

**FILED**

OCT 06 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 283160

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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LLOYD A. HERMAN and LINDA J. HERMAN, husband and wife,  
individually and their marital community,

Appellants,

v.

STATE OF WASHINGTON, et al.,

Respondents.

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**BRIEF OF RESPONDENT STATE OF WASHINGTON**

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## I. INTRODUCTION

In May 2004 the Department of Ecology and Spokane County sent the Hermans a Shoreline Violation Order and Penalty for building a structure on Liberty Lake without a shoreline permit. Mr. Herman fought the order in front of the Shorelines Hearings Board (S.H.B.), the Superior Court, and the Court of Appeals. In the midst of that proceeding, Mr. Herman brought this action against Spokane County and Ecology. In this action the Hermans claim that the state and county violated their civil rights when they enforced the state Shoreline Management Act.

The underlying facts are well-known to the court because this court reviewed the Hermans' appeal of the decision by the Shorelines Hearings Board concerning the same claims made in the present appeal. *See Herman v. Shorelines Hearings Bd.*, 149 Wn. App. 444, 204 P.3d 928 (2009), *review denied* 166 Wn.2d 1029, 217 P.3d 336 (2009).<sup>1</sup> In *Herman I* this court reversed the superior court, affirmed the S.H.B. in all respects, and found that the Hermans violated the Shoreline Management Act (RCW 90.58) when they built illegal structures on the shoreline of Liberty Lake without required permits. *Herman*, 149 Wn. App. at 461.

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<sup>1</sup> Appendix (App.) A is a copy of this court's decision in *Herman v. Shorelines Hearings Bd.*, 149 Wn. App. 444 (2009). Hereinafter, this decision is referred to as "*Herman I*." The present case is referred to as *Herman II*.

The present claim for damages that is based on and against the individuals and governmental entities who initiated and pursued the Shoreline Violation Order regarding the Hermans is frivolous, retaliatory, and vexatious. The Herman's knew that this action was time-barred and never should have filed it. When this court ruled against the Hermans in the enforcement action, the Hermans should have dismissed this appeal. Because they chose not to, the State and the County are required to respond.

Two state agencies, Spokane County, and several employees are before this court only because they enforced the Shoreline Management Act. This court has already ruled that the Hermans violated the Shoreline Management Act and upheld the State and County's right to enforce the Act in *Herman I*. In this case, the Hermans improperly attack this court's decision in *Herman I*. This court should affirm the trial court and grant reasonable attorney's fees on appeal.

## **II. DECISION BELOW**

The Spokane County Superior Court granted the State's motion for summary judgment on February 26, 2009. CP at 661-63. The Hermans' Motion for Reconsideration was denied on July 17, 2009. CP at 784-85. Herman timely appealed. CP at 786-89.

### III. ISSUES PRESENTED FOR REVIEW

A. Should the trial court be affirmed because all of the Hermans' claims for damages are predicated on the enforcement action which was decided against them in *Herman I*?

B. Is this action time-barred when the Hermans filed it three years and eight months after the date of the alleged injury?

C. Should the trial court be affirmed because none of the claims are supported by Washington law?

D. Is this appeal frivolous thereby entitling the State to reasonable attorney's fees?

### IV. STATEMENT OF THE CASE

Mr. and Ms. Herman reside on property located along the shoreline of Liberty Lake. CP at 40. During the 1970s, the Hermans made several changes to the property. They added a boat crane and lift, which were anchored in a pier made out of cement and rocks and placed out over the water. CP at 42-43. They also added an approximately 18 feet by 18 feet deck on the south side of the pier supported by pier blocks. CP at 43. They also had a toilet installed on the deck. CP at 163.

In the early 1990s, the Hermans made more changes. They replaced the old deck with a larger, 22 feet by 22 feet deck. CP at 163. They constructed a roof cover over the deck, and they replaced the

wooden steps at the end of the deck with wider concrete steps. CP at 163. The Hermans made all of these changes without seeking a shoreline substantial development permit from Spokane County. CP at 163.

In 1993, Ecology fined the Hermans \$1,000 for violating RCW 90.58.140 (the Shoreline Management Act) and the Spokane County Shoreline Master Program (SCSMP). CP at 44-45. The Hermans appealed the penalty and the parties reached a settlement prior to hearing. CP at 45-46. The settlement was contained in a Stipulation and Agreed Order of Dismissal, dated May 4, 1995, in which Ecology agreed to rescind the penalty in exchange for certain changes to the Hermans' property. CP at 46-47.

Rather than complying with the 1995 agreement, the Hermans expanded their use of the shoreline. They built a concrete slab, raised the cover over the deck, created an enclosed structure containing a kitchen sink, toilet, refrigerator, and concrete patio, and brought in a substantial number of non-native plants. CP at 164. The Hermans did not obtain any permits from Spokane County or the approval of Ecology. CP at 166.

On May 17, 2004, the county and Ecology issued Shoreline Violation Order No. 1038 to Mr. Herman imposing a \$30,000 penalty for violating the SMA, the SCSMP, and for failing to comply with the 1995 settlement agreement. CP at 167. Mr. Herman appealed to the S.H.B.

CP at 52. The S.H.B. held a three-day hearing on May 12, 13, and 16, 2005. CP at 54. After the Board ruled against him, Mr. Herman appealed the Board's Order to superior court. CP at 57. The superior court entered Findings of Fact, Conclusions of Law and an Order on August 23, 2007. CP at 189-203. The court concluded that the S.H.B. "correctly interpreted and applied the law" and the S.H.B.'s "findings and conclusions are supported by substantial evidence, and [the S.H.B.] did not act in an arbitrary or capricious manner, commit procedural error, or violate Petitioner [Herman's] constitutionally-protected rights." CP at 198. In spite of this, the court remanded the penalty to the Board to decide whether Mr. Herman could use the penalty for site restoration. CP at 202-03. Ecology appealed the order to the court of appeals. This court reversed the superior court, upheld the S.H.B. in full, and ruled that Mr. Herman violated the Shoreline Management Act. *Herman*, 149 Wn. App. at 444. This court found that the superior court improperly admitted new evidence and relied on that evidence "to reach conclusions different from the board's." *Herman*, 149 Wn. App at 456.

In the meantime, the Hermans filed this lawsuit alleging twelve causes of actions all of which relate to Shoreline Violation Order No. 1038, dated May 17, 2004. CP at 137-41. The Hermans filed the original complaint in this action with the superior court on January 23, 2008. CP

at 1. Both the complaint and the amended complaint state that the subject of this action was Shoreline Violation Order 1038, dated May 17, 2004. CP at 18-19, 51-52. The Hermans received the Order and notice of penalty by May 21, 2004. CP at 118.

Here are the critical dates in the two related actions:

- May 21, 2004 Service of Shoreline Violation Order and Penalty 1038 (*Herman I*)
- July 27, 2005 S.H.B. Findings, Conclusions, and Order (*Herman I*)
- August 24, 2007 Superior court Findings, Conclusions and Order in *Herman I* (Judge Austin)
- January 23, 2008 Summons and Complaint filed in *Herman v. Ecology and Spokane County* (*Herman II*)
- February 5, 2009 *Herman I* issued by Court of Appeals
- February 26, 2009 Order Granting Summary Judgment to Ecology in *Herman II* (Judge O'Connor)
- March 20, 2009 Order Granting Summary Judgment to Spokane County in *Herman II* (Judge O'Connor)
- March 31, 2009 *Herman I* published by Court of Appeals
- September 9, 2009 *Herman I* Petition for Review denied
- April 19, 2010 Appellant's Opening Brief filed in *Herman II*

All the present claims were decided against the Hermans when this court upheld the enforcement order on February 5, 2009. In addition, the claims are barred by the statute of limitations and are not supported by the law.

## V. ARGUMENT IN SUPPORT OF MOTION

This court reviews a summary judgment order de novo. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008).

The trial court should be affirmed for three reasons: (1) the damage claims are predicated on the illegality of the shoreline enforcement action that this court found was legal and justified; (2) the present suit was filed more than eight months after the statute of limitations barred it; and (3) none of the claims have any legal merit under Washington case law, and were properly dismissed by the trial court.

The Hermans' continued litigation of their claims in this appeal, after this court ruled against them in *Herman I*, is frivolous, vexatious, and retaliatory. Accordingly, this court should affirm and award reasonable attorney fees to the state and county respondents for this appeal.

### A. This Court's Decision In *Herman v. Shorelines Hearings Bd.* Precludes Their Success In The Present Case

"In May 2004, Ecology and Spokane County issued a joint Shoreline Violation Order. It included a \$30,000 civil penalty, a stop-

work order, and a requirement that Mr. Herman submit a plan within 30 days detailing his plan to restore the shoreline. Mr. Herman discontinued work on his property and appealed the Order to the Shorelines Hearings Board.” *Herman*, 149 Wn. App. at 452. This court went on to say:

The Shorelines Hearings Board “concluded that Mr. Herman substantially violated the [1995] agreement,”[. . . and] “further concluded that, independent of the agreement, Mr. Herman violated the Shoreline Management Act by undertaking substantial development without a permit.” [ . . . ] The Board “affirmed the \$30,000 penalty that Ecology and Spokane County imposed but ordered \$10,000 of the penalty suspended on the condition that Mr. Herman fully comply with the order’s provisions within one year.”<sup>2</sup>

In its final decision on the matter, this court affirmed the S.H.B.

“The board’s decision here is not arbitrary or capricious. Indeed, its findings and conclusions reflect a thoughtful and thorough investigation of Mr. Herman’s modifications to his shoreline.”<sup>3</sup> Herman’s “work on his property was extensive. His work included both expanding existing structures and adding new structures. The Board then methodically set out Mr. Herman’s violations of the Shoreline Management Act and the Spokane County Shoreline Master Program since 1995 and Mr. Herman’s noncompliance with the 1995 agreement.”<sup>4</sup>

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<sup>2</sup> *Herman*, 149 Wn. App. at 452-53. Mr. Herman has not paid the penalty nor has he complied with the order on the site restoration plan. These questions remain in dispute in the parallel enforcement action.

<sup>3</sup> *Herman*, 149 Wn. App. at 459.

<sup>4</sup> *Id.* at 460

This court reversed the judgment of the trial court insofar as it is inconsistent with the decision of the Shorelines Hearings Board and affirmed the Order of the board.<sup>5</sup>

In the present case, the Hermans claim monetary damages for a wide variety of torts all based on the very same enforcement order. In the complaint they assert: “The actions of the Defendants wrongfully and illegally ignored the Plaintiff’s fundamental rights to reasonably develop and use their property and to be free of arbitrary and irrational decision-making.” CP at 58. All of the twelve causes of action in the amended complaint were built on the fundamental premise that when the County and Ecology issued the enforcement order they “violated clearly established and well known basic statutory and/or constitutional rights of the Plaintiffs.” CP at 59-77.

Since February 5, 2009, when this court ruled in favor of the County and Ecology in *Herman I*, the Hermans have had no colorable claim that the State or County violated any of their rights or committed any tort against them.<sup>6</sup> In the Hermans’ 15-page statement of the case, they repeat facts and arguments they made to the S.H.B., the superior court, and this court in *Herman I*. It is remarkable that in all of the 46

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<sup>5</sup> *Id.* at 461. Herman’s request for review in the State Supreme Court was denied. *Herman v. Shoreline Hearing Bd.*, 166 Wn.2d 1029, 217 P.3d 336 (2009).

<sup>6</sup> Certainly, by September 9, 2009, when the supreme court denied Herman’s Petition for Review, this appeal became frivolous.

pages of their opening brief to this court, the Hermans mention this court's *Herman I* decision only once in passing.<sup>7</sup> For all practical purposes, the Hermans pretend this court's prior decision does not exist.

In fact, all claims for damages based upon the enforcement action were fully and finally foreclosed when this court affirmed the enforcement order. The Hermans says: "Appellants Lloyd and Linda Herman claim the State restricted the manner of use, enjoyment, and development of their property by the *alleged code violation enforcement*."<sup>8</sup> The "code violation" was not merely "alleged," it was proven to the S.H.B. and affirmed by this court. The Hermans are not entitled to any damages because the enforcement action was upheld in full.

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, 960 (2004). "For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity

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<sup>7</sup> Appellants' Br. at 16. Herman discusses Judge Austin's order at length even though that order was reversed by the court of appeals.

<sup>8</sup> Appellants' Br. at 2.

with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.” *Id.*

All the elements of collateral estoppels are met and Hermans’ claims are collaterally stopped. In *Herman I*, this court decided that the shoreline enforcement action was justified by the facts and supported by the law. The damage claims in *Herman II* predicated on the same enforcement action are barred by the doctrine of collateral estoppel.

**B. The Hermans’ Claims Are Time-Barred**

All the causes of action are barred by the statute of limitations. The maximum conceivable statute of limitation for any claim in this case is three years. *See* RCW 4.16.080(2).<sup>9</sup> The complaint was filed three years and eight months after the Hermans received the Notice of Penalty that is the basis for their claim.

A complaint must be filed within the applicable time period of the date on which the cause of action accrued.<sup>10</sup> In most tort claims, the cause of action accrues on the date of the event which produced the alleged

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<sup>9</sup> Appellants’ brief does not dispute that three years is correct.

<sup>10</sup> “Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.” RCW 4.16.005.

injury.<sup>11</sup> The general rule is that the cause of action accrues at the time the negligent act or omission occurs.<sup>12</sup> In this instance, all of the claims accrued on May 21, 2004, when Mr. Herman received the penalty Order.

The Hermans argue that their cause of action accrued when Judge Austin issued an order on August 24, 2007. According to the Hermans, “the injury did not occur until the superior court rendered its decision.”<sup>13</sup> At the superior court the Hermans argued that the action accrued when Judge Austin “determined the code enforcement to be improper.” CP at 317. Of course, Judge Austin’s decision was overturned by this court on appeal.

Alternatively, the Hermans argued that the injury occurred when they received discovery responses from Ecology during the S.H.B. proceeding. CP at 782. The trial court stated in the memorandum opinion,

Plaintiff asserts that the discovery of additional information to support cause(s) of action somehow changes the date when plaintiffs knew the facts which could support a violation of their civil rights. When the penalty order was issued, the plaintiff had facts which could support a violation of their civil rights. That is when the time begins to run. That they perceived they had additional facts to support their claims at a later date does not change the fact that the statute of limitations commenced on May 21, 2004.

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<sup>11</sup> *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969).

<sup>12</sup> *Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 760 P.2d 348 (1988).

<sup>13</sup> Appellants’ Br. at 3.

CP at 782.

“An action accrues when the factual basis for the action becomes known to the party bringing the action.”<sup>14</sup> “In many instances an action accrues immediately when the wrongful act occurs, but in some circumstances *where the plaintiff is unaware of harm sustained* a ‘literal application of the statute of limitations could result in grave injustice.’”<sup>15</sup> To avoid this injustice, courts have applied the discovery of injury rule, under which the cause of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action.<sup>16</sup> “This does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action.”<sup>17</sup>

The cause of action accrues when the plaintiff knows or should know the relevant facts; whether or not he or she also knows that these facts can establish a legal cause of action. The Hermans had all the facts they needed when they received the penalty Order on May 21, 2004. Within thirty days they appealed the order to the S.H.B. because they

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<sup>14</sup> *Gausvik v. Abbey*, 126 Wn. App. 868, 879-80, 107 P.3d 98 (2005).

<sup>15</sup> *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006) (emphasis added).

<sup>16</sup> *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998).

<sup>17</sup> *1000 Virginia Ltd. Partnership*, 158 Wn.2d at 576.

believed it harmed them and their right to use and develop their property. Judge Austin's order three years later had no adverse impact on the Hermans. The Appellant's brief cites no authority for the argument that this action accrued when the superior court "affirmed" the S.H.B., but "determined the code enforcement to be improper."

In the superior court the Hermans claimed that "Defendants negligently performed their duties by failing to inspect the purported claims to be brought and actually commenced against the plaintiffs and then negligently and over zealously sought to enforce the applicable statutes and regulations." CP at 75-77. There is no statutory or common-law cause of action for negligent inspection or negligent enforcement. Even if there were, the claim was time-barred.

The abandoned "negligent inspection" claim makes perfectly clear that the Hermans believe that the county and Ecology negligently commenced the penalty action. Since all of the claims in the complaint are based on the penalty, the Hermans were fully informed of the factual basis for their alleged injury on May 21, 2004, when they received the penalty Order.

The Appellants' brief argues that the running of the statute of limitations was tolled by equitable estoppel.<sup>18</sup> This portion of their brief, like most of their brief, is taken verbatim from their response to the State's Motion for Summary Judgment. See CP at 343-44. The Hermans rely on a footnote from an employment discrimination case (*Douchette v. Bethel School Dist.*, 117 Wn.2d 805, 809, 818 P.2d 1362 (1991)), in which the supreme court said "we do not rule out the possibility for future cases that equitable grounds might exist which justify a tolling of the statute of limitations in a discrimination case."<sup>19</sup> Herman offers no argument or authority for the proposition that this case is that "future case" wherein equitable estoppel "might" apply.

The elements of equitable estoppel are: "(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *Bd. of Regents v. City of Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). The Hermans have not offered any evidence or argument on any of the three elements required to prove equitable estoppel.

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<sup>18</sup> Appellants' Br. at 23-24.

<sup>19</sup> Appellants' Br. at 24.

**C. The Herman's Failed To State Claim Upon Which Relief Can Be Granted**

The amended complaint (CP 59-79) alleged thirteen different causes of action none of which have any merit. The State moved to dismiss all thirteen claims on summary judgment. CP at 101. The Hermans did not provide any argument to the trial court supporting eight of their claims. CP 384.<sup>20</sup> The Hermans acknowledge they abandoned five claims below. App. Brief at 22. Since they did not provide any argument on three more claims, these claims have been abandoned. Therefore there are only five claims left. All five claims were dismissed by the superior court. Each claim is discussed briefly below.

**1. The Federal Civil Rights Act Claim**

The Hermans claim that they were deprived of their constitutional rights, including, but not limited to, rights to procedural and substantive due process and equal protection under the United States Constitution in violation of 42 U. S. C. § 1983. CP at 59-61. The statute of limitations for civil rights cases is governed by Washington's general statute of

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<sup>20</sup> The Hermans have abandoned eight claims. The abandoned claims are: abuse of process, "subordination or perjury," negligent training, tortious interference, negligent inspection, CR 11, outrage, and negligent infliction. *See* Appellants Br. at 22, n.1 and CP at 384. This supports the State's argument that this suit was frivolous from the start.

limitations, which is three years.<sup>21</sup> An action for violation of substantive due process (i.e. deprivation of property without due process) is ripe immediately because the harm occurs at the time of the violation.<sup>22</sup> This cause of action accrued on or before May 21, 2004.

Mr. Herman has had six years of due process.<sup>23</sup> He was represented by counsel at every step; at a three-day hearing before the Shorelines Hearing Board, at the superior court, and yet again at this court. There is no evidence that Mr. Herman has lost the use or enjoyment of any property.

## **2. The Washington State Constitution Claim**

The Hermans claim that they were deprived of their constitutional rights, including, but not limited to, rights to procedural and substantive due process and equal protection under the Washington State Constitution. CP at 61-62. There is no cause of action in tort for violation of the Washington State Constitution.<sup>24</sup> Even if there were such a cause of action it would be time-barred.

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<sup>21</sup> *Nieshe v. Concrete School Dist.*, 129 Wn. App. 632, 638-39, 127 P.3d 713 (2005), *review denied*, 156 Wn.2d 1036, 134 P.3d 1170 (2006).

<sup>22</sup> *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 964-65, 954 P.2d 250 (1998).

<sup>23</sup> He has not paid the penalty nor has he removed any of the shoreline development for which he was penalized. He has had the full benefit of the use and enjoyment of the dock, stairs, and cabana/deck for the six years since the penalty issued.

<sup>24</sup> *Reid v. Pierce County*, 136 Wn.2d 195, 214, 961 P.2d 333 (1998); *Blinka v. Washington State Bar Ass'n*, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001).

The Appellants' brief does not offer any legal authority supporting the proposition that they may file a damage action based on an alleged violation of the Washington State Constitution.<sup>25</sup> As stated by the supreme court in *Reid v. Pierce County*, no such cause of action exists.

### **3. The RCW 64.40 Claim**

The Hermans alleged that defendants' actions as to "the plaintiffs' land use appeals, requests for permit approvals, or favorable interpretations of state and county laws including those governing shoreline use are arbitrary, capricious, unlawful, or exceeded authority pursuant to RCW 64.40.020." CP at 62-63.<sup>26</sup> An action to assert such claims must be commenced within 30 days after all administrative remedies have been exhausted. RCW 64.40.030.

RCW 64.40 provides a damage remedy to "owners of a property interest who have filed an application for a permit." The S.H.B., the superior court, and this court all found that the Hermans constructed substantial development on the shoreline without any required permits. The Hermans allege that they "*sought* to file and/or obtain approvals of

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<sup>25</sup> Appellants' Br. at 36-38.

<sup>26</sup> Owners of a property interest *who have filed an application for a permit* have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority. (Emphasis added). RCW 64.40.010(1).

‘after-the-fact’ permit or exemption applications.” (Emphasis added.) CP at 62. RCW 64.40 is not a statutory remedy for persons who “sought” to file a permit application.

In their opening brief the Hermans argue that because they submitted a permit application for the structures after they built them, they are entitled to a remedy under RCW 64.40.<sup>27</sup> But as stated above, this court has ruled that the structures were illegal when they were built without permits required by law. Therefore, the state did not act in an arbitrary, capricious, or unlawful manner, or beyond its lawful authority. It is obvious the Hermans only applied for after-the-fact permits because the state and county sent them an enforcement order and forced them to comply with the Shoreline Management Act.

#### **4. The Malicious Prosecution Claim**

The Hermans claim that defendants’ conduct constituted malicious prosecution.<sup>28</sup> Washington courts have recognized causes of action for both malicious criminal prosecution and malicious civil prosecution. The Hermans have never suffered or alleged any criminal prosecution. Therefore, they must be claiming malicious civil prosecution, that is, where a civil action has been initiated without any support in law or fact.<sup>29</sup>

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<sup>27</sup> Appellants’ Br. at 26.

<sup>28</sup> Appellants’ Br. at 43-44.

<sup>29</sup> See e.g. *Batten v. Abrams*, 28 Wn. App. 737, 626 P.2d 984 (1981).

Just as in the criminal context, probable cause is a complete defense to a claim for malicious civil prosecution. A party that initiates civil proceedings has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based.<sup>30</sup> A favorable termination of the prior proceeding in favor of the plaintiff (the defendant in the prior action) is an essential element of malicious prosecution. The plaintiff must show an end to the prior proceeding in his favor.<sup>31</sup> Since the Hermans did not prevail in *Herman I* they have no claim for malicious prosecution. Even if there were such a claim, the claim would be time-barred. RCW 4.16.080(2).

#### **5. The Breach of Contract Claim**

In response to the State's Motion for Summary Judgment, the Hermans added a thirteenth cause of action for "breach of contract." CP at 615. The trial court granted the motion to amend and allowed this claim to be heard at the same time as the other claims. CP at 619.

The trial court granted the State's Motion to Dismiss the breach of contract claim. CP at 720-22. The contract alleged to have been breached was the 1995 settlement agreement between the Hermans and Ecology. In the Stipulation and Agreed Order of Dismissal, Ecology agreed to rescind

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<sup>30</sup> *Restatement (Second) of Torts*, § 675 (1977).

<sup>31</sup> *Bender v. City of Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983); *Gem Trading Co. v. Cudahy Corp.*, 92 Wn.2d 956, 603 P.2d 828 (1979).

the \$1000 penalty. CP at 631-34. Ecology rescinded the penalty. CP at 636. Because Ecology fulfilled its obligation under the contract, there can be no breach of the contract. Even if Ecology did not, the claim is barred by the six year statute of limitations for written contracts. RCW 4.16.040(1).<sup>32</sup>

**D. This Appeal Is Frivolous And Vexatious. Therefore, The State Should Be Awarded Reasonable Attorney Fees Pursuant To RAP 18.1 and 18.9**

The Hermans ignore the published decision of this court in *Herman v. S.H.B.*, 149 Wn. App. 444 (2009). They ignore the fact that twenty months ago this court found that they violated the Shoreline Management Act, and the enforcement action by Spokane County and Ecology was justified and legal. They should have abandoned this retaliatory and frivolous appeal on February 5, 2009, when this court ruled against them on their appeal of the enforcement action.

RAP 18.1 provides this court with authority to grant reasonable attorney's fees or expenses on review. RAP 18.9 provides this court with the authority to sanction the Hermans and their counsel for asserting a frivolous claim. RAP 18.7 incorporates the remedies for a violation of Civil Rule 11 into the Appellate Rules. *Bryant v. Joshua Tree Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992). In pursuing this groundless appeal,

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<sup>32</sup> The order was entered on May 4, 1995, thirteen years before this action was commenced. CP at 634.

Mr. Herman and his counsel have violated RAP 18.9, RCW 4.84.185, and CR 11 and should be sanctioned by the award of reasonable attorney fees and expenses. *Id.*

This appeal was brought for purposes of retaliation. At least from February 5, 2009 forward, when this court ruled against Mr. Herman in *Herman I*, this appeal became frivolous. Mr. Herman filed and pursued the appeal in violation for RCW 4.84.185. The appeal is groundless both in fact and law. Therefore, the State of Washington should be awarded reasonable attorney fees and costs for the appeal.

## VI. CONCLUSION

The Order Granting Summary Judgment should be affirmed. In addition, the State of Washington respectfully requests an award of attorney fees and expenses as a sanction for this frivolous appeal. RAP 18.1; 18.9; CR 11; RCW 4.84.185.

RESPECTFULLY SUBMITTED this 4 day of October, 2010.

ROBERT M. MCKENNA  
Attorney General



MARK C. JOBSON, WSBA #22171  
Assistant Attorney General  
Attorney for Respondents

## CERTIFICATE OF SERVICE

Pursuant to RAP 10.2(h), I caused the foregoing documents described as *Brief of Respondents* to be mailed on the 4th day of October, 2010, on all interested parties to this action as follows:

US Mail to: Washington State Court of Appeals,  
Division III  
500 North Cedar Street  
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CYNTHIA A. MEYER

APPENDIX – Herman I

Westlaw

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**H**

Court of Appeals of Washington,  
 Division 3.  
 Lloyd A. HERMAN, Respondent and Cross-  
 Appellant,

v.

STATE OF WASHINGTON SHORELINES  
 HEARINGS BOARD, Spokane County, Defendant,  
 State of Washington Department of Ecology, Ap-  
 pellant.  
 No. 26459-9-III.

Feb. 5, 2009.

Publication Ordered March 31, 2009.

**Background:** Owner of shoreline property ap-  
 pealed decision of the Shorelines Hearings Board  
 that affirmed imposition of a substantial penalty on  
 landowner for violating the terms of an earlier  
 agreement with governmental agencies and for un-  
 dertaking substantial development without a permit  
 and in violation of the Shoreline Management Act.  
 The Superior Court, Spokane County, Robert D.  
 Austin, J., granted landowner's motion to supple-  
 ment the administrative record and reverse in part.  
 Landowner and Department of Ecology appealed.

**Holdings:** The Court of Appeals, Sweeney, J., held  
 that:

- (1) Superior Court could not consider additional ex-  
 pert declarations and reports;
- (2) Board's order was not self-executing;
- (3) evidence was sufficient to support decision that  
 landowner violated the Shoreline Management Act  
 and county shoreline master program and was in  
 noncompliance with settlement agreement; and
- (4) penalty of \$30,000 was not excessive.

Reversed; Board's order affirmed.

West Headnotes

[1] **Environmental Law 149E** ⚡681

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek677 Scope of Inquiry on Review of  
Administrative Decision149Ek681 k. Water, Wetlands, and Water-  
front Conservation. Most Cited Cases

Superior Court could not consider additional expert  
 declarations and reports regarding storm water  
 management and geotechnical slope stability when  
 considering shoreline property owner's appeal from  
 Shorelines Hearings Board decision; Court did not  
 admit the new evidence under any of the statutory  
 exceptions listed in the Administrative Procedure  
 Act (APA), and Board's order, which admittedly  
 did not name an actor when it referred to the con-  
 tingencies upon which approval of landowner's per-  
 mit applications and restoration plan would depend,  
 did not contemplate the admission of the reports but  
 rather stated that county retained the permitting au-  
 thority. West's RCWA 34.05.562; WAC  
 173-27-150(2).

[2] **Administrative Law and Procedure 15A** ⚡657.1

15A Administrative Law and Procedure

15AV Judicial Review of Administrative De-  
cisions

15AV(A) In General

15Ak657 Nature and Form of Remedy

15Ak657.1 k. In General. Most Cited  
Cases

**Environmental Law 149E** ⚡633

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek633 k. Nature and Form of Remedy;  
Applicable Law. Most Cited Cases

The Administrative Procedure Act (APA) governs  
 judicial review of agency actions, including the  
 Shorelines Hearings Board's decisions. West's  
 RCWA 90.58.180(3).

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**[3] Administrative Law and Procedure 15A 682**

15A Administrative Law and Procedure  
 15AV Judicial Review of Administrative Decisions  
 15AV(A) In General  
 15Ak681 Further Review  
 15Ak682 k. Record. Most Cited Cases

**Administrative Law and Procedure 15A 683**

15A Administrative Law and Procedure  
 15AV Judicial Review of Administrative Decisions  
 15AV(A) In General  
 15Ak681 Further Review  
 15Ak683 k. Scope. Most Cited Cases

Review by an appellate court is to be on the agency record without consideration of the findings and conclusions of the superior court; however, where the superior court accepts additional evidence and information needed for review is contained in the superior court record of proceedings, not the agency record, the Court of Appeals considers the superior court record. West's RCWA 34.05.562.

**[4] Administrative Law and Procedure 15A 676**

15A Administrative Law and Procedure  
 15AV Judicial Review of Administrative Decisions  
 15AV(A) In General  
 15Ak676 k. Record. Most Cited Cases

A superior court considering an administrative appeal may not allow additional evidence where the proponent of the evidence alleges only that the record is incomplete. West's RCWA 34.05.562(1).

**[5] Administrative Law and Procedure 15A 651**

15A Administrative Law and Procedure  
 15AV Judicial Review of Administrative Decisions  
 15AV(A) In General

15Ak651 k. In General. Most Cited Cases  
 The superior court reviews agency orders in a limited appellate capacity.

**[6] Administrative Law and Procedure 15A 676**

15A Administrative Law and Procedure  
 15AV Judicial Review of Administrative Decisions  
 15AV(A) In General  
 15Ak676 k. Record. Most Cited Cases

**Administrative Law and Procedure 15A 784.1**

15A Administrative Law and Procedure  
 15AV Judicial Review of Administrative Decisions  
 15AV(E) Particular Questions, Review of  
 15Ak784 Fact Questions  
 15Ak784.1 k. In General. Most Cited Cases

A court considering a petition for judicial review of an administrative decision may not generally admit new evidence or decide disputed factual issues. West's RCWA 34.05.558, 34.05.562.

**[7] Environmental Law 149E 132**

149E Environmental Law  
 149EIV Water, Wetlands, and Waterfront Conservation  
 149Ek129 Permissible Uses and Activities; Permits and Licenses; Management  
 149Ek132 k. Coastal Areas, Bays, and Shorelines. Most Cited Cases

**Environmental Law 149E 144**

149E Environmental Law  
 149EIV Water, Wetlands, and Waterfront Conservation  
 149Ek144 k. Enforcement in General. Most Cited Cases  
 Shorelines Hearings Board's order was not "self-executing," but rather ordered specific action

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by landowner and imposed specific sanctions if he did not comply; order contemplated geotechnical evaluations occurring in the context of the permitting process administered by the county and explicitly stated that it did not displace the authority granted to the county under regulation implementing the Shoreline Management Act and authorizing the county to “attach conditions to the approval of permits as necessary to assure consistency of the project” with the act and the county shoreline master program. West's RCWA 90.58.140; WAC 173-27-150(2).

**[8] Environmental Law 149E ↪150**

149E Environmental Law

149EIV Water, Wetlands, and Waterfront Conservation

149Ek147 Evidence

149Ek150 k. Weight and Sufficiency.

Most Cited Cases

Evidence was sufficient to support Shorelines Hearings Board's decision that landowner violated the Shoreline Management Act and county shoreline master program and was in noncompliance with settlement agreement with Department of Ecology; there was evidence landowner undertook substantial renovations, including widening the concrete steps to the beach, failing to remove lift and crane, failing to remove portion of the bulkhead and the deck cover, failing to remove fill and stacked rocks, planting non-native vegetation to stabilize slope, and generally increasing the development, and there was evidence that, independent of the agreement, landowner was undertaking substantial development without a permit, including the concrete stairway and retaining walls constructed after the agreement. West's RCWA 90.58.140(2).

**[9] Environmental Law 149E ↪681**

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek677 Scope of Inquiry on Review of Administrative Decision

149Ek681 k. Water, Wetlands, and Water-

front Conservation. Most Cited Cases

The Court of Appeals will not disturb the Shorelines Hearings Board's decision unless it is clearly erroneous or arbitrary and capricious; “arbitrary and capricious” means willful and unreasoning action, without consideration and in disregard of facts or circumstances, but where there is room for two opinions, and action is exercised honestly and upon due consideration, the action is not arbitrary and capricious.

**[10] Environmental Law 149E ↪125**

149E Environmental Law

149EIV Water, Wetlands, and Waterfront Conservation

149Ek125 k. Coastal Areas, Bays, and Shorelines. Most Cited Cases

The court broadly construes the Shoreline Management Act to protect the state shorelines as fully as possible. West's RCWA 90.58.900.

**[11] Environmental Law 149E ↪125**

149E Environmental Law

149EIV Water, Wetlands, and Waterfront Conservation

149Ek125 k. Coastal Areas, Bays, and Shorelines. Most Cited Cases

A liberal construction of the Shoreline Management Act is mandated by the State Environmental Policy Act. West's RCWA 43.21C.020(3), 43.21C.030(1), 90.58.900.

**[12] Environmental Law 149E ↪145**

149E Environmental Law

149EIV Water, Wetlands, and Waterfront Conservation

149Ek145 k. Penalties and Fines. Most Cited Cases

Penalty of \$30,000 imposed by the Department of Ecology for shoreline landowner's violation of the Shoreline Management Act, with \$10,000 suspended for a year on the condition that landowner comply with Shorelines Hearings Board order, was not

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excessive, where landowner had many days of development without a permit before ceasing work, and landowner undertook many more than four substantial developments that could count as separate violations. West's RCWA 90.58.210(2).

**[13] Administrative Law and Procedure 15A**  
 ⚡763

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(D) Scope of Review in General

15Ak763 k. Arbitrary, Unreasonable or Capricious Action; Illegality. Most Cited Cases

The judiciary will only review the actions of an administrative agency to determine if its conclusions may be said to be, as a matter of law, arbitrary, capricious, or contrary to law.

**[14] Penalties 295** ⚡1

295 Penalties

295I Nature and Grounds, and Extent of Liability

295k1 k. Nature and Scope as Punishment. Most Cited Cases

A civil penalty is primarily intended to coax compliance with the law and deter future violations.

**\*\*930** Thomas J. Young, Attorney General's Office, Olympia, WA, for Appellant/Cross-Respondent.

Dennis Dean Reynolds, Law Office of Dennis D. Reynolds, Bainbridge Island, WA, for Respondent/Cross-Appellant.

SWEENEY, J.

**\*450** ¶ 1 This appeal follows a decision by the State of Washington Shorelines Hearings Board that affirmed imposition of a substantial penalty on a landowner for violating the terms of an earlier agreement with governmental agencies, and for undertaking substantial development without a permit and in violation of the Shoreline Management Act

of 1971 (Shoreline Management Act), chapter 90.58 RCW. The superior court, sitting in its appellate capacity, admitted and considered new evidence on the propriety of the landowner's actions. The court then concluded based on that evidence that most of the unpermitted development should remain in place. Both the decision to admit additional evidence and the conclusion that the development did not run afoul of either the landowner's earlier agreement or the Shoreline Management Act are wrong. And we therefore reverse the superior court and affirm the decision of the Shorelines Hearings Board.

FACTS

¶ 2 Lloyd Herman purchased a hillside single-family residence on the shores of Liberty Lake from his father in 1970. Liberty Lake is protected as a shoreline of the state under the Shoreline Management Act. WAC 173-20-660(31).

¶ 3 Mr. Herman's father purchased the home in 1953 and remodeled it to expand the footprint of the home to 11,000 square feet. At the time Mr. Herman purchased the property, the following alterations were already in place: a dirt and timber trail with steps down to the beach, a rock bulkhead, a platform and a dock, retaining walls made from creosoted timbers, and a few large trees that reinforced the slope down to the lake.

**\*451** ¶ 4 Between 1970 and 1993, Mr. Herman improved the property. He added a crane and lift, anchored in a pier made out of cement and rocks on top of a naturally occurring rock outcropping in the lake. He removed the old platform and replaced it with **\*\*931** a deck that was approximately four square feet larger. He replaced the pier blocks supporting the deck with rock from the beach and added rock retaining walls. He constructed a roof over the deck, supported by eight-foot-high posts, which served as a second deck. Mr. Herman replaced the wooden stairs at the end of the deck with wider, concrete stairs.

¶ 5 In 1993, the Department of Ecology imposed a \$1,000 penalty on Mr. Herman for improving the shoreline without a shoreline permit and in violation of the Shoreline Management Act and the Spokane County Shoreline Master Program. The work it complains of included filling the lake waterward of the ordinary high water mark and constructing a rock and mortar bulkhead, a covered deck, and a concrete platform and stairs. Mr. Herman appealed the 1993 penalty to the Shorelines Hearings Board. Ecology and Mr. Herman reached a settlement in 1995, before a hearing on the merits of Mr. Herman's appeal. They recorded their agreement in a stipulation and agreed order of dismissal. Mr. Herman agreed to remove the boat crane and lift and a portion of the retaining wall or bulkhead on the northern property line. Ecology agreed to repeal the \$1,000 penalty.

¶ 6 The essence of the present dispute is whether or to what degree Mr. Herman complied with the 1995 agreement and whether he violated other provisions of the Shoreline Management Act. The parties agree, however, that Mr. Herman completed additional work on the property following the 1995 agreement.

¶ 7 Specifically, Mr. Herman modified the deck by moving the fill and rock under the deck a few feet landward. He enclosed the deck structure, added a peaked roof to resemble the historic Liberty Lake Pavilion, and furnished it with a kitchen sink, toilet, shower, refrigerator, tables, \*452 chairs, and a concrete patio. The peaked roof was designed to divert water to a vegetated area behind the deck structure. Mr. Herman widened the steps from the dock up to the deck structure by adding two short sets of stairs down to the beach. He planted the hillside with an assortment of native and non-native plants. He covered the bulkhead on the north side of the property with concrete, creating a pathway along the lakefront and installed a handrail and lights. He replaced the dirt and timber trail to the beach with a concrete stairway, eight feet wide in places, designed to divert storm water runoff. And Mr. Her-

man did not remove the crane.

¶ 8 Ecology, Spokane County, and the Washington Department of Fish and Wildlife learned about Mr. Herman's additional modifications in 2003. The agencies sent Mr. Herman letters expressing concern about potential violations. Mr. Herman responded with a letter justifying his additions. In January 2004, representatives of the agencies met with Mr. Herman at his property to look at the modifications.

¶ 9 In May 2004, Ecology and Spokane County issued a joint shoreline violation order. It included a \$30,000 civil penalty, a stop-work order, and a requirement that Mr. Herman submit a plan within 30 days detailing his plan to restore the shoreline. Mr. Herman discontinued work on his property and appealed the order to the Shorelines Hearings Board.

¶ 10 The Shorelines Hearings Board held a hearing and issued findings of fact, conclusions of law, and an order. It concluded that Mr. Herman substantially violated the agreement. The violations included widening the concrete steps to the beach, failing to remove the lift and crane, failing to remove a portion of the bulkhead, failing to remove a portion of the deck cover, failing to remove the fill and stacked rocks from under the deck, planting non-native vegetation to stabilize the slope, and generally increasing the development of the shoreline rather than decreasing development. The board further concluded that, independent\*453 of the agreement, Mr. Herman violated the Shoreline Management Act by undertaking substantial development without a permit, including the concrete stairway and retaining walls constructed after the agreement. The board affirmed the \$30,000 penalty that Ecology and Spokane County imposed but ordered \$10,000 of the penalty suspended on condition that Mr. Herman fully comply with the order's provisions\*\*932 within one year. The board also instructed Mr. Herman on the restoration plan.

¶ 11 Mr. Herman appealed the Shorelines Hearings Board's order to superior court. Mr. Herman also successfully moved to stay enforcement of the

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board's order pending judicial review. With Ecology's approval, Mr. Herman retained two consulting firms to prepare reports regarding storm water management and geotechnical slope stability.

¶ 12 The superior court granted Mr. Herman's motion to supplement the administrative record with the reports prepared by these consultants. Ecology objected to the admission of the reports into evidence.

¶ 13 The court first concluded that there was inadequate error to reverse given the criteria of the Administrative Procedure Act (APA), chapter 34.05 RCW, and it issued a decision in a letter ruling that affirmed the board's order. The superior court later entered findings of fact, conclusions of law, and issued an order. The court affirmed the board's order, subject to several conditions. The court concluded that many of the structures on the property could not be safely removed without destabilizing the slope. The court refused to order Mr. Herman to remove any of the structures. And the court required Mr. Herman to obtain a permit only for the two small stairways to the beach. The court remanded one issue to the board—whether the \$10,000 suspended portion of the penalty should be waived.

¶ 14 Both Ecology and Mr. Herman appeal.

#### \*454 DISCUSSION

##### ADMISSION OF EVIDENCE NOT BEFORE THE BOARD

[1] ¶ 15 Ecology first contends that the superior court erred by admitting and considering evidence that was not admitted or considered by the Shorelines Hearings Board. Mr. Herman responds that the court appropriately admitted and considered new evidence for any of three reasons: (1) the new evidence fell within one of the exceptions to the general statutory prohibition against admitting new evidence; (2) the new evidence was contemplated by the board's order and Mr. Herman's

agreement with Ecology; or (3) the evidence was necessary for the superior court to resolve the factual issues it was required to address by the appeal.

¶ 16 Whether the superior court properly admitted additional evidence when it reviewed the board's decision is a question of law that we will review de novo. *See Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash.2d 568, 588, 90 P.3d 659 (2004).

[2][3] ¶ 17 The APA governs judicial review of agency actions, including the Shorelines Hearings Board's decisions. *Buechel v. Dep't of Ecology*, 125 Wash.2d 196, 201, 884 P.2d 910 (1994); *see* RCW 90.58.180(3). “[R]eview by an appellate court is to be on the agency record without consideration of the findings and conclusions of the superior court.” *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wash.2d 621, 633, 869 P.2d 1034 (1994). However, where the superior court accepts additional evidence under RCW 34.05.562 and “‘information needed for review is contained in the superior court record of proceedings, not the agency record,’ ” we consider the superior court record. *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wash.2d 825, 834, 175 P.3d 1050 (2008) (quoting *Waste Mgmt. of Seattle*, 123 Wash.2d at 633-34, 869 P.2d 1034).

[4] ¶ 18 RCW 34.05.562(1) sets the parameters for superior court consideration of additional evidence. A superior\*455 court reviewing an agency decision “may receive evidence in addition to that contained in the agency record ... only if it relates to the validity of the agency action at the time it was taken and it is needed to decide disputed issues regarding:” (a) improper constitution of the decision-making body; (b) the unlawfulness of the procedure; or (c) “[m]aterial facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.” RCW 34.05.562(1) (emphasis added). A superior court may not allow additional evidence where the proponent of the evidence alleges only that the record is incomplete. \*933 *Lewis County v. Pub. Employment Relations*

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*Comm'n*, 31 Wash.App. 853, 861, 644 P.2d 1231 (1982). Here, the superior court did not admit the declarations and reports under any of the exceptions set out in RCW 34.05.562(1). Mr. Herman argues, nonetheless, that the Shorelines Hearings Board's order itself contemplated the admission of the reports. We do not read the board's order as doing so.

[5] ¶ 19 The superior court reviews agency orders in a limited appellate capacity. *Mader v. Health Care Auth.*, 109 Wash.App. 904, 922, 37 P.3d 1244 (2002), *rev'd in part on other grounds*, 149 Wash.2d 458, 70 P.3d 931 (2003). Mr. Herman's appeal from the board's decision invoked the court's appellate, not its general or original, jurisdiction. *Reeves v. Dep't of Gen. Admin.*, 35 Wash.App. 533, 537, 667 P.2d 1133 (1983); *see also Fay v. Nw. Airlines, Inc.*, 115 Wash.2d 194, 197, 796 P.2d 412 (1990). And, again, the APA controls review of a Shorelines Hearings Board decision. *Batchelder v. City of Seattle*, 77 Wash.App. 154, 158, 890 P.2d 25 (1995). The APA's provisions set forth the circumstances in which a reviewing court may receive additional evidence. None apply here.

[6] ¶ 20 A court considering a petition for judicial review may not generally admit new evidence or decide disputed factual issues. RCW 34.05.558 (judicial review confined to agency record); RCW 34.05.562 (court may receive new evidence only if it relates to the validity of the \*456 agency action at the time it was taken and meets one of three exceptions); *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wash.App. 62, 76, 110 P.3d 812 (2005) (new evidence admissible on judicial review only in "highly limited circumstances"). Here, the court did not admit the declarations and reports submitted by Mr. Herman under any of the narrow exceptions provided by the APA. *See* RCW 34.05.562(1); Clerk's Papers (CP) at 428-29. But the court relied on those expert declarations and reports to reach conclusions different from the board's. *See* CP at 494, 501. That was error.

¶ 21 Mr. Herman also attempts to justify the admission of these reports on two additional grounds, that

(1) the Shorelines Hearings Board effectively ordered the declarations to supplement the record before the superior court; and (2) even if the reports constituted a new issue, RCW 34.05.554(a) permits the court to consider them. On the first point, nothing in the board's order suggests an intent to disturb the APA's allocation of jurisdiction for judicial review or authorization to accept evidence in addition to the board's record. Granted, the board does not name an actor when it refers to the contingencies upon which approval of Mr. Herman's permit applications and restoration plan will depend. But the board is careful to clarify that Spokane County retained the permitting authority and the discretion allocated to Spokane County by WAC 173-27-150(2). CP at 71. On the second point, even if the reports were to constitute a "new issue" under RCW 34.05.554(1), the proper action for the court under RCW 34.05.554(2) would have been to "remand to the agency for determination [of] any issue that is properly raised pursuant to subsection (1)."

¶ 22 The superior court then erred by admitting and considering evidence by Mr. Herman's experts.

#### SUPERIOR COURT'S DESIGNATION OF THE SHORELINES HEARINGS BOARD'S ORDER AS "SELF-EXECUTINGGGG"

[7] ¶ 23 Ecology next assigns error to the superior court's conclusion that the Shorelines Hearings Board's order was \*457 "self-executing." It argues that the court effectively eviscerated both the agreement between Mr. Herman and Ecology and the board's order, while purporting to "affirm" the board's order. Mr. Herman responds that the board's order was self-executing as to the existing structures and that the order only required him to apply for a permit or hydraulic project approval for prospective changes to the property.

¶ 24 Our review is of the Shorelines Hearings Board's decision, not the decision of the local government or of the superior court. *Buechel*, 125

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Wash.2d at 202, 884 P.2d 910. And the standard of review is whether the board's decision was "arbitrary and capricious" or "clearly erroneous" in light of the entire record and public policy contained in \*\*934 the Shoreline Management Act. *Id.* at 201-02, 884 P.2d 910.

¶ 25 We also give "due deference ... to the specialized knowledge and expertise of the Board." *Id.* at 202-03, 884 P.2d 910. Again, the APA governs judicial review of agency actions, including the Shorelines Hearings Board's decisions. *Id.* at 201, 884 P.2d 910; see RCW 90.58.180(3). "[R]eview by an appellate court is to be on the agency record without consideration of the findings and conclusions of the superior court." *Waste Mgmt. of Seattle*, 123 Wash.2d at 633, 869 P.2d 1034. We may consider the superior court record of proceedings only where the superior court accepts additional evidence under RCW 34.05.562. *Twin Bridge Marine Park*, 162 Wash.2d at 834, 175 P.3d 1050. We have already concluded that the trial court improperly admitted and considered additional evidence here.

¶ 26 The court's conclusion that the board's order was "self-executing" is a question of law, as framed, and therefore we give no deference to the court's conclusion. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). And, as used here, the order clearly was not self-executing. It ordered specific action by Mr. Herman and imposed specific sanctions if he did not comply. CP at 69-71.

¶ 27 The superior court sits in an appellate capacity. *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wash.2d 614, 617, 902 P.2d 1247 (1995). It then \*458 had no authority in that capacity (or the expertise) to receive and evaluate the geotechnical report and the letter from the storm water engineer. The APA carefully prescribes the limited scope of judicial review. RCW 34.05.510 through .598 (Part V).

¶ 28 The Shorelines Hearings Board's order con-

templates geotechnical evaluations occurring in the context of the permitting process administered by Spokane County. CP at 71. And, again, the order explicitly states that it does not displace the authority granted to the county by WAC 173-27-150(2). That regulation implements the Shoreline Management Act and authorizes the county to "attach conditions to the approval of permits as necessary to assure consistency of the project with the [Shoreline Management Act] and the Spokane County Shoreline Master Program." CP at 71.

¶ 29 The court's conclusions of law that the permitting process or requirement for agency approval did not apply to most of the structures on Mr. Herman's property disrupt the allocation of political power set forth in the Shoreline Management Act and the APA and was, therefore, error. See CP at 500-02; RCW 90.58.140; RCW 34.05.570, .574.

#### PROPRIETY OF THE SHORELINES HEARINGS BOARD'S DECISION

[8] ¶ 30 Mr. Herman also appeals the court's decision that, ostensibly at least, affirmed the Shorelines Hearings Board's decision. He argues that his later development was in accord with his 1995 agreement.

¶ 31 We will grant relief from an agency order when the agency has erroneously interpreted or applied the law. RCW 34.05.570(3)(d). "Interpretation of the [Shoreline Management Act] and [local governments' corresponding shoreline master programs] involves questions of law, which we review for errors of law." *Bellevue Farm Owners Ass'n v. Shorelines Hearings Bd.*, 100 Wash.App. 341, 362, 997 P.2d 380 (2000). We will defer to an agency's factual findings, but we ultimately review its conclusions of law de novo. *Mader*, 149 Wash.2d at 470, 70 P.3d 931. We do, however, accord \*459 deference to the " 'agency interpretation of the law where the agency has specialized expertise.' " *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wash.App. 503, 515,

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137 P.3d 31 (2006) (internal quotation marks omitted) (quoting *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wash.2d 224, 233, 110 P.3d 1132 (2005)).

[9] ¶ 32 We will not disturb the Shorelines Hearings Board's decision unless it is clearly erroneous or arbitrary and capricious. *Buechel*, 125 Wash.2d at 202, 884 P.2d 910. "Arbitrary and capricious" means "willful and unreasoning action, without consideration and in disregard of facts or circumstances." *Smith v. Hollenbeck*, 48 Wash.2d 461, 464, 294 P.2d 921 (1956). But where there is room for two opinions, and action is \*\*935 exercised honestly and upon due consideration, the action is not "arbitrary and capricious." *Id.*

¶ 33 The board's decision here is not arbitrary or capricious. Indeed, its findings and conclusions reflect a thoughtful and thorough investigation of Mr. Herman's modifications to his shoreline.

[10][11] ¶ 34 The Shoreline Management Act requires that all use or development on Washington's shorelines conform to the act. RCW 90.58.140(1), (2); *Buechel*, 125 Wash.2d at 203, 884 P.2d 910. The act requires that a person first obtain a permit before undertaking any "substantial development" on a Washington shoreline. RCW 90.58.140(2). "Substantial development" includes "any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state." RCW 90.58.030(3)(e). We broadly construe the act to protect the state shorelines as fully as possible. *English Bay Enters., Ltd. v. Island County*, 89 Wash.2d 16, 20, 568 P.2d 783 (1977); see RCW 90.58.900. "A liberal construction of the act is also mandated by the State Environmental Policy Act. See RCW 43.21C.030(1) and RCW 43.21C.020 (3)." *English Bay Enters.*, 89 Wash.2d at 20, 568 P.2d 783.

¶ 35 The Shorelines Hearings Board found adequate support in its lengthy administrative record

for its conclusion \*460 that Mr. Herman's work on his property was extensive. His work included both expanding existing structures and adding new structures. The board then methodically set out Mr. Herman's violations of the Shoreline Management Act and the Spokane County Shoreline Master Program since 1995 and Mr. Herman's noncompliance with the 1995 agreement.

#### \$30,000 PENALTY

[12] ¶ 36 Finally, Mr. Herman argues that the \$30,000 penalty imposed by Ecology is excessive.

[13] ¶ 37 Again, our review of an administrative agency's decision is limited in scope: " '[T]he judiciary will only review the actions of an administrative agency to determine if its conclusions may be said to be, as a matter of law, arbitrary, capricious, or contrary to law.' " *Stegriy v. King County Bd. of Appeals*, 39 Wash.App. 346, 350, 693 P.2d 183 (1984) (emphasis omitted) (quoting *Helland v. King County Civil Serv. Comm'n*, 84 Wash.2d 858, 862, 529 P.2d 1058 (1975)).

[14] ¶ 38 A civil penalty is primarily intended to coax compliance with the law and deter future violations. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); see also *Lewis v. State*, No. 95-53, 1997 WL 104554, at \*3 (Wash. Shorelines Hr'gs Bd. Feb. 7, 1997). Here, the board imposed a \$30,000 penalty, with \$10,000 of it suspended for a year on the condition that Mr. Herman fully complies with the board's order. CP at 69. That penalty does not depart dramatically from previous Shorelines Hearings Board decisions that both Mr. Herman and Ecology discuss. See *Correll v. Dep't of Ecology*, No. 03-023, 2004 WL 839243 (Wash. Shorelines Hr'gs Bd. Apr. 14, 2004) (\$10,000 for first-time violation); *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, Nos. 01-016 & 01-017, 2002 WL 1650523 (Wash. Shorelines Hr'gs Bd. Jul. 17, 2002), *rev'd on other grounds*, 162 Wash.2d 825, 175 P.3d 1050 (2008) ( \$59,000

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penalty for repeat violations).

\*461 ¶ 39 RCW 90.58.210(2) provides that anyone who undertakes development without first obtaining a required permit is subject to a \$1,000 civil penalty for “each violation.” And “[e]ach permit violation or each day of continued development without a required permit shall constitute a separate violation.” RCW 90.58.210(2). Here, the record is clear. Mr. Herman had many days of development without a permit before ceasing work. The board's interpretation of when the days of continued development began to accrue is “entitled to considerable weight” because it is the administering agency for the Shoreline Management Act. *See St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wash.2d 733, 743, 887 P.2d 891 (1995). The record supports a finding that Mr. Herman undertook many more than four substantial \*\*936 developments that could count as separate violations.

¶ 40 We reverse the judgment of the trial court insofar as it is inconsistent with the decision of the Shorelines Hearings Board and affirm the order of the board.

WE CONCUR: KULIK, A.C.J., and BROWN, J.  
Wash.App. Div. 3, 2009.  
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