

## **Selected Washington Appeals Court Decisions Pertaining To Land Use Law** **In Reverse Chronological Order**

### **63646-4 – I. Citizens For Rational Shoreline Planning, Et Ano. V. Whatcom County and Dept. of Ecology. File Date: May 10, 2010.**

Dwyer, C.J. -- At issue in this appeal from the superior court's CR 12(b)(6) order of dismissal is whether shoreline master programs (SMPs), developed pursuant to the Shoreline Management Act of 1971, chapter 90.58 RCW, are subject to RCW 82.02.020, **which prohibits local governments from imposing direct or indirect taxes, fees, or charges on development.**

Because of the pervasive and necessary involvement of the state, through the Department of Ecology, in the development, review, and approval of SMPs, the superior court correctly ruled that RCW 82.02.020's prohibitions do not apply to these regulations. SMPs are developed at the insistence of, and with direction by, the state and are effective only upon state approval. **Because of the state's involvement, SMP provisions do not constitute local regulations constrained by RCW 82.02.020.** The superior court correctly so ruled.

### **63901-3 – I. Eloise Kailin et al V. Clallam County et al. File Date: November 9, 2009.**

Cox, J. -- The sole issue in this case is whether the shorelines hearings board has subject matter jurisdiction to review conditions to a substantial development permit where those conditions arise from Clallam County's critical areas ordinance. **Because the critical areas ordinance is not a part of the County's shoreline master program, the shorelines hearings board lacks jurisdiction to consider issues regarding that ordinance.** We reverse the superior court and reinstate the decision of the shorelines hearings board.

### **34780-6 – II. Kelly & Sally Samson, Et Al., Appellants V. City Of Bainbridge Island, Et Al., File Date: February 24, 2009.**

Bridgewater, J. Kelly and Sally Samson and Robert and Joanne Hacker (Samson) appeal the Central Puget Sound Growth Management Hearings Board's (Board) decision to affirm the city of Bainbridge Island's (City) amendment to the City's Shoreline Master Program (SMP), allowing the City to prohibit construction of new single-use private docks and to limit dock construction in Blakely Harbor to two joint-use docks, one community dock, floats, and buoys.

We hold that the Department of Ecology's (Ecology) proposed guidelines, which were not in effect when the City forwarded its amendment to Ecology for review, were not applicable to the City's amendment to its SMP that Ecology examined to confirm compliance with the Shoreline Management Act (SMA).

Also, the City's amendment to its SMP prohibiting private docks in this shoreline of statewide significance is consistent with statutory guidelines because it promotes the public's ability to enjoy Blakely Harbor's aesthetic qualities and to navigate its waters. The amendment elevates the public interest over local interest, and preserves the unique character of the harbor. We hold that: (1) private docks in Blakely Harbor are not a preferred use; (2) the amendment is consistent with the City's SMP and Comprehensive Plan; and (3) the amendment does not violate the 'public trust' doctrine. To the contrary, it protects the public interest in navigation and recreational use of the harbor. The amendment violates neither due process rights nor equal protection rights by treating this harbor differently from other harbors' the City still allows property owners to use floats and bulkheads, and allows two joint-use docks and a community dock. Finally, the trial court did not err in denying the Samson's request to supplement the administrative record because the document that Samson hoped to add to the record referenced Ecology's newly adopted guidelines, which are inapplicable here. We affirm.

**26459-9 – III. Lloyd A. Herman v. State of Washington, Shorelines Hearings Board, et al. File Date: February 5, 2009.**

Sweeney, J. This appeal follows a decision by the State of Washington Shorelines Hearings Board that affirmed imposition of a substantial penalty on a landowner for violating the terms of an earlier agreement with governmental agencies, and for undertaking substantial development without a permit and in violation of the Shoreline Management Act of 1971 (Shoreline Management Act), chapter 90.58 RCW.

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

**139 Wn. App. 321. ECHO BAY COMMUNITY ASSOCIATION, Appellant, v. THE DEPARTMENT OF NATURAL RESOURCES ET AL., Respondents. No. 34883-7-II. June 19, 2007.**

[1] Statutes — Construction — Review — Standard of Review. Issues of statutory interpretation are reviewed de novo.

[2] Statutes — Construction — Administrative Construction — Deference to Agency — In General. A court will give substantial weight to an agency's interpretation of the statutes and regulations the agency implements and enforces.

[3] Statutes — Construction — Legislative Intent — In General. A court's fundamental duty when interpreting a statute is to ascertain and implement the legislature's intent.

[4] Statutes — Construction — Considered as a Whole — Meaning to All Words. **When interpreting a statute, a court must give meaning to every word used and interpret the statute as written.**

[5] Statutes — Construction — Statutory Language — Plain Meaning — Related Statutes. A court's first step when interpreting a statute is to look at the plain meaning of the statutory terms. The court may also look at related statutes that might disclose legislative intent about the specific provision in question. **The court's goals are to avoid an interpretation that creates conflicts between different provisions and to achieve a harmonious statutory scheme.**

[6] Statutes — Construction — General and Specific Provisions — In General. **A conflict between a general statute and a specific statute is resolved in favor of the specific statute.**

[7] Statutes — Construction — Conflicting Provisions — Time of Enactment — In General. **A conflict between an earlier enacted statute and a later enacted statute is resolved in favor of the later enacted statute.**

[8] State — Waters — Bedlands — Lease — Aquaculture Uses — Persons Authorized To Lease — Statutory Provisions. RCW 79.135.110 confers broad authority on the State to lease tidal bedlands for shellfish cultivation and other aquaculture uses. The only restriction is that the lease must be for an aquaculture use. The statute does not limit who may apply for and receive such leases. RCW 79.130.010, which authorizes the State to lease navigable bedlands to abutting shoreline and tideland owners and lessees, does not impose a limitation on the authority granted by RCW 79.135.110. The two statutes cover different lands and allow for different sorts of leases. Each provides an independent grant of authority to the State.

[9] Statutes — Construction — Administrative Construction — Deference to Agency — Test. **An administrative agency's interpretation of a statute it administers will be upheld by a court if the interpretation reflects a plausible construction of the statutory language and is not contrary to legislative intent and purpose.**

[10] Statutes — Construction — Meaning of Words — Ordinary Meaning — Resort to Dictionary — In General. Where a regulation or statute does not define terms, a court may look to the dictionary for guidance.

[11] State — Waters — Bedlands — Lease — Aquaculture Uses — What Constitutes — Broad Interpretation. For purposes of RCW 79.135.110, which authorizes the State to lease tidal bedlands for shellfish cultivation and other aquaculture uses, the term "aquaculture" is broadly interpreted.

[12] State — Waters — Bedlands — Lease — Aquaculture Uses — What Constitutes — Herring Net Pens. For purposes of RCW 79.135.110, which authorizes the State to lease tidal bedlands for shellfish cultivation and other aquaculture uses, "other aquaculture uses" includes the use of herring net pens to rid herring of fish bacteria, thereby making them easier to freeze, preserve, and sell as bait.

[13] Fish — Aquaculture — What Constitutes — Statutory Provisions — Applicability. The definition of "aquaculture" in RCW 15.85.020 is limited to Title 15 RCW and does not apply to any other provisions of the code.

**136 Wn. App. 580, Jan. 2007. JACK THOMPSON , JR ., ET AL ., Appellants , v. THE DEPARTMENT OF ECOLOGY , Respondent. No. 34036-4-II. January 9, 2007.**

[1] Administrative Law - Judicial Review - Question of Law - Standard of Review. Questions of law raised in an administrative adjudication are reviewed de novo.

[2] Statutes - Construction - Administrative Construction - Deference to Agency - In General. A court will accord substantial weight to an agency's interpretation of a statute it administers.

[3] Waters - Environment - Shoreline Management - Ordinary High Water Mark - What Constitutes - Nature of Vegetation. Under RCW 90.58.030 (2)(b) of the Shoreline Management Act of 1971, the ordinary high water mark of waterfront property occurs where the presence of water is reflected in the vegetation. **This definition may be construed to mean that the ordinary high water mark occurs where aquatic vegetation transitions to terrestrial vegetation.**

Nature of Action: An owner of riverfront property sought judicial review of a Shorelines Hearings Board decision upholding an administrative determination that the ordinary high water mark of the property is the point where the riverbank vegetation transitions from aquatic to terrestrial.

**133 Wn. App. 503, June 2006. PRESERVE OUR ISLANDS ET AL ., Appellants , v. THE SHORELINES HEARINGS BOARD ET AL ., Respondents. Nos. 55655-0-I; 55656-8-I. June 19, 2006.**

[1] Environment - Shoreline Management - Judicial Review - Record. Judicial review of a Shorelines Hearings Board decision is based on the record made before the board.

[2] Environment - Shoreline Management - Statutory Provisions - Construction - Question of Law or Fact - Review - Standard of Review. The interpretation of the Shoreline Management Act of 1971 (chapter 90.58 RCW) is a question of law that is reviewed by a court de novo.

[3] Environment - Shoreline Management - Local Regulations - Construction - Question of Law or Fact - Review - Standard of Review. The interpretation of a local government shoreline regulation is a question of law that is reviewed by a court de novo.

[4] Statutes - Construction - Administrative Construction - Deference to Agency - Agency Expertise. A court will accord deference to an agency's interpretation of the law where the agency has specialized expertise in dealing with the particular issues, but the court is not bound by the agency's interpretation.

[5] Administrative Law - Judicial Review - Question of Law - De Novo Review - Deference to Agency - Agency Expertise. Although questions of law in administrative proceedings are reviewed de novo, a

court will accord deference to the agency's interpretation of a law that pertains to a matter that falls within the agency's area of expertise.

[6] Environment - Shoreline Management - Judicial Review - Deference to Board. The deference, if any, that a court accords when reviewing a Shorelines Hearings Board decision concerning a local government's issuance of a shoreline development permit is accorded to the board, not the local government. This is particularly true where the board has applied its specialized knowledge and expertise following an extensive fact-based inquiry. The board hears shoreline development cases de novo and does not accord deference to underlying local government decisions.

[7] Administrative Law - Judicial Review - Summary Adjudication - Standard of Review - Undisputed Facts. Judicial review of an administrative agency's summary decision in an adjudicative proceeding based on undisputed facts is reviewed by a court de novo.

[8] Statutes - Construction - Legislative Intent - Statutory Language - In General. **A court's primary objective when interpreting a statute or regulation is to ascertain and give effect to legislative intent.** To discern legislative intent, a court starts with the plain language and ordinary meaning of the provision, but the court also looks to the applicable legislative enactment as a whole and seeks to harmonize its provisions by reading them in context with related provisions and the statute as a whole. If the provision remains susceptible to more than one reasonable meaning, it is ambiguous and the court may resort to aides for construing the provision.

[9] Statutes - Construction - Amendment - Change in Language - Presumption - In General. When a legislative body amends a statute, it is presumed that a change in the law is intended.

[10] Environment - Shoreline Management - Development Permit - Water Dependent Use - "Principal Use" - What Constitutes - In General. For purposes of a shoreline development code that defines "water dependent use" as "a principal use which can only exist where the land/water interface provides biological or physical conditions necessary for use" and that defines "use" as an "activity or function carried out on an area of land, or in a building or structure located thereon," a "principal use" is the primary activity or function occurring on (1) an area of land or (2) a building or structure.

[11] Environment - Shoreline Management - Development Permit - Water Dependent Use - "Principal Use" - What Constitutes - Current Permissible Uses. For purposes of a shoreline development code that defines "water dependent use" as "a principal use which can only exist where the land/water interface provides biological or physical conditions necessary for use," what constitutes the "principal use" of a site depends on what the intended use of the property is under the current comprehensive plan and zoning regulations, regardless of how the site has been used in past.

[12] Environment - Shoreline Management - Statutory Provisions - Priority. RCW 36.70A.480 **does not mandate** that the policies and regulations of the Shoreline Management Act (chapter 90.58 RCW) **take priority over** policies and regulations adopted under the Growth Management Act (chapter 36.70A RCW). On the contrary, the statute **requires that regulations implementing the two acts be harmonized** in the process of overall land use planning and regulation and specifically states that a county's shoreline

master program goals and policies are part of its growth management comprehensive plan and that its master program regulations constitute development regulations. **Any other interpretation would create chaos in attempts to implement and apply the numerous, varied, and sometimes competing policies and regulations governing the use of land. (The court declines to follow Biggers v. City of Bainbridge Island, 124 Wn. App. 858 (2004), insofar as it is inconsistent.)**

[13] Statutes - Construction - Acts Relating to Same Subject - Harmonious Construction. It is an overarching principle of statutory construction that related statutory provisions be read as complementary rather than conflicting.

[14] Administrative Law - Rules - Construction - Consistent With Statute. A court will not read statutes and regulations to create a conflict; rather, a court is required to harmonize them when possible.

[15] Mines and Minerals - Environment - Shoreline Management - Development Permit - Water Dependent Use - "Principal Use" - What Constitutes - Commercially Significant Mining Operations - Barge-Loading Dock. When a comprehensive plan designates a site located on a small island without feasible large-scale ground transportation options as mineral resource land having long-term commercial significance and the site is zoned "mineral" to provide for continued extraction and processing of mineral and soil resources, the conduct of mining operations at a commercially significant level at the site, which would require the transport of mineral products by barge, can be the "principal use" of the property within the meaning of a shoreline development code provision defining an allowable "water dependent use" as "a principal use which can only exist where the land/water interface provides biological or physical conditions necessary for use." **As an integral part of such principal use, a shoreline facility to load the barges with the mineral products would be a "water dependent use" allowable under the shoreline development code.**

[16] Administrative Law - Judicial Review - Summary Adjudication - Standard of Review - In General. An agency's summary adjudication will not be disturbed by a reviewing court if there are no disputed issues of fact and the agency has not erroneously interpreted the applicable law.

[17] Mines and Minerals - Environment - Shoreline Management - Development Permit - Conservancy Environment - Commercial or Industrial Development Exclusion - Scope - Mining Operations. A barge-loading facility that is integral to a mining operation is not a commercial or industrial development within the meaning of a provision of county's shoreline development code prohibiting commercial and industrial development in a conservancy environment if the county's shoreline policies discuss commercial and industrial developments in terms that do not include mining operations, the policies specifically do not discourage mining, and the county's shoreline master program discusses commercial, industrial, and mining uses separately.

[18] Administrative Law - Judicial Review - Findings of Fact - Failure To Assign Error - Effect. Administrative findings of fact to which no objection is raised are verities before a reviewing court.

[19] Environment - Shoreline Management - Judicial Review - Test. A court will not reverse a decision of the Shorelines Hearings Board unless (1) the board erroneously interpreted or applied the law or (2) the board's conclusions are unsupported by substantial evidence.

[20] Administrative Law - Judicial Review - Substantial Evidence - What Constitutes. For purposes of the substantial evidence standard of RCW 34.05.570 (3)(e), "substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth or correctness of the order.

[21] Environment - Shoreline Management - Development Permit - Compatibility - Restrictions Specified by Shorelines Hearings Board - Judicial Review - Substantial Evidence. A conclusion by the Shorelines Hearings Board that specified restrictions on a proposed shoreline development will render the development compatible with permitted uses will not be disturbed by a reviewing court if the conclusion is supported by substantial evidence in the record.

[22] Environment - Shoreline Management - Development Permit - Conservancy Environment - Nature of Impacts - Mitigation. The mere fact that a proposed shoreline development is to be located in a critical habitat does not mean that any and all development impacts are significant. Any such impacts that are significant may be mitigated with specific conditional requirements or mitigation measures. The Shorelines Hearings Board's determination that specified requirements and mitigation measures are sufficient to prevent a proposed development from having unreasonable adverse effects on the shoreline and surrounding areas and uses will not be disturbed by a reviewing court if the determination is supported by substantial evidence in the record.

[23] Environment - Shoreline Management - Development Permit - Planning Policies - Effect. While both local and statewide shoreline policies are important to implementing the Shoreline Management Act (chapter 90.58 RCW), **they are only policies and, as such, cannot specify what uses and mitigation measures may be appropriate at a given site.**

[24] Environment - SEPA - Impact Statement - Adequacy - Question of Law or Fact - Review. The adequacy of an environmental impact statement is a question of law that a court reviews de novo.

[25] Environment - SEPA - Impact Statement - Adequacy - Judicial Review - Administrative Determination - Substantial Weight. A government agency's determination that an environmental impact statement is adequate will be accorded substantial weight by a reviewing court.

[26] Environment - SEPA - Impact Statement - Adequacy - Judicial Review - Clearly Erroneous Standard. A court will not overturn an agency's determination of the adequacy of an environmental impact statement under the clearly erroneous standard of review unless the court is left with a definite and firm conviction that the agency has made a mistake.

[27] Environment - SEPA - Impact Statement - Adequacy - Determination - Rule of Reason - Environmental Data. The adequacy of an environmental impact statement depends on the legal sufficiency of the environmental data contained in the impact statement. The sufficiency of the data is measured by the "rule of reason."

[28] Environment - SEPA - Impact Statement - Adequacy - Determination - Rule of Reason - Test. An environmental impact statement is adequate under the rule of reason if it presents a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed development. An environmental impact statement **is not a compendium of every conceivable effect or alternative** to a proposed project but is, simply, an aid to the decision-making process. The environmental impact statement need include only information sufficiently beneficial to the decision-making process to justify the cost of its inclusion. Impacts or alternatives having an insufficient causal relationship, likelihood, or reliability to influence decision makers are "remote" or "speculative" and may be excluded from the impact statement.

[29] Environment - SEPA - Impact Statement - Adequacy - Degree of Detail - Modeling Results and Measurements. An environmental impact statement provides a reasonably thorough discussion of a potential adverse environmental impact if the environmental review is based on extensive use and analysis of valid modeling results and measurements.

[30] Environment - SEPA - Impact Statement - Supplemental Statement - Necessity - Review - Deference to Agency. A reviewing court will accord substantial weight to a government agency's determination that a supplemental environmental impact statement is not required in a particular instance.

[31] Environment - SEPA - Impact Statement - Supplemental Statement - Necessity - Test - In General. Under WAC 197-11-600 (3)(b)(ii), a supplemental environmental impact statement is not required unless (1) there are substantial changes to the proposal that are themselves likely to have significant adverse environmental impacts or (2) new information indicates that the proposal's **probable significant adverse environmental impacts** were not previously covered by the range of alternatives and impacts analyzed in the existing environmental documents.

[32] Environment - SEPA - Impact Statement - Supplemental Statement - Necessity - New Information - Absence. A supplemental environmental impact statement is unwarranted if it would do nothing more to enhance the information already available to the administrative decision-maker.

**132 Wn. App. 239, WASHINGTON SHELL FISH , INC ., Appellant , v. PIERCE COUNTY , Respondent . No. 32471-7-II. March 28, 2006.**

[1] Building Regulations - Land Use Regulations - Judicial Review - Land Use Petition Act - Applicability - In General. Under RCW 36.70C.030 , the Land Use Petition Act (chapter 36.70C RCW) provides the exclusive means for obtaining judicial review of a land use decision if a specific exception does not apply.

[2] Administrative Law - Judicial Review - Conclusions of Law - Standard of Review. Administrative conclusions of law are reviewed by a court de novo.

[3] Environment - Shoreline Management - Statutory Provisions - Construction - Protection of Shorelines. The Shoreline Management Act of 1971 (chapter 90.58 RCW) is broadly and liberally construed to effect its purpose of protecting state shorelines.



[4] Environment - Shoreline Management - Statutory Provisions - Purposes. The purposes of the Shoreline Management Act of 1971 (chapter 90.58 RCW) are (1) to protect and manage the private and public shorelines of Washington State; (2) to protect against adverse effects to public health, public rights of navigation, land, vegetation, and wildlife; and (3) to plan for and foster reasonable and appropriate shoreline uses.

[5] Environment - Shoreline Management - Statutory Provisions - Scope. The Shoreline Management Act of 1971 (chapter 90.58 RCW) regulates "uses" of shoreline waters as well as "developments" on them.

[6] Environment - Shoreline Management - Development Permit - Scope - In General. Substantial development permits, conditional use permits, and variances are encompassed by the shoreline permit system that local governments are required to develop and administer under the Shoreline Management Act of 1971 (chapter 90.58 RCW).

[7] Fish - Clams - Geoducks - Seeding and Harvesting - Shoreline Permit - Necessity - Substantial Development. Under a local ordinance enacted pursuant to the Shoreline Management Act of 1971 (chapter 90.58 RCW) a substantial development permit is required when (1) any project of a permanent or temporary nature interferes with the normal public use of the surface waters overlying lands subject to the Shoreline Management Act at any state of water level and (2) it exceeds the specified minimum cost or fair market value. A development or use that is subject to the Shoreline Management Act does not require a permit if it is exempt.

[8] Counties - Ordinances - Construction - Applicable Rules. **County ordinances and county codes are interpreted in the same manner as statutes, using the general rules of statutory construction.**

[9] Counties - Ordinances - Construction - Legislative Intent - Plain Language. A court's objective in construing a county ordinance or code section is to ascertain and carry out the intent and purpose of the county council. In determining the legislative intent of a county ordinance or code section, a court first looks to the plain language thereof.

[10] Fish - Clams - Geoducks - Seeding and Harvesting - Shoreline Permit - Necessity - Use "Permitted Outright" - Effect. Commercial geoduck seeding and harvesting are not exempt from shoreline substantial development permit review under a local ordinance stating that "subject to the guidelines for reviewing substantial development permits, geoduck harvesting is permitted outright in all shoreline environments." The "subject to" phrase clearly subjects geoduck seeding and harvesting to substantial development regulation. **The clause that geoduck harvesting is "permitted outright in all shoreline developments" does not exempt geoduck seeding and harvesting from shoreline substantial development permit review means only that geoduck seeding and harvesting, as opposed to some other use, is permitted in the shoreline environment without need for a conditional or special use permit.**

[11] Building Regulations - Land Use Regulations - Use "Permitted Outright" - Effect. **When a land use is "permitted outright" by a local land use and development code, it means that the use is presumptively allowed in a certain zone and that a conditional use permit, a nonconforming use permit, or an administrative use permit is not required. It does not mean that the use is exempt from all permitting.**

The use may still require a building permit or a shoreline substantial development permit, if applicable, or some other license that may be required by law.

[12] Counties - Land Use Controls - Growth Management Act - Critical Areas Planning - Proposed Use - County Approval - Necessity. Where a county, pursuant to the Growth Management Act (chapter 36.70A RCW), has enacted regulations to protect designated critical areas, the county's authorization is required before any activity may be undertaken in a designated critical area. The authorization is in addition to and separate from any other permit or license that may be required by law.

[13] Appeal - Review - Constitutional Issues - Analysis - Necessity. An appellate court may decline to consider whether an argument is constitutional or nonconstitutional if it has not been provided with supporting argument.

[14] Constitutional Law - Due Process - Hearing - Necessity - Property Interest. A person who does not have a valid existing property interest in a particular activity on land is not entitled to a hearing before the government issues an order to cease and desist the activity.

[15] Eminent Domain - Inverse Condemnation - Regulatory Taking - Exhaustion of Administrative Remedies - Necessity. A person claiming that the enforcement of a land use regulation has resulted in an unconstitutional taking may seek redress in court only if all administrative remedies have been exhausted.

Nature of Action: A company engaged in the business of geoduck seeding and harvesting sought judicial review of a hearing examiner's decision upholding cease and desist orders issued against the company for seeding and harvesting geoducks without a shoreline permit and for working in eelgrass beds without authorization.

**31816-4-II City of Bainbridge Island, Respondent/Cross App. v. Annette Brennan etal, Appellants.**

**File Date: July 20, 2005. *DO NOT CITE. SEE RAP 10.4(h).***

QUINN-BRINTNALL, C.J. In this case we are asked to resolve the question of who owns tidelands fronting a road end on Bainbridge Island. Record owners of undivided fractional interests in these tidelands ('Tidelands') appeal a trial court order quieting title to the Tidelands in the City of Bainbridge Island; they contend that the trial court erred when it found that the original owner of the Tidelands had dedicated the property to the City and that the bona fide purchaser doctrine did not apply. Although the trial court did not rule on these issues, they also assert that the public is not entitled to a prescriptive easement in the Tidelands and that the City cannot dedicate the Tidelands to public use based on its status as a cotenant. In addition, the record owners contend that by agreement and acquiescence, a fence marked the boundary between public and private property; that the City's claims are barred by estoppel, laches, and abandonment; and that the trial court erred in requiring certain owners to remove trees and a fence from the right-of-way. Finally, the record owners contend that the trial court erred in dismissing their 42 U.S.C. sec. 1983 claims on summary judgment.

The City cross-appeals the trial court's determination that neighboring property owners need not remove a wooden bulkhead that the neighbors assert hampers access to the Tidelands. The Larson's, defendants in the original action and owners of a 1/80 undivided interest in the Tidelands, appeal the trial court's dismissal of their public trust doctrine claim on summary judgment. We affirm in all respects.

A dedicated right-of-way laid out to navigable waters is presumed to provide access to the water's edge, and the record owners were on notice of the public nature of the Tidelands when they purchased their properties. We hold that there was no boundary change by acquiescence and reject the record owners' asserted affirmative defenses. We hold that the trial court did not abuse its discretion in ordering that a fence encroaching on the right-of-way be removed. And we affirm the trial court's summary judgment dismissing the owners' 42 U.S.C. sec. 1983 claims. But we decline to reverse the trial court's finding that a neighboring landowner need not remove a wooden bulkhead, *and we hold that under the public trust doctrine, the public, including the Larsons, may use the neighboring tidelands when covered by water, but when the tide is out, the public has no right to walk across private property.*

**128 Wn. App. 202, ALAN HARRINGTON , Appellant , v. SPOKANE COUNTY , Respondent . No. 22837-1-III. June 23, 2005.**

[1] Judgment - Summary Judgment - Review - Standard of Review. A summary judgment is reviewed by an appellate court de novo. The court engages in the same inquiry as the trial court under CR 56(c), viewing the facts of the case and the reasonable inferences from those facts in the light most favorable to the nonmoving party. Questions of law are reviewed de novo.

[2] Appeal - Review - Documentary Evidence - Standard of Review. *When the appellate record consists entirely of written materials, the appellate court is in the same position as the trial court and reviews the record de novo.*

[3] Statutes - Procedural Requirements - Standard of Review. *A decision that turns on the interpretation of statutory procedural requirements is reviewed de novo.*

[4] Statutes - Construction - Review - Standard of Review. *The interpretation of a statute is reviewed de novo.*

[5] Courts - Jurisdiction - Review - Standard of Review - In General. The issue of a court's jurisdiction to hear a matter is reviewed de novo.

[6] Parties - Standing - Jurisdictional Issue. Whether a party has standing to bring a particular claim before a court is a jurisdictional issue.

[7] Administrative Law - Judicial Review - Exhaustion of Administrative Remedies - Necessity. A party must exhaust all available administrative remedies before a court may grant relief from an

administrative decision. A court will not intervene where an exclusive administrative remedy is provided.

[8] Administrative Law - Judicial Review - Exhaustion of Administrative Remedies - Constitutional Issues. A party must exhaust administrative remedies to have standing to seek judicial consideration of an as-applied constitutional challenge to the validity of an administrative act or decision.

[9] Building Regulations - Land Use Regulations - Judicial Review - Land Use Petition Act - Exhaustion of Administrative Remedies - Necessity. Judicial review of a land use decision may not be obtained under the Land Use Petition Act (chapter 36.70C RCW) unless administrative remedies have been exhausted. The exhaustion requirement also applies when an as-applied constitutional challenge is made to a land use decision.

[10] Building Regulations - Land Use Regulations - Judicial Review - Land Use Petition Act - Petition for Review - 21-Day Limitation Period - "Land Use Decision" - Modified Building Permit. A modified building permit, or one that grants in part and denies in part the application made therefor, is a "land use decision" within the meaning of RCW 36.70C.040 (3) of the Land Use Petition Act that **is subject to review by the superior court** upon a petition for review filed by the permit applicant within 21 days of the date the permit was issued.

[11] Building Regulations - Land Use Regulations - Judicial Review - Land Use Petition Act - Petition for Review - 21-Day Limitation Period - "Land Use Decision" - Adverse Letter Ruling - Permit Ultimately Granted. **An adverse letter ruling made by an agency** prior to ultimately granting partial approval of an applicant's request for a building permit **is not, in general, a "land use decision" within the meaning of RCW 36.70C.040 (3) for purposes of triggering the 21-day limitation period.**

**124 Wn. App. 441, WASHINGTON STATE GEODUCK HARVEST ASSOCIATION , Appellant , v. THE DEPARTMENT OF NATURAL RESOURCES , et AL ., Respondents . No. 31004-0-II. November 30, 2004.**

[1] Judgment - Summary Judgment - Review - Matters Considered - Evidence Called to Trial Court's Attention - In General. An appellate court reviewing a summary judgment may consider only factual averments and issues called to the trial court's attention.

[2] Statutes - Validity - Presumption - Burden of Proof - Degree of Proof. A statute is presumed to be constitutional and will not be invalidated unless it is proved to be unconstitutional beyond a reasonable doubt. The burden of proving that a statute is unconstitutional is on the party making the challenge.

[3] Fish - Clams - Geoducks - Regulation - Public Lands - Aquatic Lands - Authority of State. Under chapters 79.02 and 79.90 RCW, the Department of Natural Resources may manage and sell as valuable materials geoducks embedded in the soil of public lands, including state-owned aquatic lands.

[4] Fish - Clams - Geoducks - Regulation - Sales - As Valuable Materials - Statutory Provisions. RCW 79.96.080 specifies that geoducks shall be "sold as" valuable materials under the provisions of chapter

79.90 RCW. It does not specify that geoducks "are" valuable materials within the meaning of the statute. RCW 79.96.080 therefore does not conflict with the RCW 79.90.060 definition of "valuable materials." [5] Waters - Public Access - Public Trust Doctrine - State's Duty - In General. Under the public trust doctrine, the State must protect public interests in certain uses of state-owned tidelands, shorelands, and the beds of navigable waters, including commerce, navigation, and commercial fishing and the incidental rights of private fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. **The public trust doctrine necessarily obligates the State to balance the protection of the public's right to use resources on public land with the protection of the resources that enable such activities.**

[6] Fish - Clams - Ownership - Naturally Occurring Clams - Aquatic Lands. Naturally occurring clams embedded in the soil of aquatic lands are not animals *ferae naturae*. The fixed habitation of clams when embedded in soil differs from that of fish, game birds, and game animals in their wild or natural state. **In a very material sense, the clams belong with the land.**

[7] Waters - Public Access - Public Trust Doctrine - State's Duty - Disposal of Interest. **The public trust doctrine prohibits the State from disposing of its interest in the waters of the state in such a way that the public's right of access is substantially impaired, unless the action promotes the overall interests of the public.**

[8] Waters - Public Access - Public Trust Doctrine - Scope - Determination by State. It is for each state, individually, to determine the limits of the public trust doctrine within state boundaries.

[9] Waters - Public Access - Public Trust Doctrine - Geoduck Harvesting - State-Owned Beds of Navigable Waters. **The harvesting of geoducks embedded in state-owned beds of navigable waters is an interest protected by the public trust doctrine.**

[10] Waters - Public Access - Public Trust Doctrine - Violation - Test. **The State does not violate its responsibility under the public trust doctrine unless it gives up its right of control over the *jus publicum* and, in doing so, it fails to promote or substantially impairs the interests of the public in the *jus publicum*.**

[11] Public Lands - Public Access - Statutory Provisions - Review - Heightened Scrutiny. A statute that is being measured against constitutional protections for public access to unique resources is reviewed under heightened scrutiny.

[12] Waters - Public Access - Public Trust Doctrine - Geoduck Harvesting - Validity. The State does not violate the public trust doctrine by allowing commercial harvesting of geoducks embedded in the state-owned beds of navigable waters under specific procedures and requirements by which no title to state land is conveyed, the State is responsible for appraising the resources in the beds, bidders must provide an estimate of geoducks to be removed, the State may apply such terms and conditions as it deems necessary to protect the interests of the State, the State has the right to revoke or suspend a commercial harvesting agreement, the harvester must comply with applicable commercial diving safety standards and federal occupational safety and health administration regulations, and the proceeds from

the sale of harvesting rights go to support aquatic resource management and enhancement of aquatic lands for all uses by the public.

[13] Constitutional Law - Equal Protection - Scope - Classless Regulation. **The constitutional principle of equal protection of the laws is not implicated by a statute that does not create a suspect class of persons.**

[14] Fish - Clams - Geoducks - Regulation - Commercial Harvesting - Validity - Privileges and Immunities - Equal Protection. RCW 79.96.080 , which regulates commercial geoduck harvesting, does not violate the privileges and immunities clause of Const. art. I, § 12. Geoducks, not being citizens, are not entitled to equal protection of the laws. RCW 79.96.080 applies to geoduck harvesting but does not create a class of geoduck harvesters. The State may therefore regulate geoduck harvesting differently from other fish and shellfish harvesting.

[15] Fish - Clams - Geoducks - Fish and Wildlife Management - Statutory Provisions - Applicability. RCW 77.04.012 , which provides a set of general objectives for the guidance of the Fish and Wildlife Commission, its director, and the Department of Fish and Wildlife in their management of wildlife, fish, and shellfish in state and offshore waters, does not control the regulation of commercial geoduck harvesting by the Department of Natural Resources under RCW 79.96.080 .

**117 Wn. App. 781, FREDERICK J. BROWN, Respondent, v. THE CITY OF SEATTLE, Appellant. No. 49719-7-I. May 5, 2003.**

SCHINDLER, J. - This appeal concerns the city of Seattle's (the City's) authority to regulate vessels under the land use code in effect when it issued a notice of violation (NOV) in this case. Brown, the respondent, owns and operates a tugboat called the **M/V Challenger**. Aboard the boat, Brown runs a bed and breakfast. The City issued an NOV to Brown on the grounds that his use of the vessel as lodging violated the shoreline regulations of the City's land use code. Brown filed a lawsuit under the Land Use Petition Act (LUPA), chapter 36.70C RCW, challenging the City's authority to issue the NOV because the Challenger was exempt from regulation under the City's code. Brown also asserted that this code provision was void for vagueness and the City violated his rights to procedural and substantive due process. The trial court agreed that Brown's use of his vessel was exempt from regulation and the City did not have the authority to issue the NOV. The trial court dismissed Brown's other claims. The City appeals and Brown cross-appeals. **Because the City's shoreline regulations in effect at the time explicitly exempted navigable vessels, the City was without authority to regulate the Challenger**, and we affirm the court's decision to vacate the NOV. We affirm the trial court's dismissal of Brown's constitutional claims and its decision to award costs to Brown under RCW 4.84.030.

**115 Wn. App. 417, WILLAPA GRAYS HARBOR OYSTER GROWERS ASSOCIATION, Respondent, v. MOBY DICK CORPORATION, Appellant, PACIFIC COUNTY, Respondent. WILLAPA GRAYS HARBOR OYSTER**

**GROWERS ASSOCIATION, Petitioner, v. THE SHORELINES HEARINGS BOARD, ET AL., Respondents.  
Nos. 27552-0-II; 27959-2-II. February 7, 2003.**

BRIDGEWATER, J. - These consolidated appeals concern two land use decisions that, together, allow the Moby Dick Hotel to expand. The first concerns a Shoreline Substantial Development Permit (SSDP) that Pacific County (County) issued in favor of the Moby Dick and the Shorelines Hearings Board's (SHB) subsequent affirmance of that permit. The second decision, also by the County, amended a concomitant rezone agreement (CRA) to allow the Moby Dick's expansion. The superior court reversed the amendment, finding that the amendment was a spot zone. The Willapa Grays Harbor Oyster Growers Association (Association) challenges the SSDP, and the Moby Dick challenges the spot zone ruling.

We hold that, **because the Moby Dick obtained an SSDP in 1990 to expand and modernize, which the Association did not appeal, collateral estoppel bars the Association's claim that the Moby Dick cannot expand and modernize** under the 2000 SSDP. Also, substantial evidence supports the several required findings for the 2000 SSDP. Therefore, we affirm the SHB. In the consolidated challenge to the CRA, we reverse the superior court and hold that the amendment is not a spot zone and is consistent with the comprehensive plan.

**115 Wn. App. 164, H&H PARTNERSHIP, Respondent, v. THE STATE OF WASHINGTON, et AL.,  
Appellants. No. 28073-6-II. January 24, 2003.**

BRIDGEWATER, J. - H&H Partnership obtained a shoreline development permit from the city of Tacoma. The Department of Ecology (Ecology) appealed to the Shorelines Hearings Board (Board) more than 21 days after receiving the city's decision, arguing that WAC 173-27-130(6) gave it time until there was a "complete submittal." H&H moved for dismissal, and the Board denied H&H's motion. H&H then petitioned the superior court to dismiss Ecology's appeal. **After determining that WAC 173-27-130(6) exceeded Ecology's authority under the Shoreline Management Act of 1971, chapter 90.58 RCW, the superior court dismissed Ecology's appeal as untimely and awarded H&H attorney fees. We hold that Ecology could not expand the time limit of 21 days the legislature set in its unambiguous statute** by the adoption of WAC 173-27-130(6). We affirm.

**105 Wn. App. 143, SHERILYN WELLS, ET AL., Respondents, v. WHATCOM COUNTY WATER DISTRICT  
No. 10, ET AL., Appellants. No. A 7262-3-I. March 5, 2001.**

[1] Building Regulations - Land Use Regulations - Judicial Review - Land Use Petition Act - Appellate Review - Record - Agency Record. **An appellate court** reviewing a judgment entered by a superior court on judicial review of a local land use decision under the Land Use Petition Act (chapter 36.70C RCW) stands in the shoes of the superior court and **reviews de novo the local agency's decision on the basis of the agency record.**

[2] Environment - SEPA - Impact Statement - Supplemental Statement - Necessity - New Information - "Probable" Significant impact - What Constitutes. For purposes of WAC 197-11-600(3) (b)(ii), under which

an agency is required to supplement an existing environmental impact statement if there is new information indicating a proposal's probable significant adverse environmental impacts, "probable" is defined by WAC 197-11-782 to mean likely or reasonably likely to occur, as distinguished from merely having a possibility of occurring and being remote or speculative.

[3] Environment - SEPA - Impact Statement - Supplemental Statement - - Necessity - New Information - Unsupported Documentary Statements. An unsigned governmental document containing conclusory statements unsupported by any empirical evidence or supporting information does not constitute "new information" within the meaning of WAC 197-11-600(3)(b)(ii), under which an agency is required to supplement an existing environmental impact statement if there is new information indicating a proposal's probable significant adverse environmental impacts.

[4] Environment - SEPA - Governmental Action - Judicial Review - Timeliness - Statutory Provisions - Scope. The 21-day time limit of RCW 43.21C.080(2)(a) for challenging a governmental action alleged to be in violation of the State Environment Policy Act (chapter 43.21C RCW) applies to all challenges alleging noncompliance with the Act, including an argument that "new information" requires supplementation of a final environmental impact statement.

[5] Environment - SEPA - Impact Statement - Supplemental Statement - Necessity - New Information - Limitation Period. A claim that "new information" requires supplementation of a final environmental impact statement under WAC 197-11-600(3)(b)(ii) is subject to the 21-day time limitation of RCW 43.21C.080(2)(a) for challenging a governmental action under the State Environmental Policy Act (chapter 43.21C RCW).

[6] Environment - SEPA - Governmental Action - Judicial Review - Timeliness - Statutory Provisions - Purpose. The purpose of the 21-day time limitation of RCW 43.21C.080(2)(a) for challenging a governmental action under the State Environmental Policy Act (chapter 43.21C RCW) is to prohibit multiple challenges to proposals based on allegations of State Environmental Policy Act noncompliance.

[7] Environment - SEPA - Governmental Action - Judicial Review - Timeliness - Subsequent Government Action on Proposal - Significant Impact. Under RCW 43.21C.080(2)(b), a further challenge to a governmental action under the State Environmental Policy Act (chapter 43.21C RCW) after the 21-day limitation period has expired is not allowed unless there has been a substantial change in the proposal subject to environmental review that, if approved, would likely have new significant adverse environmental impacts or an impact previously identified as needing further evaluation.

[8] Environment - SEPA - Governmental Action - Judicial Review - Timeliness - Commencement of Time Period - Notice of Governmental Action - Contents. The 21-day time limit of RCW 43.21C.080(2)(a) for challenging a governmental action under the State Environmental Policy Act (chapter 43.21C RCW) may be triggered by a Notice of Action issued after approval of a final environmental impact statement for a proposed project that describes the governmental action to be taken in furtherance of the project; that sets forth the various alternative actions the government plans to pursue, as explained in the final environmental impact statement; and that explicitly states the time limitation for challenging the project on grounds of noncompliance with the State Environmental Policy Act.



[9] Appeal - Record on Appeal - Evidence Not in Record - Citation - Validity - Sanctions. **A party on appeal may not cite to evidence not in the appellate record and may be sanctioned for doing so.**

[10] Zoning -- Conditional Use Permit - Administrative Procedure - Matters Considered - Interests of Neighboring Property Owners - Validity - Context. An administrative agency ruling on a conditional use permit application may consider the interests of neighboring property owners as they relate to whether the development proposal meets the particular criteria of the laws governing the permitting process.

[11] Administrative Law - Appearance of Fairness - Violation - Allegation - Timeliness - Raised For First Time Before Appellate Court. An allegation that a local hearing examiner was biased or prejudiced is untimely if it is raised for the first time before an appellate court.

[12] Administrative Law - Appearance of Fairness - Applicability - Land Use Decision - Conditional Use Permit. **A proceeding before a local hearing examiner on an application for a conditional use permit is subject to the appearance of fairness doctrine of chapter 42.36 RCW.**

[13] Administrative Law - Appearance of Fairness - Violation - Proof - Comment Taken Out of Context. A violation of the appearance of fairness doctrine is not established by a comment taken out of context.

[14] Building Regulations - Building Permit - Adverse Impacts - Indirect Impacts - Preexisting Legal Rights. **A project permit may not be denied on the basis of adverse impacts only indirectly related to the project proposal that may arise by exercise of legal rights predating the inception of the project.**

[15] Building Regulations - Building Permit - Adverse Impacts - Hypothetical Impacts. **A land use permit may not be denied on the basis of hypothetical adverse impacts.**

**100 Wn. App. 341, BELLEVUE FARM OWNERS ASSOCIATION, Appellant, v. THE SHORELINES HEARINGS BOARD, ET AL., Respondents. No. 24401-2-II. March 31, 2000.**

[1] Environment - Shoreline Management - Statutory Provisions - Construction - Protection of Shorelines. The Shoreline Management Act (RCW 90.58) is broadly construed so as to protect the state shorelines as fully as possible.

[2] Environment - Shoreline Management - Development Permit - Administrative Review - De Novo Review. The Shorelines Hearings Board reviews de novo a local government's denial or grant of a shoreline substantial development permit.

[3] Environment - Shoreline Management - Development Permit - Administrative Review - Determination of Nonsignificance - Effect. A county's issuance of a determination of nonsignificance after conducting a State Environment Policy Act review of an application for a shoreline development permit does not preclude the Shorelines Hearings Board's independent review of the application under the Shoreline Management Act (RCW 90.58) and the local shoreline master program. **Nor does it preclude other agencies from making an independent environmental assessment.**

[4] Environment - Shoreline Management - Master Program - Aesthetics - Vagueness. **A shoreline master program's regulation of aesthetics by describing protected scenic views in general terms is not void for vagueness.**

[5] Environment - Shoreline Management - Judicial Review - Administrative Procedure Act - Applicability. Judicial review of a Shorelines Hearings Board decision is governed by RCW 34.05.570(3) of the Administrative Procedure Act.

[6] Environment - Shoreline Management - Judicial Review - Appellate Review - Decision Subject to Review. **Appellate review of a shoreline land use decision is of the decision of the Shorelines Hearings Board, not the decision of the trial court.**

[7] Environment - Shoreline Management - Judicial Review - Test. An appellate court will not reverse a decision of the Shorelines Hearings Board unless (1) it is clearly erroneous in light of the record and the policies of the Shoreline Management Act (RCW 90.58) and (2) the court is firmly convinced that the Board erred in light of the policies of the Act.

[8] Environment - Shoreline Management - Master Program - Construction - Question of Law or Fact - Review. **The interpretation of a master shoreline program and the Shoreline Management Act (RCW 90.58) are questions of law that are reviewed by a court under the error of law standard.**

[9] Statutes - Construction - Administrative Construction - Deference to Agency - Agency Expertise. A court accords substantial weight to an agency's interpretation of a law within its realm of expertise.

[10] Environment - Shoreline Management - Judicial Review - Standard of Review. Although a reviewing court may substitute its interpretation of the Shoreline Management Act (RCW 90.58) for that of the Shorelines Hearings Board, the court will not reverse the Board's decision unless the Board engaged in unlawful procedure or decision-making process, failed to follow a prescribed procedure, or erroneously interpreted or applied the law.

[11] Environment - Shoreline Management - Judicial Review - Arbitrary and Capricious - What Constitutes. A decision of the Shorelines Hearings Board is not arbitrary and capricious unless it is willful, unreasoning, and in disregard of the facts and circumstances. **When there is room for two opinions, a decision honestly reached upon due consideration is not arbitrary and capricious.**

**100 Wn. App. 158, THE CITY OF BREMERTON, Respondent, v. WILLIAM SESKO, ET AL., Appellants. Nos. 23150-6-II; 23421-1-II. February 25, 2000.**

[1] Injunction - Review - Standard of Review. An appellate court reviews a trial court's decision to grant an injunction for an abuse of discretion, giving great deference to the trial court's decision.

[2] Appeal - Assignments of Error - Authority - Necessity. An appellate court will not consider an issue unsupported by citation to authority.

[3] Environment - Shoreline Management - Local Zoning Codes - Enforcement. **Local zoning regulations that are stricter than but do not conflict with the Shoreline Management Act (RCW 90.58) are enforceable.**

[4] Judgment - Collateral Estoppel - Elements - In General. The doctrine of collateral Estelle bars the relitigation of an issue if (1) the issue is identical to one adjudicated in a prior proceeding, (2) there was a final judgment on the merits, (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior proceeding, and (4) application of the doctrine will not work an injustice on the party against whom it is applied.

[5] Judgment - Collateral Estoppel - Administrative Decisions - Factors. The doctrine of collateral estoppel may be applied to bar the relitigation of an issue adjudicated by an administrative agency if (1) the agency acted within its competence to make a factual decision, (2) there are minimal procedural differences between the agency and a court, and (3) policy considerations support application of the doctrine.

[6] Zoning - Judicial Review - Planning Commission - Collateral Estoppel. The doctrine of collateral estoppel may be applied to bar the relitigation of an issue decided by a city planning commission.

**97 Wn. App. 84, SKOKOMISH INDIAN TRIBE, Appellant, v. TOM FITZSIMMONS, as Director of the Department of Ecology, ET AL., Respondents. No. 23367-3-II. August 20, 1999.**

[1] Appeal - Decisions Reviewable - Moot Questions - Effective Relief - Enabling Federal Review. **A case is not moot if the court can provide effective relief. A state court can provide effective relief if a judgment would enable federal review of a federal agency's licensing decision.**

[2] Courts - Jurisdiction - Federal or State - State Agency's Failure To Enforce State Law. State court is the appropriate forum for a suit against a state agency based on the agency's alleged failure to enforce state law according to its delegated authority.

[3] Administrative Law - Judicial Review - Deference to Agency - Arbitrary and Capricious Actions. **The deference courts give to matters within an agency's specialized knowledge and expertise does not extend to agency actions that are arbitrary, capricious, and contrary to law.**

[4] Administrative Law - Judicial Review - Arbitrary and Capricious - What Constitutes. An agency action is arbitrary and capricious only if it was willful and unreasoning, and taken without regard to attending facts and circumstances. **An action is not arbitrary and capricious if there is room for two opinions.**

[5] Environment - Shoreline Management - Administrative Review - Hydroelectric Projects. RCW 43.21A.064 gives the Department of Ecology authority to ensure that hydroelectric projects comply with applicable state law, including the Shoreline , Management Act (RCW 90.58). **The Department's refusal to object to a project that violates the Act is arbitrary and capricious.**

[6] Environment - Administrative Proceedings - Pollution Control Hearings Board - Authority - Appeal From Licensing Decisions - Hydroelectric Projects - DEO's Refusal To Object. **The Department of Ecology's refusal to object to a licensing proposal for a hydroelectric project is not a "license" subject to review by the Pollution Control Hearings Board under RCW 43.21B.110.**

**93 Wn. App. 329, GEORGE LUND, Appellant, v. THE DEPARTMENT OF ECOLOGY, ET AL., Respondents. No. 21625-6-II. November 13, 1998.**

[1] Environment - Shoreline Management - Judicial Review - Administrative Procedure Act - Applicability. Judicial review of a Shorelines Hearings Board decision is governed by RCW 34.05.570(3) of the Administrative Procedure Act.

[2] Environment - Shoreline Management - Statutory Provisions - Construction - Question of Law or Fact - Review. The interpretation of the Shoreline Management Act of 1971 (RCW 90.58) is a question of law that is reviewed by a court under the error of law standard.

[3] Environment - Shoreline Management - Master Program - Construction - Question of Law or Fact - Review. The interpretation of a master shoreline program promulgated under the authority of the Shoreline Management Act of 1971 (RCW 90.58) is a question of law that is reviewed by a court under the error of law standard.

[4] Statutes - Construction - Administrative Construction - Deference to Agency - Agency Expertise. A court accords substantial weight to a legal interpretation made by an administrative agency acting within its realm of expertise.

[5] Environment - Shoreline Management - Judicial Review - Appellate Review - Decision Subject to Review. An appellate court reviews a judgment entered on judicial review of a Shorelines Hearings Board decision by applying the review standards of RCW 34.05.570(3) directly to the record that was before the Board. Appellate court review is of the Board's decision, not the decision of the superior court that reviewed the Board's decision.

[6] Administrative Law - Judicial Review - Additional Evidence - Denial - Review - Standard of Review. A superior court's refusal to admit additional evidence in a case on review from an administrative adjudication is reviewed for an abuse of discretion. The court's decision does not constitute an abuse of discretion unless it is manifestly unreasonable or is based upon untenable grounds or reasons.

[7] Administrative Law - Judicial Review - Constitutional Issues - Review - Standard of Review. An administrative agency's decision on a constitutional claim is reviewed de novo.

[8] Environment - Shoreline Management - Competing Policies - Priorities - Balancing Test. **Under the Shoreline Management Act of 1971 (RCW 90.58), the protection of private property rights is a secondary policy to the primary policy of the act, which is to protect state shorelines as fully as possible. Under the act, the policy of protecting private property rights outweighs the policy of shoreline protection only**

when extraordinary circumstances are present and the public interest would not suffer a substantial detrimental effect.

[9] Environment - Shoreline Management - Development Permit - Conflict With Master Program - Effect. A conditional use permit for a proposed shoreline development may not be granted if the proposed development conflicts with a guideline or requirement set forth in the local shoreline master program.

[10] Statutes - Construction - Policy Statements - Conflict With Specific Provisions. When a general policy statement in a statute conflicts with a specific statutory provision, the specific provision prevails.

[11] Zoning - Nonconforming Use - Abandonment - Discontinuance - Time Limitation. A preexisting use of land is not established if the use was discontinued for a period longer than allowed by law for preserving the use.

[12] Zoning - Nonconforming Use - Creation - Use Established Before Zoning Enacted - Necessity. To be a nonconforming use under an applicable zoning regulation, the claimed use must have existed at the time the zoning regulation was enacted.

[13] Administrative Law - Judicial Review - Constitutional Issues - Review - Argument and Citation to Authority - Necessity. A court sitting in review of an administrative adjudication may decline to consider a constitutional claim if the claim is unsupported by citation to a specific constitutional provision or a considered analysis in support of the claim; conclusory statements will not suffice.

[14] Administrative Law - Rules - Validity - Burden of Proof. The heavy burden of proving that an administrative regulation is constitutionally invalid is on the party raising the challenge.

[15] Eminent Domain - Inverse Condemnation - Regulatory Taking - Facial Invalidity - Test. A land use regulation that restricts the permissible uses that may be made of a parcel of land is not facially invalid under the takings clause of the Fifth Amendment unless the mere enactment of the regulation deprives the owner of all economically viable uses of the land.

[16] Eminent Domain - Inverse Condemnation - Regulatory Taking - Facial Invalidity - Exhaustion of Administrative Remedies. A landowner claiming that a land use regulation is facially invalid under the takings clause of the Fifth Amendment is not required to exhaust administrative remedies before raising the claim in court.

**90 Wn. App. 746, THE OVERLAKE FUND, ET AL., Appellants, v. THE SHORELINES HEARINGS BOARD, ET AL., Respondents, THE CITY OF BELLEVUE, Appellant, v. GEOFFREY J. BIDWELL, ET AL., Respondents. Nos. 37896-1-I; 38012-5-I. April 13, 1998.**

[1] Environment - Shoreline Management - Development Permit - Administrative Review - Nature - De Novo Review. A shoreline development permit granted by a local governmental decision-maker is reviewed de novo by the Shorelines Hearings Board.

[2] Environment - Shoreline Management - Judicial Review - Appellate Review - Decision Subject to Review. An appellate court reviews a judgment entered on judicial review of a Shorelines Hearings Board decision by applying the review standards of RCW 34.05.570(3) directly to the record that was before the Board. **Appellate court review is of the Board's decision, not the local decision or the decision of the trial court that reviewed the Board's decision.**

[3] Courts - Stare Decisis - Actual Decision - Necessity. **An appellate court ruling does not have precedential effect under the doctrine of stare decisis unless the ruling was made on a disputed issue specifically raised before and decided by the court.**

[4] Administrative Law - Judicial Review - Question of Fact - Substantial Evidence - What Constitutes. For purposes of the substantial evidence standard for reviewing administrative findings of fact, substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.

[5] Administrative Law - Judicial Review - Arbitrary and Capricious - What Constitutes. An administrative decision is arbitrary and capricious if it is willful and unreasoning and made in disregard of the facts and circumstances.

[6] Administrative Law - Judicial Review - Question of Law - Standard of Review. An administrative decision-maker's legal determinations are reviewed under the error of law standard. Under the error of law standard, a court may substitute its interpretation of the law for that of the administrative agency. Although the administrative agency's interpretation of the law within its area of expertise is entitled to substantial weight, no weight is accorded to an agency's interpretation of the law of another jurisdiction.

[7] Environment - Shoreline Management - Administrative Review - Nature - Deference to Local Government. **A local governmental decision to grant a shoreline substantial development permit is not entitled to deference by the Shorelines Hearings Board on review.**

[8] Administrative Law - Judicial Review - Findings of Fact - Substantial Evidence - Absence - Effect. An administrative decision cannot be sustained if the most critical findings of fact underlying the decision are unsupported by substantial evidence in the record.

[9] Environment - Shoreline Management - Development Permit - Administrative Review - Scope - Issues Not Presented - Revision or Redesign of Development. In the course of reviewing a shoreline substantial development permit granted by a local governmental decision-maker, **the Shorelines Hearings Board may decide only those issues properly presented for review; it may not, on its own motion, revise or redesign a proposed development on the basis of its belief that the development constitutes an unreasonable use of the subject property.**

[10] Environment - Shoreline Management - Development Permit - Administrative Review - Scope - Efficacy or Reasonableness of Development. In the course of reviewing a shoreline substantial development permit granted by a local governmental decision-maker, **the Shorelines Hearings Board**

may not substitute its judgment for that of the local decision-maker regarding the efficacy or reasonableness of the proposed development when that issue is not before it.

[11] Environment - Shoreline Management - Wetlands - Natural State - Development. **There is no requirement that a "natural" state wetland remain in a natural state for all time to the complete exclusion of any sort of development.**

[12] Environment - Shoreline Management - Development Permit - Administrative Review - Scope - Law Considered. In reviewing a shoreline substantial development permit granted by a local governmental decision-maker, the Shorelines Hearings Board must be cognizant of existing zoning and other laws and regulations guiding the development decision. **The Board may not unduly restrict the development of shoreline or near-shore areas in contravention of such laws and regulations.**

**87 Wn. App. 552, SWINOMISH INDIAN TRIBAL COMMUNITY, Respondent, v. ISLAND COUNTY, Appellant. No. 39421-5-I. August 25, 1997.**

[1] Judgment - Summary Judgment - Review - In General. An appellate court reviews a summary judgment by engaging in the same inquiry as the trial court; i.e., the court applies the standard of CR 56(c) to the facts of the case and the reasonable inferences therefrom as viewed most favorably toward the nonmoving party.

[2] Indians - Archeological Sites and Burial Grounds - Statutory Provisions - Civil Action - Criminal Conviction - Necessity. A civil action may be maintained under the Indian Graves and Records Act (RCW 27.44) against a defendant who has not been convicted of a criminal offense under the act.

[3] Statutes - Construction - Meaning of Words - Absence of Statutory Definition - In General. A term not defined in a statute is given its plain and ordinary meaning unless a contrary legislative intent is indicated.

[4] Statutes - Construction - Meaning of Words - Absence of Statutory Definition - **Resort to Law Dictionary. In the absence of a statutory definition of a term, a court may resort to a law dictionary to ascertain the plain meaning of the term.**

[5] Statutes - Construction - Legislative Intent - Legislative History - In General. The legislative history of a statute may be consulted to determine its legislative intent.

[6] Indians - Archeological Sites and Burial Grounds - Statutory Provisions - Exemptions - Law Enforcement Duties - What Constitutes. For purposes of RCW 27.44.040(3)(b) of the Indian Graves and Records Act, which exempts actions taken in the performance of official law enforcement duties from criminal liability under the act, the phrase "official law enforcement duties" is limited to duties related to preserving the peace. The phrase does not include the grant or denial of a request for a land use permit in a nonemergency or nonenforcement situation.

[7] Indians - Archeological Sites and Burial Grounds - Statutory Provisions - Violation - Land Use Permit. A government agency's approval of a land use permit application does not constitute a violation of the Indian Graves and Records Act (RCW 27.44).

[8] Municipal Corporations - Injunction - Scope - Enforcement of Municipal Duty. A court has the equitable power to order a municipal corporation to fulfill a duty, but the court may not order the municipality to fulfill the duty in a specific manner.

**77 Wn. App. 154, DAVID M. BATCHELDER, Respondent, v. THE CITY OF SEATTLE, ET AL, Defendants, HUGH AINSLIE, Appellant. No. 33373-9-I. March 6, 1995.**

[1] Administrative Law – Judicial Review – Question of Fact – Substantial Evidence – What Constitutes. For purposes of RCW 34.05.570(3)(e), which provides for judicial review of an administrative order to determine if it is supported by "evidence that is substantial when viewed in light of the whole record before the court", evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.

[2] Administrative Law – Judicial Review – Question of Law – Standard of Review. **Legal determinations of administrative agencies are reviewed under the error of law standard.**

[3] Statutes – Construction – Question of Law or Fact. **The interpretation of a statute is a question of law.**

[4] Environment – Shoreline Management – Development – Piecemeal Review – Consideration of Entire Project. **A local government's issuance of separate approvals for a single proposed development project does not necessarily violate the prohibition against dividing a project into segments for the purpose of avoiding compliance with the Shoreline Management Act of 1971 (RCW 90.58). The prohibition is not violated if the local government reviews the entire project comprehensively and simultaneously under both the local shoreline master program and the act.**

[5] Environment – Shoreline Management – Master Program – Construction – Question of Law or Fact. **The interpretation of a provision of a local shoreline master program is a question of law.**

[6] Environment – Shoreline Management – Statutory Provisions – Construction – Administrative Construction – Effect. Although a reviewing court must accord substantial weight to an administrative agency's interpretation of a law that falls within the agency's special expertise, **the court may substitute its view of the law for that of the agency when necessary to ensure that a proposed project complies with the Shoreline Management Act of 1971 (RCW 90.58).**

[7] Statutes – Construction – Legislative Intent – In General. A court's duty when interpreting a statute is to ascertain and give effect to the Legislature's intent.



[8] Environment – Shoreline Management – Master Program – Construction – Reasonable Construction. Zoning provisions contained in a local shoreline master program must be given a reasonable construction and application in order to serve their purpose and scope.

[9] Environment – Shoreline Management – Master Program – Local Rules – Validity – Conflict With Program. A rule adopted by a local administrative body charged with implementing a local shoreline master program is not enforceable if it conflicts with a provision of the program as enacted by the local legislative body.

[10] Environment – Shoreline Management – Development Permit – Judicial Review – Legislative Policies. A substantial development permit is subject to administrative and judicial review to determine whether the proposed project violates essential policies of the local shoreline master program and the Shoreline Management Act of 1971 (RCW 90.58).

**73 Wn. App. 576, JEFFERSON COUNTY, ET AL, Plaintiffs, PROTECT LUDLOW BAY COMMITTEE, INC., ET AL, Appellants, v. SEATTLE YACHT CLUB, Respondent. No. 15862-1-II. April 4, 1994.**

[1] Administrative Law – Judicial Review – Appellate Review – Record – Agency Record. **Appellate court review of an administrative decision is on the agency record, not the trial court record.**

[2] Administrative Law – Judicial Review – Question of Law – Standard of Review. Legal determinations of an administrative agency are reviewed under the error of law standard. Under that standard, a reviewing court may substitute its judgment for that of the agency, although the court should accord substantial weight to the agency's view of the law that falls within the agency's special area of expertise.

[3] Administrative Law – Judicial Review – Question of Fact – Substantial Evidence – What Constitutes. For purposes of the substantial evidence standard for reviewing administrative findings of fact, evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.

[4] Environment – Shoreline Management – Master Program – Construction – Question of Law or Fact. **The interpretation of a provision of a shoreline master program is a question of law.**

[5] Statutes – Construction – Administrative Construction – Effect. **Although an administrative agency's interpretation of the statute it implements is entitled to due deference from a court, a court may substitute its view of the law for that of the agency.**

[6] Environment – Shoreline Management – Public Benefits – Equal to Private Benefits. **The Shoreline Management Act of 1971 (RCW 90.58) does not require that the owner of a private project provide public benefits equal to the private benefits resulting from the project.**

[7] Zoning – Nonconforming Use – Status at Law. Nonconforming uses are disfavored. **Public policy encourages the restriction of nonconforming uses so that they ultimately may be phased out.**

[8] Environment – Shoreline Management – Development Permit – Compatibility – Nonconforming Use. For purposes of a shoreline master program requiring a proposed project to be compatible with other permitted uses in the area, a nonconforming use is not a "permitted use" and the Shorelines Hearings Board may not substantially rely on a nonconforming use to support its determination that a proposed project is compatible with its surrounding environment.

[9] Environment – Shoreline Management – Development Permit – Compatibility – Geographical Proximity. For purposes of a shoreline master program requiring a proposed project to be compatible with the area where the development is to be located, the Shorelines Hearings Board may not base its compatibility determination solely on a large scale, areawide approach; the Board must also address the project's compatibility with permitted land and water uses immediately adjacent to the project.

**67 Wn. App. 409, 836 P.2d 250, KATHLEEN HEDLUND, Appellant, v. JACK WHITE, ET AL, Respondents. No. 13558-2-II. September 9, 1992.**

[1] Appeal – Findings of Fact – Review – In General. A finding of fact supported by evidence in the record is accepted as a verity on review.

[2] Environment – Shoreline Management – Violation – Injunctive Relief – Private Citizen. Injunctive relief is not available to a private citizen in an action brought under the Shoreline Management Act of 1971 (RCW 90.58).

[3] Waters – Surface Water – Common Enemy Rule – Scope. The common enemy rule, which generally permits a landowner to repel surface water without regard to injury to adjoining land so long as neither the quantity nor the manner of the natural flow is changed from approximately that created by natural forces, does not allow a landowner to discharge water other than that which would have naturally flowed in a particular watercourse or drainway.

[4] Trespass – Waters – Surface Water – Diversion From Natural Drain. Surface water discharged via a drainage basin crossing an adjoining landowner's property constitutes a trespass if the drainage basin is not one by which the water would naturally have drained.

[5] Trespass – Injunction – Continuing Trespass – Remedy. A permanent injunction is an appropriate remedy for a continuing trespass.

**66 Wn. App. 698, 832 P.2d 1348, BRUCE BOSLEY, ET AL, Appellants, v. AMERICAN MOTORISTS INSURANCE COMPANY, Respondent. No. 11421-0-III. July 28, 1992.**

[1] Judgment – Summary Judgment – Review – In General. On review of a summary judgment, the appellate court engages in the same inquiry as the trial court, i.e., it considers the facts as viewed most favorably toward the nonmoving party and determines, as a matter of law, whether reasonable persons could reach only one conclusion from all the evidence.

[2] Community Property – Insurance – Torts – Intentional Tort by Insured – Community Loss. The act of one spouse which is done for a community benefit but which is excluded from coverage under an insurance policy provision may bar coverage for any resulting community liability.

[3] Environment – Shoreline Management – "Development" – What Constitutes – Intentional Act. **For purposes of the Shoreline Management Act of 1971 (RCW 90.58), the undertaking of a "development" is an intentional act.**

**64 Wn. App. 273, 823 P.2d 1132, EASTLAKE COMMUNITY COUNCIL, ET AL, Appellants, v. THE CITY OF SEATTLE, ET AL, Respondents. No. 14929-0-II. February 10, 1992.**

[1] Administrative Law – Hearing – Summary Disposition – In General. Although the Administrative Procedure Act (RCW 34.05) does not provide for an administrative summary judgment, **a legislatively created board or agency may dispose of an issue in a summary procedure when there is no genuine issue of material fact and the board or agency is acting in a quasi-judicial capacity.** Judicial review of a summary disposition is conducted by viewing all the facts and reasonable inferences therefrom most favorably to the nonmoving party.

[2] Statutes – Construction – Administrative Construction – Effect. The construction placed on a statute by the administrative entity charged with applying it should be given great weight by the courts.

[3] Environment – Shoreline Management – Development Permit – Water Dependent Use – Office Building. **The Shoreline Management Act of 1971 (RCW 90.58) does not require that a shoreline office building be an integral part of, or be related to, the water-dependent use built in conjunction with the office building.**

[4] Statutes – Construction – Unambiguous Language – Legislative History. The meaning of plain and unambiguous statutory language is derived from the language itself; there is no justification to examine the legislative history of the enactment for further indication of legislative intent.

[5] Environment – Shoreline Management – Development Permit – Water Dependent Use – Certainty of Use. **Absolute certainty of future water-dependent use is not required under the Shoreline Management Act of 1971 (RCW 90.58), or local ordinances implementing it, before a development permit can be issued.**

[6] Building Regulations – Land Use Regulations – Offsite Parking – Terminability – Administrative Determination. The agency charged with enforcing parking requirements contained in development permits has the power to determine if the terminability of an offsite parking lease affects the permitted use. This determination is entitled to great deference by the courts.

**59 Wn. App. 613, PUGET SOUND WATER QUALITY DEFENSE FUND, ET AL, Petitioners, V. MUNICIPALITY OF METROPOLITAN SEATTLE, ET AL, Respondents. No. 13566-3-II. November 14, 1990.**

[1] Administrative Law - Judicial Review - Mixed Question of Law and Fact Determination. Judicial review of a mixed question of law and fact requires that the law be interpreted de novo by the court and then applied to the facts as they were found by the administrative body and upheld on review.

[2] Appeal - Assignments of Error - Argument - Necessity - In General. A reviewing court is not required to consider any assignment of error which fails to comply with RAP 10.3(a)(5).

[3] Administrative Law - Judicial Review - Question of Fact - Unsupported Assignment of Error. An allegation that an administrative agency has committed a factual error in reaching a decision will not be reviewed and will be accepted by the reviewing court when the assignment of error is not supported by argument or authority.

[4] Environment - Waste Treatment - "Feasible Alternative" - Factors Balancing Test. A statute or ordinance which identifies several factors to be considered in determining the siting feasibility of a waste treatment project imposes a duty upon the determining agency to consider those same factors in evaluating alternative sites and to engage in a balancing of factors before concluding that there are no feasible alternative sites to locate the proposed project.

**Nature of Action:** Several organizations opposing the expansion of an existing sewage treatment plant sought judicial review of a tie vote by the Shorelines Hearings Board affirming the municipality's approval of the proposed expansion.

**Court of Appeals:** Upon certification of the case to the Court of Appeals for direct review, the court affirms the municipality's approval, **holding that the court was required to accept the facts as found by the agency, that the agency had properly applied the law to those facts, and that the agency had met its statutory mandate of considering feasible alternatives.**

**54 Wn. App. 117, 772 P.2d 536. Karl Guelich, et al, Appellants, v. American Protection Insurance Company, Respondent. NO.: 21802-6-I FILE DATE: May 15, 1989.**

[1] Insurance - Duty To Defend - Determination - In General. An insurer has a duty to defend its insured in an action only if the facts alleged in the complaint, if true, would render the insurer liable under the policy.

[2] Insurance - Construction of Policy - "Property Damage" Obstruction of View. **The obstruction of a neighbor's view does not constitute "property damage" for purposes of a liability insurance policy that defines property damage as physical injury to tangible property including loss of use of injured property.**

**45 Wn. App. 832, 727 P.2d 995. The State of Washington, Appellant, v. Dwayne Duncanlee Rabon, Respondent. The State of Washington, Appellant, v. Douglas Edward Bishop, Respondent. NO.: 15841-4-I; 16123-7-I FILE DATE: November 10, 1986.**

[1] Statutes - Validity - Burden and Degree of Proof. A person challenging a legislative enactment must prove its invalidity beyond a reasonable doubt.

[2] Juveniles - Juvenile Justice - Statutory Provisions - State Preemption. RCW 13.04.450, which preempts the field of adjudication of juvenile offenses, does not preempt the DEFINING of offenses by juveniles.

[3] Municipal Corporations - Ordinances - Conflict With State Law - Determination. If a state statute expressly prohibits an act and does not expressly prohibit similar acts, an ordinance which expressly prohibits those similar acts does not necessarily conflict with the statute.

**44 Wn. App. 754, William W. Kates, et al, Appellants, v. The City of Seattle, et al, Respondents. NO.: 8165-2-II FILE DATE: August 5, 1986.**

[1] Building Regulation - Building Permit - Erroneous Zoning Map - Effect. A building permit issued despite a shoreline master plan designation prohibiting such permits is valid and need not be reissued where the designation in effect at the time the permit was issued resulted from a cartographer's error, the intended designation would have allowed the permit, and the city council amended the master plan to insert the originally intended designation which made the building permit consistent with current law.

[2] Environment - Shoreline Management Act - Residential Exemption - Successive Use. Whether a structure qualifies for the residential exemption to the "substantial development" definition in RCW 90.58.030(3)(e) is a question of fact. An owner may claim the exemption on successive buildings if each is intended as his residence when it is constructed.

[3] Plats - Judicial Review - Inherent Power. The courts have inherent power to review any determination implementing the land platting statutes that affects fundamental rights.

[4] Plats - Statutory Provisions - Noncompliance - Effect. A building permit issued in violation of the land platting laws is invalid.

Finding [2] Whether a particular development falls within the family residence exemption is a question of fact. The trial court made unchallenged findings that the Martins initially intended to live in the south house, and did live there for 2 years. When their children were born, they found the house too small and built the north house intending to live there. They have lived there ever since. **As a factual matter, the Martins intended each residence, at different times, for their own use. Both houses thus fall within the family residence exemption. Contrary to appellants' contention, the statutory language does not imply that the exclusion may be used only once per owner.**

**38 Wn. App. 84, 684 P.2d 765. Friends and Land Owners Opposing Development, Appellant, v. The Department of Ecology, et al, Respondents. NO.: 6380-8-II FILE DATE: July 11, 1984.**

[1] Environment - Shoreline Management - Master Program - Approval of Local Program - Effect. Approval of a local shoreline program by the Department of Ecology under RCW 90.58 **has the effect of converting the local program adopting ordinance into a state regulation as part of the State's master shoreline program.**

[2] Environment - Shoreline Management - Master Program - Challenge - Review. A challenge to a regulation adopted under RCW 90.58 as part of the statewide master shoreline program may be in the form of an action for a declaratory judgment. A ruling in such an action is reviewable to determine if the record supports the judgment.

[3] Administrative Law and Procedure - Administrative Rules Validity - Burden of Proof. A presumption of validity applies to administrative regulations adopted under a legislative grant of authority if the rules are reasonably consistent with the intent of the statute. A party challenging a rule has the burden of demonstrating compelling reasons for finding that the rule conflicts with the intent of the statute.

[4] Environment - Shoreline Management - Floodway - Alternate Definition - Validity. **A definition of a "floodway" within an administrative rule in a manner other than that used in the shoreline management act (RCW 90.58) and other rules implementing the act does not render the definition invalid so long as it is not inconsistent with the statutory definition or does not lead to a result which is inconsistent with the intent of the act.**

**32 Wn. App. 473, 648 P.2d 448. Toandos Peninsula Association, et al, Appellants, v. Jefferson County, et al, Respondents. NO.: 4633-4-II FILE DATE: July 8, 1982.**

[1] Zoning - Comprehensive Plan - Nature - Effect. A comprehensive plan is a policy guide for future land use regulations. The plan itself, without zoning or other land use regulations implementing the plan, does not provide a basis for restricting the use of property.

[2] Zoning - Comprehensive Plan - Official Controls - Restrictions on Site Plan. A county's addition of conditions and covenants to a developer's site plan does not constitute zoning or the adoption of "official controls" implementing a comprehensive plan under the planning enabling act (RCW 36.70).

[3] Zoning - Spot Zoning - Building Permit With Restrictions. The issuance of a building permit with attendant land use restrictions does not constitute spot zoning.

[4] Environment - SEPA - Impact Statement - Adequacy - In General. The adequacy of an environmental impact statement is a question of law. As a general rule, an impact statement is adequate if it reasonably discloses, discusses, and substantiates the environmental effects of the project.

[5] Environment - SEPA - Impact Statement - Adequacy - Alternatives. The presentation of alternatives in an environmental impact statement is subject to the rule of reason. Every conceivable alternative need not be analyzed so long as sufficient information is set forth to allow a reasoned choice of alternatives.

[6] Environment - Shoreline Management - Development Permit - Negative Determination - Effect. **A decision by a local governmental body that a substantial development permit is not necessary under the shoreline management act (RCW 90.58) is not determinative as to whether such a permit is required.**

Finding [6] Because of the nature of these proceedings and the state of the record, we are unwilling to rule on whether or not the shoreline management act applies. Although the issuance or denial of a substantial development permit by the local authority (in this case the county) may be subject to review by the Shorelines Hearings Board and eventually by the court, RCW 90.58.180, **a determination by the local governing authority that a substantial development permit is unnecessary is not reviewable by the Shorelines Hearings Board.** We are thus deprived of the expertise and experience of the board whose interpretations are entitled to great weight in interpreting the shoreline management act. ENGLISH BAY ENTERS., LTD. v. ISLAND CY., SUPRA; HAMA HAMA CO. v. SHORELINES HEARINGS BD., SUPRA. The permit process, however, is not the only means of insuring compliance with the mandates and policy of the act. The Attorney General and the prosecuting attorney of the county are specifically empowered and directed to initiate appropriate court actions to insure that "no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter." RCW 90.58.210. In WEYERHAEUSER CO. v. KING CY., 91 Wn.2d 721, 592 P.2d 1108 (1979) and in MERKEL v. PORT OF BROWNSVILLE, 8 Wn. App. 844, 509 P.2d 390 (1973), the Attorney General and/ or the prosecuting attorney appropriately raised the question of compliance with the act which was then resolved by the court. This is as it should be.

In the instant case there very well may be a serious question of whether the project complies with the shoreline management act. **We do not have before us, however, the participation of those public officials who are the principal enforcement officers of the act.** Furthermore, in this case we are simply reviewing the issuance of permits by the county building officer. The county commissioners were acting only in an advisory capacity insofar as the shoreline management act is concerned. The forum in the proceedings below was not adequate to develop and resolve critical factual issues. Some evidence was presented in the Superior Court below, but even so, Toandos was substantially restricted in what could be presented. We believe the question of compliance with the shoreline management act should be reserved to another day in proceedings initiated by the Attorney General and/ or the prosecuting attorney for Jefferson County.

**30 Wn. App. 437, 635 P.2d 156. Max Hunt, et al, Respondents, v. Ronald L. Anderson, Appellant. NO.: 3791-6-III FILE DATE: October 13, 1981.**

[1] Environment - Shoreline Management - Setback of Existing Homes - Effect. **Under the Shoreline Management Act of 1971, a home may be required to conform to a voluntary setback line established by adjacent homes if a location closer to the shore would detrimentally affect the aesthetics of the neighborhood and obstruct the view and reduce the value of the adjacent homes.**

[2] Appeal and Error - Findings of Fact - Resort to Oral Findings. When reviewing incomplete or indecisive findings of fact, an appellate court may refer to the trial court's oral pronouncements accompanying the decision to determine the grounds for the decision.

**29 Wn. App. 179, 627 P.2d 988. Norco Construction, Inc., Respondent, v. King County, et al, Appellants. NO.: 9156-5-I FILE DATE: May 4, 1981.**

[1] Statutes - Construction - Legislative Intent - Considered as a Whole. Statutory language is construed in conformity with the overall purpose of the legislation.

[2] Plats - Application - Decision - Time Limits - Proposed Land Use Plan - Effect. Lack of conformity between a preliminary plat application and a proposed revision of a land use plan does not justify informally deferring action on the application beyond the time limits established by RCW 58.17.140.

[3] Mandamus - Discretionary Functions - In General. Mandamus is an appropriate remedy to compel discretionary performance of a legal duty to act.

[4] Zoning - Land Use Permits - Vested Rights - Purpose. **The purpose of giving a property owner vested rights in connection with an application for a land use permit is to prevent the local government from delaying action on the permit while changing the regulations affecting the land in a manner so as to be able to deny the requested permit.**

[5] Plats - Application - Decision - Time Limits - Violation - Vested Rights. The failure of a local legislative body to act on a preliminary plat within the time limits of RCW 58.17.140 results in the applicant's acquiring a vested right to have his application considered under the zoning ordinances and procedures in effect at the time the statutory time limits expired.

[6] Plats - Application - Decision - Nature of Action. A local legislative body acts in an administrative rather than a legislative capacity when it approves, disapproves, or returns for modification an application for a preliminary plat.

**28 Wn. App. 796, 626 P.2d 995. San Juan County, et al, Appellants, v. The Department of Natural Resources, et al, Respondents. NO.: 8051-2-I FILE DATE: April 9, 1981.**

[1] Environment - Shoreline Management - Development Permit - Administrative Review - Evidence. **When reviewing a decision regarding a development permit, the Shorelines Hearings Board may consider evidence not included in the record of the prior proceeding before the local government.**

[2] Statutes - Construction - Administrative Construction - Effect. The construction given a statute by the agency charged with its implementation will be accorded great deference by the courts.

[3] Environment - Shoreline Management - Development Permit - Administrative Review - Validity. **The authority given the Shorelines Hearings Board by RCW 90.58.180 to review local governmental decisions**



concerning development permits is not inconsistent with RCW 90.58.140(3), which gives local governments the exclusive power to administer the permit system.

[4] Environment - SEPA - Impact Statement - Necessity - Negative Determination - Review. A governmental agency's determination that a proposed action does not require an impact statement because of insufficient environmental significance will be upheld if it is supported by findings made under SEPA guidelines promulgated under the authority of RCW 43.21C.110.

**23 Wn. App. 569, 597 P.2d 449. Craig A. Ritchie, et al, Appellants, v. Thomas Markley, et al, Respondents. NO.: 3167-2 FILE DATE: June 20, 1979.**

[1] Statutes - Application - Determination. Whether a particular activity falls within statutory terms whose meaning is clear is a question of fact.

[2] Municipal Corporations - Police Power - Preemption by State - Determination. For purposes of Const. art. 11, 11, which grants power to counties, cities, and towns to make such laws as are not in conflict with state statutes, a statute will be construed as taking away the power of a municipality to legislate when that intent is clearly and expressly stated.

[3] Environment - Shoreline Management Act - Local Regulations - Conflict. **Local regulations which purport to prohibit activities expressly permitted under the provisions of the Shoreline Management Act (RCW 90.58) are void under Const. art. 11, 11 as conflicting with general laws.**

[4] Costs - Attorney Fees - In General. Attorney fees will not be awarded in the absence of a contract, statute, or recognized ground of equity.

[5] Injunction - Costs - Attorney Fees - Wrongful Injunction - Limitation. The right to recover attorney fees as a part of the costs of dissolving a wrongfully issued preliminary injunction or restraining order terminates upon such dissolution. It does not extend to other aspects of the litigation.

[6] Environment - Shoreline Management Act - Prevailing Party - Attorney Fees. **For purposes of RCW 90.58.230, which permits the recovery of attorney fees by a prevailing party, a party who successfully resists efforts to obtain an injunction restraining his activities is not a prevailing party.**

**22 Wn. App. 738, 591 P.2d 877. South Hill Sewer District, et al, Respondents, v. Pierce County, Washington, et al, Appellants. NO.: 3327-2 FILE DATE: February 27, 1979.**

[1] Utility Services - Sewage Disposal Facility - Nature of Activity. The operation of a sewage disposal facility by a governmental entity is a governmental rather than a proprietary function.

[2] Utility Services - Sewage Disposal Facility - Compliance With Zoning - Necessity. RCW 56.08, 8.12, and 35.67, which give sewer districts and cities the power of eminent domain and a broad power to manage

and control sewage disposal systems, **express a legislative intent that site selection for the construction of a sewage disposal facility not be restricted or limited by local zoning regulations.**

[3] Utility Services - Zoning - Planning Enabling Act - Public Projects - Application. Under RCW 36.70.540, the planning enabling act (RCW 36.70) is advisory only insofar as public projects are concerned, and is primarily concerned with planning future growth rather than with specific facility plans. When an interlocal agreement designates a governmental body as the "lead agency" for a project, such body is the "final authority" to which planning reports must be rendered under the statute.

[4] Statutes - Construction - Statutes Relating to Same Subject - In General. Statutes dealing with the same subject will be read, if possible, so that both have meaning and are in harmony with each other.

[5] Appeal and Error - Assignments of Error - Argument - Citation of Authority - Necessity. An assignment of error will be deemed abandoned when no authority is cited and no argument is made in support thereof, and when the assignment itself contains no reference to its basis in the law or record, the error will be considered waived.

**Particularly do we feel justified in considering the potential issue to have been abandoned when the appellants have not incorporated into the record on appeal the local regulations and shoreline technical advisory committee material which had been presented to the trial judge, a consideration of which would be necessary to evaluate an argument addressed to the propriety of the judgment. The validity of the trial court's order in this regard is not before us and has become the law of the case.**

**We therefore also affirm that portion of the judgment which authorizes the Bonney Lake and the South Hill Sewer District to proceed without a substantial development permit, noting as we do so that the project has been approved by the State Department of Ecology and the United States Environmental Agency.**

**22 Wn. App. 285, 588 P.2d 1226. Joseph P. Mentor, Appellant, v. Kitsap County, et al, Respondents. NO.: 3115-2 FILE DATE: December 28, 1978.**

[1] Administrative Law and Procedure - Procedural Rules - Compliance by Agency - Necessity. **An administrative agency may disregard its own procedural rules in its discretion and in the interest of justice so long as no substantial prejudice occurs to an interested party.**

[2] Administrative Law and Procedure - Evidence - Record of Other Proceedings. An administrative agency may consider and base its decision on evidence gathered from other files or from independent investigations if such other material is introduced into evidence in the proceeding in question.

[3] Environment - SEPA - Impact Statement - Sufficiency - Test. The sufficiency of an environmental impact statement is a question of law, but substantial weight will be accorded the decision of the appropriate administrative agency as to its adequacy. Sufficiency is determined on the basis of the "rule of reason," and remote or speculative consequences of the proposed action need not be treated in the

statement, nor does a statement need to cover in detail matters which will be the subject of later statements in connection with other segments of the proceeding.

[4] Environment - SEPA - Impact Statement - Purpose. An environmental impact statement is intended to raise and analyze potential environmental consequences of an action for the benefit of the officials charged with making a decision. It should not merely justify an affirmative decision, but inconsequential or minor errors or omissions will not invalidate the proceeding.

**17 Wn. App. 790, 567 P.2d 642. Pacific County, Respondent, v. Sherwood Pacific, Inc., et al, Appellants. NO.: 2224-2 FILE DATE: June 14, 1977.**

[1] Municipal Corporations - Powers - Statutory Provisions Construction. While municipal corporations may not exercise any powers except those expressly granted or necessarily implied, a general grant of authority that is silent as to its mode of exercise necessarily implies that the municipality has the right to exercise its discretion as to the means of achieving the statutory objective. In the areas of public health and welfare such statutes and the discretion exercised in implementing them are liberally construed by the courts.

[2] Municipal Corporations - Powers - Statutory Provisions Expressly Conferred Powers - Prior Power. The express granting of a specific power to a municipality does not, by itself, preclude the municipality from having and exercising such power as a necessary implication under its general authority prior to the express grant.

[3] Counties - Plats - Streets - Performance Bond - Authority. The provisions of former RCW 58.16.110, which granted counties and other local governments authority to regulate plats including street specifications, implied that the county could either require completed streets prior to approving a plat or require a performance bond to insure that proper streets will be installed.

[4] Counties - Plats - Streets - Performance Bond - Enforceable Interest. Approval of a plat and acceptance of a performance bond by a county in lieu of completed streets places the county in a position of trust for the public and obligates it to recover the bond and complete the streets in the event the developer is unable to do so. The county's right to recover on the bond is unaffected by whether or not it has, in fact, taken action to complete the streets.

[5] Counties - Plats - Streets - Performance Bond - Penalty. A developer's performance bond posted to insure the completion of streets, and upon which the county could only draw that amount necessary to complete such a project, is not in the nature of a penalty but serves merely to assure the completion of the project.

[6] Contracts - Breach - Impossibility - Own Acts. A party to an agreement whose own acts place him in a position of nonperformance cannot be excused from his obligation on the grounds of impossibility.

[7] Interest - Liquidated Claim - Performance Bond. Prejudgment interest will be allowed on a performance bond which is insufficient to compensate for nonperformance when the amount of the claim is fixed from the time of nonperformance.

ISSUE [6] Defendants next argue that they are exonerated by the additional road construction specifications and sewage treatment requirements imposed by the County in 1971, which allegedly rendered Sherwood's performance financially impossible. Defendants further argue performance was made impossible because of the subsequent adoption of the Washington Shoreline Management Act of 1971 (RCW 90.58.010 ET SEQ.) and the Federal Environmental Protection Act. A party to a contract cannot avail himself of nonperformance where the nonperformance is caused by his acts. WOLK v. BONTHIUS, 13 Wn.2d 217, 124 P.2d 553 (1942). The doctrine of impossibility of performance might be pertinent in the instant case had the events relied on occurred during the pendency of the original obligation to make the improvement. The only reason defendants became subject to the ordinances and other legislation is that they failed to complete performance by the original deadlines in December 1968 and September 1969.«3» As will be discussed more fully, it was not the fault of the County that the improvements were not completed on time, which would have been prior to the legislative developments cited.

«3» The Shoreline Management Act of 1971, RCW 90.58.140(1), does not require a permit for a development if a final plat was approved between April 1961 and April 1971. As Sherwood's plat was approved in 1968, it is not subject to the act.

**17 Wn. App. 774, 565 P.2d 1196. Henry Eickhoff, et al, Appellants, v. Thurston County, et al, Respondents. NO.: 4505-1. FILE DATE: June 13, 1977.**

[1] Environment - Shorelines Hearings Board - Tie Vote - Effect. Although RCW 90.58.170 requires 4 of the 6 members of the Shorelines Hearings Board to agree to a decision, a 3-to-3 vote of the board will permit an action being reviewed to stand affirmed.

[2] Environment - Shorelines Hearings Board - Judicial Review - In General. Judicial review of the findings of the Shorelines Hearings Board or the issuer of a substantial development permit is limited to determining according to the administrative procedures act whether it is clear that a mistake has been made or there has been arbitrary or capricious action.

[3] Environment - Shoreline Management - Development Permits - Factors Considered - Least Impact. Under RCW 90.58.020 and implementing regulations, the fact that a proposed development would involve less environmental impact than other methods of achieving the same result is significant to a decision on issuing a substantial development permit.

[4] Statutes - Construction - Administrative Construction. A court will give great weight to an administrative agency's construction of an ambiguous statute which it is charged with implementing.

[5] Environment - Shoreline Management - Statutory Provisions - In General. The Shoreline Management Act of 1971 has as its purpose environmentally sound development. **Substantive compliance with the act will prevail over technical objections.**

**13 Wn. App. 201, S. P. PUTNAM, Appellant, v. WILLIAM L. CARROLL et al, Respondents. No. 2384-1. April 14, 1975.**

[1] Environment - Shoreline Management - Exemption - Preexisting Plats - Development. **Developments upon a plat existing prior to April 1, 1971**, which are otherwise exempt from shoreline management permit requirements under RCW 90.58.140(9) (b), **need not conform to any developments described in the original platting documents** but rather need only be consistent with other applicable regulations and the policy of the Shoreline Management Act of 1971 in order to qualify for a permit exemption. [See 13 Am. Jur. 2d, Buildings § 8 et seq.]

[2] Environment - Shoreline Management - Exemption - Scope. **Qualification for an exemption** from shoreline management permit requirements under RCW 90.58.140(9) **does not exempt a development from other conditions required by applicable regulations or general policies of the Shoreline Management Act of 1971.**

[3] Environment - Shoreline Management - Exemption - Judicial Review. **A party denied exemption** from shoreline management permit requirements (RCW 90.58.140(9)), **is not a party aggrieved by the denial of a permit** within the meaning of RCW 90.58.180, which provides procedure for appeal.

**11 Wn. App. 807 11 Wn. App. 807, JAMES G. TALBOT et al., Appellants, v. GORDON M. GRAY et al., Respondents. No. 2140-1. August 19, 1974.**

[1] Zoning - Ordinance - Construction - Definitions. Definitions contained in a zoning ordinance must be applied to the remainder of the act according to the purpose for which the definitions were originally included. [See 58 Am. Jur., Zoning (1st ed. §§ 11, 12).]

[2] Environment - Shoreline Management - Permits - Vested Rights. **A right to a permit required by the Shoreline Management Act vests upon the application for such permit.**

[3] Injunction - Damages - Attorneys' Fees - Quashing Injunction Damages may be allowed for the costs of defending an action whose sole purpose is to impose an injunction.

**9 Wn. App. 59, JUANITA BAY VALLEY COMMUNITY ASSOCIATION et al., Appellants, v. THE CITY OF KIRKLAND et al., Respondents, JOHN A. BIGGS, Appellant. No. 1955-1. June 4, 1973.**

[1] Municipal Corporations - Environment - Environmental Policy Act - Applicability. The State Environmental Policy Act of 1971 (RCW 43.21C), including all of its detailed procedural requirements, is directly imposed upon all elements of state government including municipal corporations.

[2] Statutes - Construction - Adoption From Other Jurisdiction - Effect. A legislative enactment adopted from another jurisdiction carries the construction placed upon it by the other jurisdiction.

[3] Environment - Environmental Policy Act - Impact Statement - Initial Project. The impact statement required from the appropriate governmental agency or branch under the provisions of the State Environmental Policy Act of 1971 (RCW 43.21C) must be prepared prior to any authorization of any portion of a project, or series of projects, which in cumulative effect constitutes a major action significantly affecting the quality of the environment.

[4] Environment - Environmental Policy Act - Impact Statement - Necessity - Review. Before a court may sustain the determination of a governmental agency or branch that a proposed public or private project is not a major action significantly affecting the quality of the environment and hence outside the requirement of the State Environmental Policy Act of 1971 (RCW 43.21C.030 (c)) that an environmental impact statement be prepared, the appropriate governing body must be able to demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of the act.

[5] Environment - Environmental Policy Act - Permits - Ministerial or Discretionary - Effect. While the routine and nondiscretionary issuance of various construction permits and authorizations, such as a grading permit, may otherwise constitute ministerial action not subject to judicial review, the State Environmental Policy Act of 1971 introduces an element of legislative discretion which must be exercised in considering the various environmental factors affected by such action and renders it subject to judicial review (RCW 43.21C.030(c)).

[6] Statutes - Construction - Role of Courts - In General. Inasmuch as courts are to interpret statutes in a manner consistent with the intent and purpose of the legislature and not to substitute their judgment for that of the legislature, specific directions contained within a statute delegating a function to a specified body or agency must be respected.

[7] Administrative Law and Procedure - Judicial Review - Findings - In General. When the record indicates a clear basis for a difference of opinion by reasonable men, an administrative decision cannot be considered to be arbitrary, capricious, or an abuse of discretion. [See 2 Am. Jur. 2d, Administrative Law 620.]

[8] Environment - Shoreline Management Act - Application – Limits. **Designations** by the legislature and, upon appropriate delegation of authority, **by the Department of Ecology** of certain parameters, boundaries, and measurements concerning bodies of water, streams, or wetlands as limits beyond which the Shoreline Management Act of 1971 would not apply, **while specific and arbitrary to some degree, represent reasonable delineations arrived at with considerable care and are in keeping with the general purpose of the act and are not subject to modification by the courts as arbitrary or capricious.**

[9] Appeal and Error - Findings of Fact - Review - In General. Findings of fact supported by substantial evidence will not be disturbed on appeal.

[10] Zoning - Grading Permit - Vested Right - In General. An applicant for a grading permit acquires a vested right to have the issuance of the permit determined by the law in effect at the time application for it is made.

[11] Appeal and Error - Assignments of Error - Argument in Support - Necessity. Assignments of error unsupported by argument or citations of authority and not appearing on their face to be well taken will not be considered on appeal.

**8 Wn. App. 844, JOHN C. MERKEL et al., Petitioners, v. PORT OF BROWNSVILLE et al., Respondents. No. 956-2. April 27, 1973.**

[1] Environment - Environmental Policy Act - Purpose and Application. The State Environmental Policy Act of 1971 (RCW 43.21C) mandates environmental protection as an obligation upon every governmental agency; it is the function of the courts to insure compliance with the procedures specified in the act. [See 61 Am. Jur. 2d, Pollution Control § 8.]

[2] Environment - Shoreline Management Act - Policy - Adjacent Lands. The reference to "adjacent lands" in the shoreline management act (RCW 90.58.100(2) (e)), is a reflection of the legislative scheme that **lands adjacent to shorelines must be considered together with the "wet lands" (the area extending 200 feet inland from high water)** in order to achieve the consistency necessary for a systematic and intelligent management of the shorelines.

[3] Environment - Applicable Regulatory Act - Single Project Affecting Uplands and Shorelines. A single improvement or project of a governmental agency including and having an interrelated effect on both uplands and shorelines **cannot be divided into segments for purposes of complying with the provisions of the environmental policy act and the shoreline management act.**

[4] Port Districts - Comprehensive Plan - Alterations - Effect. RCW 53.20.020 prohibits a port district from deviating from its adopted comprehensive plan except as such plan is amended after a public hearing.