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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31013-2
(Douglas County Superior Court
No. 12-2-00010-4)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

MARK AND NANCY MARLOW, husband and wife,

Appellants,

vs.

DOUGLAS COUNTY, subdivision of the
State of Washington,

Respondent.

REPLY BRIEF OF APPELLANTS

John M. Groen, WSBA #20864

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004

Telephone: (425) 453-6206

Attorneys for Appellants

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INTRODUCTION

The Shoreline Management Act establishes the procedures for local government or the Department of Ecology to follow when enforcing the Act. The legal problems in this case result from the failure of Douglas County to follow those procedures.

ARGUMENT

I.

THE PROCEEDING BEFORE THE HEARING EXAMINER VIOLATED STATE LAW

A. Douglas County's Reliance on Subsection (3) of RCW 90.58.210 Creates the Procedural Quagmire Because the County Does Not Follow Subsection (4) of the Same Statute.

When the Shoreline Management Act was first enacted in 1971, there was only one provision governing noncriminal¹ enforcement of the Act. That provision, RCW 90.58.210, stated in its entirety as follows.

The attorney general **or the attorney for the local government shall** bring such injunctive, declaratory, or other actions as are necessary to insure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter.

Laws of 1971, chapter 286, section 21 (RCW 90.58.210).

Douglas County does not, *and cannot*, deny that this provision only authorizes bringing an enforcement action in Superior Court. The plain

¹ A willful violation of the Act was also subject to prosecution for a gross misdemeanor. RCW 90.58.220.

language referring to “injunctive, declaratory, or other actions” is clearly a reference to proceedings in a court of law. As pointed out in the Brief of Appellants at 31, this interpretation of that language has long been held by the Shoreline Hearings Board.

The language of the Act directing injunctive or declaratory action **to a court** evinces a legislative policy choice which places this relief **with the court** and not this Board.

In the Matter of Nelson, 1979 WL 52505 (Wash.Shore.Hrg.Bd.) SHB No.79-11 (June 11, 1979) at 4.

Consistent with our ruling in *Nelson*, we conclude that RCW 90.58.210(1) only authorizes actions to be brought in Superior Court. The sub-section does not incorporate any authority for administrative penalties.

H&H Partnership v. State Department of Ecology, 2001 WL 1022098 (Wash.Shore.Hrg.Bd.) SHB No. 00-022 (March 21, 2001) at 5.

Of course, limiting enforcement of the Act to this authority to bring actions in Superior Court was considered insufficient. Accordingly, in 1986, RCW 90.58.210 was amended by adding subsections (2), (3) and (4). Laws of 1986, Chapter 292, section 4 (copy provided at Appendix).

The 1986 amendment broadened the enforcement authority by allowing a civil penalty. Significantly, the amendments spelled out the procedure and expressly provided that where a penalty is sought to be

imposed, the Department of Ecology or the local government must also order the action to cease and desist. The statutory language states:

(3) The penalty provided for in this section **shall** be imposed by a notice in writing ... describing the violation with reasonable certainty **and** ordering the acts or acts constituting the violation to cease and desist or, in appropriate cases, requiring necessary corrective action ...

RCW 90.58.210 (3).

Significantly, it is this very authority that Douglas County relies upon as the basis for its enforcement. At page 26 of Respondent's Brief, Douglas County points out that subsequent to *In the Matter of Nelson*, the statute was amended by adding subsection (3), which the County then quotes in full. Respondent's Brief at 26.

While subsection (3) provides broadened authority for enforcement, the County has **not followed the procedures** set forth in the law. There are two significant procedural problems with the County's response. First, the County repeatedly states in its brief that it is not imposing a penalty. *If that is true*, then subsection (3) cannot be relied upon as the basis for the County's enforcement action.

Although the County does not expressly make the argument, the implied position is that subsection (3) allows the County to force corrective measures *without imposing a penalty*. But such an interpretation is contrary to the express language. The express language is that the penalty "**shall** be

imposed by a notice in writing ... describing the violation with reasonable particularity **and** ordering the acts or acts constituting the violation or violations to cease and desist...” RCW 90.58.210 (3). This language expressly authorizes a cease and desist order *only as part of a decision to impose a penalty*. Indeed, the decision to act pursuant to subsection (3) mandates that **the penalty and cease and desist order go together**. The language of the statute uses the conjunction “and” but does not speak in the disjunctive.

By not following this express language, the County has created a procedural quagmire that eliminates important protections for the defendant in an enforcement proceeding. That is because subsection (4) provides for an appeal to “the local government legislative authority.” In Douglas County, that is the Board of Commissioners. The Marlow’s appeal procedure, under subsection (4), should have been to the Board of Commissioners. The hearing examiner is not the “legislative authority.” See *Whatcom County v. Brisbane*, 125 Wash.2d 345, 351 and n.24 (1994) (term “legislative authority” refers to city council).

The facts of the present case demonstrate why it makes a real difference where an appeal is filed. In this case, the terms of the NOV expressly required any appeal to be filed to the hearing examiner. CP 44. But the hearing examiner rules do not fit for Shoreline Management Act

enforcement proceedings. Those deficiencies have been pointed out in the Appellant's Opening Brief. The two primary deficiencies are that the hearing examiner wrongly is required to place the burden of proof on the defendant to an enforcement action. As will be discussed below, the burden of proof in enforcement proceedings must be on the enforcing agency, *i.e.* the prosecution. Second, the hearing examiner does not have authority to consider equitable factors that are necessarily part of the enforcement process. Both of these procedural safeguards will be discussed in more detail below.

This argument was spelled out in Appellant's Opening Brief at 29, but was ignored in Respondent's Brief. As argued by Marlow:

In an enforcement action, an appeal by the defendant is supposed to go to the shoreline hearings board (if Dept. of Ecology initiates the enforcement action) or to the Douglas County Board of Commissions as the local legislative authority (if the County initiates the enforcement action). RCW 90.58.210 (4). Rather than an appeal to either of these entities, as required by the statute, the NOV process forces the Marlows to appeal to the hearings examiner. But there is no provision anywhere in the state law or the local SMP for enforcement of the Act by appeals to the local hearing examiner. And that is for good reason. The local hearing examiner is not authorized to place the burden of proof on the enforcing agency as is required by state law. A procedure that followed state law would have allowed the Marlows to appeal to the County Board of Commissioners. The Board could have then placed the burden of proof on the enforcing agency, rather than the Marlows.

Appellant's Opening Brief at 29. The County's Brief never attempts to address this significant procedural deficiency.

It is not an answer to suggest that the Marlow's should have filed an appeal to the Commissioners. The Marlows cannot re-write the Douglas County rules. The County set up its procedure and the Marlows had no choice but to try to do their best within that procedure. Of course, the Marlows argued to the hearing examiner that he did not have jurisdiction over this enforcement proceeding, but these arguments were rejected.

If the Douglas County rules had properly allowed an appeal to the Board of Commissioners, both of the procedural safeguards would have been preserved. Specifically, the burden of proof to show violations would have been on the Douglas County Department of Transportation and Land Services. The Board of Commissioners is not subject to the hearing examiner rules and would have had the authority to properly place the burden of proof. The County does not argue otherwise. Second, the Board of Commissioners would have been able to consider the equitable factors that are necessarily involved in enforcement measures. The important role of equitable factors is recognized in the applicable provision of the Washington Administrative Code (WAC).

Enforcement action by the Department [of Ecology] or local government may be taken whenever a person has violated any provision of the act or any master program or

other regulations promulgated under the act. The choice of enforcement action and the severity of any penalty **should be based on the nature of the violation**, the damage or **risk to the public** or to public resources, and/or the existence or **degree of bad faith** of the persons involved subject to the enforcement action.

WAC 173-27-260 (emphasis added). Here, the record is undisputed that the Marlows actions at their home have not caused any environmental damage of consequence, and that leaving the property “as is” would actually be best for the shoreline. As wetland scientist Tony Roth testified, the County staff pushing this enforcement proceeding is seeking removal for the sake of removal.

[A]s a biologist, I wouldn't recommend removing it if we could avoid it. It seemed like it might just be removal for removal's sake, and that doesn't seem to be the best ecological decision.

CP 660 (Tr. 76:16-25 and 77:4-19). Unlike the hearing examiner, the Board of Commissioners is fully authorized to consider these factors in determining a fair and equitable resolution to this dispute.

B. The Findings of Fact by the Hearing Examiner cannot be sustained because the Burden of Proof was Unlawfully placed on the Marlows.

Contrary to Douglas County's position, it is well established that under the Shoreline Management Act, the burden of proof is on the enforcement agency.

In *Twin Bridge Marine Park, LLC v. Department of Ecology*, 2002 WL 1650523 (Wash. Shore. Hrg. Bd.) SHB Nos. 01-016 and 01-017, July 17, 2002, the Department of Ecology imposed a \$17,000 penalty and issued a cease and desist order. *Id.* at 3 (Section XI of decision). The Order and Notice of Penalty were appealed to the Shorelines Hearings Board. *Id.* at 4 (Section XII of decision). Regarding burden of proof, the Board stated:

The Department of Ecology **has the burden of proving** that a violation has occurred, that the amounts of the penalties assessed are reasonable, and that a cease and desist order is justified.

Id. at 5 (Conclusion of Law no. D).

The County has no response to this authority other than to point out that *Twin Bridge* was reversed on other grounds and that burden of proof was not at issue on judicial review. Of course, that subsequent case history does not undermine the SHB's allocation of the burden of proof. If anything, it means that all parties recognized that the burden of proof was properly allocated.

Of course, *Twin Bridge* is not the only authority. See *Frank and Greenstone Corporation v. Department of Ecology*, 2011 WL 3398573 (Wash.Shore.Hrg.Bd.) SHB No. 11-003, July 29, 2011. In that case, Ecology imposed a \$15,000 penalty and ordered remedial actions. Following subsection (4), the appeal was to the SHB. The Board stated:

The agency must prove that the violation occurred and that the penalty was reasonable by a preponderance of evidence.

Id. at 8.

Of course, the WAC likewise places the burden of proof on the enforcing agency. In contrast to applications for permits, *in appeals involving enforcement*, the burden shifts to the enforcement agency.

Persons requesting review [of permit decisions] pursuant to RCW 90.58.180 (1) and (2) shall have the burden of proof in the matter. The **issuing agency shall** have the **burden of proof** in cases involving penalties or regulatory orders.

WAC 461-08-500 (3) (emphasis added). Remarkably, Douglas County responds that this only applies to enforcement before the SHB, and does not apply to the local government and proceedings before a hearing examiner. The County's distinction is not persuasive.

First, it makes no sense that the burden of proof should be different depending on whether the Department of Ecology initiates the enforcement action, or whether a local government initiates enforcement. The exact same alleged violation can be enforced by either Ecology or local government. The burden of proof should not change based on which governmental entity starts the enforcement action. Indeed, such an arbitrary rule would raise Equal Protection and other challenges. Both government entities have the

same enforcement powers and should have the same allocation of the burden of proof.

Second, the County can point to nothing in the Shoreline Management Act that authorizes placing the burden of proof on the defendant in an enforcement proceeding. All of the authority consistently places the burden of proof on the enforcing agency, as it should.

The County cites *Herman v. Shorelines Hearings Board*, 149 Wash. App. 444 (2009). But that case supports the Marlows. In 2003, the Department of Ecology discovered additional violations by Mr. Herman. *Id.* at 452 ¶ 8. In May 2004, Ecology followed the authority of subsection (3) and issued a \$30,000 penalty and order for remedial action. *Id.* at ¶ 9. On appeal to the SHB, the Board stated again the correct allocation of the burden of proof.

The Board has jurisdiction over the parties and the subject matter of this case under RCW 90.58.210 (4). The Board hears the case de novo. Ecology has the burden of proving that a violation of the SMA and/or the SCSMP has occurred and that the amount of the penalty is reasonable.

Lloyd A. Herman v. Department of Ecology and Spokane County, 2005 WL 1935493 (Wash.Shore.Hrg.Bd.) SHB No. 04-019 (July 27, 2005) at page 4 (Conclusion of Law I).

The Herman case follows the correct procedure of subsection (3) and subsection (4), and again places the burden of proof on the enforcing agency. It is worth noting that the local government of Spokane County was also a co-Respondent with the Department of Ecology and was subject to the same allocation of the burden of proof. *Id.* The fact that the local government was involved did not affect the allocation of the burden of proof.

C. The Misallocation of the Burden of Proof is Not Harmless Error

Recognizing its weak position, Douglas County summarily states that placing the burden of proof on the Marlows was harmless error. Regardless of the lack of argument by the County, that is simply not the case.

First, the Brief of Appellants identifies in the assignments of error and pertaining issues that the hearing examiner “misallocate[d] the burden of proof. This issue affected **all** findings of fact...” Appellant’s Brief at 2 (emphasis added).

More specifically, Marlow’s argument directly attacked Finding of Fact No. 51, which was related to whether the replacement dock qualified for the exemption based on being a freshwater dock, for private use, with fair market value of less than \$10,000. As summarized in the argument:

In short, the replacement dock was exempt from the substantial development permit requirement and was not

illegal under the SMA because it qualified for the exemption under WAC 173-27-040 (2) (h). The contrary **Finding of Fact No. 51 is in error and not supported by substantial evidence** and relief is warranted under RCW 36.70C.130 (c).

Brief of Appellants at 29 (emphasis added).

Of course, it should be recalled that the only evidence allowed by the hearing examiner was that this dock was purchased for a price of approximately \$8,500 to \$8900. CP 627 (Tr. 43:2-15). That was the testimony of Mark Marlow.² The County offered no testimony as to the fair market value of the replacement dock.

Despite that testimony, the hearing examiner in Finding of Fact No. 51 concluded that the Marlows had not met “their burden of proof” on this issue.

The dock facility installed by the Marlows required a shoreline substantial development permit at that time, unless the Marlows could have documented under **their burden of proof** that the fair market value was below \$10,000.

CP 516 (Finding of Fact No. 51).

The County might suggest that the burden of proof was harmless error, but it is clear the hearing examiner used the burden of proof in his analysis for resolving factual issues, and in particular this issue concerning

² The Marlows also sought to reopen the record to allow a receipt showing the delivered price of the dock was \$9,200. The hearing examiner would not allow that evidence, leaving the testimony of mark Marlow as the only evidence of fair market value.

the replacement dock. This is further borne out in the conclusions of law where the hearing examiner stated that

The appellant has not met **their burden of proof** in demonstrating that the dock and dock ramp, boat lift, boat launch, concrete patio/sidewalk and bulkhead, or grading with cuts and fills and four retaining walls could qualify as exemptions under WAC 173-27-040.

CP at 518 (emphasis added). Obviously, the hearing examiner's decision was driven to a significant extent by his allocation of the burden of proof to the Marlows. Otherwise, there would have been no need to point out that "their burden" was not met. The misallocation of the burden of proof was clearly not harmless and it impacted all of the hearing examiner's conclusions regarding the alleged violations.

D. Because this Case Involves Past Alleged Violations, the Correct Procedure Should Have Been to Seek an Injunction Through Subsection (1) of RCW 90.58.210

The County has asserted that it is operating under the authority of subsection (3) of RCW 90.58.210. As discussed above, subsection (3) presents significant procedural problems because the County did not provide for appeal to the County Board of Commissioners. That is itself a violation of RCW 90.58.210 (4), and also results in the burden of proof problems already discussed.

However, Marlows have also contended that where there is a **past violation, for activities that may have occurred long ago**, the correct

procedure is to proceed under subsection (1). Brief of Appellants at 25. Subsection (3) is really designed to stop **present** development activities and impose a penalty. But the Marlows are not engaged in any present development activity. Their actions took place a number of years ago. They are doing nothing that they can “cease and desist.”

Subsection (1) expressly provides for injunctive relief which is an equitable proceeding. Because there are many equitable facts which weigh in favor of the Marlows, it is understandable why the County enforcement staff does not want to proceed in that route.

An order compelling the performance of an act is mandatory injunctive relief. 15 WA PRAC § 44:3 (2011) (“mandatory injunction compels the performance of some affirmative act”); *Farnsworth v. Town of Wilbur*, 49 Wash. 416, 420 (1908) (injunctive relief may “compel the undoing of those acts that have been illegally done”).

Significantly, the Hearing Examiner does not have authority to consider equitable factors as is required in an equitable proceeding for injunctive relief. In support, Marlows cited *Chaussee v. Snohomish County Council*, 38 Wn. App. 630 (1984). *See also* DCC 2.13.070 (hearing examiner decisions must be based on local code; no provision for equitable factors involved in injunctive relief). The County responds that *Chaussee* involved equitable estoppel. Marlows do not disagree. Rather,

this confirms the point of the citation which was to show that the hearing examiner is restricted to only consider the code provisions and does not have authority to weigh equitable considerations. The principle of *Chaussee* is unimpaired. Both equitable estoppels and injunctive relief require consideration of equity, and both are therefore outside the jurisdiction of a hearing examiner.

In short, if Douglas County wants to force the Marlows to remove long established shoreline improvements, the Shoreline Management Act is very specific in how to do that. Specifically, the County prosecuting attorney must bring an action in court for injunctive relief, and if warranted, such an order would come from the Court. But such an order cannot come from a hearing examiner.

E. These Enforcement Proceedings are barred by the applicable Statute of Limitations

The statute of limitations to pursue civil penalties is the 2-year provision contained in RCW 4.16.100 (2) for penalties upon a statute. Similarly, the statute of limitations for a misdemeanor is one year. RCW 9A.04.080 (1) (j).

The Marlows agree that there is no statute of limitation for seeking injunctive relief under RCW 90.58.210 (1). Rather, the passage of time

will simply be a factor that weighs into a court's consideration as to a fair and equitable remedy.

In contrast, by proceeding as it has, Douglas County has unabashedly admitted that its procedure allows revival of the possibility of penalties long after the statute of limitations has passed. Under the County theory, there is no effective statute of limitation at all. The County can delay bringing an NOV for as long as it wanted, and then claim that penalties can be imposed if the NOV is not followed. That is exactly what the County is threatening here. Indeed, the County waited 14 years before issuing its NOV concerning the boat launch. Under the County theory, it could have waited 30 years. There simply is no limit.

The County attempts to distinguish *U.S. Oil & Refining Company v. State Department of Ecology*, 96 Wn.2d 85, 91-92 (1981). In that case, the Washington Supreme Court held that the two-year provision of RCW 4.16.100 (2) applies to notices of violation for penalties. In that enforcement proceeding, the Department of Ecology sought penalties for alleged violations of water discharge under the Washington Pollution Control Act, RCW Chapter 90.48.

Like the Court of Appeals, we believe that had the legislature intended to repeal RCW 4.16.100 (2), it would have done so in 1923 or 1937 when it amended RCW 4.16.080 (6). The Court of Appeals therefore correctly applied RCW 4.16.100 (2).

U.S. Oil & Refining Company, 96 Wn.2d at 90.

Accordingly, even if Douglas County can claim its enforcement action is brought in the name of benefit of the state, which may be very doubtful, it nevertheless is subject to the 2 year statute of limitations. Accordingly, the proceedings under RCW 90.58.210 (3) must be filed within two years of the violation. That did not happen.

Marlows do admit that the two year provision is subject to the “discovery rule.” Under *U.S. Oil & Refining Company*, the “statute of limitation does not begin to run until the plaintiff, using reasonable diligence, would have discovered the cause of action.” *U.S. Oil & Refining Company*, 96 Wn.2d at 92. The Court continued:

We therefore adopt the discovery rule for actions brought by DOE [Ecology] to collect penalties for unlawful waste discharges.

Id. at 94.

Of course, the discovery rule is a problem for the County because the evidence is clear that the County knew about the Marlows’ actions long ago. Indeed, the record shows that in 2006, Mr. Ray Perez took a photo of the property from the vantage point of a boat on the water. CP 416 (AR 392). The photo identifies Ray Perez as the County Code

Enforcement Officer. This is the same person who signed the Notice of Violation five years later. CP 044.

Violation of the statute of limitation requires reversal pursuant to RCW 36.70C.130 (b), (d) or (e).

II.

THE MARLOWS' ACTIONS WERE NOT UNLAWFUL AND WERE EXEMPT FROM THE REQUIREMENT TO SECURE A SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT

The County asserts that the findings of fact are verities on appeal. However, the Marlows have challenged **all** of the findings because of the misallocation of the burden of proof. In the assignment of error and pertaining issues, Marlows identify that this issue “affected all findings of fact and particularly the findings related to Marlow’s contention that their actions were exempt from permitting requirements.” Brief of Appellant at 2. Accordingly, there has been no failure to challenge the findings and they are not verities on appeal.

In addition, most of the so-called “findings” are actually conclusions of law. Not surprisingly, the hearing examiner states “Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.” CP 519. Naturally, the assignments of error likewise identify that “the hearing examiner err[ed] in his interpretation of law concerning shoreline exemptions.” Brief of

Appellant at 2. The corresponding arguments of the Marlows are clearly identified and argued in the opening brief.

A. The Dock Replacement was Exempt from the Shoreline Substantial Development Permitting Requirement.

1. The dock was exempt under WAC 173-27-040 (2) (h)

With respect to the dock exemption for freshwater, private docks of less than \$10,000, the County contends that the Marlows presented no evidence of the fair market value of the dock. Respondent's Brief at 42. That is not true. The Marlows provided testimony of the actual market value of the dock, *i.e.* what they paid for the dock in the market. The County contends that the cost did not include installation. Of course, there was no installation cost to include.

The County criticizes the Marlows for not remembering the name of the company they purchased it from. Of course, they eventually found a receipt which identified Nordic Marine as the vendor, but the hearing examiner refused to allow that evidence.

Finally, the County also asserts that because the replacement dock was installed after July 27, 2003, it is actually a violation of the County's critical areas ordinance. Apparently, the County is claiming the dock violates the buffer requirement for wetlands. Brief of Respondent's at 19 states, "development requires approval of buffers 50 feet to 150 feet

landward from the ordinary high water mark. DCC 19.18B.050.B.” The glaring problem, of course, is that the *dock is in the water*. It is not “landward” from the OHWM. The buffer simply has no applicability to the dock.

2. The dock was exempt under WAC 173-27-040 (2) (b)

In the alternative, the replacement dock was also exempt under WAC 173-27-040 (2) (b). That provision allows replacement of structures with a comparable structure. Here the replacement dock was comparable in size, function, and appearance to the original dock. Moreover, rather than causing adverse effects, the replacement dock is better for fish habitat because it is grated and thereby allows light to pass through the structure.

Marlows’ opening brief pointed out the testimony that Mark Marlow shopped for as close to the same dock as he could find. While not exactly the same size, both were small docks, with the same moorage capacity, and functioned the same. The Brief of Appellants summarized as follows:

Under a reasonable interpretation that considers function, use, appearance, and general size, the replacement dock is comparable to the old dock. The hearing examiner’s finding to the contrary is not supported by substantial evidence when viewed in light of the whole record, or is an erroneous interpretation of the law regarding the term “comparable”, or is a clearly erroneous application of the

law to the facts. Relief is warranted under RCW 36.70C.130 (b), (c) or (d).

Brief of Appellants at 4-41.

The only evidence the County cites is that the replacement dock is four feet wider and the dock materials are different. Respondent's Brief at 42. But the minor variation in size does not render the replacement dock as not being "comparable" to the original dock. Nor should the switch from a wooden dock to a grated dock make a difference. Indeed, grated docks are now required and wooden docks are prohibited. In short, given the facts and the subjective nature of the term "comparable" it is clear that the hearing examiner made a mistake and the replacement dock should qualify for the exemption on this basis.

In short, the preponderance of the evidence shows that the fair market value was less than \$10,000. The County should have the burden of proof, and in light of the record, it cannot be concluded that the cost of this dock exceeded the threshold limit of \$10,000. Moreover, the dock was a reasonable replacement dock that was comparable to the original dock. Either exemption is applicable.

3. The lack of a letter of exemption does not mean that the Shoreline Management Act was violated

Appellant's Opening Brief at 43-45 argued extensively that the lack of a letter of exemption does not establish that the Shoreline

Management Act was violated. The County offers no response whatsoever.

There is a single sentence in the County's brief that states: "There is a critical difference between the *eligibility* to obtain an exemption and the *application for and issuance of a determination granting an exemption.*" Respondent's Brief at 40. Whatever is the "critical difference," and what it means in an enforcement case, is left unexplained.

Ignored are the arguments set forth in Appellant's Opening Brief at 43-45. As pointed out there, the County's reliance on a procedural defect of not securing a letter of exemption suffers from the County's own procedural defect. The County **does not dispute** that the 1975 Douglas County SMP (which was still in effect when the Marlows replaced the old dock), **does not have any process for seeking an exemption.** There simply was no process set forth for an exempt use. There was no application form. There was nothing in the County code or the SMP directing the Marlows to get a letter stating that their replacement of the old dock was exempt.

The County is pushing this enforcement action based on a lack of a letter, not based on the merits of whether the actual replacement dock *qualified* for the exemption. Indeed, the County admits that it is focusing not on whether the replacement dock was *eligible* or qualified for the

exemption, but whether the replacement dock met the technical requirements of being provided with an exemption letter. Under these circumstances, it cannot be sustained that the SMA was violated by the lack of an exemption letter.

The bottom line is that the replacement dock was not illegal under the SMA. At most, there was a procedural defect in that a letter of exemption was not secured. Such a procedural defect should not be a sufficient basis to order the otherwise lawful replacement dock to now be removed.

B. The Boat Launch was Exempt from SMP Permitting.

The undisputed testimony is that capping the boat launch with concrete, and pouring the hot tub pad, had a combined cost of \$700. Accordingly, the project was well below the threshold value and therefore qualified as an exempt development under WAC 173-27-040 (2) (a).

The County again criticizes the Marlows for not having the name of the contractor who capped the launch in 1997. That was a long time ago. They don't remember. Again, this is why the allocation of the burden of proof is so important.

The County has no other argument for why the minimum fair market value exemption is not applicable. Not knowing the contractor does not negate the testimony that the actual cost for the contractor to do

the work was \$700. And that included the hot tub pad. The exemption is applicable. The conclusion of the hearing examiner that the capping of the boat launch was not exempt should be reversed and relief is warranted under RCW 36.70C.130 (b), (c) and (d).

C. The Bulkhead was Exempt because the Fair Market Value was Less Than \$2,000.

For the same reasons expressed above, the bulkhead was also exempt under the fair market value exemption. The only evidence provided by either party was that the bulkhead had a cost of between \$1500 and \$2000. CP 640 (Tr. 56:3-4).

The County's only response is to contend that the Marlow's did not provide enough information about the fair market value of the bulkhead. As part of this response, the County criticizes Mark Marlow for not immediately being able to answer the question about cost. Mark Marlow has a disability and he had been standing for a long time. He grimaced and could not answer right away. That is hardly an indictment of the truth of his answer. Nor does the County so contend.

At bottom, the County's arguments again rely on the allocation of the burden of proof. That burden should have been placed on the County. Given the undisputed testimony, the bulkhead also was exempt under the fair market value threshold.

The County does not respond to the "combined dollar value" argument set forth in Brief of Appellants at 46-47. Accordingly, the County appears to have dropped that contention.

III.

ATTORNEYS FEES ARE NOT WARRANTED

The County asserts that attorneys fees should be awarded to the County based on a frivolous appeal by the Marlows. RCW 4.84.185. This appeal is not frivolous. It is based on legal authorities and supported by rational argument in law and fact. Accordingly, it is not frivolous. *Wright v. Dave Johnson Insurance, Inc.*, 167 Wn. App. 758 (2012).

CONCLUSION

For all the foregoing reasons, the hearing examiner decision should be overturned or invalidated for lack of jurisdiction, misallocation of the burden of proof, and the exemptions applicable to the Marlows actions.

RESPECTFULLY submitted this 21st day of February, 2013.

GROEN STEPHENS & KLINGE LLP

By:

John M. Groen by *Charles A. Klinge*
Charles A. Klinge
John M. Groen, WSBA #20864 WSBA #26093
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

Attorneys for Appellants

DECLARATION OF SERVICE

I, Linda Hall, declare as follows:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On February 21, 2013, I caused a true copy of the foregoing document to be served on the following persons via the following means:

Steven M. Clem	<input type="checkbox"/> Hand Delivery via Messenger
Douglas County Prosecuting	<input checked="" type="checkbox"/> First Class U.S. Mail
Attorney	<input type="checkbox"/> Federal Express Overnight
P.O. Box 360	<input type="checkbox"/> E-Mail: sclem@co.douglas.wa.us
Waterville, WA 98858-0360	<input type="checkbox"/> Other _____

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 21st day of February, 2013 at Bellevue, Washington.



Linda Hall