

NO. 47836-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

RORY HIGHAM,

Appellant,

v.

PIERCE COUNTY,

Respondent.

BRIEF OF RESPONDENT PIERCE COUNTY

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I. INTRODUCTION

This is a land use case involving real property located in the North Clover Creek area of unincorporated Pierce County. The property owner, Appellant Rory Higham (“Appellant” or “Higham”), applied for a variance to the wetland regulations prior to constructing a new single-family residence, and for a variance to permit a driveway that had been constructed without necessary permits, both in violation of wetlands regulations. The Pierce County Hearing Examiner heard the matter, found that the criteria for the variances had not been met, and denied the requested variances. Relying in part upon an unrelated administrative mitigation agreement with the County in response to an earlier County enforcement effort against him for his prior violation of a wetlands regulations, Higham appealed the Examiner’s decision to superior court pursuant to the Land Use Petition Act, ch. 36.70C RCW (“LUPA”).

The Honorable Eric D. Price, Thurston County Superior Court, upheld the Examiner’s decision, finding that Appellant had not met his burden under RCW 36.70C.130(1). Appellant now seeks review of the Superior Court’s decision by this Court.

“In reviewing an administrative decision, an appellate court stands in the same position as the superior court.”¹ Accordingly, this Court reviews the record made before the Hearing Examiner to see if Appellant has met his burden of proving that one or more of the grounds set forth in RCW 36.70C.130(1) have been met.

Appellant also appeals the Superior Court’s determination that the elements of collateral estoppel have not been met. On appeal Appellant’s collateral estoppel arguments are reviewed de novo.²

Review of the decisions of the Hearing Examiner (variances) and Superior Court (collateral estoppel) show that the Appellant has not met his burden of proof on either issue. The Examiner’s decision was supported by substantial evidence and the Examiner correctly applied the law to the facts. In addition, the necessary elements of collateral estoppel have not been met. Accordingly, Respondent Pierce County requests that this Court uphold the Examiner’s decision denying the variances, affirm the Superior Court’s decision denying collateral estoppel, and award the County attorney fees and costs pursuant to RCW 4.84.370.

¹ *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

² *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

II. ISSUES

1. Was the Hearing Examiner's finding that Appellant failed to meet the criteria necessary for a variance supported by substantial evidence?
2. Did the Hearing Examiner correctly interpret and apply the law to the facts in denying Appellant's request for variances to the County wetland regulations?
3. Does collateral estoppel apply in this case when there was no prior adjudication or litigation?
4. If collateral estoppel applies, have all four elements of collateral estoppel been met?
5. Is Respondent Pierce County entitled to reasonable attorney fees under RCW 4.84.370 as a prevailing party?

III. RESTATEMENT OF THE CASE

Note: The diagrams attached to this brief as Attachments are helpful to understanding the facts of this case:

Attachment 1: February, 2002, Wetland Approval diagram. This diagram shows the enlarged pond in the upper right (northeast) area, and the existing access (driveway) in the lower right (southeast) area.³

Attachment 2: 2004 Boundary Line Adjustment survey. This diagram shows the 30 foot by 240 foot strip acquired by Appellant and combined with his existing parcel (lower left, southwest).⁴

³ Attachment 1 is contained within the AR at page 86. "AR" refers to the Administrative Record made before the Hearing Examiner. It was transmitted from the Thurston County Superior Court Clerk to the Court of Appeals on or about September 17, 2015.

⁴ AR 89.

Attachment 3: 2011 Site Plan for variance hearing. This diagram shows the proposed residential structure in the upper left (northwest) area and the new access (driveway) along left (west) side. The wetland buffers are shaded and the buffer edge is marked with a dashed line.⁵

In 2000 Appellant Higham purchased a 3.56 acre parcel that is rectangular in shape with access to and from Chesney Road via a driveway (access easement) in the southeast corner of his property. This “old” driveway was apparently constructed years ago, prior to Appellant’s purchase of the property.⁶

A mobile home and two barns/sheds also existed on the property at the time of Appellant acquired the property.⁷ Appellant now seeks to construct a new single-family residence while keeping the mobile home as an accessory dwelling unit.⁸

Without first obtaining necessary permits, and in violation of wetlands regulations, Appellant made several improvements to the property. Initially, in the northeast portion of the property, Appellant

⁵ AR 111. This diagram was prepared by Tom Deming, Appellant’s wetland biologist.

⁶ See “existing access” shown in the lower right hand corner of Att. 1 to this brief. See also AR 61 and AR 80-81.

⁷ Shown in the lower (southern) part of Att. 1. The barns are also described as “sheds” in various site plans. The “existing home” shown on Att. 1 is a mobile home.

⁸ AR 32 #8. Appellant also seeks to construct a detached garage, however that does not appear to be relevant to the issues in this case.

excavated an area adjacent to a natural pond in violation of critical area (wetlands) regulations.⁹ After he was contacted by a County biologist, the County and Higham eventually entered into mitigation agreement to address the violations of the wetlands regulations whereby Higham agreed to enhance the area around the pond with native trees and vegetation, and to fence it off so that the wetlands would not be disturbed.¹⁰ In return the County agreed to reduce the wetland buffer for the pond to 37.5 feet.¹¹ Of importance to this case is the language in the Wetland Approval (aka “mitigation agreement”) for the enlargement of the pond:

The wetland approval contains conditions placed on the site to allow for restoration that addresses correction of a violation. This wetland approval is being accepted for correction of the violation and top [sic] document existing structures and activities on site that were either approved or were pre-existing. **A new wetland review will be required for any change of use associated with any new proposed development activities or structures on the site. . . . The issuance of this wetland approval does not constitute approval of other proposed projects by the landowner.**¹²

Next, Appellant acquired a 30 foot by 240 foot strip of property adjacent to the southwest corner of his property.¹³ Thereafter, he applied for an adjustment to the boundary lines between the two parcels to add this

⁹ See Att. 1, AR 41 #3 and AR 83-86.

¹⁰ AR 83-86.

¹¹ Wetland Approval for the enlarged pond is at AR 83-86. Att. 1 shows the “before and after” pond.

¹² AR 84. Emphasis added.

¹³ See AR 89, attached as Att. 2

30 foot strip to his parcel and thereby create a “pipe stem” configuration on the southwest corner of his property.¹⁴

Shortly thereafter and again without permits and in violation of wetlands regulations, Appellant constructed a gravel driveway over the pipe stem portion of his property and along the west side of his property for a total distance of 690 feet.¹⁵

The Pierce County Planning and Land Services Department (“PALS”) learned of Appellant’s latest unpermitted activities and red-tagged the new driveway.¹⁶ Thereafter Appellant applied for permits for (1) the already constructed new driveway and (2) for a proposed single-family residence. Diane Ryba, the PALS biologist assigned to review these applications, reviewed Appellant’s site plan and noted that the new driveway had been constructed within the buffer of an off-site wetland (to the west of his property) and that the proposed single-family residence was within an on-site wetland buffer (the pond buffer in the northeast portion of Appellant’s property). In response Appellant applied for the following variances to the wetland regulations seeking:

¹⁴ See Att. 2, AR 89.

¹⁵ See AR 41 #5 and Att. 3. The new driveway is shown on the left or western side of Appellant’s property and is labeled “existing driveway.”

¹⁶ TR 13: 19-20 and TR 30: 5-6. “TR” refers to the transcript of the hearing before the Examiner. It was transmitted from the Thurston County Superior Court Clerk to the Court of Appeals on or about September 17, 2015.

1. Approval of the previously constructed driveway within the required 75-foot buffer of the off-site Category II wetland to the west of his property; and
2. Approval of a wetland variance which would allow him to construct a new/additional single-family residence within the required 75-foot wetland buffer for the on-site wetland (pond).¹⁷

The matter was heard by the Pierce County Hearing Examiner on May 4, 2011.¹⁸ Appellant's wetland biologist, Tom Deming, testified about the on-site wetland (the pond) and about the off-site wetlands (to the west of the property):

We believe the homesite is consistent with wise utilization of the property. Yes, we're going to encroach into buffers that are imposed onto the site.¹⁹

Mr. Deming was also candid about why Appellant wanted to locate his residence on the northern portion of the property rather than south of the pond where it could be constructed outside the wetlands and their buffers:

The site has been and continues to be managed as livestock pasture. And we don't want to lose that use by the addition of a homesite on this property.²⁰

¹⁷ AR 47-56.

¹⁸ AR 30.

¹⁹ TR 27: 22-25.

²⁰ TR 26: 4-7.

Appellant Higham, a self-described “construction superintendent,”²¹ testified that he thought approval of the boundary line adjustment approved construction of the new driveway.²²

The Hearing Examiner issued his decision on May 19, 2011, and denied the variances to both wetland buffers.²³ The Examiner found that the variance criteria set forth in the County wetland regulations had not been met:

13. Pierce County Code 18E.20.060 contains the criteria governing variance requests to reduce wetland buffers below standards of PCC 18E.30.060. Pierce County Code 18E.20.060.D(3)(a) provides that the hearing examiner shall have authority to grant a variance from the requirements of PCC 18E.30.060 and PCC 18E.40.060 when, in the opinion of the hearing examiner, all of the listed criteria are met. Findings with reference to each of the listed criteria are as follows:

1. There are **no special circumstances** applicable to this 3.5 acre parcel such as shape, topography, location of surroundings that make it impossible to redesign this project to preclude the need for a variance. In fact during the hearing, it was clearly demonstrated that proposed construction could take place without the need for a variance.

2. The **applicant has not avoided impacts and provided mitigation to the maximum extent possible**. In fact, he has proposed no mitigation and as previously stated the site contains sufficient area to build outside of the wetland and wetland buffer areas.

²¹ TR 20: 22, and TR 21: 11: “I’ve been in construction for 34 years.”

²² TR 12: 8-22.

²³ AR 28–35.

3. A buffer reduction is **not necessary** for the applicant to construct a single-family residence on this site.

4. Granting variances where the applicant fails to meet the strict application of the law **undermines the regulatory purposes and principles of zoning ordinances and the comprehensive plan.** See Settle, Washington Land Use and Environmental Law and Practice, Section 2.9. The applicant has failed to demonstrate this request meets any criteria for the granting of a variance. The burden of proof is upon the applicant to demonstrate that they meet each of the criteria for a variance.²⁴

After the time for reconsideration had run Appellant requested reconsideration and raised new issues, including collateral estoppel, which had not previously been made before by the Examiner.²⁵ The Hearing Examiner determined that because the request for reconsideration was untimely he no longer had jurisdiction.²⁶

Appellant then filed an appeal pursuant to the Land Use Petition Act, ch. 36.70C RCW.²⁷ The Superior Court heard the LUPA appeal on the record made before the Examiner and determined that Higham had not met his burden of proof under RCW 36.70C.130(1).²⁸ The Court further denied Higham's collateral estoppel argument, finding that all four (4)

²⁴ Emphasis added. Appellant does not challenge the Examiner's Finding of Fact No. 13 in his Petition for Judicial Review.

²⁵ Compare the issues set forth in the Examiner's decision, AR 28-34, with Appellant's request for reconsideration, AR 10-26.

²⁶ Att. 5, AR 1-4.

²⁷ CP (dated 8/31/15) 3-17.

²⁸ CP (dated 1/15/16) 116-136.

elements of collateral estoppel had not been met.²⁹ Thereafter Appellant filed an appeal with the Court of Appeals.³⁰

IV. ARGUMENT

A. Summary of Argument.

Appellant argues that the Examiner's decision should be reversed based upon the grounds for review in LUPA, and the doctrine of collateral estoppel.³¹ Because Appellant failed to timely raise collateral estoppel before the Hearing Examiner, the Examiner made no ruling on this issue. Despite the fact that collateral estoppel was not raised before the Hearing Examiner, Appellant raised the issue before Superior Court in his LUPA Petition.³²

After hearing Appellant's arguments on both the denial of the variances and collateral estoppel, the Court denied the LUPA petition and further found that the elements of collateral estoppel had not been met.³³ Thus, there are two decision-makers in this case:

1. The Hearing Examiner was the fact-finder and decision-maker in the land use (variance) case, and

²⁹ CP (dated 1/15/16) 117.

³⁰ CP (dated 1/15/16) 137-174.

³¹ See Appellant's Opening Brief.

³² CP (dated 8/31/15) 5-6.

³³ CP (dated 1/15/16) 117.

2. The Superior Court was the decision-maker with respect to the collateral estoppel issue.

As set forth in Respondent Pierce County's brief, a review of the record will establish that Appellant has not met his burden of proving that the criteria for a variance has been met. Appellant also failed to prove that collateral estoppel applies in this case. Because Appellant failed to meet his burden of proof on both issues the decisions of the Hearing Examiner and Superior Court should be upheld and the appeal denied.

B. Appeal of the Denial of the Variances Pursuant to LUPA.

1. The Standard of Review Under the Land Use Petition Act.

Judicial review of land use decisions is governed by the Land Use Petition Act ("LUPA"), ch. 36.70C RCW. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). The standard of review in a LUPA proceeding is set forth in RCW 36.70C.130. The party who seeks relief from the administrative tribunal has the burden of proving one or more of the grounds for relief set forth in RCW 36.70C.130(1):

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The 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;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). As the party seeking relief from the decision of the Hearing Examiner, the burden is on Appellant Higham to prove one or more of the grounds set forth in this statute.

“When reviewing a superior court's decision on a land use petition, the appellate court stands in the shoes of the superior court.” *HJS Development*, at 468, quoting *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn. App. 461, 468, 24 P.3d 1079 (2001). Reviewing courts give deference to the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Cingular Wireless LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). In this case, the Court gives deference to the facts and reasonable inferences therefrom as

found by the Hearing Examiner as he was the fact-finder and original decision-maker in the land use case.

2. Appellant Has Failed to Meet His Burden of Proving That the Variance Criteria Has Been Met.

Before discussing the specific variance criteria, the definition and environmental functions of wetlands and their buffers, as set forth in *Yakima County v. Eastern Washington Growth Management Hearings Bd.*, 168 Wn. App. 680, 694, 279 P.3d 434 (2012), may be helpful:

[W]etlands are areas “inundated or saturated by surface water or ground water at a frequency and duration to support ... a prevalence of vegetation typically adapted for life in saturated soil conditions.” RCW 36.70A.030(21). The GMA specifically defines wetlands as critical areas to be protected by development regulations. RCW 36.70A.030(5), .060(2); WAC 365-190-030(4)(a). According to the BAS Review [Yakima County's Review of Best Available Science for Inclusion in Critical Areas Ordinance Update], Washington has lost about 25 percent of its inland wetlands due to agricultural conversion, development, construction of levees and dams for flood control and irrigation, groundwater withdrawal, and other factors. . . . Wetland functions are grouped in three broad categories: biogeochemical functions (improving water quality by trapping and transforming chemicals and sediment); hydrologic functions (maintaining water flow and recharge); and food web and habitat functions (supporting wildlife). Buffers around wetlands protect mainly the water quality and wildlife habitat functions.

Pierce County’s critical area regulations are codified in PCC Title 18E. PCC Ch. 18E.30 regulates activities that have the potential to impact

regulated wetlands and their buffers. PCC 18E.30.060 sets wetland buffer widths depending upon the wetland category. In this case Appellant's wetland biologist and the PALS' wetland biologist agree that both the on-site wetlands in the north (pond) and the off-site wetlands (west of his newly constructed driveway) are Category II wetlands.³⁴ PCC 18E.30.060 Table 1 indicates that the buffer width would be 100 feet from the edge of the wetland.³⁵

The PCC allows for a reduction in the buffer width, depending upon the type of activity proposed. In this case, the proposed activity or land use is classified as "moderate intensity" use and therefore the buffer width may be reduced to 75 feet from the edge of each wetland.³⁶

Because Appellant seeks to reduce (or eliminate) the wetland buffers to less than 75 feet, he applied for wetland variances under PCC 18E.20.060(D)(3).³⁷ Appellant sought to reduce the wetland buffers as follows:

- For the proposed single-family residential structure in northern portion of property: reduce wetland buffer from 75 feet to 45 feet; and

³⁴ See Att. 3, the site plan submitted by Appellant's biologist which shows the applicable wetland buffers.

³⁵ PCC 18E.30.060(A) including Table 1 are set forth in Att. 6.

³⁶ AR 41 #6.

³⁷ PCC 18E.20.060(D)(3) is set forth in Att. 6.

- For the unpermitted driveway on west side of property: reduce wetland buffer from 75 feet to 15 feet.³⁸

Together these wetland buffer reductions would eliminate approximately 10,000 square feet of wetland buffer area.³⁹

3. The Hearing Examiner Correctly Interpreted and Applied the Law Regarding the Variance Criteria.

The gist of Appellant’s argument regarding interpretation of the law appears to be the applicable width of the wetland buffers.⁴⁰ Throughout his brief Appellant argues that the Examiner should have used the buffer width that was used in his 2001 Wetland Approval.⁴¹ However, Appellant did not raise his “37.5 foot buffer” argument at the hearing before the Hearing Examiner.⁴² Because this issue was not raised before the fact-finder (the Hearing Examiner), it cannot now be raised on appeal. *Friends of the Law v. King County*, 63 Wn. App. 650, 655, 821 P.2d 539 (1991).

³⁸ AR 42.

³⁹ AR 42, #8.

⁴⁰ See Appellant’s Opening Brief, pp. 33-34.

⁴¹ See Appellant’s Opening Brief, pp. 13, 28, 30, 31, 33 – 34, AR 84-86 and AR 41, #3.

⁴² Appellant raised this argument for the first time in his untimely motion for reconsideration. See AR 10-26.

Moreover, Appellant's argument is contrary to the site plan showing 75 foot wetland buffers submitted by Appellant's wetland biologist.⁴³ Lastly, the Wetland Approval for the pond expansion stated on its face that the approval was only to resolve the violation and would not apply to new development or structures on the property.⁴⁴

4. Substantial Evidence Supports the Hearing Examiner's Findings Regarding Appellant's Requested Variance.

Although Appellant argues that the variance criteria has been met, he failed to challenge the Examiner's key factual findings regarding the variance criteria.⁴⁵ Unchallenged findings of fact are verities on appeal, therefore Appellant's arguments regarding the facts as found in Finding #13 must be dismissed in their entirety.⁴⁶ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

Even if Appellant had challenged the Examiner's findings regarding the variance criteria, there is substantial evidence to support the

⁴³ See shaded area on AR 111, attached as Att. A to this brief.

⁴⁴ AR 84: "A new wetland review will be required for any change of use associated with any new proposed development activities or structures on the site."

⁴⁵ See Finding No. 13 of the Examiner's decision, set forth in the Restatement of Facts, and Appellant's challenged findings in the Petition for Judicial Review. CP (dated 8/31/15) 8, para. 9.

Appellant attempts to mislead the court by claiming that the proposed findings that his wetland consultant submitted with his application (AR 54-56) are the actual findings of fact made by the Hearing Examiner. They are not. See Appellant's Opening Brief, p. 27, sec. 4, and p. 28.

⁴⁶ See Appellant's Opening Brief, sec. 6, pp. 27 - 32.

Examiner's factual findings regarding each of the variance criteria. The first criteria, special circumstances or uniqueness of the property, addresses features of the parcel such as the parcel's shape, topography, etc. The Examiner found that this 3.5 acre parcel has sufficient area (approximately 1.3 acres) outside the wetlands and their buffers to construct a single-family residence.⁴⁷ One look at the site plan submitted by Appellant's wetland biologist (Att. 3), confirms the Examiner's finding and shows sufficient unrestricted area (in white) near the old driveway in which to locate a new single-family residence.

The fact that Appellant prefers to locate a new structure elsewhere on the property is irrelevant. What matters is the configuration of the property itself. The evidence shows that the wetlands and buffers on a portion of the property do not make it "impossible to redesign the project" as Appellant argues. The PALS' biologist testified, and Appellant's own site plan shows, that there is sufficient unrestricted area on which to build the proposed residence.

Furthermore, the existing (old) driveway in the southeast portion of the property has been used for years as access to the property. Clearly it is not the property's characteristics that led to the requested variances in

⁴⁷ See AR 32, # 6. Although Petitioner challenged Finding #6, he does not reference or directly challenge the 1.3 acre determination by the Examiner..

this case, but rather it is Appellant's desire to build additional structures on the property. The Examiner was correct in finding that no special circumstances exist with respect to the property, and substantial evidence supports this finding.

The second criteria, whether Appellant has avoided impacts to the wetlands and buffers and provided mitigation to the maximum extent possible, has also not been met. The Examiner found, based upon the evidence submitted, that Appellant proposed no mitigation nor did he make a serious attempt to avoid impacts to the wetland buffers. The fact that Appellant could construct outside the critical areas is obvious from looking at Appellant's proposed site plan.⁴⁸ Such evidence supports the Examiner's finding with respect to his proposed single-family residence.⁴⁹

Similarly, Appellant's unpermitted construction of the new driveway on the west side of the property was done without any effort to construct around the wetland buffers.⁵⁰ There is substantial evidence to support the Examiner's finding that the second criteria for a variance had not been met.

⁴⁸ See Att. 3 and the white space shown throughout the southern portion of his property.

⁴⁹ In his Opening Brief Appellant argues that the pond wetland buffer should be reduced to 37.5 feet because of the prior resolution of the pond buffer encroachment. See Appellant's Opening Brief, p.28. This argument was not presented to the Examiner prior to his decision on May 19, 2011, nor is it consistent with the plans and testimony of his wetland biologist. See Att. 3, showing 75-foot buffer around the pond for the newly proposed single-family development.

⁵⁰ See Att. 3.

Not only did Appellant fail to avoid impacts to wetlands and mitigation for destruction of wetland buffers, but by his own actions he put himself in the position he is now in. For example, he now argues that there is not sufficient room in the central area of his property for a house because of the location of his well on the property. The evidence shows that after purchasing the property in 2000 Appellant applied to the Tacoma-Pierce County Health Department in 2005 to construct an irrigation well (as opposed to a domestic water supply well) on his property.⁵¹ Attached to his application was a document whereon Appellant indicated the location of his proposed irrigation well.⁵² Because the Health Department approved his irrigation well, Appellant now argues that “the County” approved the location of his single-family residence in the northern portion of his property within the critical area buffers.⁵³ Appellant’s argument lacks merit as the Health Department was only reviewing an application for an irrigation well, which is not the same as reviewing an application for a domestic water supply and a proposed residence.⁵⁴

The third criteria, whether a reduction in the buffer is necessary for

⁵¹ AR 99-102.

⁵² See AR 102.

⁵³ See Appellant’s Opening Brief, p. 2, para. 3.

⁵⁴ Because the Health Department is a separate legal entity from the County under ch. 70.46 RCW, Appellant is incorrect in arguing that approval by the Health Department constitutes approval by the County.

preservation and enjoyment of property rights or uses by others similarly situated, was also not met. The Examiner correctly found, based upon the evidence submitted by Appellant and his biologist, that there is over an acre of unrestricted area to construct a residence.⁵⁵ Appellant's wetland biologist agreed with the amount of area not covered by wetlands and their buffers in his testimony: "Approximately 63 per cent of this site is covered by wetlands and buffers."⁵⁶

The fourth criteria, whether granting the variance would be detrimental to the public welfare or injurious to property, has not been met by Appellant. As the Examiner pointed out in his decision, granting variances where the applicant failed to meet the strict application of the law undermines the regulatory purposes and principles of zoning ordinances and land use comprehensive plans.⁵⁷ Here, Appellant failed to demonstrate that his request met any of the variance criteria therefore it would clearly be inappropriate and unjustified to grant the requested variances.

Based upon the evidence submitted by both PALS and the Appellant, the Examiner was correct in concluding that Appellant failed to

⁵⁵ See AR 32, #10.

⁵⁶ TR 24: 13-14. 37% of a 3.75 acre parcel equals 1.38 acres. Because this argument was raised for the first time in this appeal, it should be disregarded. See *Friends of the Law v. King County*, 63 Wn. App. 650, 655, 821 P.2d 539 (1991).

⁵⁷ See Att. 4, page 6 of the Examiner's decision, citing Settle, Washington Land Use and Environmental Law and Practice, section 2.9.

prove that any of the requirements for granting a variance had been met. His conclusion that the variances should be denied was therefore correct.

C. Collateral Estoppel Does Not Apply In This Case.

Despite the fact that Appellant is seeking variances for a new structure and for an unpermitted driveway that did not exist when he received wetland approval for his pond excavation project, he argues that collateral estoppel somehow applies in this case. Clearly it does not.

Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). It prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. *Id.* The issue to be precluded must have been “actually litigated and necessarily determined” in the prior adjudication. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987); citing *Peterson v. Department of Ecology*, 92 Wn.2d 306, 312, 596 P.2d 285 (1979); *Haslund v. Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976); *King v. Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974).

Affirmative answers must be given to the following questions before collateral estoppel is applicable:

- (1) Was the issue decided in the prior adjudication identical with the one presented

in the action in question?

(2) Was there a final judgment on the merits?

(3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

(4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Rains v. State, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

Whether collateral estoppel applies is an issue of law that appellate courts review de novo. *Christensen*, 152 Wn.2d at 305.

1. There Was No Prior Adjudication or Litigation.

Collateral estoppel doesn't apply in the present case for several reasons. First, the issue of the width of the pond buffer (37.5 feet) was not litigated or adjudicated; it was agreed upon in an administrative mitigation agreement (Wetland Approval).

Nor was the issue of the wetland buffer for the new (western) driveway addressed in a prior adjudication. Unlike this case, the cases initially cited by Appellant to support the application of collateral estoppel, *Shuman v. Dep't. of Licensing*, 108 Wn. App. 673, 32 P.3d

1011 (2001), and *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601 (1999), involve prior adjudications. *Shuman* involved the collateral estoppel effect of a district court order in a criminal prosecution on license revocation proceedings by the Department of Licensing. *Shuman*, 108 Wn. App. at 675. The prior adjudication in the *Thompson* case involved a district court criminal case. *Thompson*, 138 Wn.2d at 788. Likewise, all but one of the other cases cited by Appellant regarding collateral estoppel involve prior adjudicative proceedings:⁵⁸

- *In re Marriage of Mudgett*, 41 Wn. App. 337, 704 P.2d 165 (1985): Prior adjudication involved court's entry of decree of dissolution.
- *State v. Dupard*, 93 Wn.2d 268, 609 P.2d 961 (1980): Prior adjudication involved parole revocation proceeding.
- *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 93 P.3d 108 (2004): Prior adjudication involved action brought in United States District Court.
- *City of Arlington v. Central Puget Sound Growth Management Hearings Board*, 164 Wn.2d 768, 193 P.3d 1077 (2008): Prior adjudication involved judicial appeal of CGMHB decision.
- *August v. U.S. Bancorp*, 146 Wn. App. 328, 190 P.3d 86 (2008): Prior adjudication involved superior court case.
- *Satsop Valley Homeowners Ass'n, Inc. v. Northwest Rock, Inc.*, 126 Wn. App. 526, 108 P.3d 1247 (2005): Prior adjudication involved superior court land use case.

⁵⁸ *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974), cited by Appellant at p. 14 of his Opening Brief did not involve collateral estoppel.

As stated above, no prior adjudication existed in this case, therefore collateral estoppel is not applicable. Both the Wetland Approval and the Boundary Line Adjustment (“BLA”) involved approvals by PALS’ staff, not by a court or even by the Hearing Examiner. As the record shows, the pond buffer was approved by PALS staff to resolve a violation (enlargement of the pond without necessary permits).⁵⁹ This approval was recorded but not litigated or adjudicated in any judicial or quasi-judicial proceeding. Construction of the west driveway within the off-site wetland buffer was also not involved in any prior adjudicative proceeding; in fact it was constructed without any prior permit, approval, or proceeding of any kind.

Appellant’s reliance on PALS approval of a Boundary Line Adjustment (“BLA”) to add the 30 by 240 foot strip to his property is misplaced because a BLA only adjusts boundary lines between parcels. A BLA is defined in PCC 18.25.030 as:

. . . altering boundary lines between platted or unplatted lots or both, which does not create any individual lot, tract, parcel, site, or division, nor create any lot, tract, parcel site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a

⁵⁹ See Wetland Approval at AR 83-86.

building site, except as provided for in Chapter 18F.70 PCC.⁶⁰

Nowhere in the Pierce County Code does it state that a BLA authorizes construction of a driveway or any other road improvement.⁶¹ Such construction requires a site development permit pursuant to PCC 17A.10.070(B).⁶² Nor did the BLA authorize construction within the wetland buffer of adjacent off-site wetlands. The BLA simply adjusted the boundary lines between two parcels; no more, no less. Had Appellant applied for a site development permit before constructing his driveway, the issue of wetland buffers would have been addressed and resolved. In the absence of prior litigation regarding construction of his new driveway within off-site wetland buffers, it cannot be said that the litigation/adjudication element for collateral estoppel has been met.

Nor have the remaining elements of collateral estoppel been met.

⁶⁰ PCC Ch. 18F.70 sets forth the process wherein boundary lines between adjoining parcels are adjusted or moved.

⁶¹ In his Opening Brief Appellant cites to and includes a document which was not part of the record before the Hearing Examiner. See Appellant's Opening Brief, p. 19, and Appendix 1 to his Brief. Despite the fact that the document was not part of the record, it does not support Appellant's argument that the BLA somehow approved construction of the driveway within the off-site wetland buffer.

⁶² PCC 17A.10.070(B)(1) is set forth in Att. 6. There is no evidence that Appellant applied for a site development permit when he sought approval of his BLA in 2004 or at any time thereafter.

2. There Was No Prior Judgment.

Similarly, there was no prior judgment for either the pond buffer or the driveway. As stated above, the pond buffer was negotiated and decided by the parties (Appellant and the PALS Department) without any resulting judgment. The western driveway was never approved because Appellant never applied for a construction permit for the driveway. Accordingly, the second element of collateral estoppel has not been met.

3. The Parties in Both Matters Are the Same.

The parties involved are not the same: Appellant Higham and Pierce County PALS Department agreed to the Wetland Approval and the BLA. This case, however, involved the Hearing Examiner's quasi-judicial decision on whether the criteria for the requested variances had been met.

4. The Fourth Element of Collateral Estoppel Has Not Been Met.

The fourth element of collateral estoppel, that application of collateral estoppel does not work an injustice on the party against whom it is applied, has not been met in this case. As set forth above, Appellant is seeking approval for a new project, a residential structure, in the northern portion of his property. As the Wetland Approval documents for the pond excavation stated, new projects are subject to the regulations in effect at that time. The reasoning behind this is obvious; it promotes full disclosure

of development plans via applications for such development. Under Washington's vested rights statute, if a landowner wants to build a structure on his property he must submit a building permit application in order to have his project reviewed under then-existing regulations. See RCW 19.27.095. Until he files such an application, he cannot "lock in" regulations. See *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180, 182-3 (2009):

Washington's rule is the minority rule, and it offers more protection of development rights than the rule generally applied in other jurisdictions. The majority rule provides that development is not immune from subsequently adopted regulations until a building permit has been obtained and substantial development has occurred in reliance on the permit. Our cases rejected this reliance-based rule, instead embracing a vesting principle which places greater emphasis on certainty and predictability in land use regulations. By promoting a date certain vesting point, our doctrine ensures that "new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law." *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987). Our vested rights cases thus recognize a "date certain" standard that satisfies due process requirements.

In 1987, the legislature codified these judicially recognized principles.⁶³ RCW 19.27.095(1) reads:

A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date

⁶³ See Laws of 1987, ch. 104, § 1.

of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

The goal of the statute is to strike a balance between the public's interest in controlling development and the developers' interest in being able to plan their conduct with reasonable certainty. Development interests can often come at a cost to public interest. The practical effect of recognizing a vested right is to potentially sanction a new nonconforming use. "A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws." *Erickson [& Associates, Inc. v. McLerran]*, 123 Wn.2d at 873–74, 872 P.2d 1090 [1994]. If a vested right is too easily granted, the public interest could be subverted. *Erickson*, 123 Wn.2d at 874, 872 P.2d 1090.

The policy is particularly appropriate here where Appellant apparently knew where he wanted to locate his new residential structure, but did not apply for a building permit until almost seven (7) years later.⁶⁴ By that time wetland regulations had changed significantly and larger buffers were required.⁶⁵ Application of the doctrine here would work an injustice in that it would encourage lack of disclosure of future

⁶⁴ See TR 11:8-12 and AR41 #6.

⁶⁵ The County wetland regulations were amended effective March 1, 2005 per Ordinance No. 2004-56s.

development plans. Appellant's unpermitted construction of the driveway on the west side of his property would also work an injustice as it would encourage property owners to avoid the construction permit process by adjusting boundary lines.

Appellant chose to develop his property in stages rather than disclose all of his development plans at one time. Had Appellant been forthcoming and submitted permit applications for all necessary permits, his applications would have been reviewed under the regulations in effect at that time. He failed to do so and cannot now "bootstrap" or elevate the prior Wetland Approval associated with the enlargement of the pond into approval for future projects. Collateral estoppel would clearly work an injustice in that it would encourage property owners to benefit from their deception and failure to obtain necessary permits.

Finally, the Appellant should not be allowed to benefit in any way from a mitigation agreement resolution that was the result of his prior bad acts. To do so would grant him rights through those bad acts.

D. The Hearing Examiner Did Not Err in Finding That Appellant Has Legal Access to His Property.

Appellant argues that the Examiner erred in finding that his property has pre-existing driveway access to his property because that access is insufficient to support both the existing mobile home and a new

single-family structure.⁶⁶ Appellant does not dispute that he has legal access to his property via the existing easement on the **southeast** portion of his property. His argument appears to be that this access is insufficient to support two (2) residential structures on the site.

Pierce County Code 17C.60.150(C)(2) describes the width requirement for residential structures:

2. Width. EV Access serving one dwelling unit shall not be less than 15 feet. EV Access for all other projects shall not be less than 24 feet.⁶⁷

Appellant's existing (old) access easement (**southeast** corner of his property) is shown on the site plan submitted by his wetland biologist (Att. 3).⁶⁸ As shown on his site plan, only a portion of the existing easement is improved with the existing driveway. Appellant testified that the existing driveway was less than the 24 feet he would need to add a second residential structure to his property and that it would be difficult to widen

⁶⁶ See Appellant's Opening Brief, pp. 25 – 27.

⁶⁷ Emergency vehicle access ("EVA") is defined in PCC 17C.60.030: Emergency Vehicle Access. "Emergency vehicle access" means a drivable surface constructed and maintained in accordance with this Chapter, that provides emergency access between a public or private road or shared access facility and 150 feet of all portions of an exterior wall of the first story of any structure requiring EV Access, as measured in an approved route around the exterior of the building.

A "dwelling unit" is defined in PCC 18.25.030: "Dwelling unit" means one or more rooms designed for or occupied by one family for living or sleeping purposes and containing kitchen, sleeping, and sanitary facilities for use solely by one family. All rooms comprising a dwelling unit shall have access through an interior door to other parts of the dwelling unit.

⁶⁸ The easement itself appears to be the same width as that of the "pipe stem" on the **southwest** corner of his property that resulted from the BLA.

the existing driveway.⁶⁹

While Appellant may be correct about the difficulty in widening the old driveway, he omits that he does not have an absolute right to have two residential structures on his property. PCC 18A.05.070 limits the number of residential uses on a lot to not more than one single-family detached dwelling unit or one two-family dwelling unit [duplex]. An exception is made for accessory dwelling units (“ADUs”) that meet other requirements not pertinent here.⁷⁰

The result of these code provisions means that Appellant’s existing access is sufficient for either the existing mobile home or a new single-family structure, but not both. Appellant cites no authority for a right to have both structures. His argument that the Examiner erred must therefore fail.

E. Appellant’s Agricultural Use Is Not an Issue in This Case.

There was testimony regarding whether Appellant did or did not have agricultural use on his property, but the Examiner did not make a finding one way or the other. Nor is such a finding necessary in this case. This case involved requested variances to required wetland buffers in conjunction with new construction of a house and a new driveway, neither

⁶⁹ TR 23: 16–25.

⁷⁰ PCC 18A.36.070(L).

of which are agricultural activities. The Examiner was therefore correct in disregarding this “red herring” issue.

F. The Examiner Did Not Engage in Unlawful Procedure Nor Did He Impose Unconstitutional Conditions.

Appellant argues that the Examiner’s decision should be reversed because the staff report of the PALS’ biologist referred to a phone call she received from a neighbor.⁷¹ Although Appellant states emphatically that the Examiner relied upon this phone call, they do not point to any of the Examiner’s findings to support their argument.

Appellant also argues that the Examiner engaged in unlawful procedure by relying on Appellant’s previous wetland violation case, the same case Appellant relies upon for his argument that the wetland buffers should be the same as in the violation case.⁷² None of Appellant’s allegations regarding unlawful procedure by the Examiner have merit and should be disregarded by this court.

Likewise, Appellant’s argument that the Examiner was asked to consider improper conditions of approval is without merit as the Examiner denied the requested variances.⁷³ Had he approved the variances and imposed conditions which Appellant found offensive, he could appeal

⁷¹ See AR 40, and Appellant’s Opening Brief at p. 33.

⁷² See Appellant’s Opening Brief, p. 33.

⁷³ See Appellant’s Opening Brief, p. 34.

such conditions. For this court to reverse the Examiner for conditions he did not impose is nonsensical.

V. RESPONDENT PIERCE COUNTY IS ENTITLED TO REASONABLE ATTORNEY'S FEES.

In accordance with RCW 4.84.370 Pierce County requests that if the decisions of the Hearing Examiner and Superior Court are upheld, the County be awarded reasonable attorneys' fees. Under applicable law the County, as the prevailing party, would be entitled to an award of reasonable attorneys' fees and costs associated with defending this appeal. *See Gig Harbor Marina, Inc. v. City of Gig Harbor*, 94 Wn. App. 789, 973 P.2d 1081 (1999); *Bellevue Farm Owners Association v. State of Washington Shorelines Hearings Board*, 100 Wn. App. 341, 335-336, 997 P.2d 380 (2000).

VI. CONCLUSION

Appellant has not met his burden of proof as to any of the grounds for reversal of the Hearing Examiner's decision. Substantial evidence supports the Examiner's decision and the Examiner correctly interpreted and applied the law.

Nor does collateral estoppel apply in this case as there was no prior adjudication or litigation of any of the issues upon which Appellant relies. Even if the PALS Department's Wetland Approval and approval of the

Boundary Line Adjustment somehow qualify as prior adjudication, all of the remaining elements of collateral estoppel have not been met. Finally, the Appellant should not be allowed to benefit in any way from a mitigation agreement resolution that was the result of his prior bad acts.

Respondent Pierce County respectfully requests that the decisions of the Hearing Examiner and the Superior Court be upheld, that Pierce County be awarded attorneys' fees, and that the petition for judicial review be denied.

DATED this 15th day of January, 2016.

MARK LINDQUIST
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Respondent Pierce County was delivered this 15th day of January, 2016, to the following by personal delivery and by electronic mail:

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PIERCE COUNTY PROSECUTOR

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