

66874-9

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

NO. 66874-9-I

RENTON NEIGHBORS FOR HEALTHY GROWTH,

Appellant,

v.

PACLAND; JEFF CHAMBERS, P.E.; BONNELL FAMILY, LLC;
PETER BONNELL; CITY OF RENTON,

Respondents,

and

WAL-MART STORES, INC.,

Intervenor-Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 16 AM 10:30

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT.....	1
A. Renton Neighbors Has Standing to Bring this LUPA Appeal	1
1. The law of standing under the Land Use Petition Act	1
2. Renton Neighbors exhausted its administrative remedies	2
a) The exhaustion doctrine.....	2
b) The administrative process for site review in the City of Renton	4
c) Renton Neighbors exhausted its administrative remedies	7
3. Renton Neighbors easily meets the standards set forth in RCW 36.70C.060(2)(a), (b), and (c).....	10
a) The legal requirements for injury- in-fact under LUPA.....	11
b) The land use decision has prejudiced or is likely to prejudice members of Renton Neighbors for Healthy Growth.....	15

c)	Renton Neighbors’ interests are among those that the City was required to consider when it made its land use decision	18
d)	A judgment in favor of Renton Neighbors would substantially eliminate or redress prejudice caused by the land use decision	21
B.	The Wal-Mart Proposal is an Illegal Expansion of a Non-Conforming Structure	21
1.	Wal-Mart does not have a right to expand its nonconforming structure	21
2.	The Wal-Mart expansion is nonconforming	24
a)	The design regulations do not supersede the maximum 15 foot frontage setback requirement	26
(1)	Overlay provisions do not supersede all underlying development regulations	26
(2)	There is no conflict between the 15 foot setback requirement and any design regulations.....	27
b)	The design regulations do not “trump” the prohibition against expansion of nonconforming structures	30

3.	The Hearing Examiner did not approve a modification of the 15 foot setback	30
4.	The evidence in the record does not support approval of a modification to the setback requirement	32
5.	Even if the evidence supported a modification, it is not allowed under the provision prohibiting expansion of a nonconforming structure	36
C.	The Wal-Mart Proposal Violates the City's Design Regulations	36
1.	The minimum standards set forth in the design regulations are mandatory.....	37
2.	Wal-Mart's argument is based on an incorrect version of RMC 4-3-100.....	38
3.	The Wal-Mart proposal does not achieve the purpose and intent of the design regulations in the new Code.....	41
4.	Wal-Mart did not apply for, nor did the City grant modifications to the design standards	44
II.	CONCLUSION	45

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Biermann v. City of Spokane</i> , 90 Wn. App. 816, 960 P.2d 434 (1998).....	12
<i>Buechel v. Department of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994).....	38
<i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 52 P.3d 1 (2002)	18
<i>Citizens for Mount Vernon v. City of Mount Vernon</i> , 133 Wn.2d 861, 947 P.2d 1208 (1997).....	2, 3
<i>City of Seattle v. State Department of Labor & Industries</i> , 136 Wn.2d 693, 965 P.2d 619 (1998).....	28
<i>Fabin Point Neighbors v. City of Mercer Island</i> , 102 Wn. App. 775, 11 P.3d 322 (2000).....	28
<i>Friends of the Earth v. U.S. Navy</i> , 841 F.2d 927 (9 th Cir. 1988)	13, 14
<i>Friends of the East Lake Sammamish Trail v. City of Sammamish</i> , 361 F. Supp. 2d 1260 (W.D. Wash. 2005)	13, 14
<i>King County v. King County Boundary Review Board</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	4
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)	11
<i>Magnolia Neighborhood Planning Council v. City of Seattle</i> , 155 Wn. App. 305, 230 P.3d 190 (2010).....	11, 13

<i>McCart v. United States</i> , 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969).....	4
<i>Orion Corp. v. State</i> , 103 Wn.2d 441, 693 P.2d 1369 (1985)	3
<i>Prisk v. City of Poulsbo</i> , 46 Wn. App. 793, 732 P.2d 1013 (1987).....	3
<i>Rhod-A-Zalea and 35th, Inc. v. Snohomish County</i> , 136 Wn.2d 1, 959 P.2d 1024 (1998).....	22, 23
<i>SAVE v. City of Bothell</i> , 89 Wn.2d 862, 576 P.2d 401 (1978)	13
<i>Seattle Bldg. and Constr. Trades Council v. Apprenticeship and Training Council</i> , 129 Wn.2d 787, 920 P.2d 581 (1996).....	19
<i>South Hollywood Citizens v. King County</i> , 101 Wn.2d 68, 677 P.2d 114 (1984).....	4
<i>Spokane County Fire Protection District 9 v. Spokane County Boundary Review Board</i> , 97 Wn.2d 922, 652 P.2d 1356 (1982).....	3
<i>Sterling v. Spokane County</i> , 31 Wn. App. 467, 642 P.2d 1255 (1982).....	6, 7
<i>Stout v. Mercer</i> , 160 Ind. App. 454, 312 N.E.2d 515 (1974).....	7
<i>Suquamish Indian Tribe v. Kitsap County</i> , 92 Wn. App. 816, 965 P.2d 636 (1998).....	11, 12
<i>Sylvester v. Pierce County</i> , 148 Wn. App. 813, 201 P.3d 381 (2009).....	43
<i>Thornton Creek Legal Defense Fund v. City of Seattle</i> , 113 Wn. App. 34, 52 P.3d 522 (2002).....	11

<i>United States v. Students Challenging Regulatory Agency Procedures (SCRAP)</i> , 412 U.S. 669, 93 S.Ct. 2045, 37 L.Ed.2d 254 (1973)	13
--	----

<u>Statutes and Regulations</u>	<u>Page</u>
RCW 36.70C.....	1
RCW 36.70C.020(1).....	9
RCW 36.70C.060.....	18
RCW 36.70C.060(2).....	1, 2
RCW 36.70C.060(2)(a).....	10, 11
RCW 36.70C.060(2)(b)	10, 11
RCW 36.70C.060(2)(c).....	10, 11
RCW 36.70C.060(2)(d)	2

<u>City of Renton Regulations</u>	<u>Page</u>
RMC 4-1-020.....	20
RMC 4-1-060.....	20
RMC 4-2-120C(15).....	25, 30, 31, 33, 34, 35
RMC 4-2-120C(15)(b).....	35
RMC 4-3-100.....	30, 37, 38, 39, 40
RMC 4-3-100(A)	41

RMC 4-3-100(A)(2).....	40
RMC 4-3-100(A)(2)(b) (new version).....	40
RMC 4-3-100(A)(8).....	37
RMC 4-3-100(B)(2).....	27, 29
RMC 4-3-100(E)(1).....	16, 39
RMC 4-3-100(E)(2).....	42
RMC 4-3-100(E)(5).....	16, 42, 43
RMC 4-8-070(H)(1)(m).....	5
RMC 4-8-080(G).....	5
RMC 4-8-100.....	5
RMC 4-8-110(F)(1).....	6, 9
RMC 4-10-050.....	15, 23, 30
RMC 4-10-050(A).....	23, 36
RMC 4-10-050(A)(4).....	24, 25
RMC 4-10-050(4).....	16

Other Authorities

Page

1 Robert M. Anderson, <i>American Law of Zoning</i>	22
4 R. Anderson, <i>Zoning</i> (2 nd ed. 1977).....	6

3 A. Rathkopf, <i>Zoning and Planning</i> (4 th ed. 1981)	6
Richard L. Settle, <i>Washington Land Use and Environmental Law and Practice</i> (1983)	22

I. ARGUMENT

A. Renton Neighbors Has Standing to Bring this LUPA Appeal

Respondents' attempts to avoid consideration of the merits of Renton Neighbors' appeal by challenging its standing are simply without merit. Renton Neighbors followed all of the requisite steps to exhaust administrative remedies before filing its appeal in Superior Court and will suffer injury-in-fact from the land use decision as is demonstrated below.

1. The law of standing under the Land Use Petition Act

The Washington State Land Use Petition Act (LUPA), ch. 36.70C RCW, provides that a person who is "aggrieved" or "adversely affected" has standing to file a LUPA petition. RCW 36.70C.060(2). LUPA provides a four-part test for standing. The test is expressed in the statute as follows:

A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

- (a) The land use decision has prejudiced or is likely to prejudice that person;
- (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
- (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and

(d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

RCW 36.70C.060(2).

2. Renton Neighbors exhausted its administrative remedies

Respondents City of Renton and Wal-Mart focus on the requirement in RCW 36.70C.060(2)(d) and contend that Renton Neighbors failed to exhaust its administrative remedies to the extent required by law. The sole basis for this contention is that Renton Neighbors did not attend the public hearing held by the City of Renton Hearing Examiner before he issued his decision. This argument has no merit. As is shown below, Renton Neighbors exhausted its administrative remedies to the extent required by law.

a) The exhaustion doctrine

The doctrine of exhaustion of administrative remedies is well established in Washington. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). It is a legal doctrine that requires a party to exhaust the administrative remedies provided by a local jurisdiction's ordinances before filing a superior court challenge to an action taken by that a local jurisdiction. *Id.* In other words, a party who is challenging the granting or denial of a certain land use decision must

generally follow the steps that local ordinances provide for appealing the decision before appealing to state superior court. *Citizens for Mount Vernon v. Mount Vernon*, 133 Wn.2d at 866.

The rule provides that “in general, an agency action cannot be challenged on review until all rights of administrative appeal have been exhausted.” *Id.*, citing *Spokane County Fire Protection District 9 v. Spokane County Boundary Review Board*, 97 Wn.2d 922, 928, 652 P.2d 1356 (1982).

The exhaustion rule is not absolute. *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 797, 732 P.2d 1013 (1987). When addressing problems involving the exhaustion of remedies rule, reviewing courts necessarily exercise a great deal of discretion. *Id.* The exhaustion rule is one of restraint, requiring courts to weigh and balance many factors in order to decide whether requiring exhaustion is desirable. *Id.* When consideration of fairness and practicality outweigh the policies underlying the doctrine, compliance with the rule is unnecessary. *Id.* at 797-798, citing *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985).

The Washington Supreme Court has made it clear that the central purpose of the exhaustion doctrine is to allow for the issues to first be raised before the agency. *Citizens for Mount Vernon v. City of Mount Vernon*, 133

Wn.2d at 869, *citing King County v. King County Boundary Review Board*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993). The exhaustion principle is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges. *Id.*, *citing South Hollywood Citizens v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984). Among other things, the policies underlying this principle include protecting the local jurisdiction's autonomy by allowing it to correct its own errors and ensuring that individuals were not encouraged to ignore procedures by resorting to the courts. *McCart v. United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969).

b) The administrative process for site review in the City of Renton

Before determining whether administrative remedies “to the extent required by law” were exhausted by Renton Neighbors, it is important to know what remedies were “required by law” to be taken. In other words, we must know what steps the Renton Code requires be taken before a citizen may appeal a City decision to Superior Court.

The administrative process for Site Plan Review, which is the approval at issue here, is set forth in Chapter 8 of Title 4 (Development Regulations) of the Renton Code. (*See* Appendix A.) The Hearing Examiner has original

jurisdiction to review the type of site plan approval sought by Wal-Mart. RMC 4-8-070(H)(1)(m). Site plan review is a “Type 3” decision wherein the Hearing Examiner issues the original decision and an appeal is available to the City Council. RMC 4-8-080(G). The Hearing Examiner must hold a public hearing before he makes his decision on a proposal.

Attendance at that hearing prior to the decision being made is not a mandatory step towards exhaustion. *See* RMC 4-8-100. After the Hearing Examiner has issued his decision, any person, regardless of whether he or she attended the hearing, may request reconsideration or appeal his decision to the City Council. *Id.* The Code states:

Any interested person feeling that the decision of the Examiner is based on an erroneous procedure, errors of law or fact, error in judgment, or the discovery of new evidence which could not be reasonably available at the prior hearing may make a written application for review by the Examiner within fourteen (14) days after the written decision of the Examiner has been rendered . . .

RMC 4-8-100 (emphasis supplied).

The Code then states:

Any interested party aggrieved by the Examiner’s written decision or recommendation may submit a notice of appeal to the city clerk, upon a form furnished by the city clerk within fourteen (14) calendar days from the date of the Examiner’s written report.

RMC 4-8-110(F)(1) (emphasis supplied). Again, the Renton Code does not limit the right of appeal to individuals who attended the hearing, rather it allows “any interested party aggrieved” to appeal a Hearing Examiner’s decision.

When local code provisions gives a right of appeal to “any interested party aggrieved” by the decision, the class of persons allowed to appeal goes beyond individuals or groups who participated in the administrative hearing. Courts have confirmed that there is a distinction between code language that allows “any interested party aggrieved” to appeal a decision and code language that allows only a “party of record” to appeal:

While some review statutes have confined the right of review to persons who were parties of record in the administrative proceeding, it is clear that provisions which authorize review at the instance of a person aggrieved are intended to create a broader class of persons with standing to seek judicial review.

Sterling v. Spokane County, 31 Wn. App. 467, 472, 642 P.2d 1255 (1982), quoting 4 R. Anderson, *Zoning* § 25.10 (2nd ed. 1977).

Where the statute allows appeals to “persons aggrieved,” the standards for standing to appeal are less restrictive. *Id.* at 473, citing 4 R. Anderson, *Zoning*, § 25.09, § 25.10; see 3 A. Rathkopf, *Zoning and Planning*, § 43.01 (4th ed. 1981).

Adjoining . . . landowners may therefore be persons “aggrieved” . . . The particular landowner would be

“aggrieved” regardless of whether he appeared and became a party to the hearing before the board . . . His legal interest would be no less affected due to a failure to appear and object.

Sterling v. Spokane County, at 474, *quoting Stout v. Mercer*, 160 Ind. App. 454, 312 N.E.2d 515, 520 (1974).

The Renton Code could not be more clear – it allows a broad class of persons to appeal a Hearing Examiner decision and nowhere requires that appellants of that decision attend the open record hearing held by the Hearing Examiner before making his decision.

c) Renton Neighbors exhausted its administrative remedies

The sole argument that respondents rely on to contend that Renton Neighbors failed to exhaust its administrative remedies is that Renton Neighbors did not attend or participate in the public hearing before the Hearing Examiner before the decision was rendered. As explained above, attendance at that hearing is not required as a prerequisite to exhaustion of administrative remedies. “Administrative remedies” constitute the appeal process that the City requires after a decision is made.

Renton Neighbors took all requisite steps under the Renton City Code to exhaust administrative remedies. The City of Renton Hearing Examiner held

a public hearing for the Wal-Mart expansion proposal on Tuesday, April 27, 2010. CP 44. After that hearing, the Examiner issued a decision approving the Wal-Mart expansion site plan on May 13, 2010. *Id.*

Members of Renton Neighbors became aware of the project for the first time on or about May 17, 2010, shortly after the hearing. CP 72. The group filed a timely request for reconsideration per the Renton Code requirements on May 27, 2010 with the Hearing Examiner asking that the Examiner reconsider his decision on several grounds. CP 72-75. Renton Neighbors presented all of the issues that are currently presented to this Court on appeal to the Hearing Examiner. With that filing, Renton Neighbors became a “party” to the proceedings. The Hearing Examiner considered the questions presented and ruled on those questions on reconsideration. CP 77-79. The Examiner, at that time, had the authority to alter his decision or to reopen the hearing for further evidence. The Examiner responded to that request on June 10, 2010, indicating that he would not alter the original decision and that he was denying Renton Neighbors’ request for reconsideration. *Id.*

The requisite step provided as an administrative remedy in the Renton Code for this site plan approval is an appeal to the City of Renton City Council. Renton Neighbors filed a timely appeal with the City Council as the Code

requires be done prior to any potential judicial review. *See* RMC 4-8-110(F)(1); CP 84-89. Renton Neighbors presented all of the issues currently on appeal to the City Council. *Id.* The City Council had full opportunity to consider and rule on the issues that are now presented on appeal. CP 65. The City Council could have ordered that a limited hearing be held to the extent necessary to consider additional evidence or it could have denied the project outright based on the evidence being presented. Instead, the City Council upheld the Hearing Examiner's decision. The City Council's decision was the final land use decision as that term is defined in LUPA, RCW 36.70C.020(1).

As mentioned above, the central purpose of the exhaustion doctrine is to allow for the issues to first be raised before the agency. The policies underlying this principle include protecting the local jurisdiction's autonomy by allowing it to correct its own errors and ensuring that individuals are not encouraged to ignore procedures by resorting to the courts. The central purpose of the exhaustion doctrine was met, without question, in this case. Every issue that is presented to this Court was presented to the City of Renton Hearing Examiner for his full review, and then to the City Council for its full review. The issues were raised and the local jurisdiction had the opportunity to correct its own errors prior to this case being brought to court. In no way did Renton

Neighbors ignore procedures and resort to the Court without proper process – quite the contrary, Renton Neighbors followed every requisite procedure required to a “t.”

3. Renton Neighbors easily meets the standards set forth in RCW 36.70C.060(2)(a), (b), and (c)

As shown above, to have standing, a party must not only have exhausted his or her administrative remedies to the extent required by law, but a person must also show that (1) the land use decision has prejudiced or is likely to prejudice that person; (2) that the person’s asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision; and (3) that a judgment in favor of the person would substantially eliminate or redress the prejudice caused by the land use decision. RCW 36.70C.060(2)(a), (b), and (c).

Intervenor-respondent Wal-Mart did not challenge Renton Neighbors’ standing under RCW 36.70C.060(2)(a), (b), or (c). The City of Renton did challenge Renton Neighbors’ standing under this criteria, but mentioned it almost as an afterthought and with no legal argument or analysis to support the challenge. While this claim by the City was only half-heartedly offered and is clearly not credible, appellant believes it has no choice but to respond to it in full since it was asserted in the City’s Response Brief.

a) The legal requirements for injury-in-fact under LUPA

To establish standing under LUPA, Renton Neighbors must demonstrate that it has at least one member who would suffer an “injury-in-fact” as a result of the land use decision. RCW 36.70C.060(a), (b), and (c); *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 47-48, 52 P.3d 522 (2002); *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. at 829. In a LUPA case, Washington courts will look to general standing case law (outside of LUPA cases) to analyze injury-in-fact. *Id.*

Although plaintiffs bear the burden of proving standing, on a motion to dismiss the “general factual allegations of injury resulting from the defendant’s conduct may suffice” to demonstrate standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). An argument directed to the merits of plaintiff’s appeal are not appropriately introduced as an argument against standing. *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 312, 230 P.3d 190 (2010).

An organization has standing when at least one of its members has standing as an individual. *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 830, 965 P.2d 636 (1998).

The interests that must be shown for standing must be more than simply the abstract interest of the general public in having others comply with the law. *Biermann v. City of Spokane*, 90 Wn. App. 816, 820, 960 P.2d 434 (1998). Renton Neighbors must show that at least one of its members personally will be specifically and perceptively harmed by alleged impacts of the proposed action. *Id.*

A party need not show a particular level of injury to establish standing. *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. at 829. In *Suquamish Indian Tribe*, the court rejected defendants' argument that the injury caused to plaintiffs by increases in traffic on the roads was not significant enough to assert standing. *Id.* The defendants also attempted to argue that because the increase of traffic would be within existing road capacities, there would be no injury to the plaintiff's members. The court dismissed that argument because the capacity of roads to handle traffic did not speak to the question of whether the plaintiffs would be injured by the predicted traffic increase. *Id.* at 831-32.

The injury-in-fact requirement includes harm to recreational, aesthetic, and other benefits that individuals enjoy when they use the area that is adversely affected by the action being challenged. *United States v.*

Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2045, 37 L.Ed.2d 254 (1973); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 931 (9th Cir. 1988); *Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F. Supp. 2d 1260 (W.D. Wash. 2005).¹ In other words, when a plaintiff alleges that it uses and enjoys a particular area for recreational or other purposes and that the decision being challenged will cause harm to those interests, then the injury-in-fact requirement is met.

In *SCRAP*, the Supreme Court upheld the standing of a group of students who maintained that their enjoyment of the forest, streams, and mountains in the Washington D.C. area would be lessened as a result of an increase in railroad freight costs that would then have a domino effect of discouraging the use of recycled goods due to higher shipping costs which would lead to more use of natural resources, including more mining and pollution in the immediate area. *SCRAP*, 412 U.S. at 684-85. The members alleged that they used the forest, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and

¹ Washington State courts rely on and adopt federal jurisprudence for purposes of determining standing issues. See *SAVE v. City of Bothell*, 89 Wn.2d 862, 866-67, 576 P.2d 401 (1978); *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. at 312.

sightseeing and that this use was disturbed by the adverse environmental impact caused by the non-use of recyclable goods brought about by a rate increase on commodities. *Id.* That alleged injury constituted adequate injury-in-fact to establish standing.

In *Friends of the Earth*, the plaintiff's members lived in and around Everett and used the shoreline and waters of Everett Harbor, Port Gardner Bay, and Puget Sound for environmental, scientific, aesthetic, economic, and recreational activities. *Friends of the Earth v. U.S. Navy*, 841 F.2d at 931. The plaintiffs alleged that those interests would be affected directly and adversely by construction of a homeport without adequate environmental review and protection. *Id.* The court concluded that such threatened harm was sufficient to amount to an "injury-in-fact" for purposes of standing. *Id.*

In *Friends of East Lake Sammamish Trail*, the plaintiffs challenged government action on a recreational trail along a seven mile section of an existing railroad right-of-way in King County. *Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F. Supp. At 1265. The plaintiffs alleged that they used the area in question and that their activities and pastimes had been affected by the City of Sammamish's proposed trail development plans. *Id.* at 1269. The court concluded that plaintiffs had

demonstrated “injury-in-fact” through an impact on its use and enjoyment of the trail as a result of the City of Sammamish’s actions. *Id.*

- b) The land use decision has prejudiced or is likely to prejudice members of Renton Neighbors for Healthy Growth

Members of Renton Neighbors will be specifically and perceptibly harmed by the proposed action. The interests that they allege are personal injuries – they are more than simply the abstract interest of the general public in having others comply with the law.

Renton Neighbors is an organization that is comprised of members who either live or work in Renton. CP 116. The group’s mission is to promote development in Renton that is sustainable and mutually beneficial to the community and businesses. *Id.* The group envisions that healthy growth will create vibrant spaces that bring the community together. *Id.*

Renton Neighbors brought this appeal on the grounds that the Wal-Mart proposal violates the City of Renton design regulations and it is an illegal expansion of a non-conforming structure in violation of RMC 4-10-050. CP 39. As explained above, the existing Wal-Mart is non-conforming with the current City Code maximum frontage setback requirement of 15 feet and the City’s design requirements. Wal-Mart is not legally allowed to expand that

illegal structure unless it makes the structure conform to the existing Code. RMC 4-10-050(4).

In its design regulations, the City of Renton has established a vision for the area where the Wal-Mart is located. The regulatory vision set forth in the City Code calls for replacing the current look of the commercial area with a more vibrant, walkable, pedestrian-friendly retail area. The Design Regulations for District “D” are meant to ensure that businesses enjoy visibility from public rights-of-way and to encourage pedestrian activity. RMC 4-3-100(E)(1). The intent is to establish active, lively uses along the sidewalks and pedestrian pathways, and organize buildings in such a way that pedestrian use of the district is facilitated. *Id.* The intent is “to encourage building design that is unique and urban in character, comfortable on a human scale and uses appropriate building materials that are suitable for the Pacific Northwest climate.” RMC 4-3-100(E)(5).

Renton Neighbors’ appeal challenged the approval on the grounds that the Wal-Mart expansion is directly at odds and clearly inconsistent with the design regulations for the area. AR 39. The appeal challenges Wal-Mart’s proposal because it is precisely the opposite of the Code’s vision for this downtown area. It undermines the goal of a walkable, pedestrian-friendly,

visually stimulating area by expanding a non-conforming franchise retail store with an enormous parking lot located between the building and the front property line. The City's failure to enforce its Code undermines any attempt to change the area to meet the vision set forth in the Code.

Eric Holmes, Kim Ford, Cindy Wheeler, and Mary Le Nguyen are members of Renton Neighbors who live close to the Wal-Mart. CP 117; CP 113; CP 110; CP 81. They all often spend time in that area for shopping, going out to eat, and running errands. CP 117; CP 110-111; CP 114. It is their downtown area and they use it frequently. *Id.*

These members testified that they want the area to be like that envisioned by the City Code. CP 118; CP 114; CP 111. They would use the area more often and would enjoy it more if it were less focused on cars and regional use and more focused on being a walkable, vibrant, pedestrian friendly local retail area. *Id.*

Like the users of the Sammamish Trail, Renton Neighbors members' use of this area will be impacted adversely by the City's approval of the Wal-Mart expansion. Kim Ford, Mary Le Nguyen, Eric Holmes, and Cindy Wheeler's interests in having this area developed in line with the City Code requirements for a walkable, vibrant, pedestrian friendly local retail area is

harmd by the City's failure to enforce the very laws that carry out that vision.

These members of Renton Neighbors also regularly drive on Hardy Avenue SW, Rainier Avenue S, and other streets that will be impacted by the additional traffic that the Wal-Mart expansion will create. CP 114; CP 111; CP 81. The Hearing Examiner concluded that the Wal-Mart proposal would increase traffic by approximately 600 trips per day. That traffic will be added to roads that include Rainier Avenue South and Hardee Avenue SW. The existing traffic situation is very bad and adding to that traffic will adversely impact her by causing them to drive in increased traffic congestion. *Id.*

As Eric Holmes stated in his declaration:

As a resident, I would hope that I have a say in what my neighborhood looks like. I may not have the financial resources that Wal-Mart has, but I live and shop in this community and I think that should count for something.

CP 114.

- c) Renton Neighbors' interests are among those that the City was required to consider when it made its land use decision

The second condition of standing under RCW 36.70C.060 has been referred to as the "zone of interest test." *Chelan County v. Nykreim*, 146 Wn.2d 904, 937, 52 P.3d 1 (2002). "Although the zone of interest test serves as an

additional filter for limiting the group which can obtain judicial review of an agency decision, the ‘test is not meant to be especially demanding.’” *Id.*, citing *Seattle Building and Construction Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 797, 920 P.2d 581 (1996). The test focuses on whether the authors of the provisions at issue intended the agency to protect the type of interests alleged when taking the action at issue.

Zoning laws and development regulations are adopted in the interest of the residents of the City. The design regulations, the maximum frontage setback limitations, the limitations on expansion of non-conforming structures, and the requirement for an analysis of traffic impacts were all adopted to protect the interests of those who live nearby and use the downtown area and drive on the roads in that area. The very purpose of zoning and development regulations is to protect the public interest of members of the community, such as the community that Renton Neighbors share with Wal-Mart in Renton.

The City of Renton development regulations are introduced by the following mission statement: “the City of Renton, in partnership with residents, business and government, is dedicated to providing a healthy atmosphere in which to live and raise families, encourage responsible growth and economic vitality, and create a positive work environment; resulting in a quality

community where people choose to live, work, and play.” City of Renton, Title IV Development Regulations, Mission Statement.

The City’s development regulations state as their purpose that “it is the intent of the Renton City Council that these regulations implement the City’s policies adopted in the City’s Comprehensive Plan . . .” RMC 4-1-020. The policies of the Comprehensive Plan are “to promote public safety, welfare, and interest,” and “[p]ublic interest prevail[s] over private interests and economic and social benefits.” RMC 4-1-060.

The design regulations for District D, the maximum frontage setback requirement in the CA zone, the prohibition against illegal expansion of non-conforming use, and the requirement for a traffic impact analysis were all adopted with an intention to protect and promote public safety, welfare, and interest and to create a high quality community where people choose to live, work, and play. They were adopted precisely for the purpose of protecting those interests expressed by the Renton Neighbors members above.

As Mary Le Nguyen and others stated in their declarations:

My understanding is that the City of Renton adopted those code requirements and that vision specifically for residents of the City who use the area at issue and who would use it and enjoy it even more if it were transformed as the City Code had hoped it would be. That means that the City adopted the Code requirements for people exactly like me.

CP 111; CP 115; CP 118.

- d) A judgment in favor of Renton Neighbors would substantially eliminate or redress prejudice caused by the land use decision

A judgment in favor of Renton Neighbors would substantially eliminate or redress prejudice caused by the land use decision. As it stands, the City of Renton has approved an illegal expansion of a non-conforming structure and has approved a development that is inconsistent with the design regulations and frontage setback requirement for the CA zone. A court order in favor of Renton Neighbors would reverse the City's approval, deny the proposal, and thereby prohibit the expansion of this non-conforming use in the area and forbid the illegal design and structure from being expanded.

B. The Wal-Mart Proposal is an Illegal Expansion of a Non-Conforming Structure

1. Wal-Mart does not have a right to expand its nonconforming structure

There is an underlying assumption by the City and Wal-Mart that Wal-Mart has a right to expand its nonconforming structure. Respondents surmise that it was impossible or unreasonable to expect Wal-Mart to meet the maximum 15 foot setback requirement and certain design standards and,

therefore, the City should go easy on Wal-Mart and allow it to expand despite those Code violations.²

This puts well-established law regarding nonconforming uses on its head. A right to continue a nonconforming use “*only* refers to the right not to have the use *immediately terminated* in the face of a zoning ordinance which prohibits the use.” *Rhod-A-Zalea and 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998) (emphasis in original), *citing* 1 Robert M. Anderson, *American Law of Zoning*, § 6.01; Richard L. Settle, *Washington Land Use and Environmental Law and Practice*, § 2.7D (1983). A protected nonconforming status generally grants the right to continue the existing use, but will not grant the right to enlarge the existing use. *Id.*

Commentators agree that nonconforming uses limit the effectiveness of land use controls, imperil the success of community plans and injure property values. For these reasons, nonconforming uses are uniformly disfavored and this court has repeatedly acknowledged the desirability of eliminating such uses.

² In its Response Brief, the City of Renton stepped outside of the record to describe the current uses surrounding the Wal-Mart site in detail (a Honda dealership, Ford dealership, Holiday Inn, etc.). *See* Renton Brief at 16. The apparent purpose of describing the existing situation was to show that the immediate area does not cater to pedestrian traffic and expansion would choke off access to small businesses to the southeast of Wal-Mart. All of this information is irrelevant. For all we know, there are numerous nonconforming uses currently in that zone. The point is that the City of Renton has adopted an ambitious vision to change the area and approving expansion of existing nonconforming uses undermines the ability to meet that vision.

Id. at 8 (citations omitted). The *Rhod-A-Zalea* court stated “it is counter intuitive to conclude that nonconforming uses, which are contrary to public interest, such as health, safety, and welfare, would then be exempt from subsequently enacted public health and safety regulations.” *Id.*

The Councilmembers and Hearing Examiner mistakenly assumed that Wal-Mart was entitled to expand and, therefore, should not have to adhere to the code requirements that make that expansion impossible. The City decision makers seem to have forgotten that the proper choice before them was to deny the expansion of a non-conforming use.

Neither the City Council nor the Examiner have the discretion to disregard the plain language of RMC 4-10-050. A “non-conforming structure” may remain as is, but it may not be expanded unless the expansion is made conforming. RMC 4-10-050(A). The language in that provision, quoted in full in Renton Neighbors’ Opening Brief, is unambiguous. Here, the City ignored this provision simply because it felt that Wal-Mart was in an unfair situation because it could not physically conform to the Renton Code.

If Wal-Mart is in a situation that is unfair because Wal-Mart cannot physically meet the design regulations or the setback requirement, then Wal-Mart should seek an amendment to the code that would allow expansion of its

nonconforming use. By declaring that the project should be approved because it is “a good project,” “improves the existing building,” or for other reasons despite clear inconsistencies with the City Code, these quasi-judicial decisions makers are making decisions that are outside of the limits of the code. By declaring that it would be unfair to apply the code as written is not proper reasoning for a Court. If Wal-Mart finds itself in an unfair position because of the way the City Code is written, then Wal-Mart should approach the Council in their legislative capacity. It is at that time that the City Council can determine whether it should amend the code to allow non-conforming structures that find themselves in Wal-Mart’s predicament to expand despite being non-conforming.³

2. The Wal-Mart expansion is nonconforming

Respondents’ contention that the expansion conforms with the Renton City Code provisions and therefore does not violate RMC 4-10-050(A)(4)⁴

³ The City of Renton implies that because the City Council upheld the Hearing Examiner’s decision on appeal below, the “legislative body” agreed with the Hearing Examiner’s decision. Renton Brief at 14. That is a misstatement of the City Council’s role on appeal. On appeal, the City Council acted as a quasi-judicial body, not as legislators. They were bound by the limitations on *ex parte* contacts and appearance of fairness and were restricted to making decisions within the confines of the City of Renton Code.

⁴ There is a typographical error in the Response Brief of Intervenor-Respondent Wal-Mart Stores, Inc. wherein the brief states that RMC 4-10-050(A)(4) provides that a legal non-conforming structure “shall not be enlarged unless the enlargement is nonconforming.” In truth, RMC 4-10-050(A)(4) provides that a non-conforming structure

fails on several levels. First, respondents' claims that the expansion is consistent with the design regulations fail for the reasons explained in Section I-C herein. Second, Wal-Mart's argument that the design regulations supersede the 15-foot setback in the underlying CA zone is based on the incorrect premise that a conflict exists between the design regulations and the 15 foot setback. As is explained below, there is no such conflict.

Third, respondents' claims that the enlargement is conforming because the Examiner appropriately approved the more extensive setback pursuant to the modification provisions of RMC 4-2-120C(15) fails because the Examiner did not approve a modification and the record certainly does not support such an approval. Even if the Examiner had approved the modification, that would still be a nonconforming structure. By definition, the modification, or variance, is nonconforming. Therefore, an approved modification would not make the structure conforming as is required by RMC 4-10-050(A)(4).

"shall not be enlarged unless the enlargement is conforming . . ." While any brief is prone to containing typographical errors, appellant thought it important to highlight this error because it misquotes Code language in a manner that conveys the opposite of what it actually says.

- a) The design regulations do not supersede the maximum 15 foot frontage setback requirement

Wal-Mart argues that the “overlay” design regulations supersede “conflicting” underlying zoning requirements, including the development standard requiring a maximum 15 foot frontage setback for buildings in the CA zone. *See* Wal-Mart’s Brief at 31-32. This argument misconstrues the meaning of “overlay” provisions and it incorrectly claims that there is a conflict between code provisions where none exists.

- (1) Overlay provisions do not supersede all underlying development regulations

“Overlay” provisions do not simply supersede all underlying zoning requirements. Overlay districts add new regulations on top of existing regulations in a particular zone. In other words, overlay districts leave the existing development standards in place, but impose additional standards on top of those existing standards.

Appellant believes that both respondents would agree, if pressed, that the design regulations do not simply supersede and replace all of the existing regulations in the areas where they apply. If that were the case, then none of the development regulations in the Renton Code would apply other than the

design regulations in those zones. The general CA zoning and standards in the zone would not apply, critical areas ordinances would not apply, and none of the bulk regulations would apply. While there seems to be an attempt by Respondents to obfuscate the premise of their arguments to leave the impression that the design regulations simply wipe away all other regulations, that is not a realistic or credible premise.

- (2) There is no conflict between the 15 foot setback requirement and any design regulations

The crux of Wal-Mart's argument is that there is a conflict between the Examiner's "application" of the design overlay regulations and the 15 foot setback. This argument is based on the Code provision that states that if there is a conflict between a regulation in the Renton Code and a design regulation in the overlay district, the design regulation will prevail over the existing regulation. RMC 4-3-100(B)(2). In other words, a specific design regulation will supersede a specific existing regulation in the rare circumstance that there is a conflict between the two provisions.

But Wal-Mart does not identify any specific design regulation that actually conflicts with the setback requirement.⁵ That is because there is no

⁵ Even when a party identifies an actual conflict between two statutory provisions, courts are loathe to venture beyond the plain words of an ordinance and find

such conflict anywhere. If there were a *minimum* frontage setback requirement of 500 feet in the bulk regulations and a minimum 15 foot setback in the design regulations, then we would have a conflict. But we do not have anything of the sort here. The minimum setback requirement is not 500 feet from the frontage, rather the frontage setback must be a *maximum* of 15 feet. This maximum 15 foot setback requirement requires that buildings be built very close to the frontage street and this in turn calls for easy access by pedestrians, eliminates any potential for a parking lot to exist between the front street and the front door, and meets other elements that are completely consistent with all of the design regulations. The maximum setback goes hand in hand with the design regulations for District D toward furthering the vision of having storefronts close to the frontage street to create a more vibrant, pedestrian-friendly downtown area.

conflict when none exists. For example, in *Fabin Point Neighbors v. City of Mercer Island*, 102 Wn. App. 775, 11 P.3d 322 (2000), a proposed subdivision was subject to different minimum requirements for building area, lot width, and lot sizes under the zoning regulations and the critical areas regulations. None of the lots in the proposed development satisfied the zoning code's minimum lot width requirement. The City approved the subdivision nonetheless, determining that the interim critical areas regulation's building pad limits conflicted with, and therefore superseded, the zoning code's minimum lot dimension requirements. *Id.* at 779. The Court reversed finding no conflict between the zoning code and the critical area regulations. *Id.* The Court concluded that the requirements were not in conflict and all of the words of both ordinances could be given effect. *Id.* at 780, citing *City of Seattle v. State Department of Labor & Industries*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998) ("statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous").

Indeed, Respondents' argument is particularly ironic because the Wal-Mart proposal is not even consistent with the design regulations in the first place. It is quite something to state that this formulaic big box, asphalt parking lot, car-oriented proposal should be exempt from the 15 foot maximum setback when it is the proposal that is at odds with the design regulations, not the 15 foot setback requirement. The real conflict is between Wal-Mart's structure and the regulations, not two different regulations as envisioned by RMC 4-3-100(B)(2).⁶

In fact, Wal-Mart admits that there is no conflict between the 15 foot setback provision and any specific design regulation. *See* Wal-Mart Brief at 36-37. Instead, Wal-Mart performs somersaults of logic to suggest that the conflict is between the design regulations "as applied by the Hearing Examiner to the expansion project" and the 15 foot maximum setback. Wal-Mart Brief at 37. The premise is apparently that because the Examiner concluded that the proposal "needed a setback that was greater than 15 feet to comply with the design regulations," then the design regulations supersede

⁶ The City of Renton's claim that the project "increases conformity" is misleading. *See* City Brief at 11-12. A proposal either conforms with Code requirements or it does not conform with Code requirements. The mere fact that this expansion may inch the building slightly toward the frontage street does not mean that the new 555 feet setback conforms with the 15 foot maximum setback requirement.

the 15 foot setback requirement. *See* Wal-Mart Brief at 39. But the Examiner did not conclude that the proposal needed a setback that was greater than 15 feet to comply with the design regulations – the Examiner allowed departures from the design regulations because it would be so difficult for Wal-Mart to abide by the requirement for a storefront close to the frontage street. It is not the application of the design regulations that results in the conflict with the setback requirement -- it is the proposed structure itself that results in the conflict.

b) The design regulations do not “trump” the prohibition against expansion of nonconforming structures

Respondents claim that the language of RMC 4-3-100 (the design regulations) “trumps” the language of RMC 4-10-050 (the prohibition against expansion of nonconforming structures). Renton Brief at 14; Wal-Mart Brief at 39, fn.10. As was already shown in Appellant’s Opening Brief, there is no basis for such a claim.

3. The Hearing Examiner did not approve a modification of the 15 foot setback

Respondents attempt to leave the impression that the Examiner approved a “modification” of the 15 foot setback requirement under RMC 4-2-120C(15). The Examiner did no such thing.

RMC 4-2-120C(15) contains criteria that, if proven, allow a reviewing official to modify the maximum setback. To receive a modification, Wal-Mart was required to demonstrate that it met a list of specific criteria and the Hearing Examiner was required to actually analyze whether Wal-Mart met those criteria.

Here, the Hearing Examiner explicitly said that a modification was not necessary. *See* CP 1266 (The proposal “does not require a variance”). The criteria for a modification were never mentioned once. Wal-Mart did not request a modification under this provision, Wal-Mart did not submit evidence or analysis to show it met the criteria for a modification, and the Examiner did not consider the issue or include any decision regarding whether the criteria required for a modification had been met. The Hearing Examiner did not mention RMC 4-2-120C(15) in his decision and nowhere did the Examiner analyze whether the criteria in RMC 4-2-120C(15) were met by Wal-Mart. The Examiner simply allowed Wal-Mart to violate the maximum setback.

The Examiner’s decision regarding the 15 foot maximum setback was set forth in his findings as follows:

The CA zone requires a maximum front yard setback of 15 feet in order to locate structures closer to the street and reduce

the visual impact of parking along thoroughfares. The proposed expansion would not comply with this requirement providing setback of approximately 555 feet from Hardie-Rainier. Staff found that since the expansion encompasses a small portion of the proposed existing complex it does not trigger a need to conform to the newer, current standards.

CP 1270. The Hearing Examiner's legal conclusion regarding this issue was as follows:

The existing use, a large "big box" establishment does not meet current code requirements for the setback along its frontage street, the Hardie-Rainier complex. Only an incredibly large expansion or complete rebuild could move the front of the store to the street and parking to the rear. The proposed approximately 16,000 square foot expansion cannot be expected to accomplish the maximum front yard setback of 15 feet. As a practical matter, the trade off is allowing a reasonably well designed expansion and revitalized store or probably permitting no change weighs in favor of the excessive setback . . . Similarly, the parking lot landscaping standards would require a complete redesign of the parking area for what is a modest remodel. . . .

CP 1280. There is clearly no mention of a modification to the setback in his decision.

4. The evidence in the record does not support approval of a modification to the setback requirement

Considering that the Hearing Examiner concluded that a modification was not necessary and Wal-Mart did not submit evidence or analysis to show that it met the criteria for modification, it is not surprising that the evidence in

the record does not support approval of a modification to the setback requirement.

To obtain a modification, an applicant is required to demonstrate that the site development plan meets the following criteria:

- (a) Orients development to the pedestrian through such measures as providing pedestrian walkways beyond those required by the Renton Municipal Code (RMC), encouraging pedestrian amenities and supporting alternatives to single-occupant vehicle (SOV) transportation; and
- (b) Creates a low scale streetscape through such measures as fostering distinctive architecture and mitigating the visual dominance of extensive and unbroken parking along the street front; and
- (c) Promotes safety and visibility through such measures as discouraging the creation of hidden spaces, minimizing conflicts between pedestrian and traffic, and ensuring adequate setbacks to accommodate required parking and/or access that could not be provided otherwise.

RMC 4-2-120C(15). Alternatively, the reviewing official may also modify the maximum setback requirement if the applicant can demonstrate that the preceding criteria cannot be met, however, those criteria which can be met shall be addressed in the site development plan:

- (d) Due to factors including but not limited to the unique site design requirements or physical site constraints such as critical areas or utility easements the maximum setback cannot be met; or

(e) One or more of the above criteria would not be furthered or would be impaired by compliance with the maximum setback; or

(f) Any function of the use which serves the public health, safety, or welfare would be materially impaired by the required setback.

Id.

Respondents attempt to convince the Court that, despite that no one mentioned RMC 4-2-120C(15) or the criteria therein, other random unrelated findings in the Hearing Examiner Decision can nevertheless be relied upon to show that these criteria were met. For example, respondents point to the Examiner's findings that the proposal complies with the pedestrian environment design standards. Wal-Mart Brief at 41, *citing* CP 995-96. But the criteria for a modification to the 15 foot setback requirement require that the proponent "orient the development to the pedestrian" using measures "beyond" those required by the Code. RMC 4-2-120C(15). There is no evidence of measures to orient the building to pedestrians using measures "beyond" those required by the Code – it is not enough to simply meet the minimum standards in the design regulations. When it comes down to it, this is a car-oriented proposal with an enormous parking lot at center stage. Wal-Mart has created a pathway through the parking lot for people to walk on. It

can hardly be said that this “orients development to the pedestrian,” rather it simply allows people who are walking to avoid the traffic in the massive parking lot.

In addition, Wal-Mart must show that this proposal supports alternatives to single occupant vehicle transportation. There is no evidence in the record to show this requirement has been met.

Nor does this proposal create a low scale streetscape as required by RMC 4-2-120C(15)(b). This proposal is for a formulaic big-box discount superstore that will be dominated by architecture that constitutes the opposite of a low scale streetscape.

Wal-Mart suggests that RNHG has not “assigned error” to the Hearing Examiner’s findings and, therefore, declare them “verities on appeal.” This case is subject to the Land Use Petition Act wherein petitioners challenged the decision in the pleadings pursuant to notice pleading as set forth in the Land Use Petition Act. RNHG challenged all of the Hearing Examiner’s findings to the extent that error was claimed in that Petition.

Furthermore, the Examiner *did not even make findings or conclusions* on this issue. The findings cited by Wal-Mart are all circumscribed findings based on other legal criteria, not those listed in RMC 4-2-120C(15). Never

was the Examiner explicitly considering that provision and whether Wal-Mart had met the legal criteria set forth in that provision.

5. Even if the evidence supported a modification, it is not allowed under the provision prohibiting expansion of a nonconforming structure

As was shown in appellant's Opening Brief, RMC 4-10-050(A) forbids enlargement of a nonconforming structure unless the enlargement is conforming. Here, the structure is being enlarged despite being out of conformance with the 15 foot maximum setback requirement. The City cannot grant an exemption from that requirement and call it conforming. By its very definition, an approval of a modification or variance is an approval of a nonconforming structure. Therefore, approving a variance to the 15 foot maximum setback leaves the structure as nonconforming with the Code in violation of RMC 4-10-050(A).

C. The Wal-Mart Proposal Violates the City's Design Regulations

As was demonstrated in RNHG's Opening Brief, the Wal-Mart expansion does not meet the regulatory requirements that were enacted to carry out the City's vision for development in Urban Design District D – the design regulations. The project is inconsistent with numerous minimum

standards and does not achieve the purpose and intent of the design regulations.

1. The minimum standards set forth in the design regulations are mandatory

Wal-Mart argues that a development project does not have to be consistent with the “minimum standards” set forth in the design regulations so long as the proposal is consistent with the “guidelines” and “intent” statements. Wal-Mart Brief at 17-18.

This is simply not true. The “minimum standards” set forth in the design regulations are mandatory. At issue here is interpretation of a specific provision in the design regulations: RMC 4-3-100(A)(8). The design regulations state that they are meant to:

Establish two (2) categories of regulations:

- (a) **“minimum standards” that must be met**, and
- (b) **“guidelines”** that, while not mandatory, are considered by the Development Services Director in determining if the proposed action meets the intent of the design guidelines.

RMC 4-3-100(A)(8) (emphasis supplied).

The plain language of RMC 4-3-100(A)(8) is clear – there is no ambiguity -- the “minimum standards” set forth in RMC 4-3-100 are mandatory. The code states that they “must be met” and there is no

qualification or limitation that states otherwise. The “guidelines,” on the other hand, are not mandatory and need not be followed if the proposed action meets the intent of the design guidelines.

2. Wal-Mart’s argument is based on an incorrect version of RMC 4-3-100

For purposes of its argument, Wal-Mart relies on an incorrect version of RMC 4-3-100.

The City of Renton amended its Urban Design Regulations on March 8, 2010, after Wal-Mart applied for its site plan approval. The Hearing Examiner reviewed the proposal under the previous version -- before those amendments were made. The law in effect at the time of Wal-Mart’s application was the former RMC 4-3-100 and, therefore, all review in this case was based upon the application of the previous version of the law.⁷ *Buechel v. Department of Ecology*, 125 Wn.2d 196, 207, fn. 35, 884 P.2d 910 (1994). The full version of the Urban Design Regulations, RMC 4-3-100, that were in effect on the date that Wal-Mart’s application was deemed

⁷ When RNHG requested reconsideration by the Hearing Examiner, RNHG’s attorney was not aware that RMC 4-3-100 had been amended after Wal-Mart vested and she, therefore, relied on the incorrect version of RMC 4-3-100 in her request for reconsideration. When RNHG’s counsel realized that RMC 4-3-100 had been amended after Wal-Mart vested, she obtained the correct version from the City attorney. CP 1295.

complete is attached to Appellants Opening Brief as Appendix B and to Renton's Response Brief at Appendix B.⁸

The table that was incorporated into the Hearing Examiner's decision parallels the version of RMC 4-3-100 that Wal-Mart vested to. For example, the first category listed is "Site Design and Building Location," with the first subcategory being "Site Design and Street Pattern," which is the same as RMC 4-3-100(E)(1) in the proper version of that ordinance. In contrast, the categories and subcategories of the amended version are very different.

The substantive design requirements in the older version of RMC 4-3-100 are different from those in the amended version in many respects. There are differences between the old Code and the new Code and the Hearing Examiner has never reviewed whether the proposal meets all of the new substantive guidelines that are set forth in the new Code. Under the new Code, there are new guidelines that did not apply under the old Code.

Wal-Mart implicitly acknowledges that the proposal is inconsistent with several of the minimum standards (referred to as the "prescriptive"

⁸ The Court has now been presented with two different versions of RMC 4-3-100. With its Opening Brief, appellant provided the version of RMC 4-3-100 that was relied on by the Hearing Examiner when he approved the project. With its Response Brief, Wal-Mart presented (and relied on) the amended version of RMC 4-3-100. Respondent Renton attached the previous version of RMC 4-3-100 to its Response Brief (the same version relied on by appellant).

standards in the current code provision) that are set forth in both the previous Code and current Code provisions. However, Wal-Mart contends that under the new version of RMC 4-3-100, the Examiner would be allowed to approve projects that meet the new “guidelines” even if they fail to meet the new prescriptive standards.

Wal-Mart’s argument relies on a provision that is in the current version, but was not in the prior version. Specifically, the new Code states:

Each element includes an intent statement, standards, and guidelines. In order to provide predictability, standards are provided. These standards specify a prescriptive manner in which the requirement can be met. In order to provide flexibility, guidelines are also stated for each element. These guidelines and the intent statement provide direction for those who seek to meet the required element in a manner that is different from the standard.

RMC 4-3-100(A)(2) (new version). That provision goes on to say that when the City has determined that the proposed manner of meeting the design requirement through the guidelines and intent is sufficient, the applicant is not required to meet the standards associated with the guidelines that have been approved. RMC 4-3-100(A)(2)(b) (new version). This provision is not in the older version of the Code.

This new provision does allow more flexibility. An applicant can choose between prescriptive standards or guidelines and intent. However,

this is not the only change that occurred. The actual guidelines, standards, and intent statements were changed in the amended Code as well, presumably to coincide with this change and incorporate perhaps more strict guidelines than were adopted before. It is inappropriate to rely on this single provision, while not reviewing the project under the entire new Code and all of its changes. If one compares the intent, minimum standards, and guidelines in each of these sections (Site Design and Building Location, Parking and Vehicular Access, Pedestrian Environment, Landscaping/Recreation Areas/Common Open Space, and Building Architectural Design) one will see a multitude of changes in what is required and how it is required. Review under the new Code would constitute an entirely different review than what was done below.

3. The Wal-Mart proposal does not achieve the purpose and intent of the design regulations in the new Code

Even if he had reviewed this proposal under the current version of RMC 4-3-100(A), (which he did not) the Hearing Examiner would have erred if he approved the Wal-Mart proposal. The Wal-Mart proposal violates several guidelines and intent statements in the new code as it did with the previous version. The violations are still present even when one applies the

performance standards. There may even be more violations that have not yet been reviewed.

The intent for surface parking in the new Code is to “maintain active pedestrian environments along streets by placing parking lots primarily in back of buildings.” RMC 4-3-100(E)(2). The guidelines for surface parking state: “A limited number of parking spaces may be allowable in front of a building, provided they are for passenger drop-off and pick-up and they are parallel to the building façade.” RMC 4-3-100(E)(2). Again, the Wal-Mart proposal simply does not meet this intent and guidelines. The parking lot is in front of the building and there are hundreds of parking spaces in that lot. Those parking spaces are certainly not for passenger drop-off and pick-up, rather they are established with a primary intent of orienting the development towards cars. That is a violation of the guidelines and intent for surface parking in the design regulations.

The intent of building architectural design in the new Code provision is:

To encourage building design that is unique and urban in character, comfortable on a human scale, and uses appropriate building materials that are suitable for the Pacific Northwest climate and to discourage franchise retail architecture.

RMC 4-3-100(E)(5) (new version). The new Code guidelines state:

Building facades should be modulated and/or articulated to reduce the apparent size of buildings, break up long blank walls, add visual interest, and enhance the character of the neighborhood. Articulation, modulation, in their intervals should create a sense of scale important to residential buildings. Buildings greater than one hundred and sixty feet (160') in length should provide a variety of modulations and articulations to reduce the apparent both in scale of the façade (illustration below); or provide an additional special design feature such as a clock tower, courtyard, fountain, or public gathering.

RMC 4-3-100(E)(5) (new version). As is evident from the description of the project below, Wal-Mart is not utilizing articulation and modulation to create a sense of scale and there is not an adequate variety of modulations and articulations to reduce the apparent bulk and scale of the façade pursuant to the illustration shown in the new ordinance.

Respondents repeatedly state that deference is owed to the City Hearing Examiner and the Council, but deference does not mean that the City Council or the Hearing Examiner are authorized to disregard the plain language and the mandatory requirements that are set forth in the City of Renton Code. A Court will grant such deference as is due the construction of law by a local jurisdiction with expertise, but only so long as that interpretation is not contrary to the statute's plain language. *Sylvester v. Pierce County*, 148 Wn. App. 813, 823, 201 P.3d 381 (2009). When faced

with an unambiguous statute, the Court derives the Legislature's intent from the plain language alone and does not defer to the City. *Id.* at 826.

4. Wal-Mart did not apply for, nor did the City grant modifications to the design standards

Respondents gloss over the fact that Wal-Mart never filed a request for a modification of the minimum standards with the Planning Department and never submitted any justification for such modification. As appellant demonstrated in its Opening Brief, Wal-Mart never applied for a modification to the design regulations and no such modification was granted. Respondents cannot belatedly attempt to excuse the violations of the code after-the-fact and the record does not support any such modification.

Even if Wal-Mart had applied for a modification, it would still not get around the prohibition against expansion of nonconforming structures. As explained before, a modification or variance is, by definition, an approval of a nonconforming structure. Therefore, approval of a modification to the design standards would constitute approval of an expansion of a nonconforming structure without making it conform to the Code.

II. CONCLUSION

For the foregoing reasons, Renton Neighbors requests that the Court reverse the City of Renton's decision on the Wal-Mart expansion site plan approval and order that the Wal-Mart proposal be denied.

Dated this 15th day of September, 2011.

Respectfully submitted,

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Attorneys for Appellant

Chapter 8 PERMITS – GENERAL AND APPEALS

CHAPTER GUIDE: This Chapter implements State regulatory reform requirements for permit review, classifies permits, indicates which Responsible Official has the authority to make recommendations, decisions, or consider appeals, and lists submittal requirements for all development-related permits and decisions of the City. While chapter 4-8 RMC provides the overall review framework regarding submittal and hearings, chapter 4-9 RMC contains the permit-specific review procedures and criteria, such as conditional use permit, site plan review, variance, etc. Both chapters should be reviewed in tandem.

This Chapter last amended by Ord. 5528, March 8, 2010.

<u>4-8-010</u>	PURPOSE AND INTENT
<u>4-8-020</u>	APPLICABILITY
<u>4-8-030</u>	EFFECT OF PERMIT
<u>4-8-040</u>	PERMIT PROCESSES CLASSIFIED BY TYPE
<u>4-8-050</u>	EXEMPTIONS FROM STATE PROCESS REQUIREMENTS
<u>4-8-060</u>	SUBMITTAL REQUIREMENTS – GENERAL
<u>4-8-070</u>	AUTHORITY AND RESPONSIBILITIES
<u>4-8-080</u>	PERMIT CLASSIFICATION
<u>4-8-090</u>	PUBLIC NOTICE REQUIREMENTS
<u>4-8-100</u>	APPLICATION AND DECISION – GENERAL
<u>4-8-110</u>	APPEALS
<u>4-8-120</u>	SUBMITTAL REQUIREMENTS – SPECIFIC TO APPLICATION TYPE

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APPENDIX A

4-8-070 AUTHORITY AND RESPONSIBILITIES:**A. REVIEW AUTHORITY:**

RMC 4-8-080G, Land Use Permit Procedures, lists the development applications and outlines the responsible review authority associated with making recommendations, conducting open record public hearings, open record appeals, the responsible official for the permit decision, and appeal bodies.

B. SPECIFIC RESPONSIBILITIES:

The regulation of land development is a cooperative activity including many different elected and appointed boards and City staff. The specific responsibilities of these bodies are listed as set forth in subsections C through J of this Section and RMC 4-8-080G.

C. PUBLIC WORKS ADMINISTRATOR OR DESIGNEE:

Authority: The Public Works Administrator or designee shall review and act on the following:

1. Appeals of administrative decisions/determinations regarding requests for modification of storm drainage regulations;
2. Interpretation of flood insurance rate map boundaries;
3. Modifications:
 - a. Modifications of storm drainage requirements;
 - b. Modifications/waivers of sewer code requirements;
4. Sewer modifications, alternates, and appeals pursuant to RMC 4-9-250D and E and 4-8-110D, respectively. (Ord. 5028, 11-24-2003; Amd. Ord. 5157, 9-26-2005; Ord. 5450, 3-2-2009)

D. COMMUNITY AND ECONOMIC DEVELOPMENT ADMINISTRATOR OR DESIGNEE:

Authority: The Community and Economic Development Administrator or designee shall review and act on the following:

1. Appeals relating to the International Building Code;
2. Building and grading permits;
3. Permits to rebuild for nonconforming structures; (Ord. 5519, 12-14-2009)
4. Conditional use permit, administrative;
5. Critical area regulation alternates and modifications;
6. Critical areas regulation administrative determinations per RMC 4-3-050D4;
7. Lot line adjustments;
8. Modifications:
 - a. Minor modifications to previously approved site plan;
 - b. Modification of geologic hazard regulations for manmade slopes;
 - c. Modifications of the number of required parking stalls and the requirements of the parking, loading and driveway regulations; and
 - d. Modifications to development standards in the Urban Design Regulation Overlay District;
9. Public art exemption certificate;
10. Review of business licenses for home occupations;
11. Revocable permits for the temporary use of public right-of-way;
12. Routine vegetation management permits;
13. Shoreline exemptions;
14. Shoreline permits;
15. Short plats; (Ord. 5519, 12-14-2009)
16. Site plan approval, administrative;
17. Master Plan review (individual phases);
18. Temporary emergency wetland permits;
19. Temporary use permits;
20. Variances:
 - a. Administrative pursuant to RMC 4-9-250B; (Ord. 5519, 12-14-2009)
 - b. Variances not associated with a development permit that requires review by the Hearing Examiner, provided the variance authority is not specifically given to another authority elsewhere in this Chapter, and any building permits submitted in conjunction with such variance application; and
 - c. Variances from chapter 8-7 RMC, Noise Level Regulations; and

21. Waivers:

- a. Waivers of right-of-way dedication for plat;
- b. On- and off-site improvements (including deferrals); and
- c. Allowing a commercial or multi-family residential driveway grade of between eight percent (8%) and fifteen percent (15%). (Ord. 5450, 3-2-2009)

22. Final Planned Urban Developments. (Ord. 5519, 12-14-2009)

E. ENVIRONMENTAL REVIEW COMMITTEE:

The Environmental Review Committee shall:

1. Make threshold determinations for environmental checklists,
2. Make determinations regarding whether an optional public hearing is needed for a site plan review application,
3. Authorize circulation of draft environmental impact statements,
4. Approve and issue final environmental impact statements,
5. Approve mitigation conditions for mitigated determinations of nonsignificance and final environmental impact statements.

F

(Repealed by Ord. 5157, 9-26-2005)

G. PLANNING COMMISSION:

The Planning Commission shall review and act on the following:

1. **Comprehensive Plan:** Duties related to the Comprehensive Plan as described in chapter 2-10 RMC, Planning Commission.
2. **Shoreline Master Program Amendments:** Recommendations to City Council regarding Shoreline Master Program Amendments after holding public hearing.
3. **Area-Wide Zoning:** The Planning Commission, in conducting area land use analysis, may from time to time recommend to the City Council area-wide zonings to implement the recommended amendments to the Comprehensive Plan.
4. **Land Use Regulations and Processes:** Upon Council request and based upon the goals and policies of the Comprehensive Plan, recommendations to Council regarding effective and efficient land use regulations and processes.

H. HEARING EXAMINER:

1. **Authority:** The Hearing Examiner shall review and act on the following:

- a. Appeals of administrative decisions/determinations (including, but not limited to, parking, sign, street, tree cutting/routine vegetation management standards, and Urban Center Design Overlay District regulations) and ERC decisions, excepting determinations of whether an application is a bulk storage facility which shall be appealable to the City Council,
- b. Appeals relating to RMC 4-5-060, Uniform Code for the Abatement of Dangerous Buildings,
- c. Bulk storage special permit and variances from the bulk storage regulations,
- d. Permit to rebuild for nonconforming uses,
- e. Conditional use permit,
- f. Fill and grade permit, special,
- g. Master Plan review (overall plan) and major amendments to an overall Master Plan,
- h. Mobile home parks, preliminary and final,
- i. Planned urban development, preliminary,
- j. Plats, preliminary and final,
- k. Shoreline conditional use permit,
- l. Shoreline variance,
- m. Site plan approvals requiring a public hearing,
- n. Special permits,
- o. Variances from wireless communication facility development standards, the provisions of the subdivision regulations, and variances associated with a development permit that requires review by the Hearing Examiner, and
- p. Building permits submitted in conjunction with any of the above. (Ord. 5519, 12-14-2009)

2. **Interpretation:** It shall be the duty of the Hearing Examiner to interpret the provisions of chapter 4-2 RMC, Zoning Districts – Uses and Standards, in such a way as to carry out the intent and purpose of the plan thereof, as shown by the maps fixing districts, accompanying and made part of this Code, in

cases where the street layout actually on the ground varies from the street layout as shown on the maps aforesaid.

3. Recommendations: The Hearing Examiner shall hold a public hearing and make recommendations to the City Council on the following:

- a. Rezones, site specific, in conformance with the Comprehensive Plan,
- b. Special permits requiring Council approval. (Ord. 5519, 12-14-2009)

4. Appeals: Unless otherwise specified, any decision of the Environmental Review Committee, the Community and Economic Development Administrator or designee, or the Public Works Administrator or designee in the administration of this Title shall be appealable to the Hearing Examiner as an administrative determination pursuant to RMC 4-8-110E, Appeals to Examiner of Administrative Decisions and Environmental Determinations. (Ord. 5028, 11-24-2003; Ord. 5153, 9-26-2005; Ord. 5450, 3-2-2009)

I. CITY COUNCIL:

The City Council shall review and act on the following:

1. Annexations,
2. Appeals of Hearing Examiner decisions (any appeal from a Hearing Examiner's decision, whether an appeal from an administrative determination or an original decision, shall be appealable to the City Council pursuant to RMC 4-8-110E8),
3. Appeals of staff determinations of whether or not a proposal is considered a bulk storage facility,
4. Comprehensive Plan map or text amendment,
5. Dedications of property for public purposes,
6. Development and zoning regulations text amendment,
7. Release of easements,
8. Rezones with associated Comprehensive Plan amendment,
9. Rezones with associated Comprehensive Plan map or text amendment,
10. Street vacations, (Ord. 5153, 9-26-2005; Ord. 5519, 12-14-2009)

J. REVIEW AUTHORITY FOR MULTIPLE PERMIT APPLICATIONS:

Where required permits are subject to different types of permit review procedures, then all the associated applications are subject to the highest level of review authority that applies to any of the required applications. (Amd. Ord. 4963, 5-13-2002)

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4-8-080 PERMIT CLASSIFICATION:**A. PURPOSE:**

The purpose of this Section is to outline the procedure and time requirements for the various development applications reviewed by the City. All development applications are classified and processed according to one of eleven (11) types of permit procedures, as identified in subsection G of this Section.

B. REVIEW PROCESS BASED UPON APPLICATION TYPE:

Subsection G of this Section lists the development applications and explains the basic steps in the review process. This table also outlines the responsible review authority. More specific details regarding specific land use application procedures and decision criteria are located in chapter 4-9 RMC, Permits – Specific. (Ord. 4587, 3-18-1996; Amd. Ord. 4660, 3-17-1997; Ord. 4963, 5-13-2002)

C. CONSOLIDATED REVIEW PROCESS FOR MULTIPLE PERMIT APPLICATIONS:

1. Optional Process Resulting in a Single Open Record Public Hearing: An applicant may elect to have the review and decision process for required permits consolidated into a single review process. Consolidated review shall provide for only one open record hearing and no more than one closed record appeal period. Appeals of environmental determinations shall be consolidated except when allowed to be part of separate hearings in accordance with RCW 43.21C.075, Appeals, and WAC 197-11-680, Appeals. Where hearings are required for permits from other local, State, regional, or Federal agencies, the City will cooperate to the fullest extent possible with the outside agencies to hold a single joint hearing. A flowchart showing the timeline for processing a combined land use, environmental, and building permit application is included in subsection H of this Section.

2. Review Authority for Multiple Permit Applications: Where more than one land use permit application is required for a given development, an applicant may file all related permit applications concurrently, pay appropriate fees, and the processing may be conducted under the consolidated review process. Where required permits are subject to different types of permit review procedures, then all the applications are subject to the highest-number procedure, as identified in subsection G of this Section, and highest level of review authority, as identified in RMC 4-8-070, that applies to any of the applications. Appeals of environmental determinations shall be consolidated except when allowed to be part of separate hearings in accordance with RCW 43.21C.075, Appeals, and WAC 197-11-680, Appeals. (Amd. Ord. 4963, 5-13-2002; Ord. 5153, 9-26-2005)

D. TIME FRAME BASED ON PERMIT TYPE:

The flowcharts in subsection H of this Section indicate timelines for each of the eleven (11) land use permit types, as discussed in subsection G of this Section. For permit types I through VIII, the timelines include the statutory requirement that requires the issuance of a letter of completeness within twenty eight (28) days of the application submittal, pursuant to RCW 36.70B.070(1), and the provision for final decisions on permits within one hundred twenty (120) days of receipt of a complete application. In addition, there is a generalized flowchart for the consolidated review process. (Amd. Ord. 4974, 6-24-2002; Ord. 5153, 9-26-2005)

E. TIME FRAMES – MAXIMUM PERMITTED:

Final decisions on all Type I through Type VIII permits and reviews subject to the procedures of this Chapter shall occur within one hundred twenty (120) days from the date an application is deemed complete, unless the applicant consents to an extension of such time period. If a project application is substantially revised by an applicant, the one hundred twenty (120) day time period shall start again after the revised project application is determined to be complete. Development applications which are specifically exempted under RMC 4-8-050, Exemptions from State Process Requirements, are not subject to this time frame. (Amd. Ord. 4974, 6-24-2002; Ord. 5153, 9-26-2005)

F. EXCLUSIONS FROM ONE HUNDRED TWENTY (120) DAY TIME LIMIT:

In determining the number of days which have elapsed since the applicant was notified that the application is complete, the following periods shall be excluded:

1. Revisions/Additional Information Required: The time period in which an applicant has been requested by the Development Services Division to correct plans, perform required studies, or provide additional information. The period shall be calculated from the date the Development Services Division

notifies the applicant of the need for additional information until: (a) the date the Division determines the additional information satisfies the request for information, or (b) fourteen (14) days after the date acceptable information has been provided to the City, whichever is earlier. If the Division determines that the information submitted is insufficient, it shall notify the applicant of the deficiencies.

2. EIS Preparation: A period of two hundred fifty (250) days for the preparation of a draft environmental impact statement (DEIS), following a determination of significance. This time frame shall commence after the final scoping of the DEIS is complete.

3. Applicant Agreements: Any time extension mutually agreed upon by the applicant and the Development Services Division.

G. LAND USE PERMIT PROCEDURES:

LAND USE PERMITS	PUBLIC NOTICE OF APPLICATION	RECOMMENDATION	OPEN RECORD HEARING ⁷	DECISION/ADOPTION	OPEN RECORD APPEAL	CLOSED RECORD HEARING	JUDIC APPE
TYPE I							
Building and Grading Permits ¹	No	No	No	Staff	HE	CC	SC
Business Licenses for Home Occupations (no customer visits/deliveries)	No	No	No	Staff	HE	CC	SC
Deferrals	No	No	No	Staff	HE	CC	SC
Lot Line Adjustments	No	No	No	Staff	HE	CC	SC
Minor Modification to Previously Approved Site Plan (<10%)	No	No	No	Staff	HE	CC	SC
Modifications, Deviations, Alternates of Various Code Standards ²	No	No	No	Staff	HE	CC	SC
Public Art Exemption Certificate	No	No	No	Staff	HE	CC	SC
Routine Vegetation Management Permits (SEPA exempt)	No	No	No	Staff	HE	CC	SC
Shoreline Exemptions	No	No	No	Staff	HE	CC	SC

Special Fence Permits	No	No	No	Staff	HE	CC	SC
Temporary Use Permit: Tier I	No	No	No	Staff	HE	CC	SC
Waivers ²	No	No	No	Staff	HE	CC	SC
Other SEPA Exempt Activities/Actions	No	No	No	Staff	HE	CC	SC
TYPE II							
Additional Animals Permit	Yes	No	No	Staff	HE	CC	SC
Administrative Variances	Yes	No	No	Staff	HE	CC	SC
Business Licenses for Home Occupations (with customer visits/deliveries)	Yes	No	No	Staff	HE	CC	SC
Conditional Approval Permit (nonconforming structures)	Yes	No	No	Staff	HE	CC	SC
Planned Urban Development, final	Yes	No	No	Staff	HE	CC	SC
Temporary Use Permits: Tier II	Yes	No	No	Staff	HE	CC	SC
Temporary Emergency Wetland Permit	Yes	No	No	Staff	HE	CC	SC
Variances, Administrative	Yes	No	No	Staff	HE	CC	SC
Binding Site Plans	Yes	No	No	Staff	HE	CC	SC
Conditional Use Permit (administrative)	Yes	No	No	Staff	HE	CC	SC
Development Permit (special flood hazard)	Yes	No	No	Staff	HE	CC	SC
Environmental Review ⁹	Yes	No	No	Staff	HE	CC	SC
Master Site Plan Approvals	Yes	No	No	Staff	HE	CC	SC

(individual phases)							
Site Plan Review (administrative)	Yes	No	No	Staff	HE	CC	SC
Shoreline Permit	Yes	No	No	Staff	DOE	CC	SC
Short Plats	Yes	No	No	Staff	HE	CC	SC
TYPE III⁴							
Permit to Rebuild (nonconforming use)	Yes	Staff	HE	HE		CC	SC
Bulk Storage Special Permit	Yes	Staff	HE	HE		CC	SC
Conditional Use Permit (Hearing Examiner)	Yes	Staff	HE	HE		CC	SC
Fill and Grade Permit, Special	Yes	Staff	HE	HE		CC	SC
Final Plats	No	Staff	NA	HE		CC	SC
Master Site Plan Approval (overall plan)	Yes	Staff	HE	HE		CC	SC
Mobile Home Parks, Preliminary and Final	Yes	Staff	HE	HE		CC	SC
Planned Urban Development, preliminary	Yes	Staff	HE	HE		CC	SC
Preliminary Plats – 10 Lots or More	Yes	Staff	HE	HE		CC	SC
Shoreline Conditional Use Permit ⁶	Yes	Staff	HE	DOE, HE		SHB	
Shoreline Variance ⁶	Yes	Staff	HE	DOE, HE		SHB	
Site Plan Review (Hearing Examiner)	Yes	Staff	HE	HE		CC	
Special Permits	Yes	Staff	HE	HE		CC	
Variations (associated with Hearing)	Yes	Staff	HE	HE		CC	

Examiner land use review)							
TYPE IV⁴							
Rezones (site-specific, not associated with a Comprehensive Plan amendment)	Yes	Staff, HE	HE	CC			SC
TYPE V⁴							
Street Vacations ⁸	Yes	Public Works Staff	CC	CC			SC
TYPE VI⁴							
Development Regulation Text Amendments	Yes	Staff, PC	PC	CC			GMHB
Comprehensive Plan Map or Text Amendments (may include associated rezones)	Yes	Staff, PC	PC	CC			GMHB

LEGEND:

Staff – Community and Economic Development Staff
 ERC – Environmental Review Committee
 PC – Planning Commission
 Admin. – Community and Economic Development Administrator or designee
 HE – Hearing Examiner
 CC – City Council
 DOE – Washington State Department of Ecology
 SC – Superior Court
 SHB – Shoreline Hearings Board
 GMHB – Growth Management Hearings Board
 NA – Not Applicable

FOOTNOTES:

1. SEPA exempt or for which the SEPA/land use permit process has been completed.
2. Administratively approved.
3. Deleted.
4. Environmental review may be associated with a land use permit. The Environmental Review Committee (ERC) is responsible for environmental determinations.
5. The Community and Economic Development Administrator or designee shall hear variances where not associated with a development that requires review by the Hearing Examiner.
6. Shoreline conditional use permits and shoreline variances also require approval of the State Department of Ecology (DOE). DOE has up to thirty (30) days to make a decision on a permit. This time period does not count toward the one hundred twenty (120) day maximum time limit for permit decisions. DOE's decision is followed by a twenty one (21) day appeal period, during which time no building permit for the project may be issued.

7. An open record appeal of an environmental threshold determination must be held concurrent with an open record public hearing.

8. Street vacations are exempt from the one hundred twenty (120) day permit processing time limit.

9. Environmental review for a permitted/secondary/accessory use not requiring any other land use permit.

(Amd. Ord. 4827, 1-24-2000; Ord. 4963, 5-13-2002; Ord. 4975, 7-1-2002; Ord. 5153, 9-26-2005; Ord. 5356, 2-25-2008; Ord. 5450, 3-2-2009; Ord. 5471, 7-13-2009; Ord. 5516, 12-14-2009; Ord. 5519, 12-14-2009)

H. (Repealed by Ord. 5519, 12-14-2009)

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F. PUBLIC HEARING:

1. Hearing by Examiner Required: Before rendering a decision or recommendation on any application for which a public hearing is required, the Examiner shall hold at least one public hearing thereon.

2. Constitutes Hearing by Council: On applications requiring approval by the City Council, the public hearing before the Examiner, if required, shall constitute the hearing by the City Council.

3. Hearing Rules: The Examiner shall have the power to prescribe rules and regulations for the conduct of hearings under this Chapter subject to confirmation by the City Council, and to administer oaths and preserve order.

4. Closure/Continuation of Public Hearing: At the close of the testimony, the Examiner may close the public hearing, continue the hearing to a time and date certain, or close the public hearing pending the submission of additional information on or before a date certain.

5. Application Dismissal: Until a final action on the application is taken, the Examiner may dismiss the application for failure to diligently pursue the application after notice is given to all parties of record.

G. EXAMINER'S DECISION:

1. Standard Decision Time and Notification Procedure: Unless the time is extended pursuant to this Section, within fourteen (14) days of the conclusion of a hearing, or the date set for submission of additional information pursuant to this Chapter, the Examiner shall render a written decision, including findings from the record and conclusions therefrom, and shall transmit a copy of such decision by regular mail, postage prepaid, to the applicant and other parties of record in the case requesting notice of the decision. The person mailing the decision, together with the supporting documents, shall prepare an affidavit of mailing, in standard form, and the affidavit shall become a part of the record of the proceedings. In the case of applications requiring City Council approval, the Examiner shall file his decision with the City Council members individually at the expiration of the appeal period for the decision.

2. Decision Time Extension: In extraordinary cases, the time for filing of the recommendation or decision of the Examiner may be extended for not more than thirty (30) days after the conclusion of the hearing if the Examiner finds that the amount and nature of the evidence to be considered, or receipt of additional information which cannot be made available within the normal decision period, requires the extension. Notice of the extension, stating the reasons therefor, shall be forwarded to all parties of record in the manner set forth in this Section for notification of the Examiner's decision.

3. Conditions: The Examiner's recommendation or decision may be to grant or deny the application, or the Examiner may require of the applicant such conditions, modifications and restrictions as the Examiner finds necessary to make the application compatible with its environment and carry out the objectives and goals of the Comprehensive Plan, the zoning regulations, the subdivision regulations, the codes and ordinances of the City of Renton, and the approved preliminary plat, if applicable. Conditions, modifications and restrictions which may be imposed are, but are not limited to, additional setbacks, screenings in the form of landscaping and fencing, covenants, easements and dedications of additional road rights-of-way. Performance bonds may be required to insure compliance with the conditions, modifications and restrictions.

4. Reconsideration of Examiner's Decision: Any interested person feeling that the decision of the Examiner is based on an erroneous procedure, errors of law or fact, error in judgment, or the discovery of new evidence which could not be reasonably available at the prior hearing may make a written application for review by the Examiner within fourteen (14) days after the written decision of the Examiner has been rendered. The application shall set forth the specific errors relied upon by such appellant, and the Examiner may, after review of the record, take further action as the Examiner deems proper. The Examiner may request further information which shall be provided within ten (10) days of the request. The Examiner's written decision on the request for reconsideration shall be transmitted to all parties of record within ten (10) days of receipt of the application for reconsideration or receipt of the additional information requested, whichever is later.

H. EXPIRATION OF DECISION:

The City declares that circumstances surrounding land use decisions change rapidly over a period of time. In order to assure the compatibility of a decision with current needs and concerns, any such decision must be limited in duration, unless the action or improvements authorized by the decision is implemented promptly. Any application or permit approved pursuant to this Chapter with the exception

of rezones shall be implemented within two (2) years of such approval unless other time limits are prescribed elsewhere in the Renton Municipal Code. Any application or permit which is not so implemented shall terminate at the conclusion of that period of time and become null and void.

I. EXTENSION:

The Examiner may grant one extension of time for a maximum of one year for good cause shown. The burden of justification shall rest with the applicant.

J. EXPIRATION OF LARGE SCALE OR PHASED PROJECTS:

For large scale or phased development projects, the Examiner may at the time of approval or recommendation set forth time limits for expiration which exceed those prescribed in this Section for such extended time limits as are justified by the record of the action.

K. COUNCIL ACTION:

1. Council Action Requires Minutes and Findings of Fact: Any application requiring action by the City Council shall be evidenced by minute entry unless otherwise required by law. When taking any such final action, the Council shall make and enter findings of fact from the record and conclusions therefrom which support its action.

2. Adoption of Examiner's Findings and Conclusions Presumed: Unless otherwise specified, the City Council shall be presumed to have adopted the Examiner's findings and conclusions.

3. Applications to Be Placed on Council Agenda: Except for rezones, all applications requiring Council action shall be placed on the Council's agenda for consideration. (Ord. 3454, 7-28-1980)

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4-8-110 APPEALS:**A. SCOPE AND PURPOSE:**

This Section provides the basic procedures for processing all types of land use and development-related appeals. Specific requirements are based upon the type/level of appeal and the appeal authority. Procedures for the following types of appeals are included in this Section:

1. Appeals of administrative decisions to Public Works Administrator or designee; (Ord. 5450, 3-2-2009)
2. Appeals to Hearing Examiner of administrative decisions and environmental determinations;
3. Appeals to City Council;
4. Appeals to Superior Court;
5. Appeals to the State Shorelines Hearings Board;
6. Appeals to the Growth Management Hearings Board; and
7. Appeals of administrative decisions to Community and Economic Development Administrator or designee. (Ord. 5154, 9-26-2005; Ord. 5157, 9-26-2005; Ord. 5450, 3-2-2009)

B. DECISION AUTHORITY:

RMC 4-8-080G, Land Use Permit Procedures, lists the development permits reviewed by the City and the review authority responsible for open record appeals, closed record appeals and judicial appeals. Where required permits are subject to different types of permit review procedures, then all the applications are subject to the highest-number procedure, as identified in RMC 4-8-080G, and highest level of review authority, as identified in RMC 4-8-070, that applies to any of the applications. (Ord. 4587, 3-18-1996; Amd. Ord. 4660, 3-17-1997; Ord. 4963, 5-13-2002)

C. GENERAL INFORMATION APPLICABLE TO ALL TYPES OF APPEALS:**1. Standing: (Reserved)****2. Time to File: (Reserved)**

3. Required Form for and Content of Appeals: Any appeal shall be filed in writing. The written notice of appeal shall fully, clearly and thoroughly specify the substantial error(s) in fact or law which exist in the record of the proceedings from which the appellant seeks relief. (Ord. 4353, 6-1-1992)

4. Filing of Appeal and Fee: The notice of appeal shall be accompanied by a fee in accordance with RMC 4-1-170, the fee schedule of the City. (Ord. 3658, 9-13-1982)

5. Facsimile Filings: Whenever any application or filing is required under this Chapter, it may be made by facsimile. Any facsimile filing received at the City after five o'clock (5:00) p.m. on any business day will be deemed to have been received on the following business day. Any facsimile filing received after five o'clock (5:00) p.m. on the last date for filing will be considered an untimely filing. Any party desiring to make a facsimile filing after four o'clock (4:00) p.m. on the last day for the filing must call the Hearing Examiner's office or other City official with whom the filing must be made and indicate that the filing is being made by facsimile and the number to which the facsimile copy is being sent. The filing party must ensure that the facsimile filing is transmitted in adequate time so that it will be completely received by the City before five o'clock (5:00) p.m. in all instances in which filing fees are to accompany the filing of an application, those filing fees must be received by the City before the end of the business day on the last day of the filing period or the filing will be considered incomplete and will be rejected. (Ord. 4353, 6-1-1992)

6. Notice of Appeal: (Reserved)

7. Restrictions on Subsequent Actions: Any later request to interpret, explain, modify, or retract the decision shall not be deemed to be a new administrative determination creating a new appeal period for any new third party to the permit. (Ord. 4168, 8-8-1988)

8. Limit on Number of Appeals: The City has consolidated the permit process to allow for only one open record appeal of all permit decisions associated with a single development application. (Ord. 4587, 3-18-1996, Ord. 4660, 3-17-1997)

There shall be no more than one appeal on a procedural determination or environmental determination such as the adequacy of a determination of significance, nonsignificance, or of a final environmental impact statement.

Any appeal of the action of the Hearing Examiner in the case of appeals from environmental determinations shall be joined with an appeal of the substantive determination. (Ord. 3891, 2-25-1985)

9. Exhaust of Administrative Remedies: (Reserved)

D. APPEALS OF ADMINISTRATIVE DECISIONS TO THE PUBLIC WORKS DEPARTMENT:

Any decisions made in the administrative process related to the City's storm drainage regulations may be appealed to the Public Works Administrator or his/her designee within fifteen (15) days and filed, in writing, with the Public Works Department. The Administrator shall give substantial weight to any discretionary decision of the City rendered pursuant to this Chapter. (Ord. 4342, 2-3-1992; Ord. 5156, 9-26-2005; Ord. 5450, 3-2-2009)

E. APPEALS TO EXAMINER OF ADMINISTRATIVE DECISIONS AND ENVIRONMENTAL DETERMINATIONS: (Amd. Ord. 4827, 1-24-2000)

1. Applicability and Authority:

a. Administrative Determinations: Any administrative decisions made may be appealed to the Hearing Examiner, in writing, with the Hearing Examiner, Examiner's secretary or City Clerk. (Ord. 4521, 6-5-1995)

b. Environmental Determinations: Except for permits and variances issued pursuant to RMC 4-3-090, Shoreline Master Program Regulations, when any proposal or action is granted, conditioned, or denied on the basis of SEPA by a nonelected official, the decision shall be appealable to the Hearing Examiner under the provisions of this Section.

c. Authority: To that end, the Examiner shall have all of the powers of the office from whom the appeal is taken insofar as the decision on the particular issue is concerned.

2. Optional Request for Reconsideration: See RMC 4-9-070N. (Ord. 5153, 9-26-2005)

3. Standing:

a. Standing for Filing Appeals of the City's Environmental Determinations: Appeals from environmental determinations as set forth in subsection E1b of this Section or RMC 4-9-070N may be taken to the Hearing Examiner by any person aggrieved, or by any officer, department, board or bureau of the City affected by such determination. Any agency or person may appeal the City's compliance with chapter 197-11 WAC for issuance of a Threshold Determination. A person is aggrieved when all of the following conditions are met: The decision is prejudiced or is likely to prejudice that person; the person's asserted interests are among those that are required to be considered by the City when it made its decision; and a decision in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the decision; and prejudice means injury in fact. (Ord. 3891, 2-25-1985; Ord. 5153, 9-26-2005)

b. Standing for Appeals of Administrative Determinations other than Environmental: Appeals from administrative determinations of the City's land use regulation codes and from environmental determinations required by the Renton environmental review regulations may be taken to the Hearing Examiner by any person aggrieved, or by any officer, department, board or bureau of the City affected by such determination. (Ord. 3454, 7-28-1980)

c. Special Standing Requirements for Appeals of Administrative Determinations Relative to the Tree Cutting and Land Clearing Regulations: Any individual or party of record who is adversely affected by such a decision may appeal the decision to the City's Hearing Examiner pursuant to the procedures established in this Section. (Ord. 4351, 5-4-1992)

d. Special Standing Requirements for Appeals of Decisions Relating to Master Site Plans: Any appellant must be seeking to protect an interest that is arguably within the zone of interest to be protected or regulated by this Title must allege an injury in fact, and that injury must be real and present rather than speculative. (Ord. 4551, 9-18-1995)

4. Time for Appeal: Any such appeal shall be filed in writing with the Examiner within the following time limits:

a. Appeals of Environmental Determinations: Appeals of a final environmental determination under the Renton environmental review regulations shall be filed within fourteen (14) days of publication of notice of such determination. (Ord. 3454, 7-28-1980)

i. A Final DNS: The appeal of the DNS must be made to the Hearing Examiner within fourteen (14) days of the date the DNS is final.

ii. A DS: The appeal must be made to the Hearing Examiner within fourteen (14) days of the publication date of the DS in the official City newspaper.

iii. A Final EIS: The appeal of the FEIS must be made to the Hearing Examiner within twenty (20) days of the date the permit or other approval is issued. (Ord. 3891, 2-25-1985)

b. Appeals to Examiner of Administrative Determinations Other Than Environmental:

Appeals from an administrative decision pursuant to this Chapter shall be filed within fourteen (14) days of the date that the action was taken. (Ord. 3454, 7-28-1980)

The appeal from an administrative decision implementing a land use decision of the City Council or the Hearing Examiner pursuant to this Chapter shall be filed with the Hearing Examiner, along with the required fee, within fourteen (14) days of the administrative decision or, if no date of administrative decision can be determined, within fourteen (14) days of the issuance of any permit which requires interpretation of that land use decision, such administrative decision being an essential part of the issuance of the permit, license, or other City permission to proceed.

As between the permit holder and the City, any decision to modify or retract the permit shall give the permit holder a fourteen (14) day appeal period from the date of the action to modify or retract the permit.

5. Complaints After Expiration of Appeal Time: Any claim that an administrative decision maker has failed to correctly interpret or enforce a land use decision after the expiration of the appeal time established in this Section shall not create an appeal right, but will be treated as a complaint of noncompliance with the land use decision. (Ord. 4168, 8-8-1988)

6. Appeal Procedures – Hearing Examiner: The City establishes the following administrative appeal procedures under RCW 43.21C.075 and WAC 197-11-680:

a. Notice to Officer: Immediately upon receipt of the notice of appeal, the Hearing Examiner shall forward to the officer from whom the appeal is being taken a copy of the notice of appeal.

b. Transmittal of Records and Reports: Upon receiving such notice, the officer from whom the appeal is being taken shall transmit to the Hearing Exam-

iner all of the records pertaining to the decision being appealed, together with such additional written reports as are deemed pertinent. The Examiner may request additional information from the applicant.

c. Notice of Hearing Required: A written notice of the time and place of the hearing at which the appeal shall be considered by the Examiner shall be mailed to the applicant, all parties of record in the case, and to the officer from whom the appeal is taken not less than ten (10) days prior to the date of the hearing. (Ord. 3454, 7-28-1980)

d. Content of Hearing: The Examiner may hear and consider any pertinent facts pertaining to the appeal. (Ord. 3992, 5-19-1986)

e. Record Required: For any appeal under this subsection, the City shall provide for a record that shall consist of the following:

- i. Findings and conclusions;
- ii. Testimony under oath; and
- iii. A taped or written transcript.

f. Electronic Transcript: The City may require the appellant to provide an electronic transcript. (Ord. 3891, 2-25-1985)

7. Examiner Decision:

a. Substantial Weight: The procedural determination by the Environmental Review Committee or City staff shall carry substantial weight in any appeal proceeding. (Ord. 3891, 2-25-1985) The Hearing Examiner shall give substantial weight to any discretionary decision of the City rendered pursuant to this Chapter/Title. (Ord. 4346, 3-9-1992)

b. Examiner Decision Options and Decision Criteria: The Examiner may affirm the decision or remand the case for further proceedings, or it may reverse the decision if the substantial rights of the applicant may have been prejudiced because the decision is:

- i. In violation of constitutional provisions; or
- ii. In excess of the authority or jurisdiction of the agency; or
- iii. Made upon unlawful procedure; or
- iv. Affected by other error of law; or
- v. Clearly erroneous in view of the entire record as submitted; or
- iv. Arbitrary or capricious. (Ord. 3992, 5-19-1986)

c. Time for Examiner's Decision: The Hearing Examiner shall render a written decision within ten (10) days. (Ord. 4401, 5-3-1993)

8. Appeal of Examiner Decision:

a. Appeal of Examiner's Decision to Council: Unless a specific section or State law providing for review of decision of the Examiner requires review thereof by the Superior Court or other body, any interested party aggrieved by the Examiner's written decision or recommendation may submit a notice of appeal to the City Council, upon a form furnished by the City Clerk, within fourteen (14) calendar days from the date of the Examiner's written report. (Amd. Ord. 4899, 3-19-2001)

b. (Deleted by Ord. 4899, 3-19-2001) (Ord. 3454, 7-28-1980)

c. Other Bodies: (Reserved)

F. APPEALS TO CITY COUNCIL – PROCEDURES:

1. Time for Appeal: Unless a specific section of State law providing for review of a decision of the Examiner requires review thereof by the Superior Court or any other body, any interested party aggrieved by the Examiner's written decision or recommendation may submit a notice of appeal to the City Clerk, upon a form furnished by the City Clerk, within fourteen (14) calendar days from the date of the Examiner's written report.

2. Notice to Parties of Record: Within five (5) days of receipt of the notice of appeal, the City Clerk shall notify all parties of record of the receipt of the appeal.

3. Opportunity to Provide Comments: Other parties of record may submit letters in support of their positions within ten (10) days of the dates of mailing of the notification of the filing of the notice of appeal.

4. Transmittal of Record to Council: Thereupon the Clerk shall forward to the members of the City Council all of the pertinent documents, including the written decision or recommendation, findings and conclusions contained in the Examiner's report, the notice of appeal, and additional letters submitted by the parties. (Ord. 3658, 9-13-1982)

5. Council Review Procedures: No public hearing shall be held by the City Council. No new or additional evidence or testimony shall be accepted by the City Council unless a showing is made by the party offering the evidence that the evidence could not reasonably have been available at the time of the hearing before the Examiner. If the Council determines that additional evidence is required, the Council shall remand the matter to the Examiner for reconsideration and receipt of additional evidence. The cost of transcription of the hearing record shall be borne by the applicant. In the absence of an entry upon the record of an order by the City Council authorizing new or additional evidence or testimony, and a remand to the Hearing Examiner for receipt of such evidence or testimony, it shall be presumed that no new or additional evidence or testimony has been accepted by the City Council, and that the record before the City Council is identical to the hearing record before the Hearing Examiner. (Ord. 4389, 1-25-1993)

6. Council Evaluation Criteria: The consideration by the City Council shall be based solely upon the record, the Hearing Examiner's report, the notice of appeal and additional submissions by parties.

7. Findings and Conclusions Required: If, upon appeal of a decision of the Hearing Examiner on an application submitted pursuant to RMC 4-8-070H1, and after examination of the record, the Council determines that a substantial error in fact or law exists in the record, it may remand the proceeding to Examiner for reconsideration, or modify, or reverse the decision of the Examiner accordingly.

8. Council Action: If, upon appeal from a recommendation of the Hearing Examiner upon an application submitted pursuant to RMC 4-8-070H2 and I, and after examination of the record, the Council determines that a substantial error in fact or law exists in the record, or that a recommendation of the Hearing Examiner should be disregarded or modified, the City Council may remand the proceeding to the Examiner for reconsideration, or enter its own decision upon the application.

9. Decision Documentation: In any event, the decision of the City Council shall be in writing and shall specify any modified or amended findings and conclusions other than those set forth in the report of the Hearing Examiner. Each material finding shall be supported by substantial evidence in the record. The burden of proof shall rest with the appellant. (Ord. 3658, 9-13-1982)

10. Council Action Final: The action of the Council approving, modifying or rejecting a decision of the Examiner shall be final and conclusive, unless appealed within the time frames established under subsection G5 of this Section. (Ord. 4660, 3-17-1997)

G. APPEALS TO SUPERIOR COURT:

1. Intent: Appeals pursuant to this Section are intended to comply with the Land Use Petition Act, chapter 36.70C RCW. (Ord. 4587, 3-18-1996, Amd. Ord. 4660, 3-17-1997)

2. Applicability: Any decision or order issued by the City pursuant to this Section may be judicially reviewed provided that available administrative appeals, including those listed in RMC 4-9-250D, have been exhausted. (Ord. 4346, 3-9-1992)

3. Standing: Those persons with standing to bring an appeal of a land use decision are limited to the applicant, the owner of property to which land use decisions are directed, and any other person aggrieved or adversely affected by the land use decision or who would be aggrieved or adversely affected by a re-

versal or modification of the land use decision. The terms “aggrieved” and “adversely affected” are defined in RCW 36.70C.060.

4. Content of Appeal Submittal: The content, procedures and other requirements of an appeal of land use decision are governed by chapter 36.70C RCW which is incorporated herein by reference as if fully set forth.

5. Time for Initiating Appeal to Superior Court:

a. Appeals of Land Use Decisions: An appeal to Superior Court of a land use decision, as defined herein, must be filed within twenty one (21) days of the issuance of the land use decision. For purposes of this Section, the date on which a land use decision is issued is:

- i. Three (3) days after a written decision is mailed by the City or, if not mailed, the date on which the local jurisdiction provided notice that a written decision is publicly available;
- ii. If the land use decision is made by ordinance or resolution by the City Council, sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or
- iii. If neither (i) or (ii) of this subsection applies, the date the decision is entered into the public record. (Ord. 4587, 3-18-1996, Amd. Ord. 4660, 3-17-1997)

b. Appeal of Environmental Determinations: Appeal to the Superior Court of the environmental decision and the substantive determination must be made within twenty (20) days of the substantive determination and must be made by writ of review to the Superior Court of Washington for King County. (Ord. 3891, 2-25-1985)

6. Appeals of Other Than Land Use Decisions – Superior Court: Appeals to Superior Court from decisions other than a land use decision, as defined herein, shall be appealed within the time frame established by ordinance. If there is no appeal time established by an ordinance, and there is no statute specifically pre-empting the area and establishing a time frame for appeal, any appeal, whether through extraordinary writ or otherwise, shall be brought within twenty one (21) days of the decision. (Ord. 4587, 3-18-1996; Amd. Ord. 4460, 3-17-1997)

H. APPEALS OF SHORELINE PERMIT DECISIONS TO SHORELINES HEARING BOARD:

1. Standing for Appeals to Shorelines Hearings Board: Any person aggrieved by the granting or denying of a substantial development permit, a conditional use permit and/or a variance on shorelines of the City, or by the rescinding of a permit pursuant to the provisions of the Shoreline Master Program, may seek review from the State of Washington Shorelines Hearing Board.

2. Place and Time for Filing Appeals: Appeals of decisions by the Land Use Hearing Examiner must be made directly to the Shorelines Hearings Board. Appeals are made by filing a request for the same within twenty one (21) days of receipt of the final order and by concurrently filing copies of such request with the Department of Ecology and the Attorney General’s office as provided in section 18(1) of the Shorelines Management Act of 1971. (Amd. Ord. 4999, 1-13-2003)

3. City Requires Copy of Appeal Notice: A copy of any such appeal notice shall likewise be filed with the Planning/Building/Public Works Department and the City Clerk of the City of Renton.

4. Limited Utility Extensions and Protective Bulkheads – Appeals: Appeals of substantial development permits, for a limited utility extension as defined in RCW 90.58.140 (11) or for the construction of a bulkhead or other measures to protect a single family residence and its appurtenant structures from shoreline erosion, shall be finally determined by the legislative authority within thirty (30) days. (Ord. 3758, 12-5-1983, Rev. 7-22-1985, 3-12-1990 (Res. 2787), 7-16-1990 (Res. 2805), 9-13-1983 (Min.))

I. GROWTH MANAGEMENT HEARINGS BOARD:

1. Standing for Appeals to GMHB:

- a. Those who may file an appeal are:

- i. The State of Washington or county or city that plans under GMA;
- ii. A person who has participated orally or in writing before the City regarding the matter on which a review is being requested;
- iii. A person who is certified by the Governor within sixty (60) days of filing the request with the Board; or
- iv. A person who qualifies pursuant to RCW 34.05.530 as aggrieved or adversely affected by the City's action on an item in subsection I2 of this Section.

b. Participatory Standing: A person who files an appeal under subsection I1a(iv) of this Section must establish participatory standing by showing that his or her participation before the City was reasonably related to the person's issue as presented to the Board.

c. Standing When a State Environmental Policy Act (SEPA) Appeal Is Made to the Board: To establish SEPA standing to appeal to the Board, the petitioner's endangered interest must be arguably within the zone of interests protected by SEPA. Also, the petitioner must allege an injury in fact; that is, the petitioner must present sufficient evidentiary facts to show that the challenged SEPA determination will cause him or her specific and perceptible harm. The petitioner who alleges a threatened injury rather than an existing injury must also show that the injury will be 'immediate, concrete, and specific'; a conjectural or hypothetical injury will not confer standing.

2. Matters Which May Be Appealed:

a. That the City planning under chapter 36.70A RCW is not in compliance with the requirements of that chapter, chapter 90.58 RCW as it relates to the adoption of shoreline's master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

b. That the twenty (20) year Growth Management population projections applicable to the City of Renton or its potential annexation area as adopted by the Office of Financial Management pursuant to RCW 43.62.035 should be adjusted.

3. Time for Appeal: All petitions under this Section must be filed within sixty (60) days after publication of the appealed Comprehensive Plan, development regulation or permanent amendment thereto by the legislative body of the City. The date of publication by the City shall be the date it publishes the ordinance, or summary of the ordinance, adopting the Comprehensive Plan, development regulations or amendment thereto, as is required to be published.

4. Contents of Petition for Review: Each petition for review to the Growth Management Hearings Board shall be initiated by the filing of a petition that includes a detailed statement of issues presented for resolution by the Board, and citation to the law that the appellant believes has been violated. (Ord. 5154, 9-26-2005)

J. APPEALS OF ADMINISTRATIVE DECISIONS TO THE DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT:

Any decisions made in the administrative process related to the Community and Economic Development Department may be appealed to the Administrator or his/her designee within fifteen (15) days and filed, in writing, with the Department of Community and Economic Development. The Administrator shall give substantial weight to any discretionary decision of the City rendered pursuant to this Chapter. (Ord. 5450, 3-2-2009)

This page of the Renton Municipal Code is current through Ordinance 5534, passed April 5, 2010.

Disclaimer: The City Clerk's Office has the official version of the Renton Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

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