

FILED

MAY 09 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 296750

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

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

v.

CITY OF SPOKANE VALLEY AND COYOTE ROCK, LLC,

Respondents.

**OPENING BRIEF OF APPELLANT STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY**

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I. INTRODUCTION

The City of Spokane Valley (City) issued shoreline permit exemptions to Coyote Rock, LLC, allowing construction of two residential docks in the Spokane River (River). These two docks are “speculative” (or spec docks) in the sense that Coyote Rock does not intend to use the docks itself, but intends to sell them to future, unspecified, purchasers of the lots Coyote Rock is developing. The two docks are the first of 30 docks planned for construction in the Coyote Rock subdivision.

The Department of Ecology (Ecology) appealed the exemptions under the Land Use Petition Act (LUPA). The City’s permit exemptions are erroneous and should be reversed because (1) spec docks built for resale are not exempt from permitting under the Shoreline Management Act (SMA or Act); and (2) the City failed to include any conditions in the exemptions to offset the cumulative impacts that construction of 30 docks on this stretch of river will have. The superior court’s decision denying relief is erroneous and should be reversed.

II. ASSIGNMENTS OF ERROR

1. The superior court erred by entering Findings of Fact Nos. 4–6 (Issues 1 and 2).
2. The superior court erred by entering Conclusions of Law Nos. 1–4 (Issues 1 and 2).

3. The superior court erred by failing to reverse the permit exemptions issued by the City (Issues 1 and 2).

III. STATEMENT OF ISSUES

1. Does the exemption from shoreline permitting for residential docks in RCW 90.58.030(3)(e)(vii) apply to spec docks built for resale?

2. Are the exemptions issued by the City inconsistent with the SMA and the City's Shoreline Master Program because they contain no conditions to address the adverse cumulative impacts that will result from the construction of 30 docks planned for the area?

IV. STATEMENT OF THE CASE

A. **The Spokane River Provides Important Recreational And Ecological Values That Will Be Impaired By Unrestricted Dock Construction**

Coyote Rock is a residential subdivision in the City of Spokane Valley on one of the few remaining free-flowing stretches of the Spokane River. The subdivision includes 30 lots with river frontage. *See* CP 86–89, 400–401, 488–489, 539. The River in this area provides high quality habitat for trout, birds, and other wildlife. CP 179 (area used by ducks, geese, raccoon, porcupine, squirrel, beaver and osprey); CP 231 (project is in a sensitive area adjacent to critical habitat); CP 490–491 (river contains spawning habitat for redband trout; rocks in the river

provide unique habitat for songbirds); CP 526 (high quality bird habitat). The banks of the River are well-vegetated with trees and other vegetation. CP 641–648. The River and the associated riparian vegetation provide a scenic backdrop to boaters and users of the Centennial Trail on the bank opposite Coyote Rock. *See* CP 411, 489, 511 (noting use by canoers, rafters, and kayakers).

To protect the habitat and scenic values provided by the River and the riparian vegetation in this location, the City approved the Coyote Rock subdivision on condition that the developer maintain a 75 foot buffer between the proposed houses and the water. CP 433–434. The intent of the buffer was “to maintain in perpetuity the natural character and ecology of the shoreline in this relatively undisturbed reach of the Spokane River.” CP 434. In addition, the City included a condition requiring the property owner to consult with Ecology and the Department of Fish and Wildlife prior to the installation of any docks in the River. The intent of the condition was “to reduce the number and impacts of docks along this reach of the shoreline. Only minimal low impact access ways and docks will be approved.” *Id.*

The adverse environmental impacts of residential docks are well documented in the scientific literature. “In general, modification of riparian areas and near-shore littoral zone habitat (i.e., shoreline

development) degrades freshwater aquatic communities.” CP 556, *see also* CP 608. Impacts from docks include shore-zone habitat changes, shading and ambient light changes, water flow pattern and energy disruption, and physical/chemical environmental disruption. CP 582, 592, 597 (charts summarizing impacts). Dock construction and use often result in riparian zone alterations, such as vegetation removal, that have adverse effects in addition to the effects caused by the docks themselves. CP 567–571. These impacts are likely to occur at Coyote Rock. CP 513 (“[r]esidential growth in the Coyote Rock development area will likely further degrade a historically disturbed shoreline area due to increased shoreline access pressure.”).

The scientific literature emphasizes the importance of addressing the cumulative impacts resulting from the construction of numerous docks in a particular area. CP 556, 568, 612. In particular, the science literature recommends construction of multi-use docks to avoid cumulative impacts. CP 636 (“[t]o minimize the cumulative effects of over-water structures . . . the multifamily use of individual docks should be encouraged, and only one dock per multi-lot development should be allowed.”).

As noted above, the Coyote Rock subdivision includes 30 lots with river frontage. The developer intends to install docks on each of these 30 lots. CP 4, 16–17. This intent is reflected on the company’s website,

which depicts each lot with an individual dock. CP 539. In addition, the developer has stated in the press that it is his “dream” to install 30 docks in the river and that he would not have undertaken the development if he couldn’t do so. CP 16–17. This intention has also been stated in meetings between Ecology, the City, and the developer. CP 4. It was this intent that caused Ecology to recommend, and the City to include, the condition in the subdivision approval requiring consultation with Ecology and Fish and Wildlife prior to dock construction. *See* CP 166, 433–434; *see also* CP 164.

The developer’s plans submitted to the City for how access to the docks will be achieved state that a trail may be built from each house to the River. City Record at 172–182.¹ Clearly, if individual trails are built on each lot to the water on all 30 lots, the 75 foot buffer previously required by the City will no longer serve its intended purpose of protecting the natural character of the shoreline. *See* CP 22, 221 (“[i]n order to be effective, this 75 foot buffer must be absolutely undisturbed and undeveloped.”).

¹ The City’s Record was submitted to the court without clerk’s numbers per RAP 9.7(c).

B. The Superior Court Erroneously Affirmed The City's Exemptions

Coyote Rock submitted applications to the City for exemptions from shoreline permitting for the two docks at issue here. *E.g.*, City Record at 38–48. Coyote Rock claimed the docks were exempt under RCW 90.58.030(3)(e)(vii) which exempts from the requirement to obtain a substantial development permit the construction of certain residential docks. The applications indicated that the docks are not for the use of Coyote Rock, but are intended to be sold with the adjoining lots and will be used by the subsequent purchasers. City Record at 42; *see also* CP 4, 19. Despite comments from Ecology that the docks were not exempt and that the City should consider joint use or other conditions to offset the cumulative impacts of constructing 30 docks, the City granted the exemptions without any such conditions. CP 22 (Ecology's comments); City Record at 88–90 (exemption decision).

The City required the developer to submit plans showing how access through the buffer to the docks would be provided. These plans describe a trail up to 8 feet wide that may include stepping stones, wood steps, drainage and erosion control features, or a stairway on pilings. City Record at 173 (“[a] private pedestrian trail, not exceeding 8 feet in width, shall be allowed in the Habitat Protection Zone of each lot for the purpose

of providing a single access point to the river.”). The City did not limit the number of docks or the number of trails that may be constructed.

Ecology appealed the exemptions to Spokane County Superior Court under LUPA. CP 1–22; 46–63. The Spokane Riverkeeper, Spokane Chapter of Trout Unlimited, and the Lands Council, intervened in support of Ecology’s appeal. CP 33–35. Ecology moved to supplement the record with various materials, including a paper summarizing the science regarding the impacts of docks in fresh water, an inventory of shoreline conditions prepared by the City documenting the scenic, recreational, and habitat values of the Spokane River, the City’s decision on Coyote Rock’s subdivision application including the conditions described above, and other materials. CP 67–73.² The court granted the motions to supplement and consolidated the two appeals. CP 673–680.

On the merits, the court declined to reverse the City’s exemptions. CP 744–745. The court concluded that the statutory exemption from permitting in RCW 90.58.030(3)(e)(vii) applied because the docks were intended for individual use by the eventual purchasers of the lots. In addition, the court concluded that the evidence of cumulative impacts in the record was “speculative.” CP 752–755. This appeal followed.

² Spokane Riverkeeper, et. al., also moved to supplement the record.

V. AUTHORITY AND ARGUMENT

A. Standard of Review

Under LUPA, the party challenging a land use decision has the burden of demonstrating one of the grounds for relief in the statute. RCW 36.70C.130. The grounds for relief in RCW 36.70C.130(1) include:

(b) [t]he land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

...

(d) [t]he land use decision is a clearly erroneous application of the law to the facts

On appeal, the appellate court stands in the shoes of the superior court and reviews the administrative record for factual or legal error under the statutory standards. *HJS Dev., Inc. v. Pierce Cy.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003); *Satsop Valley Homeowners Ass'n v. Nw. Rock*, 126 Wn. App. 536, 541, 108 P.3d 1247 (2005). The appellate court does not review the findings of fact or conclusions of law entered by the superior court. *Humbert/Birch Creek Constr. v. Walla Walla Cy.*, 145 Wn. App. 185, 192 n.3, 185 P.3d 660 (2008).

Review under subsection (b) of the statute presents purely legal questions that the appellate court reviews de novo. Under subsection (d), the appellate court may grant relief only if it reaches a “definite and firm

conviction” that a mistake has been committed. *Quality Rock Products, Inc. v. Thurston Cy.*, 139 Wn. App. 125, 133, 159 P.3d 1 (2007).

In this case, the City’s shoreline exemptions violate subsections (b) and (d) of RCW 36.70C.130(1). As explained in Section D below, the exemptions are an erroneous interpretation of the law because the exemption does not apply here. In addition, as explained in Section E below, the exemptions involve an erroneous application of the law to the facts because the City failed to include conditions in the exemptions to address cumulative impacts. Such conditions are required by the Shoreline Management Act and the local shoreline master program in the circumstances of this case.

B. Unrestricted Or Piecemeal Construction Is Inconsistent With The Shoreline Management Act

The SMA declares that “unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest” RCW 90.58.020. To prevent the “inherent harm in an uncoordinated and piecemeal development of the state’s shorelines,” the SMA declares that “coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest.” *Id.*

To meet these and other goals of the SMA, the Act requires local governments to adopt shoreline master programs to regulate uses and developments on state shorelines. RCW 90.58.080. The master program must, among other things, utilize “all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data” RCW 90.58.100(1)(e). The master program must be consistent with guidelines adopted by Ecology and it must be approved by Ecology before it becomes effective. RCW 90.58.080(1); 90.58.090(1). The current state guidelines are published in WAC 173-26.

All developments and uses on state shorelines must be consistent with the goals and policies of the Act, state guidelines, and the local master program. RCW 90.58.140(1). To ensure consistency, the SMA requires all “substantial developments” to obtain a permit from the local government. RCW 90.58.140(2). The SMA contains various exemptions from the requirement to obtain a substantial development permit, RCW 90.58.030(3)(e), but these are not exemptions from the Act. Even exempt development must be consistent with the SMA and the local master program. RCW 90.58.140(1); WAC 173-27-040(1)(b); *Putnam v. Carroll*, 13 Wn. App. 201, 534 P.2d 132 (1975). Local governments have the duty and obligation to condition exempt developments as necessary to ensure consistency. WAC 173-26-191(2)(a)(iii)(A). Because of their

potential to undermine the purposes of the Act, exemptions must be construed narrowly. WAC 173-27-040(1)(a).

The Act gives special protection to “shorelines of statewide significance” like the Spokane River. RCW 90.58.020. Shoreline master programs for such shorelines, as well as uses and developments on such shorelines, must meet the policy and use hierarchy in RCW 90.58.020. Local governments must give preference to uses that: (1) recognize and protect the statewide interest over local interest; (2) preserve the natural character of the shoreline; (3) result in long term over short term benefit; (4) protect the resources and ecology of the shoreline; (5) increase public access to publicly owned areas of the shorelines; (6) increase recreational opportunities for the public in the shoreline; and (7) provide for any other element deemed appropriate or necessary. RCW 90.58.020.

The SMA is to be broadly construed to effectuate its purposes. RCW 90.58.900; *see also Clam Shacks v. Skagit Cy.*, 109 Wn.2d 91, 97, 743 P.2d 265 (1987). The Act grants authority to Ecology to adopt rules necessary for its implementation. RCW 90.58.200. These rules are codified in WAC 173-27 and they have the force and effect of law. *See Champagne v. Thurston Cy.*, 163 Wn.2d 69, 80 n.9, 178 P.3d 936 (2008) (properly promulgated substantive agency regulations have the force and effect of law). In addition, the Act directs Ecology to adopt guidelines for

shoreline master program development. RCW 90.58.060. The guidelines are codified in WAC 173-26. Ecology's shoreline guidelines are binding on local governments because the Act requires local master programs to be consistent with the guidelines as well as the Act. RCW 90.58.080; *see also* RCW 90.58.090 (requiring Ecology approval of local shoreline master programs).

C. The City's Shoreline Master Program Prohibits Non-Exempt Docks

The City has adopted the Spokane County Shoreline Master Program (Spokane Valley SMP). Spokane Valley Municipal Code § 21.50.010 (2007); *see* CP 324–398. The Spokane Valley SMP designates the Spokane River in this area in the Pastoral Environment. City Record at 88. Under this designation, docks are prohibited except for those docks that meet the terms of the exemption in RCW 90.58.030(3)(e)(vii). Spokane Valley SMP § 18.1.1; CP 383.

The Spokane Valley SMP describes the intent of the Pastoral Environment designation as follows:

The Pastoral area is intended to protect and maintain those shorelines which have historically been subject to limited human interference and have preserved their natural quality as wildlife habitat and places of scenic beauty. These areas are appropriate for passive agricultural and recreational uses. . . . Because the areas are not suited for permanent structures, they are valued wildlife areas which provide for grazing and 'wild hay' for dispersed-use outdoor recreation. Management of the area should be designed to

prevent the loss or reduction of the wetland area and to restrict development from hazardous areas.

CP 343. The management objectives for the Pastoral Environment include “[p]rotect these areas for their value as open space areas for diffuse outdoor recreation and as valuable wetland and wildlife habitat areas.” CP 364.

Regarding docks, the Spokane Valley SMP recognizes the impacts that docks may have and includes policies encouraging joint use docks. For example, in the Rural Environment, Policy 2 states that “[t]he sharing of piers and docks by adjoining property owners or community groups shall be encouraged over piers and docks of individual property owners.” Similarly, in the Urban Environment, Policy 2 states that “[t]he number and type of piers and docks permitted shall be regulated to protect navigation, the quality of water, and the natural and visual quality of the shoreline environment.” In the Pastoral Environment, the Spokane Valley SMP’s policy is to prohibit docks. CP 358.

D. Spec Docks Built For Resale Are Not Exempt From Permitting

The City concluded the docks here were exempt from the requirement to obtain a shoreline substantial development permit under RCW 90.58.030(3)(e)(vii). This conclusion is erroneous. The Court should reverse the exemptions and deny the applications.

The proper interpretation of a statute is a question of law for the court. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The court's goal is to ascertain the intent of the legislature. To do so, the court first looks to the plain language of the statute. If the meaning of the statute is clear on its face, then the court must give effect to that plain meaning. *J.M.*, 144 Wn.2d at 480. However, the meaning of the statute is derived not only from the words used but also from the context in which they appear and from related statutes that disclose legislative intent. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11–12, 43 P.3d 4 (2002). In the event the plain language is ambiguous, the court then may resort to aids to interpretation. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

As discussed above, the exemptions in RCW 90.58.030(3)(e) must be construed narrowly so as not to undermine the general rule requiring substantial development permits. WAC 173-27-040(1)(a). Projects authorized under the exemptions are not subject to the procedural protections that apply to substantial development permits. They do not require a public hearing and they are not subject to appeal to the Shorelines Hearings Board. *Putnam*, 13 Wn. App. at 204–205. Consequently, exemptions do not receive the same level of review as permits and they have a higher potential for error. In addition, broad

application of the exemptions has the potential to lead to the piecemeal and uncoordinated development of the state shorelines that the Act is supposed to prevent.

RCW 90.58.030(3)(e)(vii) exempts “construction of a dock . . . designed for pleasure craft only, for the private, noncommercial use of the owner, lessee, or contract purchaser of single and multiple family residences.” To fit within the precise terms of this exemption, a proposed dock must (1) be designed for pleasure craft only, and (2) be for the private, noncommercial use of the owner, lessee or contract purchaser of single and multiple family residences.

A spec dock built for resale does not meet the second of these requirements. When such a dock is built, the developer is the owner of the lot and may also be the owner, lessee or contract purchaser of the associated residence. The dock, however, is not built for the developer’s use. Indeed, in this case, Coyote Rock has no intention of using the docks at issue here. Spec docks, by their very nature, are built for use by a *future* owner, lessee or contract purchaser of the residence.

The plain language of the exemption does not include docks built for future owners. The exemption specifies that the dock must be for use by “*the* owner, lessee or contract purchaser” of a residence (emphasis added). The term “the owner, lessee or contract purchaser” in ordinary

usage refers to the *current* owner, lessee or contract purchaser—not a future one. That is, it refers to the person who is the owner of the residence at the time application for the exemption is made. The dock must be intended *for use by that person*—the same person who is applying for the exemption—not intended for use by someone else in the future. Had the legislature intended the exemption to apply to docks built for use by future purchasers, it would have said so, or used the term “an” or “any” owner, lessee or contract purchaser. By using the term “*the* owner, lessee or contract purchaser” the legislature limited the exemption to docks built for use by the current owner (or lessee or contract purchaser).³

Campbell & Gwinn supports this point. There, the issue was whether a developer could utilize the exemption from groundwater permitting in RCW 90.44.050 to drill multiple exempt wells in a single subdivision. The court held the developer was limited to a single exemption only. *Campbell & Gwinn*, 146 Wn.2d at 14. Of particular importance here, the court held that the applicability of the exemption must be determined at the time application for it is made. *Campbell & Gwinn*, 146 Wn.2d at 13–14. The court stated the exemption did not become applicable simply because future homeowners might ultimately

³ The words “lessee or contract purchaser” clarify the legislature’s intent that the exemption applies regardless of the precise real estate interest the current owner may have. These words do not make the exemption applicable to docks that are not built for use by the current holder of the real estate interest.

use the wells. *Id.* (“[t]he one seeking an exemption from permit requirements is necessarily the one planning the construction . . . and is the one who would otherwise have to have a permit before any construction commences”). Similarly, here, the exemption does not become applicable simply because a future homeowner may use the dock.

The intent of the exemption is to allow someone who owns, leases, or is in the process of purchasing a home, to construct a dock on the lot for his own use or the use of his family without going through the permit process that would be applicable to a substantial development permit. This intent is not served by applying the exemption to developers who are constructing multiple docks for resale, because developers presumably have the time, means and ability to file permit applications and proceed through the full permit process. In addition, spec docks by their very nature are constructed without knowledge of the specific needs or desires of the future homeowner. Inevitably, some homeowners will decide they do not want the dock, or they will want a different size or type of dock to better fit their needs. The construction of spec docks built for resale necessarily entails incurring environmental harm without, at least in some cases, any corresponding benefit to the homeowner. Interpreting the exemption to apply to speculative dock construction is thus inconsistent

with the overall purpose of the SMA to avoid piecemeal and uncoordinated development.

Again, *Campbell & Gwinn* supports this point. There, the court held that allowing developers to claim multiple exemptions was inconsistent with the general rule requiring permits for the use of groundwater. *Campbell & Gwinn*, 146 Wn.2d at 16. The court was concerned that allowing developers to claim multiple exemptions would lead to a vast expansion in unpermitted groundwater use to the detriment of the public interest. *Campbell & Gwinn*, 146 Wn.2d at 13 n.4. Similarly here, allowing developers to claim multiple dock exemptions likely would lead to the construction of more docks than would otherwise occur. At the very least, under *Campbell & Gwinn*, the court should hold that the developer here is limited to one dock exemption only, not an unlimited number.⁴

The wording of the dock exemption is similar to the exemption in RCW 90.58.030(3)(e)(vi) for single family residences.⁵ With respect to that exemption, the Shorelines Hearings Board has held that it does not apply to spec homes built for resale. *Lux Homes, LLC v. Dep't of*

⁴ The dock exemption is limited to docks costing less than \$10,000. While one dock of the type installed at Coyote Rock may cost less than \$10,000, it is highly unlikely that 30 docks collectively meet that limit.

⁵ That statute exempts “construction on shorelands by an owner, lessee, or contract purchaser of a single family residence for his own use or for the use of his or her family”

Ecology, Shorelines Hearings Board (SHB) No. 04-025, Findings of Fact, Conclusions of Law, and Order (CL 6), (Aug. 1, 2005). The Shorelines Hearings Board concluded under the plain language of the exemption that the home must be constructed for the owner's personal use, not constructed for sale to others. *See also Kates v. City of Seattle*, 44 Wn. App. 754, 760, 723 P.2d 493 (1986) (exemption applies where homes intended for personal use of homeowner). Given the similarity in language between the two exemptions, and the overall purpose of the SMA to avoid piecemeal and uncoordinated development, the court should reach the same result with respect to the dock exemption. The decisions of the Shorelines Hearings Board are entitled to deference from this Court. *Weyerhaeuser Co. v. King Cy.*, 91 Wn.2d 721, 727, 592 P.2d 1108 (1979); *San Juan Cy. v. Dep't of Natural Res.*, 28 Wn. App. 796, 626 P.2d 995 (1981); *Jefferson Cy. v. Seattle Yacht Club*, 73 Wn. App. 576, 589, 870 P.2d 987 (1994).

In this case, because docks that are not exempt are prohibited by the Spokane Valley SMP in the Pastoral Environment, the Court should reverse the exemptions and direct the City to deny the applications.

E. The City Failed To Include Conditions To Address Cumulative Impacts

Even if the exemption applies here, the City erred by failing to include conditions in the exemptions to address cumulative impacts. Such conditions are necessary to ensure consistency with the SMA and the Spokane Valley SMP.

1. The SMA requires consideration of cumulative impacts.

As far back as 1976, the supreme court recognized the need for consideration of cumulative impacts in making permitting decisions under the SMA:

Logic and common sense suggest that numerous projects, each having no significant effect individually, may well have very significant effects when taken together. This concept of cumulative environmental harm has received legislative and judicial recognition.

Hayes v. Yount, 87 Wn.2d 280, 287–88, 552 P.2d 1038 (1976) (citing cases); *see also Skagit Cy. v. Dep't of Ecology*, 93 Wn.2d 742, 750, 613 P.2d 115 (1980) (“The SMA recognizes the necessity for controlling the cumulative detrimental impact of piecemeal development through coordinated planning of all development.”); *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 210, 884 P.2d 910 (1994) (Board may consider cumulative environmental impact of development); WAC 173-26-186(8)(d) (avoidance of cumulative impacts is a governing principle of Ecology’s shoreline guidelines).

The Board has in a number of cases denied dock permits based on cumulative impacts. *See, e.g., McCauley v. Mason Cy.*, SHB No. 06-033 (June 8, 2007) (discussing cases); *Bellevue Farm Owners Ass'n v. Shorelines Hearings Bd.*, 100 Wn. App. 341, 362, 997 P.2d 380 (2000). Cumulative impacts from dock construction include not only environmental impacts, but also aesthetic impacts and impacts on views, navigation and recreation. *See Samson v. Bainbridge Island*, 149 Wn. App. 33, 56–58, 202 P.3d 334 (2009) (upholding limits on dock construction based on cumulative impacts); WAC 173-26-201(3)(d)(iii) (“a cumulative impact of allowing development of docks or piers could be interference with navigation on a water body.”).

The proliferation of docks on a water body is sometimes called the “porcupine effect” due to the fact that the docks may become so numerous they resemble the spines of a porcupine. *See TG Dynamics Group v. San Juan Cy.*, SHB No. 08-030 (May 26, 2009). For these reasons, Ecology’s shoreline guidelines require local governments to limit docks in residential subdivisions to joint use or community docks where feasible. WAC 173-26-231(3)(b). In addition, the Spokane Valley SMP includes policies prohibiting docks in the Pastoral and Natural Environments, encouraging joint use docks in the Rural Environment, and limiting the

number and size of docks in the Urban Environment where docks are allowed. CP 358.

2. Cumulative impacts in this case are not speculative.

In this particular case, the City issued the exemptions without giving any consideration to the potential cumulative effects of constructing 30 docks at this location. The docks at issue in this case are not isolated, but are part of a larger plan of development to install 30 docks on the 30 waterfront lots in the Coyote Rock subdivision. CP 4, 16–17, 539. According to the scientific literature, and the City’s own shoreline inventory, construction of 30 docks at this location, and the development associated with those docks, will negatively impact the ecological functions of the Spokane River, and will likely result in negative impacts to views, navigation, and recreational use of the River as well. *See* CP 164 (describing 30 access paths and multiple docks as a “worst case scenario”); CP 489, 513 (noting potential for adverse cumulative impacts at Coyote Rock due to dock construction); CP 568 (cumulative impacts of shoreline development may affect fish abundance and species richness); City Record at 81, 84 (reporting citizen concerns that the river will become “congested.”).

One of the most serious impacts of constructing 30 docks at this location lies in constructing access through the 75 foot shoreline buffer to

the water. *See* City Record at 86. As discussed above, preservation of the 75 foot buffer in perpetuity was a key condition of the substantial development permit issued by the City that allowed the Coyote Rock development to proceed. Allowing individual access trails through the buffer for each lot is inconsistent with this provision. Such access trails would, at a minimum, result in fragmentation of the buffer that would destroy much of its habitat value. *See* CP 221–222 (buffer must remain undisturbed to be effective). In addition, such access trails would likely lead to installation of other structures adjacent to or associated with the trails, such as retaining walls, stairways, landings, railings, and lights, that would further degrade its value. *See* City Record at 172–182 (access plans allow such structures). In fact, installation of 30 access trails and associated structures through the buffer would defeat the intended purpose of the buffer to preserve the natural character of the shoreline.

In denying relief on this issue, the superior court ruled that cumulative impacts were “speculative.” CP 747. The court cited *Robertson v. May*, 153 Wn. App. 57, 218 P.3d 211 (2009), in support of this conclusion. CP 745. The superior court, however, failed to appreciate the significant factual differences that exist between this case and *Robertson*. In addition, the court appears to have misread *Robertson* because *Robertson* does not stand for the proposition that cumulative

impacts should never be considered. Whether cumulative impacts exist and must be considered depends on the facts and evidence in each case. *See Hayes*, 87 Wn.2d at 291.

Here, the record demonstrates that cumulative impacts are not speculative. All 30 waterfront lots in the Coyote Rock subdivision are similarly situated such that construction of individual docks and trails on each lot is reasonably foreseeable. *See* WAC 173-26-201(3)(d)(iii) (local governments should address cumulative impacts when they are “reasonably foreseeable” given the existing pattern of development). The developer’s stated intention—his “dream”—is to construct 30 docks at this location, one on each lot of the Coyote Rock subdivision. CP 16–17. This stated intention is supported by the marketing information posted on the company’s website, which depicts each lot with its own dock. CP 539. In addition, the company’s access plans provide that trails may be built on each lot. City Record at 172–182. Furthermore, the City’s shoreline inventory and the scientific information in the record demonstrate that construction of individual docks on each lot at this location likely will negatively impact the shoreline. *E.g.*, CP 513 (“[d]ock construction and associated watercraft use . . . [has] potential for increased bank erosion, petroleum pollution, and removal of vegetation cover.”).

By contrast, in *Robertson*, the court did not reach the issue of cumulative impacts. *Robertson*, 153 Wn. App. at 94 n.30 (“we do not reach this final argument.”). The court did not reach the argument because it held that the petitioners had failed to prove the dock in that case had any detrimental impacts. The court noted that the dock in that case was a joint use dock and it found the dock was consistent with the policies of the local shoreline master program. *Id.* In the present case, there is substantial evidence of detrimental environmental impact, as discussed above. Unlike *Robertson*, the developer here presented no site-specific evidence or analysis showing an absence of impact. The only possible conclusion on the evidence presented here is that individual docks on each lot pose a significant threat to the environment.⁶

In addition, individual docks on each lot in the subdivision represent a high intensity level of use that is inconsistent with the policies of the Pastoral Environment in the Spokane Valley SMP, and inconsistent with the policies applicable to shorelines of statewide significance. The Spokane Valley SMP policies stress preservation of the Pastoral Environment as open space for “diffuse” recreation. Construction of 30 docks on this short stretch of river is inconsistent with this policy.

⁶ In fact, the evidence of cumulative impacts here is stronger than in any other reported dock case. In no other dock case was there evidence of an actual intent to construct 30 docks.

Similarly, construction of individual docks on each lot is inconsistent with the use hierarchy in RCW 90.58.020 because it does not put the statewide interest over the local interest nor does it preserve the natural resources and ecology of the shoreline. Thus, this case is not similar to *Robertson* and the superior court erred.

3. At a minimum, the City should have required joint use docks or trails.

Cumulative impacts could be significantly reduced or eliminated if the City required joint use docks or joint use access trails in the Coyote Rock subdivision rather than permitting individual docks on each riverside lot. *See Robertson*, 153 Wn. App. at 93–94 (joint use pier minimizes environmental impacts). The City could limit the total number of docks and trails to one or two, thereby allowing recreational use by the homeowners while at the same time preserving the natural character of the shoreline “as fully as possible.” *Buechel*, 125 Wn.2d at 203; *see also Samson*, 149 Wn. App. at 51 (community docks strike appropriate balance between recreational use and environmental protection). Joint use conditions would also better preserve the buffer between the houses and the water that the City previously required in the subdivision approval. In environments where docks are permitted, the Spokane Valley SMP includes policies encouraging joint use piers and docks. CP 358. The

City's failure to require joint use docks or access trails in this case is inconsistent with these policies, with the policies applicable to shorelines of statewide significance, and with its previous decision on the subdivision application. It should be reversed.

VI. CONCLUSION

For the reasons stated above, the Court should reverse the superior court's order and, pursuant to RCW 36.70C.140, either reverse the exemptions issued by the City or remand them for modification to address cumulative impacts.

RESPECTFULLY SUBMITTED this 6 day of May, 2011.

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