

IN THE MATTER OF

APP-09-01

Kelly and Marnie Clark

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**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION**

THIS MATTER having come on for hearing in front of the Douglas County Hearing Examiner on July 23, 2009, the Hearing Examiner having taken evidence hereby submits the following Findings of Fact, Conclusions of Law and Decision as follows:

I. FINDINGS OF FACT

1. The appellants are Kelly and Marnie Clark, 23197 Columbia Point Lane, Orondo WA.
2. On April 9, 2009, the Code Enforcement Officer issued a notice of code violations and order.
3. On May 11, 2009, Don Dimmitt filed a notice of appeal of the notice of violation for the riparian area disturbance per Chapter 14.12.010, on behalf of Mr. and Mrs. Clark.
4. Chapter 2.13.070, DCC, authorizes the Douglas County Hearing Examiner to hear appeals alleging an error in a decision of the director of land services in the interpretation or the enforcement of violations of the zoning code or any other development regulations.
5. Chapter 14.12, DCC, establishes procedures for appealing notices of violation.
6. The Plat of Columbia Point was recorded on April 25, 2000.
7. Vesting under the old conditions of approval and development regulations expired on April 24, 2005.
8. The Columbia River shoreline is designated as a wetland by Douglas County Code 19.18B.030.

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9. A wetland delineation and rating was not submitted to Douglas County prior to commencing activity as required by DCC 19.18B.020(E) for activity adjacent to or within an unrated wetland area.
10. An unpermitted activity has occurred closer than 50 feet from the Ordinary High Water Mark, which is the smallest wetland buffer in county code.
11. A wetland management and mitigation plan was not submitted prior to commencing activity as required by DCC 19.18B.035.
12. The Columbia River is classified as a Water of the State and therefore a fish and wildlife habitat conservation area by DCC 19.18C.020(B)(4).
13. Documentation regarding the habitat boundary survey and associated buffer required by DCC 19.18C.035(A) and (C) was not submitted prior to commencing activity.
14. DCC 19.18B.050 requires that wetlands and their buffers be left undisturbed and in their natural condition.
15. DCC 19.18.035 requires the approval of a wetland management and mitigation plan when impacts to a wetland are unavoidable during project development.
16. No wetland delineation and rating or wetland management and mitigation plan was submitted to Douglas County for review and approval prior to commencing development activity.
17. The construction of retaining walls and placement of fill on Lot 2 of the Plat of Columbia Pointe occurred after the issuance of occupancy for the residence and was not approved as a component of the building permit application.
18. Critical area standards adopted in 2003, do not accommodate the placement of retaining walls and fill in the wetland buffer. Construction of the retaining walls and fill placement are a violation of Title 19 of Douglas County Code. Since the walls and fill cannot be permitted in the buffer and are a violation, they cannot be permitted as accessory to the house under the Douglas County Shoreline Master Program.
19. Retaining walls and the fill placed on Lot 2 of the Plat of Columbia Pointe as violations, exceed the dollar values established under WAC 173-27-040(2)(a), for both the cost of construction and the cost of remediation, and require the submittal of a shoreline substantial development permit application.

20. Property owners are obligated to inquire first whether a project requires permit approval. Completing a project then seeking permission later is not a valid approach to shoreline development.
21. WAC 173-27-040(2)(c) establishes that, "Construction of the normal protective bulkhead includes those structural and nonstructural developments installed at or near, and parallel to, the ordinary high water mark for the sole purpose of protecting an existing single-family residence and appurtenant structures from loss or damage by erosion....."
22. The retaining walls onsite are not located at or near the ordinary high water mark and no evidence is in the record that the home is in danger of threat or loss due to erosion.
23. Approved site and construction plans for the placement of the residence did not include provisions for a retaining wall necessary for the construction of the home or to protect the home from erosion.
24. The geological site assessment prepared by Munson Engineers, dated March 28, 2005, did not call out the need to develop retaining walls to protect the home from erosion.
25. Unless geotechnical review determines that structures are necessary for erosion control within habitat buffers, the common resource agency recommendation for erosion control in buffers is via bioengineering, developed through a wetland management and mitigation plan. Such measures are consistent with the intended functions of the wetland buffer.
26. No information in the record exists to support the appellant's assertion that the retaining wall was necessary to protect the single family home from erosion. In fact, the appellants on page 2, item 1c of Kelly and Marnie Clark's testimony, state that the retaining wall was necessary for landscaping, not for home safety.
27. Site pictures in the record depict the extent and nature of fill on the site prior to home construction. Site pictures depict the extent and nature of fill on the site upon issuance of home occupancy. No pictures within the record depict a vertical wall of fill 6' in height. Site pictures below the 6' concrete retaining wall, (7' including the footing), show fill below the retaining wall itself that is similar in height and character to the pictures and extent of fill depicted on the site prior to home construction and at the time of issuance of final occupancy for the residence. Evidence in the record substantiates the county's assertion that the applicant has placed fill within the wetland buffer.

28. No provision in county code exists to waive buffer requirements by the submittal of an assessment of the functions and values of a site's buffer by a biologist.
29. Section 19.18.030 Exemptions, DCC addresses the issue of maintaining nonconforming structures in critical areas and does not provide for the expansion of nonconforming structures.
30. WAC 173-27-080 does not include authorization to violate locally adopted development standards, (wetland buffers) established under the Growth Management Act. This section of the WAC is not germane to the violations under appeal.
31. Mr. Kelly Clark has testified that he is a builder.
32. A builder should be familiar with the specific provisions of the applicable building code, in this case International Residential Code Section R105.2, Work exempt from permit (in part). Item 3, provides that retaining walls that are **not** over 4 feet in height measured from the bottom of the footing to the top of the wall, unless supporting a surcharge, are exempt. The height of the wall in question is greater than 4 feet measured from the bottom of the footing. The enforcement photos clearly indicate that the height of the wall is actually 6 feet measured from the top of the footing which is not exempt from the IRC. The photo indicates that 3 form panels 2 feet in height were used to contain the concrete. The wall measures 7 feet in height including the footing.
33. In response to the Clark's written statement that they were pressured to get a final, the building permit file reflects that it had been approximately 11 months since their last inspection and their permit was approaching expiration pursuant to DCC 15.12.080. Their home was furnished and possibly occupied prior to final inspection and required a certificate of occupancy. As a builder, Mr. Clark should be familiar with certificate of occupancy requirements of the International Residential Code which state: "R110.1 Use and occupancy. No building or structure shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made until the building official has issued a certificate of occupancy therefore as provided herein. Issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of this code or of other ordinances of the jurisdictions. Certificates presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid". Where feasible, the Department notifies property owners ahead of a permit expiration, to the benefit of the property owner to avoid permit extensions or reactivation fees. Additionally, a certificate of occupancy was necessary for the Clark's to legally occupy the home and to assure a safe residence.

34. A mitigated determination of non-significance with environmental conditions was issued by Douglas County Land Services with the rezone for the property under application R#4-91.
35. The environmental condition which relates to native vegetation states: “The preliminary short plat application shall identify all wetlands on site using the Federal Wetlands Delineation Methodology on the preliminary plat map. The drainage area bisecting the Northwest portion of this property and a portion of the shoreline area shall be retained as a natural greenbelt/open space, to be approved by the Department of Wildlife and the Douglas County Planning Director. The natural greenbelt/open space area shall be indicated on the preliminary plat application with all of the above duly noted on the final plat”
36. WAC 197-11-350 allows for mitigation to be applied to a project either by condition imposed by an agency, or by a mitigation agreement entered into voluntarily by a property owner, in effect changing the property owner’s application. A mitigation agreement was not entered into with the developer of Columbia Pointe.
37. RCW 58.17.170 states: “Any lots in a final plat filed for record shall be a valid land use notwithstanding any change in zoning laws for a period of five years from the date of filing. A subdivision shall be governed by the terms of approval of the final plat, and the statutes, ordinances, and regulations in effect at the time of approval under RCW 58.17.150 (1) and (3) for a period of five years after final plat approval unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision.”
38. The provisions of RCW 58.17.170 are clear, a subdivision shall be governed by the terms of approval of the final plat, and the statutes, ordinances, and regulations in effect at the time of approval under RCW 58.17.150 (1) and (3) for a period of five years after final plat approval. The 5 year period after the recording of the Plat of Columbia Pointe has elapsed. Property owners are subject to the notes and the requirements on the face of the final plat, which in part were established by environmental conditions of R#4-91, and are subject to the rules and regulations in place at the time of any further development of their parcels.
39. In a letter prepared by Terry L. Brink, legal counsel for the developer of the Plat of Columbia Pointe, dated July 15, 1999, Mr. Brink asserts that after five years from the date of recording of the plat, that property owners will be subject to the more restrictive buffer standards.
40. The SEPA Handbook states the following under *B.8. Vested Rights*, “*Victoria Tower Partnership v. City of Seattle (Victoria I)*, 49 Wn. App. 755, 745 P. 2d 1328 (1987) The vested rights doctrine, which requires that a building permit application be

evaluated under the zoning and building regulations in effect at the time of application, applies to land use decision made under SEPA. Polices proposed but not adopted at the time of application could not be used as basis for mitigation under SEPA.”

41. The guidance in B.8. of the SEPA Handbook, clearly indicates that when evaluating an application that jurisdictions utilize the rules and regulations in place at the time a complete application has been submitted. The handbook seeks to clarify that for those applications which require SEPA review as a component of the project application, that rules, regulations and polices not yet adopted cannot be considered. A building permit does not require SEPA, but this component of the handbook also acknowledges the clear standard that building permits are subject to the rules and regulations in place at the time of application.
42. RCW 36.70A.170, RCW 36.70A.172, WAC 365-195-410, and WAC 365-195-900 establish Douglas County’s obligation to designate and protect fish and wildlife habitat conservation areas and wetlands utilizing best available science with special consideration for anadromous fisheries.
43. Best available science has been incorporated into the provisions of Title 19 of the DCC to implement the above noted statutory and WAC rule provisions referenced in finding #43 above. The appellant’s contention that the county cannot impose more restrictive standards is in direct conflict with the requirements of the Growth Management Act. The full scope and intent of the critical area standards established within Title 19 of DCC were not envisioned, addressed or required at the time of R#4-91.
44. RCW 43.21C.060 establishes: “Chapter supplementary -- Conditioning or denial of governmental action. The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporations, and counties. Any governmental action may be conditioned or denied pursuant to this chapter: PROVIDED, That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. Such designation shall occur at the time specified by RCW 43.21C.120. Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decision maker. Mitigation measures shall be reasonable and capable of being accomplished. In order to deny a proposal under this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final

or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact. Except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a legislative decision, is conditioned or denied by a nonelected official of a local governmental agency, the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals. Such appeals shall be in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency.”

45. Consistent with RCW 43.21C.060, SEPA is a tool for local governments to address environmental issues as a component of a project that may not be fully addressed within local adopted standards. The mitigation required as a component of SEPA must be tied to locally adopted policies. SEPA is considered accessory to these local policies, and is not a standalone provision that contains specific development standards. The statutory language is clear.
46. WAC 173-27-080 does not include authorization to violate locally adopted development standards, (wetland buffers) established under the Growth Management Act. This section of the WAC is not germane to the violations under appeal.
47. Site pictures at the time of final occupancy depict 1-2 feet of native vegetation landward of the erosion barrier placed at the 25’ setback boundary. Pictures of the site after wall placement clearly depict that this vegetation landward of the erosion control fencing has been removed. As a component of the wetland buffer, this vegetation could not be removed.
48. Title 14 of Douglas County Code defines a critical area buffer to be: “means the zone contiguous with a sensitive area that is required for the continued maintenance, function, and structural stability of the sensitive area. The critical functions of a riparian buffer (those associated with an aquatic system) include shading, input of organic debris and coarse sediments, uptake of nutrients, stabilization of banks, interception of fine sediments, overflow during high water events, protection from disturbance by humans and domestic animals, maintenance of wildlife habitat, and room for variation of aquatic system boundaries over time due to hydrologic or climatic effects. The critical functions of terrestrial buffers include protection of slope stability, attenuation of surface water flows from stormwater runoff and precipitation, and erosion control.”
49. As noted in the critical area buffer definition, a buffer is important for the attenuation of surface water flows from stormwater runoff and precipitation and erosion control.

50. As discussed in Douglas County's counter proposal to the Department of Ecology on the Douglas County Regional Shoreline Master Program, dated April 13, 2009, buffers provide an important function for the protection of aquatic habitat and water quality.
51. The placement of impervious surfaces such as the concrete retaining walls and the intended deck would decrease the ability of the wetland buffer to accommodate its intended functions and increase impervious surfaces and runoff in close proximity to a wetland.
52. Section 19.18.020 of DCC states: "The provisions of this chapter shall apply to all development activities within unincorporated Douglas County. Any development authorized to alter the condition of any land, water or vegetation; or to alter or construct any building, structure or improvement shall be in compliance with the requirements of this chapter."
53. As established in Section 19.18.020 Applicability of DCC, the placement of fill and retaining walls in the buffer constitute development regulated under county critical area standards
54. The statement signed by Mr. Forester speaks to the vesting of the single family building permit specifically. The appellant received vesting for their single family residential building permit, completed this permit application and requested and received a certificate of occupancy. The statement has no legal bearing to the subject violations.
55. The phrase "natural condition" relates to the condition of the property before new regulations would go into effect.
56. Open Record Public Hearing was held on this matter on July 23, 2009.
57. At the conclusion of the hearing, the Hearing Examiner kept the record open to allow for the planning filed in the underlying plat to be received and admitted into the record. The Hearing Examiner then gave until August 14th, 2009 for supplemental written responses to be provided and indicated that the record would close on August 14th, 2009 and that a decision would be rendered by August 28th, 2009.
58. Attending and appearing on behalf of the applicant was Kelly Clark, assisted by his attorney, Don Dimmitt.
59. Admitted into the record as Exhibit "1" was copies of a PowerPoint presentation submitted by Douglas County Transportation Land Services Staff.

60. Admitted into the record as Exhibit "2" is a July 14th, 2009 letter from Don Dimmitt to Glen DeVries.
61. Admitted into the record as Exhibit "3" is a copy of an Affidavit of Mailing with an attached July 17th, 2009 letter from Mr. DeVries to Mr. Dimmitt.
62. Admitted into the record as Exhibit "4" is a copy of a Notice of Code Violation and Order dated July 9th, 2009 to Kelly and Marnie Clark.
63. Admitted into the record as Exhibit "5" is a copy of WAC 173-27-080.
64. Admitted into the record as Exhibit "6" is a July 21, 2009 letter from Don Dimmitt to the Hearing Examiner including the Appellant's response brief to the staff report on the code violation, as well as documents identified as Exhibits "1, 2, 3, 4, 5, 6, 7, and 8".
65. Also submitted and admitted into the record was a Summary of the Building process of the Clark's home, submitted in the form of a declaration dated July 21, 2009 and signed by Kelly and Marnie Clark. Attached to this declaration were Exhibits "B, B.2, C, D, G, H, I, J, K, L, M.1, M.2, M.3, N, O, P, Q, R, S, T, U.1, U.2, U.3, V, W, X, Y, Z, and AA."
66. Finally, submitted with this packet of materials is a July 20, 2009 letter from Larry Lehman of Grady and Associates to Mr. Clark with attached Exhibits "1, 2, and 3".
67. Submitted after the open record public hearing, but before the public record closed, was an August 12th, 2009 letter from Mr. Dimmitt to the Hearing Examiner and an email dated August 14th, 2009 from Kelly and Marnie Clark to the Hearing Examiner with three attached photographs. All these documents were admitted into the record.
68. Submitted into the record is an August 14th, 2009 letter from Mr. Glen DeVries to the Hearing Examiner.
69. Also admitted into the record were all materials from code enforcement file 09-52 and PC 2-93
70. The appellant purchased the property in 2004. Near the time that they purchased the property, they were advised by a neighbor of an issue regarding the set back from the ordinary high watermark and the vesting procedures and vesting concerns relating to the same.
71. Although the Appellants have placed great reliance upon a letter prepared by the appellant's dated April 8th, 2005 which was signed by Kelly Clark and David Forester

of Douglas County Land Services, and it is clear to the Hearing Examiner that this document (Exhibit "P" in Appellant's materials) relates to the residential home permit sought by the appellant's. Although it is read by the appellant's as meaning that the set backs of the original plat were not divested after the five year expiration, the Hearing Examiner finds that this is an incorrect reading. This was a document which was prepared by Kelly and Marnie Clark. Even if the Hearing Examiner were to adopt Mr. and Mrs. Clark's impression as to the meaning of this letter, David Forester had absolutely no authority to modify, amend, or waive any set back requirements as required by the Douglas County Code, the Douglas County Shoreline Master Program, and the Washington State Management Act.

72. The Hearing Examiner's review of the complete file of PC 2-93, the preliminary subdivision application for Columbia Rivers Properties, as well as the Hearing Examiner's decision, does not provide any substantial factual basis to reverse the Douglas County Transportation Land Services Notice of Code Violations and Order.
73. Mr. Clark testified that he would not have asked for a final inspection if he knew that any further development on the property would have to comply with current and existing shoreline set back requirements.
74. Mr. Clark testified that he has been a residential building contractor, but that he did not have waterfront experience.
75. The wall that has been constructed on the Appellant's property is not a bulkhead.
76. The appellant did place fill on the landward side of the wall that they constructed.
77. A concrete pad was part of the permit of the single family residence and therefore this concrete pad is not subject to a violation and will be allowed.
78. There is no authority in the Douglas County Code for the Hearing Examiner or the Douglas County Administrator to reinstate building permits.
79. The retaining wall and deck are not appurtenances to the single family residence on the property.
80. Critical area standards adopted in Douglas County in 2003 do not accommodate the placement of retaining walls in a wetland buffer.
81. After April 25, 2005, the placement of retaining walls within the wetland buffer are a violation as set forth by Douglas County Transportation and Land Services.

82. The Appellant, Kelly Clark, has on one hand indicated that he was a professional builder and it was his opinion that the retaining wall is a necessary appurtenance to the home to protect it from erosion, but on the other hand, indicates that he did not understand the consequences of a final inspection and occupancy permit and was relying upon staff for guidance, professing, apparently, an inability to understand the Douglas County development standards and regulations.
83. If indeed, Kelly Clark, were an expert on the need for a retaining wall, it's the Hearing Examiner's finding that certainly a retaining wall would have been part of the application for the single family residence. Instead, it appears that the retaining wall was not considered necessary for the construction of the single family residence, and instead was contemplated to be constructed sometime in the future, after the single family residence was completed, and that the purpose of the retaining wall was for landscaping and to develop a flat backyard for the appellant's home.
84. The height of the retaining wall on the Appellant's property is greater than four feet, measured from the bottom of the footing.
85. Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

II. CONCLUSIONS OF LAW

1. The Hearing Examiner has been granted authority to render this Decision.
2. Sections 18.82.050-060 DCC do not apply to Title 19 critical area regulations, only provisions of Title 18 Zoning.
3. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

III. DECISION

Based on the above Findings of Fact and Conclusions of Law, the Hearing Examiner hereby **AFFIRMS** in all respects the April 9, 2009 Notice of Code Violations and Order

Dated this 26 day of August, 2009.

DOUGLAS COUNTY HEARING EXAMINER



ANDREW L. KOTTKAMP

Any aggrieved party or agency of record may request a reconsideration of this Hearing Examiner's decision. Motions for reconsideration must be filed with the Department within ten (10) days from the date of issuance as defined by RCW 36.70C.040(4)(a). Unless otherwise provided, the filing of a motion for reconsideration shall not stop or alter the running of the period provided to appeal the Hearing Examiners decision to Superior Court. Motions for reconsideration are governed by Douglas County Code 2.13.150.

Anyone aggrieved by this decision has twenty-one (21) days from the issuance of this decision, to file an appeal with Douglas County Superior Court, as provided for under the Judicial Review of Land Use Decisions, RCW 36.70C.040(3). The date of issuance is defined by RCW 36.70C.040 (4)(a) as "(t)hree days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available" or if this section does not apply, then pursuant to RCW 36.70C.040(3) (c) "...the date the decision is entered into the public record." Anyone considering an appeal of this decision should seek legal advice.