

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

VICTORIA M. LUHRS,	)	
	)	No. 62534-9-1
Appellant/Cross-Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
WHATCOM COUNTY, a subdivision of	)	
the State of Washington,	)	
	)	
Respondent/Cross-Appellant.	)	FILED: September 21,
2009		

Grosse, J. — Washington’s Shoreline Management Act mandates that a local government’s shoreline management program contain standards governing the protection of single family residences and appurtenant structures against damage or loss due to shoreline erosion. Victoria Luhrs claims that the absolute prohibition of bulkheads on feeder bluffs contained in a former version of Whatcom County’s Shoreline Management Program conflicts with this statutory mandate. But, as the parties acknowledge, the issue of whether Luhrs’ proposed revetment is the only means by which she can protect her residence against loss or damage due to shoreline erosion has not yet been decided. The record before us is therefore inadequate to permit resolution of the issue presented.

**FACTS**

Victoria Luhrs purchased a six-acre parcel located on a bluff on Lummi Island in 1992. In 2000, Whatcom County Planning and Development Services (PDS) issued a correction notice requiring that Luhrs remove a wooden

bulkhead constructed on the property because PDS determined that the bulkhead was on a feeder bluff and bulkheads are not permitted on feeder bluffs.<sup>1</sup> Luhrs appealed to the county hearing examiner, who agreed that the bulkhead was not permitted. Luhrs next appealed to the county council, which also determined that the bulkhead was not permitted and had to be removed. Luhrs then filed a petition under the Land Use Petition Act (LUPA)<sup>2</sup> in Whatcom County Superior Court. The court affirmed the county council's decision.

In October 2006, Luhrs filed an application for a shoreline exemption to build a revetment on her property.<sup>3</sup> PDS denied this application, which is the subject of this appeal, in March 2007, determining that the site of the project was a feeder bluff, the proposed project constituted a bulkhead under the County's Shoreline Management Program (SMP), and bulkheads are prohibited on feeder bluffs. Luhrs appealed this decision to the hearing examiner, who upheld PDS's decision on the same grounds. She then appealed to the county council, and the council affirmed the hearing examiner's decision.

Luhrs filed a LUPA petition in Snohomish County Superior Court. That court issued a letter decision in July 2008, affirming the denial of Luhrs'

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<sup>1</sup> "Bulkheads are wall-like structures placed parallel to shore primarily for retaining uplands and fills prone to sliding or sheet erosion, and secondarily to protect uplands and fills from erosion from wave action." Former Whatcom County Code (WCC) 23.110.B.12 (1998).

<sup>2</sup> Ch. 36.70C RCW.

<sup>3</sup> A revetment is "a sloped wall constructed of rip rap or other suitable material placed on stream banks or other shorelines to retard bank erosion from high velocity currents or waves respectively." Former WCC 23.110.R.6. Rip rap is "dense, hard, angular rock free from cracks or other defects conducive to weathering used for revetments or other stream control works." Former WCC 23.110.R.7.

application to construct a revetment. In October 2008, the trial court entered its final LUPA decision and order, affirming the county council's decision except to the extent that the council decided issues arising under the critical areas ordinance that were not, by agreement of the parties, before the council for decision. The court issued a separate order finding that there was no prevailing party in the matter and that "[t]herefore there is no award of statutory 'costs to be called the attorney fee,' under the authority of RCW 4.84.020."

Luhrs appeals the denial of her application to construct the revetment. Whatcom County cross-appeals, asking for an award of attorney fees under RCW 4.84.370.

#### ANALYSIS

In reviewing an administrative decision in a LUPA proceeding, an appellate court stands in the same position as the superior court.<sup>4</sup> We review errors of law de novo and review the hearing examiner's decision as a whole for substantial evidence supporting the decision.<sup>5</sup>

Under LUPA, a court may grant relief only if the party seeking relief has carried the burden of establishing that one of the following standards has been met:

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

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

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<sup>4</sup> Habitat Watch v. Skagit County, 155 Wn.2d 397, 405-06, 120 P.3d 56 (2005).

<sup>5</sup> City of University Place v. McGuire, 144 Wn.2d 640, 647, 30 P.3d 453 (2001).

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

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

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

(f) The land use decision violates the constitutional rights of the party seeking relief.<sup>[6]</sup>

There is no dispute that the location of Luhrs' proposed revetment is a feeder bluff. At the time of Luhrs' application, the Whatcom County SMP absolutely prohibited bulkheads on feeder bluffs.<sup>7</sup> Also under that SMP, revetments closer than ten feet to the ordinary high water mark (OHWM) are considered bulkheads and are subject to the regulations pertaining to bulkheads.<sup>8</sup> Luhrs' proposed revetment was to be located closer than ten feet to the OHWM and was therefore considered a bulkhead under the SMP in effect at that time and was prohibited.<sup>9</sup>

Luhrs argues that the County's prohibition of bulkheads (or revetments closer than ten feet to the OHWM) on feeder bluffs conflicts with the provision in Washington's Shoreline Management Act of 1971 (SMA) that requires a local

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<sup>6</sup> RCW 36.70C.130(1).

<sup>7</sup> Former WCC 23.100.150.32(e).5 (1998).

<sup>8</sup> Former WCC 23.100.70.32(f).

<sup>9</sup> We reject Luhrs' argument that the County misinterpreted its SMP in concluding that her proposed revetment is a bulkhead under the SMP. Under the plain meaning of the SMP, considered in its entirety, Luhrs' proposed revetment constitutes a bulkhead under the SMP because it was to be located closer than ten feet from the OHWM.

government's shoreline management program to

contain standards governing the protection of single family residences and appurtenant structures against damage or loss due to shoreline erosion. The standards shall govern the issuance of substantial development permits for shoreline protection, including structural methods such as construction of bulkheads, and nonstructural methods of protection. The standards shall provide for methods which achieve effective and timely protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion.<sup>[10]</sup>

As the parties acknowledged at oral argument, the issue of whether construction of a revetment in accordance with Luhrs' proposal is the only means by which to protect her property has not yet been resolved. By agreement of the parties, the issues before the hearing examiner were limited to (1) whether the 2002 administrative decision had a preclusive effect on Luhrs' current application and (2) whether PDS erred in interpreting its regulations to prohibit Luhrs' proposed revetment. Without resolution of the issue of whether the revetment Luhrs wants to construct is necessary to protect her property, we cannot address whether the SMP under which the County denied her application conflicts with the SMA. Accordingly, we remand this matter to the superior court with directions to take whatever steps the court deems necessary to ascertain the relevant and necessary facts as to whether Luhrs' proposed revetment is the

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<sup>10</sup> RCW 90.58.100(6). We reject the County's arguments that Luhrs (1) waived this issue by raising for the first time in her reply brief in the LUPA appeal, (2) is barred by collateral estoppel from raising this issue, and (3) cannot raise this issue because she failed to provide notice to the Attorney General pursuant to RCW 7.24.110. First, Luhrs raised this issue in several briefs at the administrative level and also in her briefs before the superior court. Second, a crucial element of collateral estoppel—identity of the issues—is not present here. Finally, RCW 7.24.110 has no applicability here because Luhrs did not bring her action under the Uniform Declaratory Judgments Act.

only means by which she can protect her property against loss or damage due to shoreline erosion. On remand, the superior court may send the matter back to the hearing examiner for further fact-finding.<sup>11</sup>

Alternatively, upon remand, the parties may dismiss this proceeding and commence a new proceeding under the SMP the County adopted on February 27, 2007, and the Department of Ecology approved on August 8, 2008. That SMP does not absolutely prohibit bulkheads on feeder bluffs under all circumstances, but rather provides:

Bulkheads and other similar hard structures are prohibited on marine feeder bluff and estuarine shores, and on wetland and rock shores; provided that, such structures may be permitted as a conditional use where valuable primary structure(s) are at risk and no feasible alternatives exist and where ongoing monitoring, maintenance and mitigation for impacts to shoreline ecological functions and processes are provided.<sup>[12]</sup>

The proceedings involving Luhrs' property have been going on for nine years. According to Luhrs, her property is eroding at an alarming rate. The issues must be resolved without delay and Luhrs afforded whatever relief, if any, to which she is entitled. Should the aggrieved party on remand decide to appeal to this court once again, we stress that we will be unable to provide an effective remedy unless and until we are presented with a fully developed record.

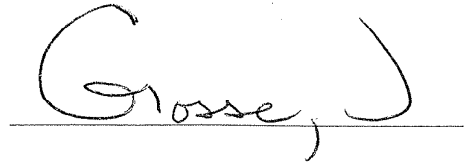
We vacate the superior court's decision and remand this matter to the

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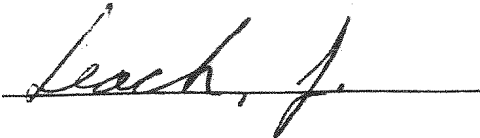
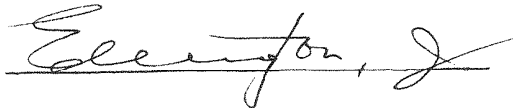
<sup>11</sup> See RCW 36.70C.140 ("The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.").

<sup>12</sup> WCC 23.100.13.B.2.b.

superior court for further proceedings consistent with this opinion.<sup>13</sup> We deny the County's request for an award of attorney fees under RCW 4.84.370.

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WE CONCUR:

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<sup>13</sup> We reject Luhrs' argument that any of the ex parte communications she identifies between with hearing examiner's clerk and the County's attorney require vacation of the decision under the appearance of fairness doctrine. Luhrs has not sustained her burden of showing evidence of actual or potential bias resulting from the ex parte communications. No bias resulted from the e-mail regarding the County's intent to argue collateral estoppel because the issue was decided adverse to the County. Luhrs' assertions of bias resulting from the e-mail regarding the Kovalik/Ritchie case are speculative at best. Further, we note that Luhrs herself included the document granting the Kovalik exemption as an exhibit to her reply brief submitted to the hearing examiner. Finally, Luhrs fails to show any actual or potential bias resulting from the clerk's request for copies of other decisions regarding Luhrs' property.