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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 90716-1

COURT OF APPEALS NO. 69414-6-I

TOWARD RESPONSIBLE DEVELOPMENT,

Appellant,

v.

CITY OF BLACK DIAMOND, et al.,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

Toward Responsible Development ("TRD"), appellant below, hereby petitions for review of the Court of Appeals' decision identified in Part II.

II. CITATION TO COURT OF APPEALS DECISION

TRD seeks review of the unpublished opinion issued by Division I in the case of *Toward Responsible Development, et al. v. San City of Black Diamond, et al.,* No. 69414-6-I (June 16, 2014) (App. A. hereto). The Court of Appeals denied TRD's motion for reconsideration on July 9, 2014 (App. B. hereto).

III. ISSUE PRESENTED FOR REVIEW

RCW 4.84.370 provides that the Court of Appeals may award attorney's fees to the prevailing party in a land use case provided that the party also prevailed before the Superior Court and before the local jurisdiction. Does RCW 4.84.370 allow the Court of Appeals to award attorney's fees when the case is dismissed on procedural grounds, where no court has ruled on the merits of the appeal, and where the case was dismissed as moot?

IV. STATEMENT OF THE CASE

This is the second appeal to reach this Court regarding two massive development projects in the small town of Black Diamond. The

two projects, proposed by respondent Yarrow Bay,[1] are known as The Villages and Lawson Hills. Together, The Villages and Lawson Hills represent the largest development project ever proposed in King County and are anticipated to transform the small town of Black Diamond into a city the size of Anacortes.

The first appeal to reach this Court was *Toward Responsible Development v. City of Black Diamond, et al.,* Supreme Court No. 89997-5 (herein "*TRD I*"). That appeal involved a challenge by TRD to the City's first round of approvals for The Villages and Lawson Hills — known as the Master Planned Development ("MPD") Ordinances — which the City adopted on September 20, 2010. In that appeal, TRD alleged violations of the State Environmental Policy Act ("SEPA"), Chapter 43.21C RCW, and the City's comprehensive plan and code requirements. On January 27, 2014, the Court of Appeals upheld the MPD Ordinances and, on June 4, 2014, this Court denied TRD's petition for review.

In contrast, this appeal involves the City's second round of approvals of The Villages and Lawson Hills — the "Development Agreements" — which the City adopted while the dispute in *TRD I* was still pending before the King County Superior Court. *See* CP 15 & 145.

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[1] We use the name "Yarrow Bay" to refer collectively to the proponents of The Villages and Lawson Hills, respondents BD Village Partners LP and BD Lawson Partners LP.

These second-round approvals are subsidiary to the MPD Ordinances at issue in *TRD I* and their purpose is to flesh out and add detail to the requirements in City's first round of approvals.[2] We refer to this appeal as the "Development Agreements Appeal."

On December 29, 2011, TRD initiated the Development Agreements Appeal in King County Superior Court pursuant Washington's Land Use Petition Act ("LUPA"), Chapter 36.70C RCW. *See* CP 1. LUPA provides the state's exclusive mechanism for judicial review of local land use decisions.

While both lawsuits challenged the City's approval of The Villages and Lawson Hills, TRD also anticipated that the Development Agreements Appeal would be rendered moot once the dispute in *TRD I* was finally resolved. For example, TRD anticipated that if its appeal in *TRD I* was successful, the Court of Appeals would void the MPD Ordinances, in which case the projects could not proceed.[3] On the other hand, TRD

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[2] A detailed explanation of the relationship between the MPD Ordinances and the Development Agreements may be found in TRD's reply brief before the Court of Appeals. *See* Reply Brief of Toward Responsible Development at 9–11 (Aug. 5, 2013) (herein "TRD Reply Br."). Suffice it to say, the MPD Ordinances at issue in *TRD I* represent the City's high-level, generalized approval of the projects, while the Development Agreements are intended to implement the MPD Ordinances with, *inter alia*, specific development standards, mitigation requirements, vesting provisions, and review procedures. *See id.*

[3] As noted in TRD's reply brief below, the City's municipal code forbids the construction of a development project with the City's "Master Planned Development Zoning District" without a valid MPD ordinance specifically authorizing the project. *See* TRD Reply Br. at 9. Thus, voiding the MPD Ordinances in *TRD I* would have stripped

informed the superior court that, should it lose the appeal in *TRD I*, it would not pursue the Development Agreements Appeal (which would also render the appeal moot). *See, e.g.,* CP 726, 734. In all, TRD had a very narrow purpose in filing the Development Agreements Appeal — to preserve its right to oppose The Villages and Lawson Hills in the event that its first appeal proved successful, and to head off any argument by Yarrow Bay that the projects could proceed notwithstanding the abolishment of the MPD Ordinances in *TRD I*.

TRD also filed the Development Agreements Appeal before *TRD I* was finally resolved because the dispute is subject to LUPA's strict 21-day statute of limitations. *See* RCW 36.70C.040(3). Had TRD waited to file the Development Agreements Appeal until after *TRD I* was resolved, it would have been precluded from challenging the development agreements even were it to prevail in *TRD I*.

Consistent with its limited purpose in filing the Development Agreements Appeal, and recognizing that the issues would be mooted by a final ruling in *TRD I*, TRD moved the superior court early on to stay its challenge to the development agreements. *See* CP 417. Subsequently, the parties agreed to stay the litigation pending the superior court's resolution of TRD's challenge to the MPD Ordinances. *See* CP 476–77. The parties

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Yarrow Bay of its authority to proceed with the two projects, notwithstanding that the City subsequently adopted development agreements for the two projects.

agreed that, should the superior court rule against TRD, TRD could move the court for a further stay pending the Court of Appeals' resolution of *TRD I*. CP 477.

On August 27, 2012, the superior court upheld the MPD Ordinances in *TRD I* and, shortly thereafter, TRD filed a motion to continue the stay of the Development Agreements Appeal. *See* CP 497. As with the initial stay, TRD believed that a further stay was warranted because a final resolution in *TRD I* would render the Development Agreements Appeal moot. *See* CP 501.

Notwithstanding TRD's statement that it would dismiss the Development Agreements appeal should it lose its appeal in *TRD I*, and notwithstanding that the issues in the Development Agreements Appeal would soon be rendered moot, the superior court denied TRD's request to continue the stay. *See* CP 799. Later, the superior court dismissed the Development Agreements Appeal for failure to pay for the administrative record. CP 1126. TRD had hoped to avoid that cost — totaling $17,000 — by staying the litigation pending a final resolution in *TRD I*. CP 631. For a grass-roots group like TRD, such an expense would have been burdensome and, worse, unnecessary in light of the fact that the case would soon be moot. *Id.*

TRD appealed the superior court's dismissal of the Development Agreements Appeal, arguing that the dismissal was unwarranted in light of the court's prior, erroneous decision to not stay the case. *See* CP 1129. But before the Court of Appeals issued its final ruling in that appeal, it issued its opinion in *TRD I* and upheld the MPD Ordinances. The Court of Appeals later affirmed the superior court's dismissal of the Development Agreements Appeal, noting that the case was moot in light of TRD's prior statement that it would drop the appeal should it lose in *TRD I*. *See* App. A at 6.

In addition to dismissing the Development Agreements Appeal as moot, the Court of Appeals awarded the City and Yarrow Bay their attorneys' fees pursuant to RCW 4.84.370. *See* App. A. at 7–8.[4] In doing so, the court noted that RCW 4.84.370 is currently the subject of a conflict among the Courts of Appeals. *Id.* at 8. According to Divisions II and III, RCW 4.84.370 does not permit an award of attorneys' fees unless the challenged land use decision is upheld on the merits. Under that interpretation, the Court of Appeals would have been precluded from making a fee award because the case was dismissed on procedural grounds

[4] Subsequent to the Court of Appeals' decision, respondents requested more than $50,000 in attorneys' fees and costs for work performed before the Court of Appeals in the Development Agreements Appeal. Between them, Yarrow Bay and the City have also requested nearly $200,000 in fees and costs for work performed before the Court of Appeals in *TRD I*.

and neither the superior court nor the Court of Appeals ruled on the merits of the Development Agreements Appeal. *See* App. A. at 8.

On July 7, 2014, TRD moved for reconsideration of the court's fee award. In part, TRD asked the Court of Appeals to defer ruling on the attorneys' fees issue until this Court issues its opinion in *Durland v. San Juan County*, Supreme Court No. 89293-8. In *Durland*, this Court accepted review to resolve the conflict among the Divisions regarding RCW 4.84.370 — namely, whether the statute authorizes an award of attorneys' fees when no final decision on the merits has been issued.[5] TRD also noted that subsequent to this Court accepting review in *Durland*, the same issue was raised in *Gresh v. Okanogan County*, Supreme Court No. 89948-7. On June 3, 2014, this Court deferred its decision to grant review in *Gresh* pending the outcome in *Durland*.

On July 9, 2014, the Court of Appeals denied TRD's motion for reconsideration, including TRD's request that it defer ruling on the attorneys' fees issue until after this Court decides the issue in *Durland* (and, potentially, in *Gresh*). *See* App. B. This petition followed.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may grant review and consider a Court of Appeals opinion if it involves an issue of substantial public interest or if the

[5] Oral argument in *Durland* was held on March 13, 2014, but no decision has yet been issued.

decision conflicts with other decisions of the Court of Appeals. RAP 13.4(b)(2), (3), (4). Here, TRD does not seek review of the dismissal of the Development Agreements Appeal. Nor does TRD seek review of the superior court's denial of a stay. As TRD has stated throughout this case, it has no intention of prosecuting the merits of this appeal after losing its appeal in *TRD I*.

TRD does, however, seek review of the Court of Appeals' decision to award the City and Yarrow Bay attorneys' fees under RCW 4.84.370. That statute, titled "Appeals of land use decisions — Fees and costs," provides as follows:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

RCW 4.84.370 (emphasis added).

As noted in the petitions for review in *Durland* and *Gresh*, RCW 4.84.370 is an exception to the American rule that governs the awarding of attorney's fees. Like most American jurisdictions, Washington has followed this rule since the beginning of its statehood. *See, e.g., Larson v. Winder*, 14 Wash. 647, 651, 45 P. 315 (1896). The American rule provides that "[i]n absence of contract, statute or recognized ground of equity, a court has *no power* to award an attorney's fee as part of the costs of litigation." *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113, 111 P.2d 612 (1941) (emphasis added).

The American rule embodies many important public policies, not the least of which is access to justice — it ensures that less wealthy plaintiffs will not be deterred from seeking redress for fear of being saddled with their opponent's legal fees should they lose.[6] Accordingly,

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[6] *See, e.g., Ackerman v. Kaufman*, 41 Ariz. 110, 114, 15 P.2d 966 (1932) ("Our public policy requires that the honest plaintiff should not be frightened from asking the aid of the law by the fear of an extremely heavy bill of costs against him should he lose."); *Straus v. Victor Talking Mach.* Co., 297 F. 791, 799 (2nd Cir. 1924) ("[I]t would be a negation of the principle and right of free access to the courts to hold that the submission of rights to judicial determination involved a dangerous gamble which might subject the loser to heavy damage.").

this Court has held that because fee-shifting statutes are exceptions to the American rule, they must be construed narrowly. *See Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006). Abrogation of the American rule, in whole or in part, requires "a clear expression of intent from the legislature." *Id.*

Consistent with this Court's instruction in *Cosmopolitan Engineering Group* to construe fee-shifting statutes narrowly, the Courts of Appeals for Divisions II and III have held that RCW 4.84.370 does not authorize an award of attorneys' fees unless the case is resolved on the merits. *See, e.g., Northshore Investors, LLC v. City of Tacoma*, 174 Wn. App. 678, 701, 301 P.3d 1049 (2013); *Richards v. City of Pullman*, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006); *Witt v. Port of Olympia*, 126 Wn. App. 752, 759–60, 109 P.3d 489 (2005); *Overhulse Neighborhood Association v. Thurston County*, 94 Wn. App. 593, 601, 972 P.2d 470 (1999).

In this case, the superior court dismissed the Development Agreements Appeal for failure to pay the costs of the administrative record, and the Court of Appeals affirmed, in part, on the basis that the case is moot. The merits of the Development Agreements Appeal was never adjudicated — either by the superior court or by the court of appeals

— and the court had "no power" to make a fee award to the City or Yarrow Bay. *State ex rel. Macri*, 8 Wn.2d at 113.

In awarding fees, the Court of Appeals followed *Prekeges v. King County*, 98 Wn. App. 275, 285, 990 P.2d 405 (1999), in which Division I held (contrary to Divisions II and III) that RCW 4.84.370 does not require a decision on the merits. *See* App. A. at 9 n. 23. The Court of Appeals also relied on the Division I opinion in *Durland v. San Juan County*, which is currently under review by this Court. *Id.*

As evidenced by this Court's acceptance of review in *Durland*, and its deferral of the *Gresh* petition for review, the correct interpretation of RCW 4.84.370 raises issues of substantial public interest. The issue is also currently the subject of a conflict among the Courts of Appeals. Thus, we ask that this Court accept review of the issue in this case or, alternatively, defer review pending the outcome in *Durland*. Because neither the superior court nor the Court of Appeals reached the merits of this case, those courts did not address, let alone "uphold" the Development Agreements within the meaning of RCW 4.84.370. The statute does not authorize an award of attorneys' fees and this Court should grant review to correct the Court of Appeals' erroneous interpretation of RCW 4.84.370, which has now further divided the Courts of Appeals on this important issue.

VI. CONCLUSION

For the foregoing reasons, Appellant Toward Responsible Development respectfully requests that this Court grant review of the fee award to respondents City of Black Diamond and Yarrow Bay.

Dated this 8 day of August, 2013.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: _____

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TOWARD RESPONSIBLE DEVELOPMENT, a Washington not-for-profit corporation, Appellant, v. CITY OF BLACK DIAMOND; BD LAWSON PARTNERS LP; BD VILLAGE PARTNERS, LP, Respondents, and CITY OF MAPLE VALLEY; CYNTHIA E. AND WILLIAM B. WHEELER; ROBERT M. EDELMAN; PETER RIMBOS; MICHAEL E. IRRGANG; JUDITH CARRIER; VICKIE HARP and CINDY PROCTOR, Other Parties.	)	No. 69414-6-I UNPUBLISHED OPINION FILED: June 16, 2014

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VERELLEN, J. — Toward Responsible Development (TRD) appeals the superior court's order denying its motion to continue a stay of its land use petition pending this court's resolution of a prior petition. TRD also challenges the dismissal of its petition following its failure to perfect the record. We affirm both of the superior court's orders.

APPENDIX A

FACTS

This is the third appeal addressing TRD's challenges to permits issued by the City of Black Diamond (City) to BD Village Partners and BD Lawson Partners (collectively Yarrow Bay) for two large-scale master planned development (MPD) projects, known as The Villages and Lawson Hills. A fuller recitation of the facts of TRD's two prior challenges is set out in this court's prior opinions, BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Board[1] and Toward Responsible Development v. City of Black Diamond (Toward Resp. Dev. I).[2]

The City approved Yarrow Bay's MPD permits by ordinance in September 2010. TRD, a citizens group opposed to the developments, appealed the MPD permits to the City's hearing examiner, arguing that the environmental impact statements upon which they were based were inadequate. The hearing examiner upheld the permits, and on October 11, 2010, TRD filed a land use petition in King County Superior Court under the Land Use Petition Act (LUPA), chapter 36.70C RCW (the MPD petition).

RCW 36.70C.100 allows a petitioner to request a stay of implementation while a LUPA petition is pending. TRD did not seek a stay, and while the MPD petition was pending, Yarrow Bay moved forward with the next step in the permitting process. In 2011, the City adopted development agreements for both projects. TRD filed a second LUPA petition challenging the development agreements (the DA petition). The

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[1] 165 Wn. App. 677, 269 P.3d 300 (2011), review denied, 173 Wn.2d 1036, 277 P.3d 669 (2012).

[2] Noted at 179 Wn. App. 1012 (2014).

parties agreed to stay the DA petition pending the superior court's resolution of the MPD petition.

On August 27, 2012, the superior court dismissed the MPD petition, finding that TRD's claims regarding the MPD permits were without merit. TRD appealed the dismissal to this court and sought to continue the stay of the DA petition pending the resolution of the appeal. TRD argued that litigating the DA petition would be inefficient given that either: (1) the MPD permits would be upheld by this court, at which point TRD would abandon the DA petition,[3] or (2) the MPD permits would be voided, at which point TRD would seek to have the development agreements remanded to the City's hearing examiner. Yarrow Bay opposed a continued stay, arguing that any further delay would significantly prejudice its ability to enter into construction contracts and jeopardize its capital investment in the projects.

The superior court denied TRD's motion to continue the stay and set a case schedule for the DA petition. The case schedule required TRD to pay the City the cost of producing the administrative record by October 10, 2012 and file the record by November 5, 2012. TRD failed to meet these deadlines, and the City and Yarrow Bay moved to dismiss. The superior court denied the motion and set new deadlines for payment and filing of November 2 and November 20, 2012, respectively. TRD again failed to meet these deadlines, and the City and Yarrow Bay renewed their motion to dismiss. The superior court denied the motion a second time, setting new

[3] In its briefing regarding the stay, TRD stated that "[i]f the Court of Appeals upholds the Superior Court decision [on the MPD petition], TRD will not pursue this LUPA appeal of the Development Agreements." Clerk's Papers at 734.

deadlines for payment and filing of November 26 and December 10, 2012, respectively, and warning that "[s]hould TRD fail to comply with this third court-ordered payment deadline, it will place petitioners in significant jeopardy of case dismissal."[4] TRD once again failed to meet these deadlines, and Yarrow Bay filed a third motion to dismiss. In its response, TRD conceded that "because [TRD] has appealed this Court's denial of its motion for a stay of this matter, it seems that dismissal is warranted to allow these repeated issues to be resolved in a timely manner before the Court of Appeals."[5] Based on TRD's repeated failures to comply with court-imposed deadlines as well as its concession that dismissal was warranted, on December 6, 2012, the superior court granted Yarrow Bay's motion and dismissed the DA petition with prejudice.

On January 27, 2014, this court issued its decision affirming the superior court's dismissal of the MPD petition in Toward Resp. Dev. I.

TRD appeals the superior court's denial of its motion for a continued stay and the dismissal of the petition.

DISCUSSION

Motion for Stay

The legislature enacted LUPA in order to establish "uniform, expedited appeal procedures" for land use decisions made by local jurisdictions.[6] The overarching goal

[4] Clerk's Papers at 1092.

[5] Clerk's Papers at 1107.

[6] RCW 36.70C.010.

of LUPA is to ensure "consistent, predictable, and timely judicial review."[7] A hearing on the merits shall take place within approximately 60 days from the filing of the petition.[8] A delay in setting the hearing on the merits requires either a stipulation of the parties or a showing of good cause.[9]

The grant or denial of a motion for stay rests within the sound discretion of the superior court, and we review the court's decision only for abuse of that discretion.[10] A court abuses its discretion only if its ruling is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons.[11] "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."[12]

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[7] Id.

[8] See RCW 36.70C.080 (requiring that within 7 days after the petition is served, petitioner must note the initial hearing, which must be set between 35 and 50 days after the petition is served, and at which time the court shall enter an order setting a date for perfection of the administrative record); RCW 36.70C.110 (requiring the administrative record be perfected within 45 days of said order); RCW 36.70C.090 (requiring a hearing on the merits to be set within 60 days of the date set for submitting the administrative record, absent a showing of good cause for a different date or a stipulation of the parties).

[9] RCW 36.70C.090.

[10] King v. Olympic Pipeline Co., 104 Wn. App. 338, 348, 16 P.3d 45 (2000).

[11] Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

[12] In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

TRD fails to demonstrate that the superior court abused its discretion in denying a further stay of the DA petition. TRD's sole argument in support of the stay was that it did not want to expend time and resources litigating the DA petition when it planned to either abandon the DA petition or seek a remand of the development agreements to the City's hearing examiner. But Yarrow Bay demonstrated that it would be negatively impacted by any further delay. It was not unreasonable for the superior court to determine that Yarrow Bay's interest in a timely resolution of the case was greater than TRD's interest in minimizing litigation costs. The denial of the stay was consistent with the express purpose of LUPA to provide expedited judicial review.

Moreover, TRD has continually asserted that it would abandon the DA petition if this court affirmed the dismissal of the MPD petition, as we have done in Toward Resp. Dev. I.[13] Even if the superior court had erred, it would be difficult to see what relief this court could provide. An issue is moot if it is not possible for this court to provide effective relief.[14] Absent exceptions not argued here, this court will not consider a case if the issue presented is moot.[15]

Motion to Dismiss

In a LUPA appeal, the petitioner is required to pay the local jurisdiction the cost of preparing the record and to prepare at its own expense a verbatim transcript

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[13] Review of this court's decision was denied by the Washington State Supreme Court on June 4, 2014.

[14] Klickitat County Citizens Against Imported Waste v. Klickitat County, 122 Wn.2d 619, 631, 860 P.2d 390 (1993), 866 P.2d 1256 (1994).

[15] State v. Walker, 93 Wn. App. 382, 385, 967 P.2d 1289 (1998).

of any hearings on the matter.[16] "Failure by the petitioner to timely pay the local jurisdiction . . . is grounds for dismissal of the petition."[17]

TRD does not deny that the superior court was well within its discretion to dismiss its petition for failure to comply with the statutory requirement of paying the costs of preparing the administrative record. TRD instead argues that dismissal was unwarranted because "[h]ad the Superior Court granted TRD's motion for a stay, the case never would have progressed to the point of requiring TRD to pay for the administrative record."[18] This argument necessarily fails because we have determined that the superior court did not err in denying the stay.[19]

Fees

The City and Yarrow Bay request attorney fees and costs incurred in defending this appeal pursuant to RCW 4.84.370, which provides for reasonable fees and costs incurred in appeal of a decision relating to development permits:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

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[16] RCW 36.70C.110(1), (3).

[17] RCW 36.70C.110(3).

[18] Appellant's Br. at 21.

[19] For the first time in reply, TRD argues that the superior court erred in imposing unreasonable deadlines for filing of the administrative record. We do not consider this argument because issues raised and argued for the first time in reply are too late to warrant our consideration. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline hearings board; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.[20]

In essence, parties are entitled to attorney fees if a local jurisdiction's decision is rendered in their favor and at least two courts affirm that decision.[21]

TRD argues that because it challenges only the superior court's order denying a further stay, the superior court did not reach the merits of the LUPA petition and the City and Yarrow Bay are thus not "prevailing parties" entitled to fees and costs. Though TRD cites no authority in support of this contention, we note that Division II of this court has repeatedly declined to award fees in cases where LUPA petitions are dismissed on procedural grounds, concluding that the legislature intended RCW 4.84.370 to apply only in cases in which the merits of a land use decision are decided.[22] However, this court has consistently disagreed, holding that

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[20] RCW 4.84.370.

[21] Habitat Watch v. Skagit County, 155 Wn.2d 397, 413, 120 P.3d 56 (2005).

[22] See, e.g., Overhulse Neighborhood Ass'n v. Thurston County, 94 Wn. App. 593, 601, 972 P.2d 470 (1999); Witt v. Port of Olympia, 126 Wn. App. 752, 759, 109 P.3d 489 (2005); Northshore Investors, LLC v. City of Tacoma, 174 Wn. App. 678, 701, 301 P.3d 1049, review denied, 178 Wn.2d 1015, 311 P.3d 26 (2013).

RCW 4.84.370 "does not require that the party must have prevailed on the merits" in order to be granted a fee award pursuant to the statute.[23]

Because the City and Yarrow Bay have prevailed at two court levels, they are awarded their fees and costs, subject to compliance with RAP 18.1.

Affirmed.

WE CONCUR:

Spearman C.J.

Cox, J.

[23] Prekeges v. King County, 98 Wn. App. 275, 285, 990 P.2d 405 (1999); see also Durland v. San Juan County, 175 Wn. App. 316, 326, 305 P.3d 246, review granted, 179 Wn.2d 1001, 315 P.3d 530 (2013).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TOWARD RESPONSIBLE DEVELOPMENT, a Washington not-for-profit corporation, Appellant, v. CITY OF BLACK DIAMOND; BD LAWSON PARTNERS LP; BD VILLAGE PARTNERS, LP, Respondents, and CITY OF MAPLE VALLEY; CYNTHIA E. AND WILLIAM B. WHEELER; ROBERT M. EDELMAN; PETER RIMBOS; MICHAEL E. IRRGANG; JUDITH CARRIER; VICKIE HARP and CINDY PROCTOR, Other Parties.	)	No. 69414-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant has filed a motion for reconsideration of the court's opinion entered June 16, 2014. After consideration of the motion, the court has determined that it should be denied. Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Done this 9th day of July, 2014.

FOR THE PANEL:

Verellen, ACJ

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STATE OF WASHINGTON
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