 30, 2009
- Exhibit 6** Supplemental Little River Quarry Site Geological Hazard Evaluation Report (October 20, 2008) prepared by ADA Engineering dated March 9, 2009
- Exhibit 7** Little River Quarry Site Geologic Hazard Evaluation Special Report prepared by ADA Engineering dated October 2008
- Exhibit 8** Supplemental Review of the 1999 Report of Soil Survey and Geotechnical review of the Little River Quarry dated January 31, 2008
- Exhibit 9** Geotechnical Engineering Study prepared by Allen Hart Engineering Geologist dated July 15, 1999
- Exhibit 10** Letter from Toby Thaler, Attorney for Upper Elwha River Conservation Committee, dated March 10, 2009
- Exhibit 11** Letter from Charles Natsuhara, Area Soil Scientist with the Natural Resource Conservation Service (NRCS), dated March 4, 2009
- Exhibit 12** Letter from Puget Sound Surfacers, Inc dated February 13, 2009 regarding NRCS letter
- Exhibit 13** Letter from Puget Sound Surfacers, Inc dated January 13, 2009 regarding request for additional information from Clallam County DCD dated December 22, 2008
- Exhibit 14** Letter from Puget Sound Surfacers, Inc dated December 23, 2008 regarding request for additional information from Clallam County DCD dated December 22, 2008
- Exhibit 15** Request for additional information from Clallam County DCD dated December 22, 2008
- Exhibit 16** Letter from Keith Peters, adjacent landowner with the Upper Elwha River Conservation Committee, regarding critical areas within Little River Quarry dated December 10, 2008

- Exhibit 17** E-mail & Photos from Scott Morrison, NPDES Sand & Gravel Manager with the WA State Department of Ecology, dated November 19, 2008
- Exhibit 18** Soil data from the updated NRCS Soil Survey
- Exhibit 19** Clallam County Critical Area Maps, LIDAR, & Aerial Photos
- Exhibit 20** Assessor's map and parcel information
- Exhibit 21** WA State Department of Natural Resources Forest Practice Application #2607078 & related info regarding excavate material from Little River Quarry
- Exhibit 22** Sample of SM-6 form
- Exhibit 23** Letter from Toby Thaler, attorney for the Upper Elwha River Conservation Committee dated May 26, 2009
- Exhibit 24** Letter from Olympic Forest Coalition dated May 26, 2009
- Exhibit 25** Rules of Procedure for Proceeding before the Hearing Examiner on Appeals of Administrative Decision Policy and Procedure 922
- Exhibit 26** Email from Barbara Blackie dated May 27, 2009
- Exhibit 27** Letter from Sue Chickman dated May 27, 2009
- Exhibit 28** Letter from Mike Shaw dated May 27, 2009 with attachments
- Exhibit 29** Letter from Gerry Lane dated May 27, 2009 with attachments
- Exhibit 30** Little River Quarry Vicinity Map
- Exhibit 31** DNR Quadrant Map
- Exhibit 32** Letter from Steve Eidelberg received May 27, 2009 with photos
- Exhibit 33** Letter from Keith Peters dated May 23, 2009 with photos
- Exhibit 34** Letter from Keith Peters dated May 26, 2009 with photos
- Exhibit 35** Letter from Carmen and Tom Germain dated May 25, 2009
- Exhibit 36** Letter from Josephine Pedersen dated May 27, 2009
- Exhibit 37** Memorandum from Greg Ballard received June 5, 2009 with attached definitions
- Exhibit 38** Letter from Mike Shaw/George Lane dated June 2, 2009 with attached definitions

Upon consideration of the record, the Hearing Examiner enters the following Findings of Fact and Conclusions of Law:

### FINDINGS OF FACT

1. Michael and Susan Shaw, and George and Patricia Lane are the owners of an approximately 40 acre parcel of land located in central Clallam County. The parcel is designated by the Clallam County Assessor as Parcel Number # 073033-120000 and is commonly known as the Little River Quarry.
2. On March 30, 2009, the Clallam County Department of Community Development through its Administrator issued a Critical Areas Determination (CRI 2008-165) concluding that the geotechnical engineering reports submitted by the applicants "have not satisfactorily demonstrated to the Administrator that all portions of the study site do not meet the designation criteria of erosion hazard pursuant to C.C.C. 27.12.410 (1)(b)".
3. On April 13, 2009 the Shaws and the Lanes filed a timely Notice of Appeal challenging that conclusion.
4. As set forth in C.C.C. 27.12.050, "the location and extent of critical areas shall be designated by Clallam County based upon the best available information from qualified professional sources". The Ordinance also states that "critical areas shall not include those lands where a qualified professional or qualified professional sources demonstrate to the satisfaction of the Administrator that maps or other information used to identify the location and extent critical areas are in error".
5. The March 30<sup>th</sup> Determination by the Administrator considered three special reports and related attachments: (1) Letter dated 1/31/08 from Allen Hart wherein he has reviewed a 1999 geotechnical engineering study ; (2) Geologic Hazard Evaluation prepared by Herbert Armstrong dated October 2008; (3) Geologic Hazard Evaluation Supplement dated March 2009 prepared by Herbert Armstrong.
6. Both the Shaws/Lanes, and the County agree that the above referenced reports and their authors meet the definition of "qualified professional sources" and "qualified professionals" for geologic hazard areas set forth in C.C.C. 27.12.050. The Critical Areas Administrator, however, was not satisfied that above referenced reports had demonstrated that the subject property was not an erosion hazard area.
7. Under the Clallam County Critical Areas Ordinance, there are five classifications which qualify as Erosion Hazard Areas: landslide areas, areas of existing erosion activity, a concave slope and soils classified by the Soil Survey of Clallam County as having a moderate, severe or very severe erosion hazard activity. The remaining classification, and the only one alleged by Clallam County to be at issue here, is the classification articulated as "any slope 40 % or steeper with a vertical relief of ten or more feet, except areas composed of consolidated rock". C.C.C. 27.12.410(1)(b)(iii).
8. The October 2008 report of Herbert Armstrong stated that his study of the parcel reveal that "there are areas of 40% or steeper slope but they are composed of solid rock. The report went on to say that Mr. Armstrong had found "basalt rock of crescent formation

overlaid by shallow depth of soil". The report further stated that he does not agree with the Soils Survey of Clallam County which designates the soils at issue here to have "moderate, severe, or very severe erosion hazard potential.

9. The January 2008 report of Allen Hart stated that "based on our field work, it appears that the subject property is underlain at comparatively shallow depth by consolidated rock".
10. The March 2009 report of Herbert Armstrong indicated that Mr. Armstrong had performed soil loss equations for three areas on the Little River Quarry site and found that these locations have a very minor susceptibility of any soil erosion. The report further states that "virtually no erosion would be expected in the undisturbed forested areas".
11. As set forth in the Administrator's Critical Areas Determination, that based upon Clallam County's LIDAR topographic data, that "although areas of consolidated rock may occur at the surface on this site, much of the site is covered by soil".
12. The October 2008 report of Herbert Armstrong addressed soil conditions on the property using the "K" factor. The "K factor" is one of six factors used in the Universal Soil Loss Equation and the Revised Universal Soil Loss Equation to predict the average annual rate of soil loss by sheet and rill erosion. Values of "K" range from 0.02 to 0.69 - the higher the number, the more susceptible the soil is to sheet and rill erosion by water. Here the soil samples from three map units reveal "K" factors which are extremely low:  
  
(a) 429D7: .05            (b) 664M7: .05            (c) 901AZ: .10
13. The "K factor" addresses erosion by water. Water, however, is only one source or cause of erosion.
14. Under the Critical Areas Ordinance, erosion is defined as "process whereby the surface is worn away by action of water, wind, ice, and by processes such as gravitational creep or events such as landslides. Geologic erosion occurs as an on-going process that acts on all land surfaces to some degree. Human activities such as removing vegetation, increasing storm runoff or decreasing slope stability often accelerate or aggravate natural erosion process". C.C.C. 27.12.900 (17).
15. In his March 2009 report, Mr. Armstrong addressed overall soil erosion (as opposed to addressing only the "K factor") using the Universal Soil Loss Equation. Using that equation, cross-sections of soils taken from the three map units referenced above, indicate that each would be susceptible to very low amounts of erosion. However, as stated by Mr. Armstrong, "this small loss calculated by using this formula is a result of applying generalized factors to the formula and is not representative of conditions at the site". Additionally, Mr. Armstrong found that "virtually no erosion would be expected to occur in the undisturbed forested areas because the canopy formed by the mature trees and understory, as well as the litter on the forest floor shields the soil from the erosive energy of the falling raindrops".

16. Mr. Armstrong does not agree with the Clallam County Soil Survey wherein it is stated that the soil on the property has a moderate, severe or very severe erosion hazard potential. His opinion is supported by his Universal Soil Loss Equations and the Natural Resources Conservation Service's position that due to the variables in predicting soil erosion, the NRCS will no longer make erosion hazard class ratings, or support ratings made in the past.
17. In a letter to Clallam County dated March 4, 2009, Charles Natsuhara of the NRCS ( a sub-division of the USDA) stated that "due to the variables involved with predicting soil erosion, the NRCS no longer makes erosion hazard class ratings, nor does it support ratings that were made in older soil surveys.
18. Mr. Armstrong's March 2009 report stated that "erosion hazard criteria 3 and 4 (slopes 40% or steeper and concave slopes) appear erroneous because they lack benchmarks against which erosion can be measured".

### CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction to hear this matter pursuant to C.C.C. 26.04.060(3)(d) and 26.10.610(1).
2. Notices of the application and public hearing have been substantially complied with.
3. Pursuant to C.C.C. 26.10.620(2)(b), in making his decision on the appeal, the Hearing Examiner shall find that one of the standards has been met:
  - (i) The land use decision is an erroneous interpretation of the law;
  - (ii) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record;
  - (iii) The land use decision is a clearly erroneous application of the law to the facts;
  - (iv) The land use decision is outside the authority or jurisdiction of the Hearing Examiner.dsdf
4. The burden is on the appellants, here the Shaws and the Lanes, to prove that the Administrator's decision was wrong.
5. The Clallam County Critical Areas Code states that lands meeting certain classifications **shall** be designated as erosion hazard areas (emphasis added). One of those classifications is "any slope 40% or steeper with a vertical relief of ten or more feet except areas composed of consolidated rock". C.C.C. 27.12.410 (1)(b)(iii). The Ordinance's use of the word "shall" requires that unless the slope is composed of consolidated rock, there is no choice but to designate it as a critical area.
6. According to the Oxford American Dictionary, the word "composed" means "to form, to make up". Here, the Critical Areas Ordinance specifically states " except areas composed of consolidated rock". It does not say "except areas composed of consolidated rock and shallow soils". Accordingly, as stated by the County, the erosion hazard classification addressing slopes greater than 40 percent, provides no exemption for areas of consolidated rock with shallow soils at the surface.

7. The Critical Areas Ordinance also provides that the location and extent of critical areas shall be designated by Clallam County based upon the best available information from qualified professional sources, and where a qualified professional source has demonstrated to the satisfaction of the Administrator that the information used to identify the location and extent critical area is in error, that that area shall not be designated as critical area.
8. Based on the October 2008 report of Herbert Armstrong wherein it is stated that he found basalt rock overlaid by a shallow depth of soil, the January 2008 report of Allen Hart wherein it is stated that the property is underlain at a comparatively shallow depth by consolidated rock, the County LIDAR map, and the five pictures submitted with Exhibit #7 and dated 10/10/08, it appears that it is accurate to describe the topography of the property as being composed of consolidated rock at a shallow depth with soil at the surface.
9. With regard to the topography of the subject property, the appellants have not met their burden; i.e. that based upon qualified professional sources that the County was in error in finding "that although there are areas where consolidated rock is at the surface, much of the area is covered by soil".
10. With regard to the County's interpretation of the ordinance finding that there is no exemption for shallow soil at the surface, the appellants have not met their burden. The ordinance is clear, there is no exemption for areas of consolidated rock covered by shallow soil.
11. Although the classification of critical areas is clear, the Ordinance still provides that the location and extent of critical areas may be fluid if the information from qualified professionals, demonstrates to the critical areas administrator, that the location and extent of the critical area is in error.
12. The erosion process was addressed by Mr. Armstrong, a qualified professional, using the "K factor". For the soils at issue here, he found the "K factor" to be low. Reliance on the "K factor" is problematic because the "K factor" only addresses erosion caused by water, and water is just one source of soil erosion.
13. Mr. Armstrong also addressed the erosion process through use of the Universal Soil Loss Equation. The calculations indicated that the soils at issue here would have a low susceptibility to erosion; however, as explained by Mr. Armstrong, the calculations were based on "applying generalized factors to the equation and was not representative of conditions at the site". Additionally it appears that the conclusion that the soil would have low susceptibility to erosion was based on an assumption of the soils being located in areas of undisturbed forests.
14. Mr. Armstrong says that erosion #3 (40% slope or steeper) and #4 (concave slopes) appear erroneous because they lack benchmarks against which erosion can be measured (emphasis added).
15. The fact that (1) the "K factor" addresses only water, (2) that the soil loss equation can only be made in general terms and is not site specific, and (3) that Mr. Armstrong would say only that the erosion hazard classifications #3 and #4 "appear" to be

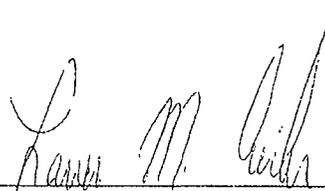
erroneous, that with regard to the issue of susceptibility of the shallow soils to erosion, the appellants have not met their burden; i.e. that the information provided by the qualified professional should have demonstrated to the County, that the extent and location of the critical areas designated by the County were in error.

16. It does not appear that based on the two Conclusions set forth in the Critical Areas Determination, that the County is seeking to find an erosion hazard area on the subject property based upon "soils classified by the soil survey". To the extent that the County is doing so, the County is in error. The appellants have met their burden that qualified professional sources have demonstrated that the location and extent of erosion hazard areas based upon the Soil Survey of Clallam County is in error.

### DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the decision of the Administrator's Critical Areas Determination that the 40 acre Little River Quarry site was designated Erosion Hazard per Section 27.12.410(1)(b) (iii) CCC (CRI 2008-00165) is affirmed. The land use decision is not an erroneous interpretation of the law, nor is it a clearly erroneous application of the law to the facts.

DECIDED this 17<sup>th</sup> day of June, 2009.



Lauren Erickson  
Pro Tem Hearing Examiner for Clallam County

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

MIKE & SUSAN SHAW and GEORGE &  
PATRICIA LANE,

Respondents,

vs.

CLALLAM COUNTY and UPPER ELWHA  
RIVER CONSERVATION COMMITTEE,

Petitioners.

NO. 41992-1-II

CERTIFICATE OF SERVICE  
BY MAIL



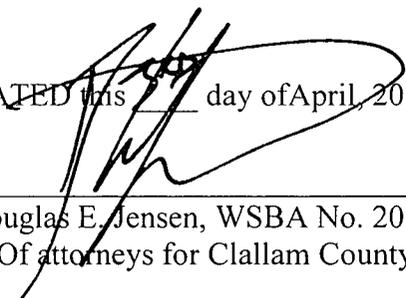
The undersigned says: That the undersigned is a citizen of the United States and over the age of eighteen years; that on the below date, the undersigned deposited in the mail of the United States of America a properly stamped and addressed envelope containing an original and/or copy of Clallam County's Opening Brief addressed as follows:

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DATED this 9<sup>th</sup> day of April, 2012.

  
\_\_\_\_\_  
Douglas E. Jensen, WSBA No. 20127  
Of attorneys for Clallam County

CERTIFICATE OF SERVICE