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Court of Appeals
Division III
State of Washington

No. 310132

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

MARK and NANCY MARLOW, husband and wife,

Appellants,

v.

DOUGLAS COUNTY, subdivision of the State of Washington,

Respondent.

RESPONDENT'S BRIEF - AMENDED

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I. INTRODUCTION

The County will refer to the Appellants as the Marlows, pursuant to RAP 10.4(e), and in the same manner as Appellants' Brief.

The County cites to the record throughout this brief. The administrative record before the Douglas County Hearing Examiner consisted of 556 pages and was submitted to the superior court in digital format. Each page of the administrative record is sequentially numbered in the lower right-hand corner. The administrative record has been indexed by the Clerk as Clerk's Papers Volume II, pages 25-580. The administrative record will be cited as CP.

The transcript of the hearing before the Hearing Examiner was filed in superior court. The hearing transcript has been indexed by the Clerk as Clerk's Papers Volume III, pages 584-680. The hearing transcript will be cited as CP, with an RP reference to the transcript's specific pages and lines.

Exhibits admitted at the hearing before the Douglas County Hearing Examiner will be cited using Ex, together with a description of the exhibit.

II. COUNTER-STATEMENT OF THE CASE

The Marlows' Statement of the Case in their Brief of Appellant contains argument throughout its 21 pages, contrary to RAP 10.3(a)(5). Brief of Appellants, pp. 3-24.

Statement of Procedure

On June 24, 2011, Douglas County issued a Notice of Land Use Violations and Order to Comply (NOV) relating to unauthorized Columbia River shoreline development by the Marlows. CP 64-69. See, CP 423, Photograph attached to this Brief as Appendix A. The Marlows filed a Notice of Appeal to the Douglas County Hearing Examiner on July 8, 2011. CP 96-104.

A hearing was held on November 17, 2011. The Hearing Examiner entered his Findings of Fact, Conclusions of Law and Decision affirming the NOV on December 21, 2011. CP 534-544.

The Marlows filed a Land Use Petition in the superior court on January 11, 2012, challenging the Hearing Examiner's decision. CP 1-21. Following the hearing on the Land Use Petition, the superior court entered its Order Dismissing Land Use Petition on June 29, 2012. CP 689-690. The Marlows filed a timely Notice of Appeal to the Court of Appeals, Division III. CP 691-703.

Statement of Facts

On June 24, 2011, Douglas County issued a Notice of Land Use Violations and Order to Comply (NOV) to the Marlows. CP 64-69. The NOV described the Marlows' unauthorized development on the Columbia River shoreline as violations, specifically including the following:¹

- Boatlift;
- Concrete sidewalk/patio on the shoreline with a timber bulkhead, which includes concrete fill and other material;
- Concrete launch ramp, which includes concrete fill and other material placed;
- Multiple dock floats and a ramp;
- Diving board and slide;
- Grading and the placement of retaining walls and non-native fill/sand; and
- Concrete gazebo pad placed above retaining walls.

CP 65.

Evidence before the Hearing Examiner of the Marlows' unauthorized development on the Columbia River shoreline was undisputed:

Installation of Boat Lift. The Marlows admitted installing a boat lift in 2008. CP 359-360. See, Hearing Examiner's Finding of Fact 48, CP 539.

¹ The Marlows have not provided issues or argument relating to the concrete pad, diving board, slide, and boat lift violations affirmed by the Hearing Examiner.

Installation of a shoreline bulkhead, sidewalk and patio, and related fill. The Marlow's concrete bulkhead, sidewalk and patio are shown in photographs in the administrative record. CP 416-423. The Marlows admitted installing the large concrete bulkhead in July 2003. CP 635-638 (RP p.51, l.22-p.54, l.3); CP 117-132. The Marlows also admitted installing concrete sidewalks and a patio along the bulkhead. CP 117-132, 359-360. The sidewalk and patio were installed in or after 2003, based on photographs included in the administrative record. CP 414-423. See, Hearing Examiner's Finding of Fact 49, CP 539-540.

Construction of a concrete boat launch ramp, and related fill. The Marlows property served as a ferry landing 75-100 years ago. The ferry landing was submerged by the Rock Island Dam pool when the dam was constructed. The unsubmerged road bed that served the ferry landing is shown in photographs in the administrative record. CP 433, 456, 457. The Marlows admitted constructing the concrete boat ramp in 1997. CP 611, 619-620 (RP p. 27, ll. 10-21; p.35, l.10-p.36, l.20); CP 114-132. See, Hearing Examiner's Finding of Fact 50, CP 540.

Installation of a boat dock. The County did not issue any SMA permits or determinations of exemption for the Marlows' original dock installed sometime after 1984. CP 413, 473-475; CP 592-593 (RP p.8, l.15-p.9, l.6). The new dock installed by the Marlows is shown in 2010 and 2011 photographs in the administrative record. CP 420-423. The Marlows admitted they installed the new dock in 2008. CP 626-629 (RP p.42, ll.3-15; p.45, ll.6-12). The new dock is 8'x20', 2.5 times the size of the prior dock, differs in shape and configuration, and is made from different materials. CP 117-132, 473-476, 506; CP 626 (RP p.42, ll.3-5). See, Hearing Examiner's Finding of Fact 51, CP 540.

Grading, construction of retaining walls, and related fill. The retaining wall system constructed by the Marlows is shown in 2006 and 2011 photographs in the administrative record. CP 416, 417, 419, 422, 423. The Marlows admitted constructing a prior concrete block retaining wall in 1997 and a second retaining wall in 1998 or 1999. CP 622-623 (RP p.38, l.2-p.39, l.12). They also admitted these retaining walls were replaced and two additional retaining walls were constructed in or after 2006. CP 623-624 (RP p.39, l.24-

p.40, l.17); CP 117-132, 358, 416-419. See, Hearing Examiner's Finding of Fact 53, CP 541.

Installation of a concrete pad. The concrete pad constructed by the Marlows is shown in photographs in the administrative record. CP 414. The Marlows admitted installing the concrete pad in 1997, which they use for a hot tub. CP 619-620 (RP p. 35, l.10–p.36, l.20); CP 117-132.

The Washington State Department of Ecology submitted written comments to the Hearing Examiner. The Department of Ecology found the Marlows' development of the shoreline was unauthorized and not exempt under the Shoreline Management Act (RCW Chapter 90.58), WAC Chapter 173-27, and the County's Shoreline Master Program. CP 108-110.

The Army Corps of Engineers also issued violation letters to the Marlows in 2010 and 2011. The Army Corps of Engineers notified the Marlows of federal permit requirements, that their boat launch, boat dock and bulkhead on the Columbia River constituted violations requiring removal, and that future development required federal permits.² CP 352-360.

² The U.S. Army Corps of Engineers has permitting jurisdiction over the Columbia River and its shoreline under the federal Rivers and Harbors Act, and

III. ARGUMENT

A. Summary of Argument

Development of the Columbia River shoreline within Douglas County requires authorization in the form of a permit or an exemption determination, both of which require an application, review and action by Douglas County. Exemptions are not self-executing. An exemption determination issued by the County requires compliance with all buffers, mitigation and other environmental protections, as required by both the Shorelines Management Act and the County's Shoreline Master Program and by the County's critical areas ordinance.

The Marlows' claim their shoreline development is "exempt." However, the Marlows never applied for or obtained an exemption. The County did not have an opportunity to investigate and review the scope, intensity and impacts of the Marlows' development, or the fair market value and purpose of the development. Further, the County did not have an opportunity to impose conditions to protect the shoreline, critical areas, water quality and habitat as required by the Shoreline Master Program and/or critical areas ordinance.

under the federal Clean Water Act. Permits are also subject to review under the federal Endangered Species Act. CP 352-360.

The Marlows cannot avoid their violations by merely claiming the development *would have been exempt*. Their argument essentially substitutes the appeal hearing on their violations for the required application, review and determination process.

The Douglas County Hearing Examiner properly affirmed the County's NOV. The superior court properly affirmed the Hearing Examiner's decision.

B. *Burden of Proof and Standards for Review*

The Land Use Petition Act (LUPA), RCW Chapter 36.70C, provides standards for review and the burden of proof for LUPA actions, at RCW 36.70C.130(1):

The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. **The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met.** The standards are:

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

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

(c) The land use decision is **not supported by**

evidence that is substantial when viewed in light of the whole record before the court;

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

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

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

(Emphasis added.)

The amended Brief of Appellants cites subsections (a), (b), (c) and (d) throughout its argument, without explanation or expressly connecting an applicable standard under RCW 36.70C.130(1) to an issue or assignment of error and to the record before the Hearing Examiner.³

The party seeking relief under LUPA has the burden of proving error under the standards of review. RCW 36.70C.130(1). The appellate court applies the LUPA standards of review directly to the administrative record of the land use decision. *Griffin v. Thurston County*, 165 Wn.2d 50, 196 P.3d 141 (2008); *Isla Verde*

³ In their amended Brief of Appellants, the Marlows list five issues, but failed to include any assignments of error or otherwise identify how the issues pertain to RCW 36.70C.130(1). RAP 10.3(a)(4).

International Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

When the sufficiency of the evidence is challenged under LUPA, the appellate court reviews the administrative record under the substantial evidence standard. The substantial evidence standard has been most recently applied as “whether a fair-minded person would be persuaded by the evidence of the truth of the challenged findings.” *Lauer v. Pierce County*, 173 Wn.2d 242, 252-53, 267 P.3d 988, 992 (2011). See also, *Griffin v. Thurston County*, 165 Wn.2d at 55 (evidence sufficient to convince a rational, unprejudiced person); *Woods v. Kittitas County*, 162 Wn.2d 597, 616, 174 P.3d 25 (2007) (a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true); *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d at 751-752 (evidence sufficient to convince a rational, unprejudiced person); *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000) (sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true).

When applying this substantial evidence standard, the evidence is to be considered in the light most favorable to the party

who prevailed in the highest forum that exercised fact finding authority, which in this case is the Douglas County Hearing Examiner. *Lauer v. Pierce County*, 173 Wn.2d at 253; *Julian v. City of Vancouver*, 161 Wn.App. 614, 625, 255 P.3d 763 (2011); *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 756, 768, 129 P.3d 300 (2006).

The Marlows have not specifically assigned error to any Finding of Fact entered by the Hearing Examiner. Brief of Appellants, p. 2. The Hearing Examiner's findings are, therefore, verities on appeal. *Hilltop Terrace Homeowner's Association v. Island County*, 126 Wn.2d 22, 29, 35, 891 P.2d 29 (1995) (Unchallenged findings of hearing examiner constitute substantial evidence).

Conversely, when the challenge is based upon unlawful procedure or an erroneous interpretation and application of the law, the appellate court reviews the alleged errors of law *de novo*. *Griffin v. Thurston County*, 165 Wn.2d at 55; *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d at 751. When the challenge is for unlawful procedure, the alleged error is subject to a harmless error analysis. RCW 36.70C.130(1)(a).

The Hearing Examiner clearly has expertise in conducting administrative hearings, the application and interpretation of the County's Shoreline Master Program and critical areas ordinance, and weighing evidence and the credibility of witnesses. Deference should be given to the Hearing Examiner in this LUPA appeal on these matters. See, *Timberlake Christian Fellowship v. King County*, 114 Wn.App. 174, 180-181, 61 P.3d 332 (2002).

The Marlows have the burden of proof and must establish one of the standards for relief under RCW 36.70C.130(1).

C. *Shoreline Management Act – Growth Management Act Overview*

There has been overlap between the Shorelines Management Act (the SMA) and the Growth Management Act (the GMA) with respect to protection of shorelines and regulation of critical areas. This section of Respondent's Brief provides an overview of how the SMA and GMA operate with respect to shorelines and critical areas.

1. *The Shoreline Management Act – A Brief Overview*

The SMA was adopted in 1971 to protect Washington's shoreline environment and is codified at RCW Chapter 90.58. The SMA is broadly construed by Washington courts to protect the state shorelines as fully as possible and a liberal construction is also

mandated by the State Environmental Policy Act, RCW Chapter 43.21C (SEPA). *English Bay Enterprises, Ltd. v. Island County*, 89 Wn.2d 16, 20, 568 P.2d 783 (1977); RCW 90.58.900; RCW 43.21C.030(1) and RCW 43.21C.020(3).

The policies of the SMA include preserving the natural character of the shorelines of the Columbia River, a shoreline of statewide significance, as well as protecting the resources and ecology of the Columbia River shoreline. RCW 90.58.020; RCW 90.58.030(2)(f).

Each local jurisdiction having shorelines is required to develop a Master Program addressing the policies and requirements of the SMA. RCW 90.58.030(3)(c). These Master Programs, after approval and adoption by the Department of Ecology, comprise the State Master Program. RCW 90.58.030(3)(d); RCW 90.58.090. Douglas County's Shoreline Master Program was originally adopted in 1975. CP 314-345. An updated Shoreline Master Program was adopted in 2009.

The SMA and the Shorelines Master Program protect the County's "shorelines," which includes those areas 200 feet landward from the ordinary high water mark. *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 203-204, 884 P.2d 910 (1994);

RCW 90.58.030(2); RCW 90.58.040. The County has responsibility for administration and enforcement of permitting under the SMA and the Shoreline Master Plan. RCW 90.58.050; RCW 90.58.140(3); WAC 173-27-240, et seq.

The SMA *prohibits* development within shorelines unless development is consistent with the SMA and the Shoreline Master Program. RCW 90.58.140(1). Development may be authorized under a substantial development permit, a variance, a conditional use permit, *or an exemption*. RCW 90.58.140; WAC 173-27-040(1)(b); WAC 173-27-140 through -170; WAC 173-27-250. Depending upon the scope and details of a proposed development, a combination of SMA permits may be required. In addition to SMA permits, a proposed development may also require building and/or grading permits under the County Code and the International Building Code.

“Substantial development” within shorelines is *prohibited* without first obtaining a substantial development permit from the local jurisdiction. RCW 90.58.140(2). “Substantial development” is defined at RCW 90.58.030(2)(e), in part, as follows:

“Substantial development” shall mean any development of which the total cost or **fair market value exceeds five thousand dollars, or any development which materially**

interferes with the normal public use of the water or shorelines of the state The following shall not be considered substantial developments for the purpose of this chapter:

(i) **Normal maintenance or repair of existing structures or developments**, including damage by accident, fire, or elements;

(ii) **Construction of the normal protective bulkhead common to single-family residences;**

* * *

(vii) **Construction of a dock . . . in freshwaters, the fair market value of the dock does not exceed ten thousand dollars**

(Emphasis added)

This definition of “substantial development” in the SMA has been materially the same since 1996, with one exception. In 2002, the fair market value limitation in the SMA definition was increased from \$2,500 to its current limit of \$5,000. Douglas County’s former Shoreline Master Program and implementing regulations, effective from 1975 through 2009, *set a lower threshold of \$1,000* as the fair market value limitation on substantial development. CP 340. “Fair market value” is defined at WAC 173-27-030(8):

“Fair market value” of a development is the **open market bid price for conducting the work**, using the equipment and facilities, and purchase of the goods, services and materials necessary to accomplish the development. **This would normally equate to the cost of hiring a contractor** to undertake the development from start to finish, including

the cost of labor, materials, equipment and facility usage, transportation and contractor overhead and profit. The fair market value of the development **shall include the fair market value of any donated, contributed or found labor, equipment or materials.**

(Emphasis added)

Exemptions under the SMA are not self-executing and are narrowly construed. WAC 173-27-040(1)(a). An “exemption” is the *express authorization* granted by a local jurisdiction determining the proposed development is exempt from the SMA’s substantial development permit requirements. WAC 173-27-040(a) and (e); WAC 173-27-250(2). The development proponent has the burden of proving development is exempt. WAC 173-27-040(1)(c). Even though development may be “exempt,” it remains subject to regulation under the SMA and the Shoreline Master Program and the local jurisdiction may impose conditions on the development to assure consistency and compliance with the SMA. WAC 173-27-040(1)(b) and (e); WAC 173-27-250(2). If any part of development does not qualify for an exemption, then a substantial development permit is required for the entire development. WAC 173-27-040(1)(d).

The U.S. Army Corps of Engineers has jurisdiction over the Columbia River under the Rivers and Harbor Act and the Clean

Water Act. The Marlow's development required federal permits. CP 352-360. If a U.S. Army Corps of Engineers permit is required, the local jurisdiction that determines development is exempt from the SMA's substantial development permit process must issue a letter of exemption. The letter of exemption must set forth the specific exemption provisions applicable to the development and analyze consistency with the SMA and the Master Program. WAC 173-27-040; WAC 173-27-050.

Therefore, in order for the Marlow's development to be exempt under the SMA, not only is an exemption determination by the County required under WAC 173-27-040(1) and WAC 173-27-250(2), but the County must also issue a letter of exemption meeting the requirements of WAC 173-27-050.

The Marlow's did not obtain any SMA permits, exemption determinations, Letters of Exemption or other approvals required for development of the shoreline.

2. The Growth Management Act – Critical Areas Ordinance

The GMA, RCW Chapter 36.70A, was adopted in 1990 to coordinate land use planning and attain several specific planning goals, including conservation of resource lands, conservation of fish

and wildlife habitat, and protection of the environment. RCW 36.70A.020.

The GMA directed local jurisdictions to adopt development regulations protecting “critical areas.” RCW 36.70A.030(5); RCW 36.70A.060(2); RCW 36.70A.170(1)(d); RCW 36.70A.172(1). These local development regulations are commonly referred to as a “critical areas ordinance” (CAO).

Douglas County adopted its CAO in 1997. DCC Chapters 19.18 through 19.18E; Resolution TLS 97-10-158, CP 182-214. The County amended the CAO in 2003. Resolution TLS 03-01-01B, CP 216-310.

The entire Columbia River shoreline in Douglas County is identified as a habitat critical area under the County’s CAO. DCC 19.18C.020.B.1 and B.4. Because it is an aquatic habitat, the entire Columbia River shoreline is protected and regulated as a “wetland” under DCC Chapter 19.18B.

Development of the Columbia River shoreline is prohibited, unless the development proposal includes “appropriate mitigation and enhancement measures as determined on a site-specific basis.” DCC 19.18B.050. Development may also require prior approval of a wetland management and mitigation plan, a wetland

boundary survey and rating evaluation report. DCC 19.18B.035, et seq. Finally, development requires approval of buffers 50 feet to 150 feet landward from the ordinary high water mark. DCC 19.18B.050.B

The County's CAO sets out a limited number of exemptions and, like the SMA, an exemption from permitting is not self-executing. However, unlike the SMA, the County's CAO does not provide for exemptions based on fair market value, for single-family residences, for docks or bulkheads, or for "total replacement" as a means of normal maintenance and repairs. DCC 19.18.030.A. The County must review proposed development and determine whether an exemption applies. DCC 19.18.030.

The Marlows did not obtain any development permits or determinations regarding exemptions as required under the CAO.

3. SMA and GMA Overlap

GMA wetland and habitat critical areas may be within 200 feet of a shoreline and, therefore, may also be within the jurisdiction of the SMA. What law regulates development?

- Prior to July 27, 2003, the SMA and the local jurisdiction's Master Program protect shorelines, including regulation of development within shoreline critical areas.

- Starting July 27, 2003, the local jurisdiction's SMA continues to protect shorelines, but the local jurisdiction's CAO protects and regulates shoreline critical areas.
- Upon adoption of an updated Master Program, the SMA and the local jurisdiction's updated Master Program protect shorelines and regulate development within shoreline critical areas.

See, Kitsap Alliance of Property Owners Central Puget Sound Growth Management Hearings Board, 160 Wn.App. 250, 256-264, 255 P.3d 696 (2011) (Upheld the retroactive provisions of RCW 36.70A.480 applying GMA CAO's to shorelines, effective July 27, 2003, as not violating the separation of powers doctrine, the vested rights doctrine, or prohibitions of ex post facto laws); RCW 36.70A.480.

4. *The Current, Updated Shoreline Master Program Applies*

The Marlows' development prior to July 27, 2003, violated the SMA and the County's Shoreline Master Program. The Marlows' development activity after July 27, 2003, but prior to adoption of the County's updated Shoreline Master Program, violated the County's CAO.

More importantly, the Marlows' development is no longer regulated by the old Shoreline Master Program and the CAO. The Marlows must now comply with the County's current, updated Shoreline Master Program.

The Marlows do not have any "vested right" based upon the date of their development. *Samuel's Furniture v. Department of Ecology*, 105 Wn.App. 278, 288, 19 P.3d 474 (2001), reversed on other grounds, 147 Wn.2d 440 (2002), recognized that an unlawfully issued permit cannot create vested rights:

[T]he SMA gives the Department the responsibility for reviewing local land use decisions to ensure compliance with the act. RCW 90.58.050. To that extent, land use decisions by local governments are not final. Consistent with this analysis, a landowner has no vested rights under the SMA if the building permits he or she receives from a local government are issued in error..

The case of *Kelly v. Chelan County*, 157 Wn.App. 417, 237 P.3d 346 (2010), involved an applicant who made several changes, from 1989 through 2005, to a conditional use application. A new comprehensive plan and new development regulations were adopted in 1994. In 2000, the county amended the plan and regulations, decreasing the property's allowable development density. A conditional use permit was granted in 2005 based on the 1994 development regulations. This Court of Appeals held no

rights had vested because none of the amended permit applications complied with the comprehensive plan and development regulations existing at the time of each amendment. *Kelly v. Chelan County*, 157 Wn.App. at 428.

The case of *Lauer v. Pierce County*, 173 Wn.2d 242, 267 P.3d 988 (2011) also provides guidance. In 2004, the Garrisons obtained a building permit and began constructing a home. The Garrisons' application materials failed to identify a stream and buffer area on the property and the home was built within the 35 foot buffer. In 2007, Garrison applied for a variance to allow encroachment into the buffer area. However, in 2005, the county had increased buffer requirements from 35 feet to 65 feet. The Supreme Court held the Garrisons' rights did not vest in 2004 because the building permit contained misrepresentations and material omissions and, therefore, was not complete. The increased 65 foot wide buffer was held applicable to the home built in 2004. *Lauer v. Pierce County*, 173 Wn.2d at 262-263

In the case before this Court, the Marlows did not submit any applications for development approval and developed without the benefit of any permits or exemption determinations. The vested rights doctrine should not be expanded to benefit persons who

develop without proper legal authorization. *Lauer v. Pierce County, supra; Kelly v. Chelan County, supra; Samuel's Furniture v. Department of Ecology, supra.*

The Marlow's development is now subject to the County's Shoreline Master Program, as updated in 2009.

D. The Marlow's Legal Issues

1. *The County Has Jurisdiction to Pursue the Marlow's Violations*

Implementation of the SMA is a coordinated effort of the State and local jurisdictions. The SMA and applicable regulations expressly provide for the County's permitting and enforcement under the SMA and its Shoreline Master Program. RCW 90.58.050; RCW 90.58.140(3); WAC 173-27-240, et seq. This authority was recognized in *Twin Bridge Marine Park, LLC, v. Department of Ecology*, 162 Wn.2d 825, 835-836, 175 P.3d 1050 (2008) (Where the county issued a substantial development permit, the Department of Ecology had no authority to directly review the permit or issue fines for non-compliance with the SMA).

Any argument by the Marlow's regarding the County's lack of jurisdiction is without merit. To the extent this issue or challenge is before this Court, the Marlow's have failed to meet their burden of

proof. The County has jurisdiction to pursue the Marlows for SMA violations.

2. *Neither the NOV nor the Hearing Examiner Imposed Injunctive Relief*

Marlows assert the NOV is invalid because it imposes injunctive relief. Brief of Appellants, pp. 30-35. The Marlows cite “RCW 36.70C.130 (a), (b) or (e)” in their argument as the standards for relief. Brief of Appellants, p. 33. The order language in the NOV provides:

II. ORDER TO COMPLY

YOU AND EACH OF YOU are ORDERED to comply with the following:

1. Immediately **cease and desist all development**
2. **Submit to the Douglas County Department of Transportation and Land Services**, within 30 days, the following:
 - a. A Shoreline Management Substantial Development Permit Application;
 - b. State Environmental Policy Act (SEPA) Environmental Checklist;
 - c. A fish and wildlife habitat management and mitigation plan; and
 - d. Appropriate application fees in the amount of \$3,208.00.
3. In accordance with an approved shoreline substantial development permit and fish and wildlife habitat management and mitigation plan, **all structures and development identified in this notice and order must be removed and remediated**

CP 66-67. (Emphasis added)

The NOV orders the Marlows to immediately stop development of their property and identifies the specific steps necessary to address their violations and comply with the County's Shoreline Master Program, as expressly authorized by WAC 173-27-270.

The Marlows rely upon *Chaussee v. Snohomish County Council*, 38 Wn.App. 630, 689 P.2d 1084 (1984), asserting the Hearing Examiner exceeded his jurisdiction by granting injunctive relief. The *Chaussee* case does address a challenge to injunctive relief. The case involved the authority of a hearing examiner and the County Council to consider and apply the doctrine of equitable estoppel in a land use administrative proceeding. The case holds the authority of a hearing examiner is created by and limited to the statutes and/or ordinances creating the position. *Chaussee*, 38 Wn.App at 636-638.

The Marlows also rely upon two administrative decisions as authority on the issue of injunctive relief. *In the Matter of Nelson*, 1979 WL 52505, SHB No. 79-11 (Findings of Fact, Conclusions of Law and Order, June 11, 1979), and *H&H Partnership v. Department of Ecology*, 2001 WL 1022098, SHB No. 00-022

(Amended Summary Judgment and Order of Dismissal). However, both cases involve the jurisdiction of the Shorelines Hearings Board, not a local hearing examiner. RCW 90.58.210 was amended after the *Nelson decision* to provide the following enforcement authority:

The penalty provided for in this section **shall be imposed by a notice in writing**, either by certified mail with return receipt requested or by personal service, to the person incurring the same **from the department or local government, describing the violation with reasonable particularity and ordering the act or acts constituting the violation or violations to cease and desist or, in appropriate cases, requiring necessary corrective action to be taken within a specific and reasonable time.**

RCW 90.58.210(3) (Emphasis added).

The case of *Herman v. Shorelines Hearings Board*, 149 Wn.App. 444, 457-458, 204 P.3d 928 (2009), review denied 166 Wn.2d 1029, is instructive on this issue. This division of the Court of Appeals reversed the superior court's decision and reinstated the Order issued by the Shorelines Hearings Board. The SHB Order included an order to comply, conditions required to comply, and imposed sanctions if compliance was not achieved. In affirming the Order of the SHB, this Court acknowledged the SHB's authority to place conditions on development and held the administrative order was not self-executing.

The NOV issued to the Marlows, as affirmed by the Hearing Examiner, does not impose injunctive relief. The NOV contains a cease and desist order, ordered compliance with the SMA and Shoreline Master Program and set out the requirements necessary to achieve compliance. The order contained in the NOV is not equivalent to a court-ordered injunction and is not self-executing. *Herman v. Shorelines Hearing Board*, 149 Wn.App. at 457-458. If, after the conclusion of these proceedings challenging the NOV, the Marlows do not take the steps necessary to comply, then judicial enforcement of the NOV may be sought, as well as imposition of penalties. RCW 90.58.210.

The Hearing Examiner reviewed and affirmed the NOV. The decision did not impose injunctive relief. The Marlows have failed to meet their burden of proof under standards of relief RCW 36.70C.130(1)(a),(b) and (e). Brief of Appellant, p. 33. The Hearing Examiner did not exceed his jurisdiction or authority.

3. *Statutes of Limitation Do Not Bar These Proceedings*

The Marlows claim the NOV issued by Douglas County pursues civil penalties and is, therefore, barred by the two year statute of limitations. RCW 4.16.100(2). The Marlows also claim the one year statute of limitations for misdemeanor crimes is

applicable because the NOV threatens criminal enforcement. RCW 9A.04.080. Brief of Appellants, pp. 36-38. The Marlows do not cite to a standard for relief under RCW 36.70C.130(1).

The enforcement language in the NOV provides:

III. ENFORCEMENT ON FAILURE TO COMPLY

Your failure to comply with the requirements of this Order shall result in further enforcement action. Such enforcement may include one or more of the following actions:

1. Civil Enforcement. Civil enforcement pursuant to DCC Chapter 14.92.040, including the following:

A. Any permit, variance, subdivision, or other land use or development approval issued for the subject property may be revoked, suspended and/or modified; and/or

B. A civil penalty of \$50.00 per day per violation may be imposed until corrective action is fully completed; and/or

C. The County may enter upon the subject property and complete all corrective action . . . and/or

D. The County may obtain temporary, preliminary and/or permanent injunctive relief from the Superior Court.

2. Criminal Penalties. **Pursuant to DCC 14.92.050**, any person, or any managing director, officer or partner of a corporation, partnership, association or other legal entity, **who willfully fails or refuses to complete corrective action and comply with a notice of violation and order shall be guilty of a misdemeanor** and shall be punished by not more than ninety days in jail or a one thousand dollar fine, or both. Failure or refusal to complete corrective action

shall be a separate offense as to each violation in the notice of violation and order.

3. Shoreline Management Act Penalties. **Civil and/or criminal penalties as provided in the Douglas County Regional Shoreline Master Program, RCW 90.58.210, RCW 90.58.220, RCW 90.58.230, and WAC 173-27, Part II Shoreline Management Act Enforcement.**

CP 67-68. (Emphasis added)

The NOV does not impose civil penalties and does not impose criminal liability. Those enforcement methods are within the array of enforcement alternatives available to Douglas County if the Marlows fail to comply with the NOV.

In *U.S. Oil & Refining Company v. State Department of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981), the Supreme Court applied a three year statute of limitations to effluent discharges occurring over 18 different days. The *U.S. Oil* case is clearly distinguishable from the facts before this Court. The violations by U.S. Oil were discrete occurrences and civil penalties were imposed on each occurrence. The Marlows' unauthorized development is a continuing violation. The NOV did not impose penalties.

The Marlows cite *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 258 P.3d 36 (2011), as the sole

case authority for their statute of limitations challenge. *Citizens* held that, even though counties take the lead in developing local shoreline master programs, such programs are not the product of local government, but are the product of the State. Prohibitions applicable to imposition of development taxes and fees by counties do not apply to local shoreline master programs. *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d at 396-397. If this Court applies *Citizens* as urged by the Marlows, then RCW 4.16.160 makes clear there are no statutes of limitation applicable to these proceedings. RCW 4.16.160 provides, in part:

[T]here shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state

The Marlows' unauthorized development of the Columbia River shoreline is a continuing violation of the SMA and the County's Shoreline Master Program. Every day the Marlows' unauthorized development continues is a violation. *See, Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006) (Continuing violation doctrine allowed recovery where original trespass occurred decades earlier).

The Marlows have failed to meet their burden of proof. The NOV is not barred by any statute of limitation. The Hearing Examiner did not err.

4. *The Marlows Have the Burden of Proof*

The Marlows assert the County had burden of proof before the Hearing Examiner. Brief of Appellants, pp. 27-30, 35. They rely upon *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), and challenge the Hearing Examiner's allocation of the burden of proof under the "unlawful procedure" standard for relief found at RCW 36.70C.130(1)(a).

Post involved a challenge to over \$500,000 in infraction penalties administratively imposed by Tacoma under its building code. The penalties were imposed without any opportunity for administrative challenge or review, and were struck down by the Supreme Court as violating due process. In this case, the Marlows exercised their right to administratively challenge the NOV and no infractions were issued or penalties imposed. The Marlows will be subject to enforcement *after* their failure to comply with the NOV. The *Post* case is clearly distinguishable on its procedure and facts.

The Marlows also rely upon the administrative decision in *Twin Bridge Marine Park, LLC v. Department of Ecology*, 2002 WL

1650523, SHB Nos. 01-016 and 01-017 (Findings of Fact, Conclusions of Law and Order, July 17, 2002). This decision was reversed by the superior court, which was affirmed by the Court of Appeals and the Supreme Court. *Twin Bridge Marine Park, LLC v. Department of Ecology*, 130 Wn.App. 730, 125 P.3d 155, affirmed 162 Wn.2d 825, 175 P.3d 1050 (2008) (Where the county issued a substantial development permit, the Department of Ecology had no authority to directly review the permit or to issue fines for non-compliance with the SMA). Burden of proof was not an issue in the administrative decision or on judicial review.

The Marlows also cite WAC 461-08-500(3) as authority:

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

(Emphasis added)

WAC 461-08-500 applies only to proceedings before the Shoreline Hearings Board, which reviews cases *de novo*. Also, the term “agency” used in WAC 461-08-500(3) is defined as “any *state* governmental agency” at WAC 461-08-305(1). A county falls within the defined term “local government.” WAC 461-08-305(7). The

burden of proof provision in WAC 461-08-500(3) is not applicable to proceedings before a county hearing examiner.

Finally, the Marlows rely upon RCW Chapter 7.80, which authorizes the issuance of infractions by law enforcement and filing of infraction notices in courts of limited jurisdiction. The system for issuance and adjudication of infractions established in RCW Chapter 7.80 has no applicability to the issues before the Hearing Examiner.

Under the SMA, the proponent seeking a development permit has the burden of proving the policies and regulations of the SMA have been met. RCW 90.58.140(7). The statute also places the burden of proof on any party challenging the granting or denial of a permit. *See also*, WAC 173-27-140. Similarly, the proponent of development has the burden of proving the development is exempt from permitting. WAC 173-27-040(1)(c).

The evidence submitted to the Hearing Examiner regarding the Marlows' development and the lack of any permits, exemption determinations or other development approvals was clear and undisputed. The scheme of the SMA clearly, and rightfully, places the burden of proof on the Marlows to demonstrate they did not develop within the shoreline, or they obtained all necessary

permits, exemption determinations and other approvals. The Marlows failed to present any evidence to controvert the factual and legal grounds for the NOV. Therefore, even if the burden of proof was improperly imposed by the Hearing Examiner, any unlawful procedure was harmless error under the exception to RCW 36.70C.130(1)(a).

The Marlows have failed to meet their burden of proof to establish the standard for relief at RCW 36.70C.130(1)(a). The Hearing Examiner did not err and, if he did err, such error was harmless.

5. *The Marlows' Right to Cross-Examine Was Not Violated*

The Marlows contend their right cross-examine county staff was violated by the Hearing Examiner. The Marlows cite the “unlawful procedure” standard for relief found at RCW 36.70C.130(1)(a). Brief of Appellants, p. 35, 41.

The Marlows' sole authority is *Post v. City of Tacoma, supra*, and RCW 7.80.100(2). As discussed above, *Post* involved the issuance of infractions without an opportunity for administrative challenge or review. The NOV did not issue infractions or impose penalties. The system for issuance and adjudication of infractions

established in RCW Chapter 7.80 has no applicability to the issues before the Hearing Examiner.

If, for the purposes of this appeal, it is assumed the Marlows did have a right of cross-examination, they fully exercised that right. Counsel for the Marlows cross-examined Mr. DeVries, Douglas County staff, at length. CP 598-603 (RP p.14, l.5 – p.19, l.2).

During his staff report, Mr. DeVries referenced a photograph in the record and stated the photograph showed “an illegal dock right here in 1997 that was placed sometime after 1984 . . . permits have been required for dock facilities since 1975.” Counsel for the Marlows questioned Mr. DeVries regarding the basis for characterizing the dock as “illegal.” The Hearing Examiner limited that continued line of cross-examination because the characterization as “illegal” was a legal determination for the Hearing examiner to make, and the existence of the prior dock was not relevant to the current, on-going violations. CP 601-602 (RP p.17, l.23 – p.18, l.21). Counsel for the Marlows objected to the Hearing Examiner’s ruling and then stated, “No further questions.” CP 602-603 (RP p.18, l.22 – p.19, l.22).

The Hearing Examiner did not *deny* the right to cross-examine. The Hearing Examiner *limited* the Marlows’ continued

cross-examination on an issue that was a legal determination and was not relevant to the alleged violations. The Marlow's placement of a dock in 2008 is the basis for the violation: not the permitting of a pre-existing dock. Even if a right to cross-examine exists, the Hearing Examiner had the right to exercise discretion in controlling the subject matter, scope and length of cross-examination, as would a trial judge.

The Marlow's have failed to meet their burden of proof. The Hearing Examiner did not abuse his discretion and did not err. If there was error, such error was harmless under the exception found at RCW 36.70C.130(1)(a).

6. *The Hearing Examiner Did Not Err or Abuse His Discretion When He Denied the Motion to Re-Open the Record*

The Marlow's did not identify the Hearing Examiner's Decision on Appellants' Motion to Open the Record in their Land Use Petition as a decision being appealed. Land Use Petition, CP 1-21; Decision on Appellant's Motion, CP 577-578.

The Hearing Examiner's denial of their motion is referenced in the Brief of Appellants, but the Marlow's do not include any legal argument on this issue. Brief of Appellants, pp. 17-18. The issue should be deemed by this Court to have been abandoned. RAP

10.3(a)(6); *Dickson v. U. S. Fidelity & Guaranty Co.*, 77 Wn.2d 785, 787, 466 P.2d 515 (1970).

The Decision on Appellant's Motion contains 17 findings, none of which have been assigned error by the Marlows. CP 577-578. The Hearing Examiner's findings are, therefore, verities on appeal. *Hilltop Terrace Homeowner's Association v. Island County*, *supra*. The 2007 proposal offered by the Marlows did not reflect the final, actual scope of work completed by the contractor in 2008, the total amount actually paid by the Marlows for the completely installed dock and ramp, or the "fair market value" of contributing work performed by the Marlows.⁴ CP 565.

If not deemed abandoned, the Marlows have failed to meet their burden of proof. The Hearing Examiner did not error and did not abuse his discretion.

7. *The Witness Testimony Was Properly Limited*

The Marlows claim the Hearing Examiner erred by not characterizing the testimony of their witness, Tony Roth, as expert

⁴ If this Court should reverse the Hearing Examiner's denial to reopen the record, that ruling will strengthen the County's position. The excluded evidence was a 2007 proposal from Nordic Marine Floats for construction of a boat dock for \$9,200, excluding sales tax. The \$9,200 price, after including 8% sales tax, totaled \$9,936. The price *specifically excluded the dock's bull rails, cleats, bumpers or conduit, or installation*. The price *specifically excluded permit fees*. This evidence would support a total fair market value exceeding \$10,000.

witness testimony. The Marlows assert a lack of substantial evidence under RCW 36.70C.130(1)(c). Brief of Appellants, p. 48.

Mr. Roth's testimony in the proceeding before the Hearing Examiner was not that of an expert or offered on any issues relevant to the proceeding.⁵

The Marlows retained Mr. Roth, of Seattle, Washington, the day before the hearing and Mr. Roth "visited" the Marlows' property the day of the hearing. Mr. Roth did not testify regarding the scope and details of his investigation of the Marlows' property and did not prepare a written report. Mr. Roth testified regarding general observations of the Marlows' property, which were consistent with the evidence submitted by the County and the Marlows' testimony. Mr. Roth then testified regarding the biological aquatic "impacts" of the Marlows' development. CP 653-663; Finding of Fact 18, CP 536.

⁵ The minimum qualifications for an expert used by a development proponent to address impacts and mitigation are set out in the County's Shoreline Master Program, Chapter 8, at Section 203:

A qualified professional for wetlands means a biologist who has a degree in biology, ecology, botany, or a closely related field and a minimum of five (5) years of professional experience in wetland identification and assessment in Eastern Washington.

Mr. Roth did not testify as to any professional experience involving Eastern Washington wetlands. Based on the limited information provided regarding his education and experience, Mr. Roth did not qualify as an expert under the County's Shoreline Master Program.

Finding of Fact 19 of the Hearing Examiner's decision, to which the Marlows have not assigned any error, states:

The Hearing Examiner does not find Mr. Roth to be an expert witness. Even if Mr. Roth could be characterized as an expert witness, the Hearing Examiner does not find either Mr. Roth's investigation or purported opinions to be convincing in any respect.

CP 536.

Marlows complain the Hearing Examiner ruled "without any explanation." Unchallenged Finding of Fact 18 provides the basis for the Hearing Examiner's ruling. CP 536.

The Hearing Examiner did not abuse his discretion. Mr. Roth had, at most, conducted a superficial inspection of the Marlows' property. He did not express any opinions based upon his knowledge of or in reference to the ecology and environmental science of the Eastern Washington Columbia River shoreline. His testimony regarding the "impacts" of the Marlows' development was not relevant to the Marlows' violations. Impacts would only be relevant if, following the conclusion of their challenges to the NOV, the Marlows file an application for a permit or exemption under the SMA. See, RCW 90.58.140(1); WAC 173-27-040(1)(e); WAC 173-27-140(1); WAC 173-27-150; DCC 19.18.070-.130; DCC 19.18B.035-050.

The Marlows have failed to meet their burden of proof. The Hearing Examiner did not err regarding the testimony of Mr. Roth.

E. *The Marlows Are Not Entitled to Exemptions*

The County believes its preceding argument relating to permitting and exemptions is dispositive of all the additional issues raised by the Marlows.

The Marlows have not assigned error to any Findings of Fact. Unchallenged findings are verities on appeal. *Hilltop Terrace Homeowner's Association v. Island County, supra*. The record and all inferences from the record are to be viewed in the light most favorable to the County. *Lauer v. Pierce County, supra; Julian v. City of Vancouver, supra; Cingular Wireless, LLC v. Thurston County, supra*.

There is a critical difference between the *eligibility* to obtain an exemption and *the application for and issuance of a determination granting an exemption*. The Marlows' issues and argument are based on the former.

1. *The Dock*

According to aerial photographs of the shoreline, the dock was placed sometime after 1984, subsequent to adoption of the SMA and the Shoreline Master Program. CP 413. The County did

not issue any SMA permits, determinations of exemption or letters of exemption for this prior dock. CP 413, 473-475; CP 592-593 (RP p. 8, l.15–p.9, l.6).

In 2008, the Marlows placed a new dock in the shoreline. Finding of Fact 51, CP 540. The Marlows claim this dock was exempt in 2008 based on a fair market value of under \$10,000 or exempt because it constituted exempt maintenance or repair under WAC 173-27-040(2)(b). SMA exemptions were inapplicable to the 2008 dock.

Since this dock was placed after July 27, 2003 and prior to the County's updated Shoreline Master Program, the County's CAO applies to the initial placement. Exemptions for docks under the County's COA were not based on fair market value or "total replacement" as a means of normal maintenance and repairs. DCC 19.18.030.A. Even if exemption eligibility existed, the Marlows were required to apply for and obtain an exemption determination from the County. DCC 19.18.030.

If the SMA applied as asserted by the Marlows, then the new dock is not eligible for an exemption as maintenance or repair. WAC 173-27-040(2)(b). No evidence was presented that replacement is the "common method of repair." The new dock is

not “comparable to the original, including its size, shape, configuration, location, and external appearance.” The new dock is 2.5 times the size of the original (8’x8’ vs. 8’x20’), differs in shape and configuration, and is made from different materials (wood and carpet vs. grating). CP 626 (RP p. 42, ll.3-15); CP 506.

The Marlows presented no evidence under the SMA addressing “fair market value” under WAC 173-27-030(8), which is based on “the cost of hiring a contractor to undertake the development from start to finish, including the cost of labor, materials, equipment and facility usage, transportation and contractor overhead and profit.”⁶

Mr. Marlow testified it was a “cash–and–carry type of thing” and paid “in that range, not – not more than \$8,900, not less than \$8,500 . . . I’m sorry. It’s been quite a while.” CP 627-628 (RP p.43, l.22–p.44, l.2). The cost estimated by Mr. Marlow did not include installation. The Marlows did not testify regarding the name of the contractor who constructed the dock and ramp or offer any documentation of the actual payment to the contractor. Dock

⁶ This discussion of “fair market value” relating to the new dock, as well as the Marlows’ other development, is an excellent example of why the eligibility for an exemption requires a review and express determination by the local jurisdiction. The exemption may only be determined after review of complete and reliable information supporting fair market value.

exemptions based on fair market value have not been issued since 2004 because due to increased prices for dock construction and installation. CP 506-509; Finding of Fact 51, CP 540. The Marlows did not present any convincing evidence addressing “fair market value” under WAC 173-27-030(8).

The Marlows have failed to meet their burden of proof. Even if eligible for an exemption in 2008, the Marlows’ new dock was placed without any authorization by the County or by the Army Corps of Engineers. The Hearing Examiner did not err.

2. *The Boat Launch*

In 1997, the Marlows constructed a long concrete boat launch extending from a concrete parking area down into the Columbia River. Concrete was poured 5 to 10 feet into the Columbia River. Finding of Fact 50, CP 540; CP 458. This placement occurred prior to July 27, 2003, and was subject to SMA regulation.

The Marlows argue the boat launch was exempt in 1997 based on fair market value, or as maintenance or repair under WAC 173-27-040(2)(b).

The SMA fair market value exemption had a \$2,500 limitation in 1997. RCW 90.58.030(3)(e). The County’s Shoreline

Master Program had a \$1,000 limitation. CP 340. Mr. Marlow testified a contractor was paid “cash” to pour both the boat launch and a hot tub pad and further testified , “I believe, for that, it was right around 7 – between \$500 and \$700. It was a long time ago, but I – that’s what I believe . . . I think it was \$700.” CP 619-620 (RP p.35, l.17-p.36, l.10). The Marlows did not testify regarding the name of the contractor who did the work or offer any documents evidencing the actual amount paid. The Marlows did not present any convincing evidence addressing “fair market value” under WAC 173-27-030(8).

The concrete boat launch was not eligible for an exemption as maintenance or repair. The boat launch is not “comparable to the original,” which was an abandoned roadbed consisting of soil and rock. The “size, shape, configuration, location, and external appearance” are totally different. Photographs clearly show these differences. There is little, if any, evidence the road bed was used as a boat launch prior to 1997, as the soil, vegetation and grade appear to be in a natural state. CP 455-458.

To be exempt based on fair market value or “maintenance or repair” requires review by the County, in addition to a determination

of exemption and a letter of exemption for Army Corps of Engineers permitting.

The Marlows have failed to meet their burden of proof. The Hearing Examiner did not err regarding the concrete boat launch.

3. The Bulkhead and Patio

In July 2003, the Marlows constructed a large 60' concrete bulkhead and patio along the shoreline. The bulkhead and patio are clearly depicted in photographs and sketches. Concrete was poured waterward of the ordinary high water mark to a depth of 3 to 6 feet. Finding of Fact 49, CP 539-540; CP 358, 416-419.

The Marlows claim the bulkhead was eligible for the fair market value exemption under the SMA. During his testimony Mr. Marlow could not remember how much he paid for the concrete bulkhead and patio until reminded by his counsel. Mr. Marlow agreed with his counsel that the cost was \$1,500 to \$2,000. CP 639-640 (RP p.55, l.19-p.56, l.5). The Marlows did not testify regarding the name of the contractor who installed the bulkhead and patio, or offer any documents evidencing actual payment. The Marlows did not present any convincing evidence addressing "fair market value."

Further, the Marlows have confused the exemption issue for the concrete bulkhead. The Hearing Examiner applied RCW 90.58.030(2)(e)(ii) and WAC 173-27-040(2)(c), which allows an exemption for a “normal protective bulkhead” on a single-family residence property. The bulkhead was not constructed to protect their residence from erosion. Also, the bulkhead creates “dry land,” albeit a “dry” concrete patio, and, therefore, cannot be exempt. CP 511. The Marlows provided no evidence regarding the concrete bulkhead and patio qualifying as a “normal protective bulkhead” or as meeting the requirements of the pre-existing Shoreline Master Program, Section XV. CP 326.

The Marlows have failed to meet their burden of proof. The Hearing Examiner did not err regarding the concrete bulkhead and patio.

4. *The Retaining Walls*

In 2006, the Marlows constructed four retaining walls within the shoreline, two of which replaced existing retaining walls. Finding of Fact 53, CP 541. The Marlows claim the retaining walls are exempt under the SMA based upon fair market value, as “maintenance or repair” or as a “normal appurtenance to the use and enjoyment of their home.” The Marlows presented little, if any,

evidence as to the retaining walls meeting these exemptions and provided no evidence regarding the fair market value of the grading, cuts, and fills, wall materials and installation. CP 622-624 (RP p. 38, l.2 – p.40, l.17).

The retaining walls are not eligible for an exemption as “maintenance and repair.” The walls are not “comparable to the original,” which were concrete block. The “size, shape, configuration, location, and external appearance” are totally different, as the terracing has been expanded and more walls were constructed. Photographs clearly show the work comprising the new retaining walls. CP 422, 423, 434, 439.

An “appurtenance” to a single-family residence is eligible for an exemption and is defined at WAC 173-27-030(2)(g):

An "appurtenance" is necessarily connected to the use and enjoyment of a single-family residence and is located landward of the ordinary high water mark and the perimeter of a wetland. On a statewide basis, normal appurtenances include a garage; deck; driveway; utilities; fences; installation of a septic tank and drainfield and grading which does not exceed two hundred fifty cubic yards and which does not involve placement of fill in any wetland or waterward of the ordinary high water mark.

The retaining walls are not within the list of improvements constituting an appurtenance. The retaining walls are not “connected to use and enjoyment” of the residence. The retaining

walls do not serve as support or erosion control for the residence itself. The walls are protecting the unauthorized patio, boat launch and hot tub pad from erosion. As seen from the photographs prior to 1997, during 1997 and after 1997, the “erosion problem” is the result of Marlow’s development. The photographs prior to 1997 do not evidence any erosion problems. CP 413-423, 455-460.

Regardless of any eligibility as exemption under the SMA, the Marlows did not obtain County review and a determination of exemption.

Contrary to the Marlow’s argument under the SMA, the County’s CAO was applicable to the 2006 construction of the four retaining walls. All development within critical areas requires a permit and is subject to buffers. DCC 19.18B.050 and .060.A. The CAO does not include an exemption based on fair market value, “replacement” within the scope of “maintenance and repair” or an “appurtenance” to a single-family residence. DCC 19.18.030. The Marlows’ retaining walls were constructed without the approvals required under either the SMA or the County’s CAO.

The Marlows have failed to meet their burden of proof. The Hearing Examiner did not err regarding the retaining walls.

F. The County is Entitled to an Award of Attorney's Fees and Costs

This appeal by the Marlows is frivolous, as it has been advanced without reasonable cause. There are no debatable issues over which reasonable minds could differ. The evidence of the Marlows' unauthorized development of the Columbia River shoreline was undisputed. They have failed to prove any of the standards for relief under RCW 36.70C130(1).

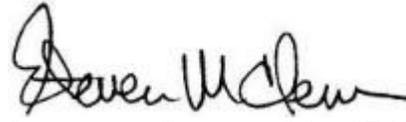
The County should be awarded its reasonable attorney's fees and costs incurred in this appeal pursuant to RAP 18.9(a) and/or RCW 4.84.185.

IV. CONCLUSION

The Marlows' entire argument is an attempt to substitute their administrative appeal before the Hearing Examiner for the County's required application process under which it reviews and determines exemptions under the SMA and/or its CAO, and imposes conditions to protection the Columbia River shoreline.

The Marlows have failed to meet their burden of proof on all issues raised in their Brief. The Hearing Examiner did not err. The decision of the superior court dismissing the Marlows' Land Use Petition should be affirmed.

Respectfully submitted this 10th day of January, 2013.

A handwritten signature in black ink, appearing to read "Steven M. Clem". The signature is fluid and cursive, with a long horizontal stroke at the end.

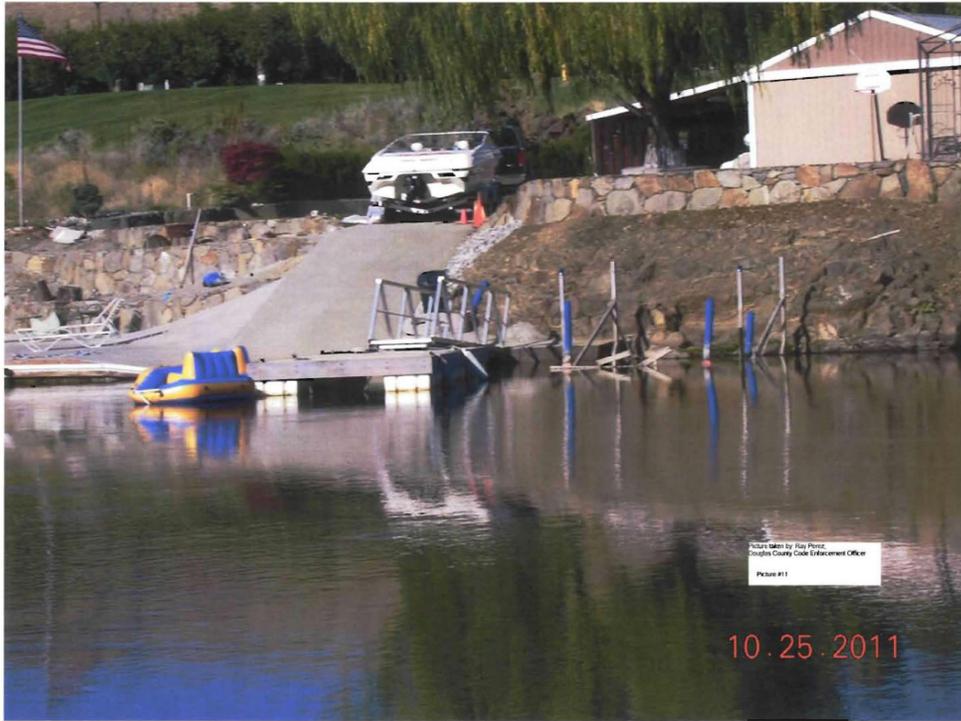
Steven M. Clem, WSBA #7466
Prosecuting Attorney
For Respondent Douglas County

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APPENDIX A
CP 423

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Picture taken by Ryan Perutz
Douglas County Code Enforcement Officer

Picture #11

10.25.2011

APPENDIX B

DOUGLAS COUNTY CODE SECTIONS (Relevant Excerpts)

19.18.030 Exemptions.

The activities enumerated below are exempt from the provisions of this chapter. The final determination of whether an activity is exempt is an administrative function of the director.

A. Normal maintenance or repair of existing buildings, structures, roads or development, including damage by accident, fire or natural elements. Normal repair of buildings and structures involves restoring to a state comparable to the original condition including the replacement of walls, fixtures and plumbing; provided that the value of work and materials in any twelve-month period does not exceed twenty-five percent of the value of the structure prior to such work as determined by using the most recent ICBO construction tables, the repair does not expand the number of dwelling units in a residential building, the building or structure is not physically expanded, and, in the case of damaged buildings and structures, a complete application for repair is accepted by the department within six months of the event and repair is completed within the terms of the permit;

B. Emergency construction necessary to protect property from damage by the elements. An emergency is an unanticipated event or occurrence which poses an imminent threat to public health, safety, or the environment, and which requires immediate action within a time too short to allow full compliance. Once the threat to the public health, safety, or the environment has dissipated, the construction undertaken as a result of the previous emergency shall then be subject to and brought into full compliance with this chapter;

C. Agricultural activities normal or necessary to general farming conducted according to industry-recognized best management practices including the raising of crops or the grazing of livestock;

D. The normal maintenance and repair of culverts and bridges that does not involve the use of heavy equipment, and that does not require permit issuance from other local, state or federal agencies.

9.18.070 Mitigation, maintenance, monitoring and contingency.

A. Mitigation, maintenance, monitoring and contingency plans shall be implemented by the developer to protect resource lands, critical areas and their buffers prior to the commencement of any development activities.

B. The property owner shall be responsible for reporting to the department and undertaking appropriate corrective action when monitoring reveals a significant deviation from predicted impacts or a failure of mitigation or maintenance measures.

19.18B.030 Designation.

All existing lands, shorelands and waters of Douglas County classified according to the provisions in DCC Section 19.18B.020, as determined by the review authority, are designated as wetlands.

19.18B.035 Wetland management and mitigation plan.

A. A wetland management and mitigation plan shall be required when impacts to a wetland are unavoidable during project development.

B. Wetland management and mitigation plans shall be prepared by a biologist or wetland ecologist who is knowledgeable of wetland conditions within North Central Washington.

C. The wetland management and mitigation plan shall demonstrate, when implemented, that there shall be no net loss of the ecological function or acreage of the wetland.

D. The wetland management and mitigation plan shall identify how impacts from the proposed project shall be mitigated, as well as the necessary monitoring and contingency actions for the continued maintenance of the wetland and its associated buffer.

E. The wetland management and mitigation plan shall contain a report that includes, but is not limited to, the following information:

F. Mitigation ratios shall be used when impacts to wetlands cannot be avoided

19.18B.040 Application requirements.

Development permit applications shall provide appropriate information on forms provided by the review authority, including without limitation the information described below. Additional reports or information to identify potential impacts and mitigation measures to wetlands may be required if deemed necessary.

Development within a wetland or its buffer shall provide the following information:

1. Wetland boundary survey and rating evaluation pursuant to DCC Section 19.18B.020;
2. Wetland management and mitigation plan pursuant to DCC 19.18B.035 . . .

19.18B.050 General standards.

The following minimum standards shall apply to all development activities occurring within designated wetlands and/or their buffers.

A. Wetlands will be left undisturbed, unless the development proposal involves appropriate mitigation and enhancement measures as determined on a site-specific basis.

B. Appropriate buffer areas shall be maintained between all permitted uses and activities and the designated wetland

19.18B.060 Specific standards.

The following standards shall apply to the activity identified below, in addition to the general standards outlined in DCC Section 19.18B.050.

- A. Docks. Construction of a dock, pier, moorage, float or launch facility may be authorized subject to the following standards:
 - 1. The dock/facility shall be in substantial conformance with the Douglas County shoreline master program;
 - 2. The dock/facility and landward access shall not significantly alter the existing wetland or buffer vegetation; and,
 - 3. For all land divisions, dock/facilities shall be designed, designated and constructed for joint use.
- B. Road Repair and Construction.
- C. Developments within a wetland buffer shall comply with the following minimum standards
- D. Stream Crossings.

19.18C.010 Permitted uses and activities.

Uses and activities allowed within designated habitat conservation areas are those uses permitted by the zoning district, subject to the provisions of this chapter.

19.18C.020 Identification.

- A. All fish and wildlife habitat conservation areas shall be identified by Douglas County to reflect the relative function, value and uniqueness of the habitat area
- B. Fish and wildlife habitat conservation areas include
- 4. Waters of the state

Identification and regulation of all wetlands, riparian areas, lakes, ponds, streams and rivers shall be in accordance with DCC Chapter 19.18B, Resource Lands Critical Areas—Wetlands.

19.18C.030 Designation.

All existing areas of unincorporated Douglas County identified as stated in DCC Section 19.18C.020, as determined by the review authority, are designated as fish and wildlife habitat conservation areas.

19.18C.035 Habitat boundary survey.

A. A wildlife habitat boundary survey and evaluation shall be conducted by a fish or wildlife biologist

19.18C.037 Fish/wildlife habitat management and mitigation plan.

A. A fish/wildlife habitat management and mitigation plan shall be prepared by a biologist who is knowledgeable of wildlife habitat within North Central Washington.

B. The fish/wildlife habitat management and mitigation plan shall demonstrate, when implemented, that the net loss of ecological function of habitat is minimal.

C. The fish/wildlife habitat management and mitigation plan shall identify how impacts from the proposed project shall be mitigated, as well as the necessary monitoring and contingency actions for the continued maintenance of the habitat conservation area and any associated buffer.

D. The fish/wildlife habitat management and mitigation plan shall contain a report containing, but not limited to, the following information

19.18C.040 Application requirements.

Development permit applications shall provide appropriate information on forms provided by the review authority, including without limitation the information described below. Additional

reports or information to identify potential impacts and mitigation measures to fish and wildlife habitat conservation areas may be required if deemed necessary.

Projects processed according to DCC Section 14.10.030 or Section 14.10.040 within a fish or wildlife habitat conservation area or its buffer shall provide the following information

19.18C.050 General standards.

The following minimum standards shall apply to all development activities occurring within designated habitat conservation areas and their associated buffers

19.18C.060 Specific standards.

The following standards shall apply to the activity identified below, in addition to the general standards outlined in DCC Section 19.18C.050.

A. Road Repair and Construction. . . .

B. All developments processed according to DCC Section 14.10.020, 14.10.030 or Section 14.10.040 authorized within a designated habitat conservation area shall comply with the following minimum standards