

FILED

DEC 31 2012

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.

BRIEF OF APPELLANTS - AMENDED

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INTRODUCTION

This case is about Douglas County's efforts to enforce alleged shoreline violations for actions taken by Mark and Nancy Marlow at their home primarily in 1997 and 2003.

The substantial passage of time since the activities took place creates legal issues concerning the applicable statute of limitation. In addition, the procedure followed by Douglas County violates state law for enforcement of the Shoreline Management Act (SMA). The result is an unlawful allocation of the burden of proof, denial of the right to cross-examine government witnesses, and the imposition of an injunctive remedy by a hearing examiner not empowered to impose an injunction.

Aside from these significant procedural errors, the Marlows actions were exempt from the need to get a shoreline substantial development permit. Accordingly, their actions were not illegal.

The record is undisputed that the Marlow's shoreline improvements have been in place for **many years, and are *not* causing any harm whatsoever to the environment or the public.** Despite the lack of adverse impact, the County wants the Marlows to pay thousands of dollars to go through a permit process to have them all removed. As the Court will see, much is at stake personally for the Marlows.

ASSIGNMENTS OF ERROR

The court below erred in affirming the decision of the hearing examiner. The issues pertaining to the assignment of error are as follows:

(1) Did the hearing examiner have legal authority or jurisdiction to impose an injunctive relief remedy?

(2) Was the Notice of Violation proceeding barred by statute of limitation?

(3) Was the hearing examiner process as established by Douglas County contrary to state law in that it forced the hearing examiner to misallocate the burden of proof? This issue affected all findings of fact and particularly the findings related to Marlow's contention that their actions were exempt from permitting requirements.

(4) Did the hearing examiner err in denying cross-examination, excluding evidence concerning the cost of the replacement dock, and refusing to recognize Tony Roth as an expert witness?

(5) Did the hearing examiner err in his interpretation of law concerning shoreline exemptions?

STATEMENT OF THE CASE

A. Procedural Background.

On January 19, 2011, Douglas County sent a letter to the Marlows notifying them of possible shoreline violations.¹ At a subsequent meeting concerning these allegations, Douglas County Code Enforcement Officer, Ray Perez, told the Marlows to hire a wetland biologist, specifically Larry Lehman of Grette & Associates.² The Marlows met with Mr. Lehman but could not afford his services. Mr. Lehman told Nancy Marlow that the County wanted to make “an example” out of them.³

The Marlows have limited financial means. Mark Marlow is on permanent disability from a work accident. Nancy operates a “pilot car” business and their combined income generally is between \$30,000 and \$40,000 annually.⁴ The Marlows financial situation is greatly stressed and they could not afford to comply with the County’s demands.⁵

The County issued a Notice of Land Use Violations and Order to Comply on June 24, 2011.⁶ The Order alleges violations of the Shoreline

¹ Clerk’s Papers at 34 (Administrative Record at 010). The Administrative Record (AR) was provided to the Court in the form of a CD. That document is identified as Clerk’s Papers 25-580. Of course, those pages are also stamped with the AR numbering sequence, which is different from the CP numbering sequence. To assist the Court, citations will be to both the CP and the corresponding AR page numbers.

² CP 651 (Certified Transcript (Tr.) at 67:1-17).

³ CP 652 (Tr. 68:5-6).

⁴ CP 648-49 (Tr. at 64:11-65:13).

⁵ *Id.*

⁶ CP 64-68 (AR 040-44).

Management Act as implemented locally through the Douglas County Shoreline Master Program.⁷

The remedy the County seeks is to order the Marlows to apply for permits. The purpose of the permits is **not** to authorize the existing improvements, but to remove them. The Marlows are ordered to remove all improvements and to do so by applying for a Shoreline Substantial Development permit; submit a State Environmental Policy Act (SEPA) checklist; a fish and wildlife habitat management and mitigation plan; a planting plan for compensatory mitigation; and application fees of \$3,208.00.⁸ As stated in the Notice and Order, “all structures and development identified in this notice and order must be removed and remediated.”⁹ If the Marlows do not comply with the order, they will be subject to civil penalties and criminal enforcement of a misdemeanor, including civil or criminal penalties under the Shoreline Management Act, RCW Chapter 90.58.¹⁰ The order states that if an appeal of the NOV is filed to the hearing examiner, the burden of proof will be on the Marlows.¹¹

⁷ The NOV originally included allegations concerning the County’s critical areas ordinances, however the County subsequently agreed that the critical areas ordinances are not retroactive to Marlows’ actions that took place prior to July 27, 2003. Accordingly, this case focuses on the alleged violations of the Shoreline Master Program.

⁸ CP 66 (AR 42).

⁹ CP 67 (AR 43, line 3).

¹⁰ CP 67-68 (AR 43-44).

¹¹ CP 68 (AR 44).

The Marlows filed an appeal and the matter went to hearing before the Douglas County Hearing Examiner on November 17, 2011. The Marlows then sought judicial review through the Land Use Petition Act. This appeal followed.

B. Property Characteristics.

The property is located about six miles upstream from the Rocky Reach dam, near the town of Rock Island. It has about 155 feet of rocky waterfront on the Columbia River. The Marlows purchased the property on June 3, 1997. At that time, there was an existing single wide mobile home and a large shop. There was also an existing dock.

1. Topography of the shoreline shows a historically disturbed site

It is important for the Court to understand the topography of the site. The natural feature for this property is a steep, rocky bank of the Columbia River. However, at the location of the alleged violations, the steep bank was excavated long ago. The apparent reason for the historical excavation of the bank was for use as a ferry landing of some sort.¹²

The County is not sure whether or not the property was an actual ferry landing. That historical fact really does not matter. What does

¹² CP 605 (Tr. 21:7-21).

matter, and is undisputed, is that the shoreline in this location has long been a disturbed, non-natural area.¹³

The Court is encouraged to review the 1997 aerial photo, located at CP 455 (AR 431), a copy of which is provided here for convenience as Appendix A. That photo clearly shows the steep, rocky bank located in front of the mobile home. Adjacent to the left of the steep bank is the excavated area where the boat launch and dock is located.

Significantly, the excavation of the bank occurred many years prior to the Marlows' ownership.¹⁴ Aside from their own testimony, this fact is further supported by photographs pre-dating Marlow's ownership. In Marlow's exhibits 2 and 3, the cut in the bank, and the resulting slope to the water, is clearly visible. CP 456 and 457 (AR 432 and 433) (copies provided here as Appendices B and C). In Appendix B, a portion of the old dock can also be seen in the lower right hand corner.¹⁵

In short, the record is undisputed that the area of the alleged violations is a previously disturbed area that had long been altered from its natural state. The County provided no evidence to the contrary.

¹³ CP 605 (Tr. At 21:22-25 and 22:1).

¹⁴ CP 608 (Tr. 24:8-13).

¹⁵ See also CP 615 (Tr. 31:11-18) (testimony regarding old dock shown in photo).

2. As a disturbed area, the property had no vegetation and had a very low ecological function

The record is also undisputed that there was no vegetation, just rocks and dirt, in the area referred to as a historic ferry landing. Mark Marlow testified:

Q. ... [W]hen you put the concrete down to harden the boat launch, did you need to remove any vegetation?

A. No.

Q. No vegetation was there?

A. No. No vegetation at all.

CP 614 (Tr. 30:4-9).

This testimony is corroborated by photographs of the property. The photos at Appendices B and C, which are from 1996 prior to the Marlow's purchase, show the rock and dirt surface and no visible vegetation in the ferry landing area. Even outside that area, the vegetation is sparse at best. In reviewing these photos, Mark Marlow testified as follows:

Q. And in that area where the boat launch is and – do you see any vegetation?

A. No.

Q. In your visits to the property before you bought it, was there ever vegetation growing in that area?

A. No. No. It was – there were sheep there that – it was just dirt.

Q. Was this area an obviously previously disturbed area? It was not in its natural state?

A. Yes.

CP 616 (Tr. 32:7-17).

The lack of vegetation, the historical excavation, and the prior grazing of sheep, meant that the site has very low ecological function. Mr. Tony Roth is a professional wetland scientist with over thirty years experience in shoreline and aquatic biology. He conducted a site visit, observed the historical excavation of the site, and testified as to the low ecological function of the property. As stated by Tony Roth:

A. Well, when you look at impacts – and one is always trying to look at what functions of the area is and what values those functions might have. And given this disturbance, I would say that the -- the functions are – are of variable value and essentially *de minimis* in relationship to the rest of the properties in the basin ...

Q. And in terms of functions, is seeing that prior disturbance, is that what contributes to the low value of the shoreline function?

...

A. The area is very sparse scrub, has – has very low value, and it – it – it's consistent with my understanding that the grazing by sheep would have strongly affected any – any biologic functions on that site for habitat or wildlife support.

CP 655, 656 and 657 (Tr. 71:24-25 and 72:1-9 and 72: 20-73:5).

In short, the uncontroverted evidence showed that the site of the alleged violations had been previously excavated and disturbed, and did not have any vegetation. Accordingly, it had *de minimis* ecological function and did not provide habitat or wildlife support. The County submitted no evidence to the contrary.

C. Facts Related to Alleged Violations.

1. Facts related to the boat launch

As mentioned above, there is an area where the steep bank had been excavated and was used as a boat launch by the prior owner. The seller showed to Mark Marlow where he could launch a boat and, upon purchase, Mark continued to use that area for launching his boat and Seadoo. Mark Marlow testified as follows:

Q. ... Now, when you first bought the property, was there an existing dirt/rock boat launch there?

A. Yes, there was.

Q. And when you bought the property, how did you feel about that fact, that there was a boat launch?

A. That was – it was awesome. I loved it because we could, you know, launch our – our Seadoos or boat right from the property, not have to go all the way down to the – the park or whatever.

Q. Okay. Was it very apparent to you that this was a boat launch; it had been used as a boat launch?

A. Yes.

...

Q. And did you start using the boat launch right away?

A. Yes. Yeah. I would –well, we bought some Seadoos and used them, just backed it right down into the water.

CP 609 (Tr. 25:15 – 26:11).

However, the problem with the boat launch was that the more it was used, the more it deteriorated, eroded, and became rough and rutted.

Q. Okay. So you're using the boat launch. As – as you were using it, did you notice that through – through your

use, that there would be any deterioration or decline in the usability of that boat launch?

A. Yeah. Yeah. It was something – you know, it was – it was useable, but it – bringing the pickup down, it would, oh, kick up dirt and gravel, you know as – you know, pulling up, it made it, you know, a little difficult at times when it was eroding.

Q. Were the – did the tires of the truck spinning, was it creating – so it was – at one point, you told me it was making it lumpy –

A. Ruts, yeah.

...

Q. And was that making it less and less easy to use as a boat launch, as you used it more?

A. Yes. Yes. It – it made it more tore up and more rougher [sic].

CP 610 (Tr. 26:16 - 27:9).

To address the erosion and deteriorating condition of the launch,

Mark decided to just cap it with a layer of concrete.

Q. So what did you think might be a way to stop that deterioration?

A. Well, capping it with concrete was – was what – you know, was what we thought would be best.

Q. That's why you put the concrete strip that we see in Exhibit 1 –

A. Yeah.

Q. It was to prevent the continued deterioration of that boat launch?

A. Yes.

Q. Okay. And did it work?

A. Yeah.

CP 611 (Tr. 27:10 – 21).

At this point, it would be helpful for the Court to look again at the 1997 aerial photo of the subject property (Appendix A). The photo is in

August 1997. The Court will see the existing single wide mobile home and the shop. In the lower left corner, the Court will see the concrete strip reaching down to the edge of the water. This is the boat launch that was capped with concrete in the summer of 1997.

The Court should notice three other things in this 1997 photo. First, it shows the retaining wall to control erosion (located to the left of the boat launch). Second, the Court can also see the original blue dock that was existing when the Marlow's bought the property. Third, as discussed above, the Court will notice the steep, rocky, bank along the waterfront downstream (to the right) of the boat launch.

The Marlows have admitted that in 1997 they placed the layer of concrete on the existing dirt boat launch. They likewise admit that they poured the hot tub pad in 1997. They had a contractor do the work for the boat launch and the hot tub pad for a combined total of \$700.¹⁶

The Marlows also testified that before doing the work, they called the County to see if any permits were necessary. Because it was flat work (as contrasted to vertical walls), the County said no permits were necessary. Nancy Marlow testified as follows:

Q. Did you call the County back in 1997 about permits?

A. I did.

Q. And –

¹⁶ CP 619 and 620 (Tr. 35:14-25 and 36:1-20).

A. I did. I –

Q. Tell me about that.

A. Well, I just made the call and asked if I needed a permit to do concrete work, and I – I told them my name. I says, “My name is Nancy Marlow, and I need a permit to do flat-work concrete work,” and they said no.

Q. Okay. And how did you interpret that? Did --what was your understanding? Was it because you were a private property owner, or what did you –

A. Yeah. It was my property. You know, we wanted to pour concrete to – so I just thought: Okay, I’ll just – we just went on our merry way. They just said: No, we don’t need permits for flat work.

Q. And so that’s what you and your husband thought, so you thought you were fine?

A. Yeah.

CP 643 (Tr. 59:1-21).

Several years later, the Marlows had further reason to continue to believe that everything was fine. They got a building permit to replace their mobile home with a new house. During construction of the house in 2000, a County building inspector showed up. During that visit, Nancy Marlow also took him to the waterfront.

Q. From where your home is situated, can you readily see the boat launch?

A. Oh, absolutely.

And the inspector walked down there with us, because we were so proud of what we had done, and we were just -- you know, “Isn’t this – I can see it’s so beautiful.”

Q. Who said that?

A. The inspector.

Q. The Douglas County –

A. Yeah, the Douglas County inspector ...

Q. And so he saw the boat launch, didn't say anything about it?

A. Yes. He just told us it was very nice and, you know, and he thought we were doing wonders.

CP 644 (Tr. 60:4-24). The Marlows did not hear anything further from the County until the enforcement activity began that led to this litigation.

2. The landscape retaining walls

The Marlows also admit that in 1997 they built a concrete block retaining wall. That retaining wall is visible in the 1997 aerial photo (Appendix A), located to the left of the boat launch.¹⁷ The Marlows built that retaining wall to prevent erosion of dirt into the river. Mark Marlow testified that the sand was “washing down” and that the retaining wall would hold the soil in place.¹⁸ They also wanted to just improve the use and enjoyment of their property.¹⁹

The next year, 1998, or possibly the following year, the Marlows built the other retaining wall that was located toward the hot tub.²⁰ It was also built for the same purpose of controlling erosion.²¹

In 2006, the Marlows re-constructed the retaining walls. The old concrete blocks were falling and the walls dipping as the earth underneath

¹⁷ See CP 622 (Tr.38:2-6).

¹⁸ *Id.* (Tr. 38:11-15).

¹⁹ CP 622 (Tr. 38:18-19).

²⁰ CP 623 (Tr. 39:1-7).

²¹ CP 623 (Tr. 39:13-23).

eroded away.²² They rebuilt the walls using a more natural looking flat stone. *Id.* The Marlows admit that in reconstructing the walls, they added two additional walls to terrace and better keep the soils in place.

3. The replacement dock

The County does not dispute that there was an existing dock at the property when the Marlows purchased in 1997. However, the County characterizes that original dock as an “illegal dock”²³ that could not lawfully be replaced.

In the testimony to the hearing examiner, counsel for the Marlows attempted to cross-examine the County representative about what facts support the assertion that the original dock was illegal. However, the hearing examiner would not allow that line of questioning.

HEARING EXAMINER: But as far as cross-examination of – of – of staff, I’m not – if this is – and I’m not sure where this is going, and I’m certainly not finding it relevant to my consideration of the issues of whether or not there is ongoing violations as alleged in the – in the notice.

MR. GROEN: Well, Mr. Hearing Examiner, it was said today by Mr. DeVries that the dock that is in the photo was an illegal dock, and that conclusion has to be based on some fact. So I’m trying to find out: Well, what facts might there be to support that --

HEARING EXAMINER: And I’m not going to allow that line of questioning.

²² CP 623-24 (Tr. 39:24 - 40:17).

²³ CP 593 (Tr. 9:2).

MR GROEN: Okay. For the record, I object to the denial of the line of questioning on cross-examination regarding the factual basis for the assertion that the dock that appears in the 1997 photo is illegal.

CP 602-03 (Tr. 18:9-25 and 19:1).

The Marlows used the old dock from 1997 until 2008, a total of eleven years. That old dock had a solid surface that did not allow light to pass through. Mark Marlow described the dock in this fashion.

A. ... It was a solid dock. It was a solid surface. The dock had plywood over it, then with that indoor/outdoor grass carpeting type stuff over the surface of that, so –

Q. Okay. That's why it's kind of blue colored and –

A. Yeah.

Q. Okay. Okay. And were you able to use that dock?

A. Yeah. Yeah. We used it for a number of years.

CP 625 (Tr. 41:2-12).

Eventually, the Marlows decided they needed to replace the old dock because it was simply becoming too hard to maintain.

A. ... [I]t seemed like every year I was repairing it and putting new grass carpeting on it, or, you know, that indoor/outdoor stuff. And it just got to the point where you know, it just didn't seem feasible to keep fixing it, you know, so we looked into, you know, just getting a – replacing it.

Q. Okay. So it just became time where you felt it needed to be replaced?

A. Yeah.

CP 625 (Tr. 41:13-22).

The Marlows learned from neighbors that the replacement dock should be one with a grated surface so that light can pass through for fish.

Q. And the dock you purchased has a grated surface, doesn't it?

A. Yeah. It's a grated surface, to where light can shine through it.

Q. Okay. Now, why did you get that kind of dock instead of a solid one, like the old one?

A. Well, that's what my neighbors were putting in and using, so I – it – that's what they said was fish-friendly and that's what they were using, so that's what I – what I got.

Q. Okay. They had told you about light passing through the grates was good for fish?

A. Yeah.

Q. Okay. So, did you view that you were doing something good by getting rid of the old dock and putting in one of these new grated ones?

A. I – I thought so.

CP 626 (Tr. 42:6-22).

Mark Marlow testified that his recollection was that they paid around \$8500 to \$8900 for the dock and ramp as a delivered price.²⁴ With the help of his boys, they installed it themselves. *Id.*

Mark and Nancy tried to find a receipt for the dock but were not able to find it in their records prior to the hearing.

Q. Did you and your wife try to find the receipt for – for that dock?

A. We did.

Q. Were you successful in finding the receipt?

A. No, we weren't.

²⁴ CP 627 (Tr. 43:2-25).

CP 627 (Tr. 43:17-21).

This bothered Nancy, so she kept looking for the receipt after the November 17th hearing was over. Eventually, the documentation for the dock was found with some tax records for a different year. The Marlows filed a motion to open the record to allow inclusion of the receipt. In support of the motion, Nancy Marlow submitted a declaration stating under penalty of perjury the following:

Prior to the hearing on November 17, 2011, my husband and I searched through our papers and files looking for documentation showing that we paid under \$10,000 for the replacement dock. Despite our best efforts and diligent searching, we could not find the document. After the hearing was over, it really bothered me that we had not found the dock record and I was concerned that it might look like we were lying about the dock cost. So, I kept on looking even though the hearing was over. Finally, on December 28, 2011, I found the document mixed in with our tax records for a different year.

CP 564 (AR 540) (Second Declaration of Nancy Marlow). Attached to the declaration was copy of the 2007 record from Nordic Marine Floats for the delivered dock and ramp at a price of \$9,200. CP 565 (AR 541).

The Hearing Examiner denied the request to include the receipt into evidence.²⁵ In his decision, the Hearing Examiner asserted that the Marlows had not previously indicated that they had been searching for the

²⁵ CP 572 (AR 548).

records showing the purchase price.²⁶ Apparently, the Hearing Examiner had forgotten the testimony of Mark Marlow at the hearing, quoted above, that he and his wife did search for the documentation prior to the hearing, but could not find it.²⁷ Despite that testimony, the Hearing Examiner determined that the Marlows had not been diligent enough.

Having purchased the replacement dock, the Marlows installed it themselves in the same location as the old dock.²⁸ Mark testified that it functioned the same as the old dock, it was just for a single family purpose, and was comparable in appearance. Transcript at 45:17-46:9.

The County contends that the replacement dock is not “comparable” to the old dock because the old dock was 4 feet wide, and the new dock is 8 feet wide. Also, the old dock was 16 feet long, whereas the new dock is 20 feet long. Mark Marlow responded:

From my perspective, the dock we have now is very comparable to the old dock. We use it the very same way, solely for our private use. It is very close to the same length and while it is 4 feet wider, that difference has no practical use other than it gives a little more room for moving around when we are tying the boat up. When I was shopping around to replace the old dock, this was really the closest thing in size that I could find that was available and affordable. There were plenty of docks available for a lot more money and that were a lot bigger and fancier. But I chose a simple and small dock that was much like our old dock.

²⁶ CP 573 (AR 549, paragraph no. 12).

²⁷ CP 627 (Tr. 43:17-21).

²⁸ CP 629 (Tr. 45:11-16).

CP 531-32 (AR 507 – 08) (Declaration of Mark Marlow).

The County also contended that the cost of booms and cranes needed to be included in the cost of installing the dock, thus bringing the cost to over \$10,000. Mark Marlow responded as follows:

The County said I did not include the cost of booms and cranes to install the dock. That is because we didn't need any cranes or booms. As I said, the dock is relatively small, so we installed it ourselves just like we pulled the old dock out ourselves too. There simply was no need for cranes and booms as there might be for other larger docks.

CP 532 (AR 508).

With respect to the ecological impact of the replacement dock, the testimony is uncontroverted that the new dock is better for the aquatic environment than was the old dock. Tony Roth testified as follows:

Q. What about comparing the old dock that was taken out of the water to the new replacement dock?

A. Well, the new – the replacement dock is – is consistent with modern technology, in that it has a grated surface, as well as the ramp has a grated surface so that light will pass through it, except for the areas that are required for floating it. So it's consistent in form and function to what is currently required for those docks that are permitted.

Q. Would it be correct then to understand that, if anything, the new dock is more environmentally friendly than –

A. Oh, clearly.

Q. -- the old dock.

A. Clearly, because it doesn't provide a large shaded area that the Department of Fish and Wildlife has felt is inappropriate.

CP 659 and 660 (Tr. 75:19-25 and 76:1-11). The County provided no contrary evidence.

4. The concrete bulkhead

The final point of contention concerns a large concrete bulkhead constructed in the week of July 20, 2003.

Because of the steep bank, the only “beach” area is adjacent to the boat launch where the steep bank was excavated away many years ago. In the 1997 aerial photo (Appendix A), a purple colored jet ski can be seen parked on the shore in that area.

The Marlows used that part of their property for recreation, but between 1997 and 2003, it had become increasingly susceptible to erosion.

Q. [B]etween 1997 when you bought it, and then in 2003 when this concrete bulkhead was built, had you been experiencing erosion problems in this area?

A. Yes, we did.

Q. What was going on?

A. Every summer when boats would travel up – up and down the river, it would wash everything away and expose jagged rocks. It was just a really unfriendly type of beach situation. It was really rocky.

Q. And did that get worse over time as you lived there?

A. Yes, it did.

...

It seemed like every summer, the kids would go down to play. One boy, I believe, got stitches in his foot, slipped on a rock, and my boys would hurt their feet in that area. ...

Q. Okay. Would it be fair to say that it was becoming a hazard --

A. Yes.

Q. --in your opinion?

A. Yes.

Q. Okay. The – was – did you notice an increase in boating activity offshore from your property?

A. Oh. Oh yeah. It seemed like every summer more and more – we've had more and more boat traffic, boats traveling fairly close to the shore. Slow boats put out a large wave, and it – it would wash away further and further out.

Q. So as boating activity increased, you saw more and more erosion?

A. Yes, we did.

CP 634 (Tr. 50:8-25 and 51:1-21).

With that background, in July of 2003, Nancy Marlow's father was getting ready to do a concrete pour at his shop at the north end of the property. Nancy had noticed that the water level in the river was unusually low. Without any prior planning, Mark went and asked the concrete guys to take a look at the situation with the exposed rocks and asked if they could do anything about it.

A. ... Went up and brought one of the guys up, and he looked at it and said, "Oh yeah, we can fix that for you." And so we pulled them off of what they were doing up there and brought them down. They slapped up forms, and the concrete was already coming, and poured it.

Q. So you hadn't planned on this before that day. The opportunity just arose?

A. Yeah, it – it – I mean, it was kind of a – fluke thing. It was – we had no plans, no intentions to do that ...

...

CP 636 (Tr. 52:12 - 53:8). The work was done during the week of July 20, 2003.²⁹

Although simple, the concrete bulkhead is very large. It is approximately 55 feet long, and three to five feet thick. It has a vertical face on the waterward side. It is not cantilevered over the water, but simply goes from the ground straight up to the flat surface.³⁰ The total cost for the project was less than \$2,000.³¹

To get a visual idea of the bulkhead, the Court should review the photo at CP 416 (AR 392). This photo was submitted by the County and states on its face that it was taken by Ray Perez, County Code Enforcement Officer, on August 18, 2006. At that time, a slide was attached to the bulkhead. A subsequent photo in 2010, found at CP 419 (AR 395), shows that the slide had been removed.

Although constructed in 2003, and photographed by the County code enforcement officer in 2006, the County now in 2012 wants the bulkhead removed. The County submitted no evidence as to the environmental consequences of removal of this large structure. However, Tony Roth testified that removal would not benefit the environment, but instead removal would create risk of ecological damage. With respect to

²⁹ CP 637 (Tr. 53:21 – 54:3).

³⁰ CP 638 (Tr. 54:14 – 55:18).

³¹ CP 640 (Tr. 56:3-4).

fish, particularly salmon, Tony Roth explained that juvenile salmon are more likely to migrate in the shallower water on the other side of the river.³² However, to the extent any juvenile salmon were to migrate near this shoreline, the vertical face of the bulkhead would actually prevent a predator from hiding. In contrast, a rocky shoreline can provide hiding places for predators (primarily bass) of the juvenile salmon.

Q. ... [T]he concrete bulkhead, can you discuss your assessment of – of the impact of the bulkhead on shoreline functions and values?

A. ... [A]long the 55 feet that we had discussed, it doesn't, from a biological perspective, in comparison to the rocky shoreline that's there adjacent, it doesn't provide any refuge for predators. Predators like to hang out in little crevices in the rock, as juvenile salmonids might migrate along; not that this very steeply sloping shoreline would be their preference. They don't -- they don't like to have – migrate in steep-sloping areas, but – so that there's less opportunity in this built environment for predation than there was previously.

CP 657 (Tr. 73:15-25). Tony Roth further explained why there are no hiding places for predators:

A. Because it's – it has a sheer face. It doesn't have holes and little – little refuges. It's just a flat wall.

CP 658 (Tr. 74:23-25). Overall, Mr. Roth testified it would be better to just leave the concrete in place because it is stable and not causing any harm. Removal would just be for sake of removal.

³² CP 658 (Tr. 74:1-14).

A. Removal of concrete that is facing an aquatic area is always difficult because the export of concrete particles is deleterious to fish life, and the – the necessity to protect an area in which demolition is going to take place requires a considerable level of permitting and expense to prevent – and I mean prevent – the export of any materials off the site, into the water.

Q. Right now, is the – is the concrete stable?

A. Yeah, the concrete is stable. It's not doing anything.

Q. ... [W]hat would your on-balance assessment be of whether it is ecologically beneficial to remove that concrete structure as opposed to just leaving it there?

A. ... [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.

Q. So from a biologist's standpoint, you would rather it just stayed there?

A. Yes.

CP 660 (Tr. 76:16-25 and 77:4-19).

ARGUMENT

I.

THE PROCEEDING BEFORE THE HEARING EXAMINER VIOLATED STATE LAW

This Court reviews questions of law *de novo*. *Julian v. City of Vancouver*, 161 Wash. App. 614, 623 ¶ 8, 255 P.3d 763 (2011). As an appeal under LUPA, this Court stands in the shoes of the superior court and reviews the administrative decision on the record before the hearings examiner. *Id.* The burden is on the appellant to show the grounds for reversal as set forth in RCW 36.70C.130.

A. The Shoreline Management Act establishes a framework for Enforcement which the County must follow.

Under the statutory scheme, set forth in RCW Ch. 90.58, there are several opportunities for enforcement. First, anyone who undertakes development without first obtaining a permit is subject to a civil penalty. Specific procedures for imposing a penalty, and the appeal procedure to the shorelines hearing board or local legislative authority, are set forth in the statute. RCW 90.58.210 (4).

In addition to any civil penalty, someone who willfully violates the SMA can be guilty of a gross misdemeanor. RCW 90.58.220. The County does not dispute that a 1-year statute of limitation applies to a misdemeanor. RCW 9A.04.080 (1) (j).

If there is **ongoing** development activity in violation of the SMA, such activity may be brought to a halt through a cease and desist order. The procedure is set forth in WAC 173-27-270.

Finally, in those instances where there is a **past** violation, a remedy is available under RCW 58.17.210 (1). That section provides that the Attorney General or the local Prosecuting Attorney may bring an action for injunctive relief “to ensure that no uses are made of the shorelines of the state in conflict with” the SMA. As will be discussed below, it is this provision that should have been invoked in the Marlows’ case.

The Douglas County Shoreline Master Program (SMP) that was in place since 1975, and also the updated SMP adopted in 2009, both provide that the County will follow the enforce mechanisms set forth in the state law. For example, the 1975 SMP states in Section 18 as follows:

The Douglas County Prosecutor shall bring such injunctive, declaratory, or other actions as are necessary to insure that no uses are made of the shorelines of the state located within Douglas County in conflict with the provisions and programs of this ordinance or the Shoreline Management Act of 1971; and to otherwise **enforce the provisions** of this ordinance **in accordance with** Sections 21, 22, and 23 of the **Shoreline Management Act** of 1971.

CP 344 (AR 320) (Douglas County SMP, Section 18) (emphasis added).

The 2009 updated SMP contains Section 6.19, regarding enforcement. It is even more clear that the state law enforcement mechanisms are to be followed.

The county or city shall bring such declaratory injunctive or other proceeding as may be necessary to assure that no uses be made of the shorelines of the state located in Douglas County contrary to the provisions of this Program or of RCW Chapter 90.58, and it shall otherwise enforce **RCW 90.58.210 through 90.58.230**, and **WAC 173-27**, "Part II Shoreline Management Act Enforcement", as amended, in cooperation with the State.

2009 Douglas County SMP, Section 6.19, page 97 (copy at Appendix D).

In short, the 1975 and 2009 versions of the local Shoreline Master Program are in agreement that enforcement must be pursuant to the

mechanism established in the state law. The problem is the County has not followed the state procedures. Instead, the County has invoked a Notice of Violation process that forces an appeal to a hearing examiner. But, as will be shown, the rules for hearing examiner appeals do not fit with an enforcement proceeding under the SMA. For example, state law requires that the burden of proof be on the enforcement agency. But the local code governing the hearing examiner requires that the burden of proof be on the applicant for a permit. Likewise, the hearing examiner does not have authority to weigh equitable considerations. In contrast, an injunction proceeding under RCW 90.58.210 (1) is an equitable proceeding where such considerations are within the authority of the Court to evaluate. These deficiencies will be discussed in turn.

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

In this case, the hearing examiner is the officer who had fact-finding authority. However, under the Douglas County Code 2.13.070 A.(3), the hearing examiner must place the burden of proof on the appellant to a Notice of Violation. That procedure is contrary to state law.

This is an enforcement action. It is well established that in proceedings to enforce the SMA, the burden of proof is on the enforcement agency. For example, 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 issued cease and desist orders to stop further construction of a large marina facility. The Department of Ecology ordered the work stopped until proper permits were issued. Twin Bridges did not stop work and so civil penalties were also issued. On appeal, the **unanimous** shoreline hearings 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 6 (Conclusion of Law no. I).

This ruling of the shoreline hearings board is not a surprise. Indeed, 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).

Unfortunately, the Douglas County hearing examiner was compelled to follow local rules which place the burden of proof on the Marlows. But, as shown here, state law governing enforcement of the SMA places the

burden of proof on the agency. As quoted above, the “agency **shall** have the burden of proof.”

This point underscores that the hearing examiner should never have been placed in a position of even hearing the appeal. The hearing examiner rules simply do not comply with the procedures under state law.

This is also shown by the statute governing appeals in enforcement actions. 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.

The error regarding the burden of proof undermines the entire decision and requires that it be overturned. The hearing examiner repeatedly concluded that the Marlows did not meet the burden of proof. But that burden was wrongly placed on the Marlows. The hearing examiner decision should be invalidated as contrary to law. RCW 36.70C.130 (1) (a).

C. The Hearing Examiner does not have authority to impose Injunctive Relief.

The Hearing Examiner decision affirms the NOV, which in turn compels the Marlows to apply for permits to remove the developments that allegedly violate the Shoreline Management Act and local SMP. Such an order, commanding the Marlows to take certain action, is an order imposing injunctive relief.

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 compel injunctive relief. Rather, under the Shoreline Management Act, injunctive relief to ensure compliance with the Act is required to be brought through an action in court. RCW 90.58.210 (1) states that the

“attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the state in conflict with” the Act.

Following this statutory directive, the Shoreline Hearings Board has ruled that injunctive relief under the SMA can **only** be sought in Superior Court and **not** through **administrative proceedings** and the penalties provision of RCW 90.58.210 (2).

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.

This conclusion is also consistent with long-established Washington law that a hearing examiner is without authority to consider equitable and injunctive relief. *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).

In short, if Douglas County wants to force the Marlows to remove 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.

In a proceeding for injunctive relief, the Court would consider a variety of equitable factors that cannot be considered by the hearing examiner. For example, a judge may evaluate the effect of the passage of time, the degree of public benefit to be gained, if any, from removal of the structures, the relative hardships involved, and other equitable factors that the hearing examiner is precluded from considering. Accordingly, it should not be a surprise that the SMA spells out in RCW 90.58.210 (1) that actions for injunctive relief to ensure compliance with the Act are to be brought in Superior Court.

Of course, Douglas County has not done that. If Douglas County chooses, at some point, to file an action for injunctive relief under RCW 90.58.210 (1), it may certainly do so. In any such action, a hearing would consider all relevant equitable factors and apply the appropriate standards.

The statute does not allow injunctive relief to be imposed by a hearing examiner. Accordingly, the proceedings below, and the remedy imposed, are unlawful and should be overturned. Relief is warranted under RCW 36.70C.130 (a), (b) or (e).

The facts of this case illustrate why the Legislature provided that injunctive relief to ensure compliance with the SMA are to be brought in Superior Court, and heard by a judge, who is able to weigh all the facts and equitable considerations. There are numerous equitable considerations that should be evaluated. For example, this is not a case where the Marlows were developers who knowingly violated the law. They called the County before doing anything and were told no permits were necessary because all they wanted to do was “flat work.” They are not “bad actors” who are trying to undermine the law. They are people who called the County, were given bad advice, and unknowingly assumed that everything was fine.

Nor is this a case where there has been any environmental damage, let alone significant damage. The shoreline bank had been excavated long ago. It was just dirt and rocks, there was no vegetation. Moreover, Tony Roth testified that the concrete bulkhead is stable and that attempts to remove it will create greater environmental risk than just leaving it alone.

Nor is this a case of installing a new dock where there was none. There was an existing dock at the property that the Marlows used for years.

It finally needed replacement, so it was replaced with a fish-friendly dock that actually is an ecological improvement as compared to the old dock.

The passage of time is also relevant as to whether an injunction should issue to compel removal of these improvements. The boat launch has been there since 1997. In 2000, a Douglas County inspector was taken to the boat launch and he commented on how nice a job the Marlows were doing with their property. The concrete bulkhead has been in place since July 2003, now over nine years ago. In 2006, a Douglas County enforcement officer took a picture of the bulkhead from the river, but the County did nothing then. CP 417 (AR 393) (photo by code enforcement officer Perez dated 2006). Instead, **the County waited until after 2009** when a **new SMP** was in place. Of course, under the new SMP none of the improvements are able to be permitted. After the fact permits, or exemptions, are simply no longer an option under the new rules. Accordingly, the County's delay is very prejudicial and has severely limited the options that otherwise would have been available to the Marlows.

The bottom line is that to compel the performance of an act, a court will weigh these and other considerations. The County does not want to go through that process. Mark and Nancy Marlow contend that in seeking to compel them to tear out these improvements, RCW 90.58.210 (1) requires the County to proceed by seeking an injunction from the Court. The County

has not done so. The hearing examiner is without authority to order the Marlows to take such action.

D. The Hearing Examiner process does not provide the Procedural Protections required by State law.

Because the hearing examiner's findings of fact may be the basis for penalties, any system that substitutes for a court proceeding must still comply with procedural protections that would apply if this matter were being prosecuted as any other criminal matter or civil infraction. *Post v. City of Tacoma*, 167 Wn.2d 300 (2009). Douglas County maintains it will only pursue penalties if the NOV is not complied with. Of course, the findings of fact by the hearing examiner will be the basis for the penalties. Accordingly, RCW 7.80.100 (3) and *Post v. Tacoma* requires that the burden of proving the violation rests on the local government. The burden must be met by a preponderance of evidence. *Id.* Moreover, the defendant has a right to cross-examine witnesses. RCW 7.80.100 (2).

Because the hearing examiner findings may be the basis for bringing civil or criminal proceedings, the hearing examiner process must comply with the protections afforded by RCW 7.80.100. The lack of those procedural protections underscores that the hearing examiner process as established by Douglas County violates state law.

E. Under the Shoreline Management Act, these enforcement proceedings are barred by the applicable Statute of Limitation.

First, it must be understood that the alleged violations of the local SMP are actually violations based on state law, namely RCW Ch. 90.58. This is because the local SMP is actually a state regulation. This was made clear by the Washington Supreme Court in *Citizens For Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 258 P.3d 36 (2011). The Court ruled that the local SMP “is not the product of local government.” *Id.*, 258 P.3d. at 41. Rather, the Department of Ecology has “stringent oversight authority and command” over the contents of the SMP and the local role is nothing more than a “benevolent gesture by the state.” *Id.* The Court concluded that the “SMP regulations are the product of state action.” *Id.* at 43. Accordingly, the enforcement of state action is upon the state statute, namely RCW Ch. 90.58 and more specifically, RCW 90.58.210.

The NOV asserts that it can be the basis for civil or criminal penalties. However, 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 County contends that penalties are not imposed by the NOV. However, according to the County, penalties may be

imposed if the Marlows fail to comply with the NOV and do not remove the improvements.

The County's contention is an attempt to revive the possibility of penalties long after the statute of limitations has passed. If that is the law, we are all in trouble. Indeed, under the County theory there would be no effective statute of limitation at all. The County could delay bringing an NOV for as long as it wanted, and then claim that penalties can be imposed if the NOV is not followed. Here 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 correct approach is that the beginning of the running of the statute of limitations is triggered *when the action occurs* that allegedly violates the Act. In this case, those actions occurred many years ago. If anything, the County's argument to revive the opportunity for penalties further demonstrates that this whole process is contrary to the state law mechanism for enforcing the SMA.

As stated above, the correct procedure should be for the County to seek injunctive relief through an action filed in Superior Court. If an injunction is issued, after consideration of all equitable factors, the Marlows will be required to comply with the court order. Failure to comply with the Court order would be contempt, and would carry its own consequences.

In other words, the County is not being deprived of the ability to engage in enforcement actions. Rather, it must do them right.

II.

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

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)

The Marlows purchased the property in 1997. At that time, a dock was already in place. The Marlows do not know when the original dock was installed, but they do know it was prior to 1996.

The Marlows used the dock for many years, but eventually they sought to replace it with a better dock. Accordingly, they purchased a dock for under \$10,000 and installed it themselves.

The dock replacement was exempt from the shoreline substantial development permit requirement under WAC 173-27-040 (2) (h). That provision expressly exempts a freshwater dock for private, noncommercial purposes, for pleasure craft only, where the fair market value of the dock does not exceed \$10,000. *Id.* Here, 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).

Of course, that testimony was generally corroborated by the written document from Nordic Marine Floats showing a purchase price of \$9200, delivered. To the extent the hearing examiner concluded that the replacement dock had a fair market value of greater than \$10,000, such a finding is not supported by substantial evidence in light of the whole record. The only evidence that was specific to this dock was that of Mark Marlow that it did cost less than \$10,000. Mark Marlow also testified that this is a relatively small dock and he was able to install it himself, with the help of his boys. Unlike large docks that require booms and cranes, this dock was small, and inexpensive. There is no contrary evidence as to the actual cost of this dock. Accordingly, the hearing examiner finding is not supported by substantial evidence and should be reversed.

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).

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 normal repair and 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.

The hearing examiner concluded that the replacement dock was not “comparable” to the original dock because it is larger in size. There is no definition of what is “comparable.” Such a term is subjective, and depends to an extent on perspective. In the present case, Mark Marlow shopped for a replacement dock that was close in size to his old dock. This dock was the closest he could find. It is nearly the same length, and while the replacement dock is four feet wider, the practical impact of that additional width is negligible. The use of the dock remained the same, simply for tying up personal pleasure craft. The difference in size did not allow for more boats to tie up; there was no increase in moorage. Compared to other docks, both the original dock and the replacement dock are small. Each could be handled by the owner, with help from his sons, and did not require special equipment. 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).

The Hearing Examiner also concluded that the original dock was an “illegal” dock. That finding should be reversed because the Examiner engaged in unlawful procedure in prohibiting questioning of staff by Marlow’s counsel regarding the factual basis for the assertion that the old dock was illegal. As stated above, this is an enforcement proceeding with potential civil and criminal penalties flowing from it. Accordingly, RCW 7.80.100 (2) provides for a right to cross-examine witnesses. By prohibiting that line of questioning, this right was violated. Accordingly, relief is warranted under RCW 36.70C.130(a) and the corresponding finding of fact should be reversed.

Even without cross-examination, there is no evidence that the original dock was illegal. The County maintains that because the old dock was installed at some point between 1984 and 1996, permits would have been required for that dock. The County then tells us that it could not find any permits for the old dock. The County therefore concludes that it must have been illegal.

The fact that the County could not find a permit does not mean that there was not a permit at one time. It just means that the County could not find it. Of course, it is also possible that the old dock, being a small dock

for single family, pleasure craft use, in fresh water, was exempt under the dock exemption standard in the 1980s and the County simply told the prior owner to proceed. Equally plausible, the County records from the 1980s might not be that good, or were destroyed, or misfiled. Or, maybe the County didn't look too hard for the permit.

Given the undisputed fact that the dock existed for several decades without any enforcement action by the County or any other entity, a reasonable explanation could be that the old dock **was lawful**. Indeed, the lack of information about the old dock underscores why it is important to correctly allocate the burden of proof. Here, it is unfair for the County to base an enforcement action against the Marlow's for an allegedly illegal dock installed by a prior owner several decades ago. Given the length of time that the old dock was used, to the point of even being worn out and no longer repairable, the conclusion should be that the old dock was a lawful use. The Hearing Examiner's contrary conclusion should be reversed and relief is warranted under RCW 36.70C.130 (a), (b), (c) or (d). Accordingly, the Marlows could replace the original dock with a comparable replacement. Under WAC 173-27-040 (2) (b), the replacement dock was comparable in size, function and appearance.

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.

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

The hearing examiner ruled that even if the dock met the exemption standard for a freshwater dock of less than \$10,000, it was still illegal because the Marlows did not get a letter of exemption.

But the County's reliance on a procedural defect suffers from the County's own procedural defect. Significantly, 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.

To the contrary, the only language in the SMP that mentions exemptions confirms that there was no approval process for exempt projects. The only process identified was for projects that were not exempt and needed a substantial development permit. The relevant provision of the SMP is at CP 332 (AR 308). It states there that "Any activity, use, or development not specifically exempt from the provisions of the Act" shall proceed with a permit application. *Id.* (Section XXIIIV,

General Provisions, paragraph 2). There is no mention of a different permit, or application, or letter of exemption, mentioned anywhere in the SMP for an exempt project.

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. That is a tough distinction for the County to draw when its own SMP has no procedure for seeking 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.

Of course, a procedural defect of this sort is yet another factor to consider in an injunction proceeding. In other words, despite the lack of a letter, the fact that the dock actually qualified for the exemption is a strong factor to support a conclusion that it is inequitable to now compel that the

dock be removed. As discussed above, the hearing examiner has no authority to consider such equitable factors.

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).

In the alternative, placing concrete on the launch was exempt as normal maintenance under WAC 173-27-040 (2) (b) because it was intended to prevent further decline of the existing launch. The conclusion of the hearing examiner that the hardening was not exempt should be reversed and relief is warranted under RCW 36.70C.130 ((b), (c) and (d).

The County complained that the Marlows did not provide more information about who the contractor was, or any document showing the \$700 cost. Of course, the work was done in 1997. That was long ago. The Marlows no longer have the contractor's name, or any documents.

The County asserts that without the additional information, the Marlows have not met their burden of proof. But of course, the burden of proof in an enforcement proceeding should be on the County. The County offered no evidence whatsoever that the cost was not \$700. The County has not met its burden of proof.

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 as a development that did not exceed the threshold value for needing a substantial development permit.

The Hearing Examiner attempts to avoid this conclusion by contending that the “combined dollar value” for all developments must be considered in evaluating the applicability of the exemption based on cost. CP 542 (AR 518) (Conclusion No. 8).

The question is what constitutes “the development.” The Hearing examiner concludes that the development is all of the separate projects that occurred over several years time. This interpretation of the law is not persuasive. First, it makes no sense to combine the dollar values of distinct projects separated by six years in time. The boat launch was capped with concrete in 1997. The bulkhead was constructed in 2003. These developments are not a single “development.” Rather, they were completely distinct projects significantly separated in time.

Second, the statutory language uses the singular form in referring to “any development” of which the total cost does not exceed the threshold. RCW 90.58.030 (3) (e); WAC 173-27-040 (2) (a). There is nothing in the language of the statute or the administrative code to support

the idea that these separate projects are to be treated as one development and therefore not eligible for the dollar amount exemption.

Certainly, there may be situations where several actions are all part of a single project, but that is not the case here. This is not a situation where a prior development is actually the groundwork for a next step in a project. Nor is this a situation where a single project was divided into segments. *See, e.g., Merkel v. Port of Brownsville*, 8 Wn. App. 844, 851 (1973). The hearing examiner conclusion that everything should be combined so that the exemption becomes unavailable should be rejected. Relief is warranted as an erroneous interpretation of the law, or a finding not supported by substantial evidence in light of the whole record, or a clearly erroneous application of the law to the facts. RCW 36.70C.130 (b), (c) or (d).

D. The Retaining Walls were Exempt from SMP Permitting Requirements.

The Marlows' originally built their retaining wall in 1997. At the time of construction, the retaining wall was exempt from SMP permitting because the fair market value was far below the \$2500 threshold. The retaining wall also was exempt under WAC 173-27-040 (2) (g) as a normal appurtenance to the use and enjoyment of their single family residence. A number of years later, it became necessary to repair and

rebuild the retaining wall. That effort was likewise exempt under the normal maintenance and repair exemption of WAC 173-27-040 (2) (b). The rebuilding and addition to the retaining walls was also exempt as a normal appurtenance to the use and enjoyment of the home.

E. The Hearing Examiner erred in concluding that Tony Roth is not an Expert Witness.

Tony Roth has a masters degree in aquatic ecology. He is a certified by the Society of Wetland Scientists as a Professional Wetlands Scientist (PWS). He is also a Washington certified Erosion and Sedimentation Control Lead. He has over 30 years of experience in the field of aquatic impacts, working for public, private and tribal entities. CP 653 (Tr. 69); *see also* CP 461 (AR at 437) (curriculum vitae). Mr. Roth is well qualified to testify as to aquatic impacts.

Despite these credentials and background, the hearing examiner ruled, *without any explanation*, that Mr. Roth is not an expert. CP 536 (AR 512) (Finding no. 19). The hearing examiner provides no details, just an unsupported conclusion. The finding should be reversed for lack of any supporting evidence, under RCW 36.70C.130 (c). If anything, the hearing examiner may have demonstrated a bias or result oriented purpose.

CONCLUSION

The hearing examiner decision should be overturned or invalidated for lack of jurisdiction and the NOV should be dismissed. The County should proceed, if it desires, to seek mandatory injunctive relief by filing an action in Court, as established by RCW 90.58.210 (1).

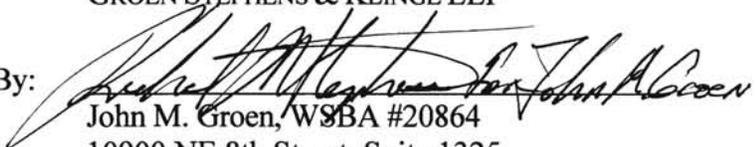
In the alternative, the hearing examiner decision should be overturned because it improperly placed the burden of proof on the Marlows. In an enforcement action, the burden of proof must be on the enforcement agency.

Finally, the actions taken by the Marlows were exempt from the substantial development permit requirements. The improvements did not violate the SMP that was in effect when the improvements were installed.

RESPECTFULLY submitted this 28th day of December, 2012.

GROEN STEPHENS & KLINGE LLP

By:


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10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
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Attorneys for Appellants

DECLARATION OF SERVICE

I, Linda Hall, declare as follows:

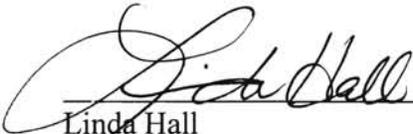
I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On December 28, 2012, 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 Attorney	<input checked="" type="checkbox"/> First Class U.S. Mail
P.O. Box 360	<input type="checkbox"/> Federal Express Overnight
Waterville, WA 98858-0360	<input type="checkbox"/> E-Mail: sclem@co.douglas.wa.us
	<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.

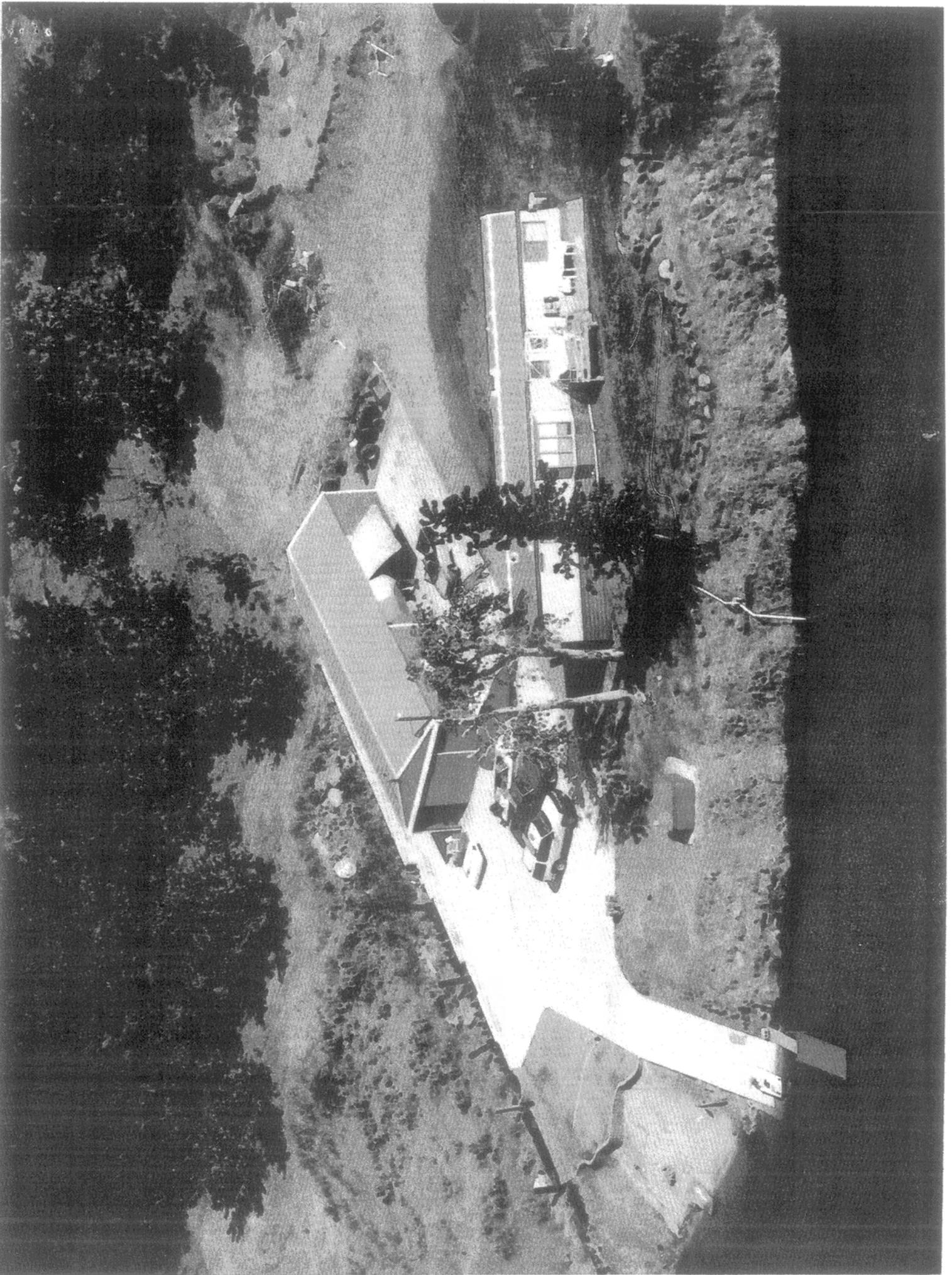
Executed this 28th day of December, 2012 at Bellevue, Washington.



Linda Hall

APPENDIX A

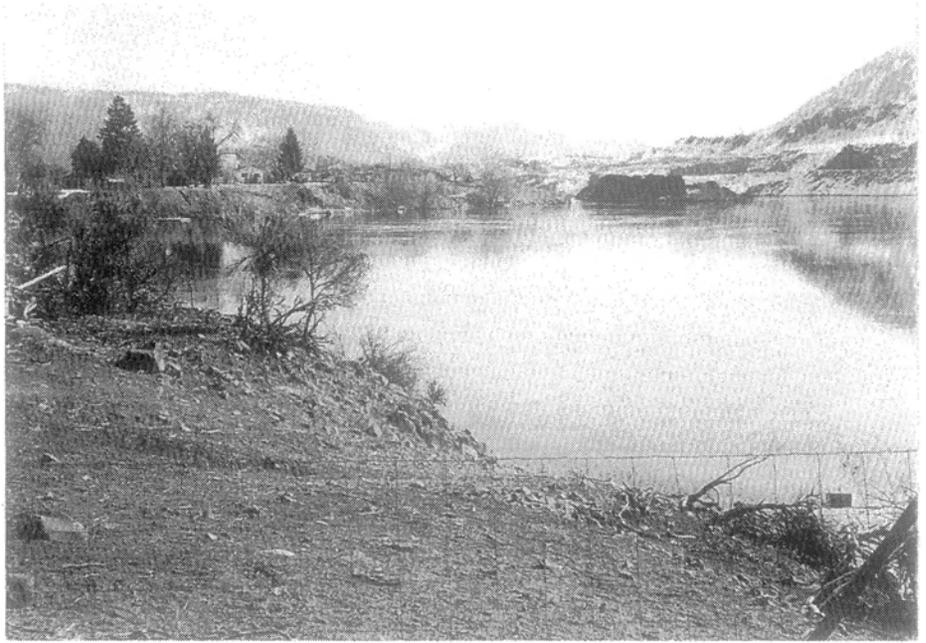
1997



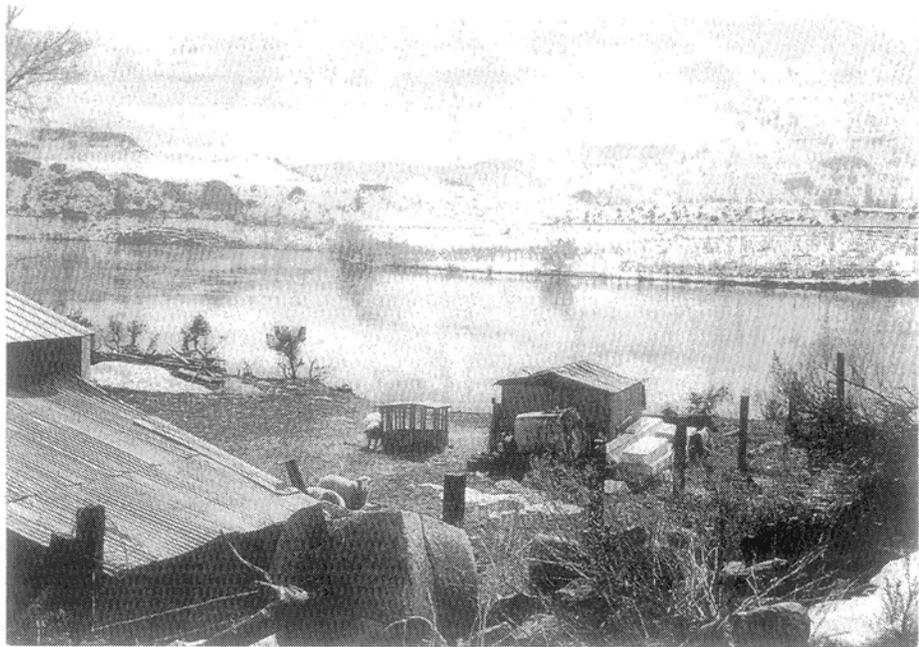
APPENDIX B

1. 2. 3.

Exh. (2)



APPENDIX C



APPENDIX D

5. The Administrator shall submit an annual report to the city council or board of county commissioners reviewing the effectiveness of the Program in achieving its stated purpose, goals, and objectives. Such report may also include any proposed amendments deemed necessary to increase its effectiveness or equity. If said report contains proposed amendments, the city council or board of commissioners may schedule a public hearing to consider such matter in accordance with the procedure described above.
6. Upon city council or board of commissioner's adoption of a sub area plan or significant amendments to an existing comprehensive plan within the shoreline jurisdiction; the Administrator shall prepare amendments, as appropriate, for the purpose of incorporating the goals, objectives, and standards of the new or amended plan into this Program, where consistent with the Shoreline Management Act.

6.19 Enforcement

The county or city shall bring such declaratory injunctive or other proceeding as may be necessary to assure that no uses be made of the shorelines of the state located in Douglas County contrary to the provisions of this Program or of RCW Chapter 90.58, and shall otherwise enforce RCW 90.58.210 through 90.58.230, and WAC 173-27, "Part II Shoreline Management Act Enforcement", as amended, in a cooperation with the State.