

67737-3

67737-3

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

NO. 67737-3-I

NEAL COY,

Appellant,

v.

CITY OF DUVALL,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court's conclusion on summary judgment that the City of Duvall's arbitrary and capricious conduct, which led to extraordinary delay but ultimate approval of Neal Coy's preliminary plat application, was not actionable under RCW 64.40.020 was erroneous.

2. The trial court's conclusion on summary judgment that Neal Coy had failed to exhaust administrative remedies was erroneous.

3. The trial court's conclusion that Neal Coy could not recover lost profits caused by a decline in the market value of his property under Ch. 64.40 RCW was erroneous.

4. The trial court's award of over \$126,000.00 in attorneys' fees to the City of Duvall was both an error of law and an abuse of discretion.

II. ISSUES PRESENTED

1. RCW 64.40.020 provides a cause of action for damages to property owners based on arbitrary or capricious agency conduct. Where a City's arbitrary conduct in processing of an application to subdivide property results in significant delay and damages, does the property owner have a right to proceed under RCW 64.40.020 and recover

damages resulting from the delay even though the City's ultimate decision was to approve the application? (Assignment of Error 1)

2. The Duvall Municipal Code does not provide for an administrative appeal of an interim staff determination. Where the City staff asserts, nonetheless, that an appeal was available, is the failure to exhaust the staff-created appeal grounds for dismissing an action under RCW 64.40.030? (Assignment of Error 2)

3. Does RCW 64.40.020 allow for lost profits where the lost profits are based on a lost market value of property supported by testimony from a licensed appraiser? (Assignment of Error 3)

4. Where a City prevails on jurisdictional grounds and not on the merits of the plaintiff's claim, did the trial court err in awarding the City its attorneys' fees available under RCW 64.40.020? (Assignment of Error 4)

5. Where a City prevails on jurisdictional grounds based on evidence that it had available at the outset of litigation, did the trial court abuse its discretion in awarding the entirety of the attorneys' fees requested by the City? (Assignment of Error 4)

III. STATEMENT OF THE CASE

A. The City of Duvall's Arbitrary Treatment of Coy's Preliminary Plat Application

In 1993, Neal Coy, along with two other individuals, purchased ownership of a 4.58-acre property within the City of Duvall with the hopes of developing the property for single-family homes. Mr. Coy bought out his partners' interests in 1995, taking sole ownership first through his company, Coy Construction, and then in his own name in 2003. The claimed value of the property in 2003 was \$340,000. CP 214, ¶ 2.

On May 11, 2006, Coy, through his engineer Jack Molver,¹ applied to the City of Duvall for preliminary plat approval in order to subdivide the property into 32 lots for single-family homes. The subdivision was to be named "Yacklich." At the time of Coy's preliminary plat application, the property was zoned "R-8," which allowed construction of up to eight single-family homes per acre. Coy's proposal was consistent with the density of the properties surrounding

¹ Jack Molver is an office leader, engineer and vice president for David Evans & Associates in their Everett, Washington office. Mr. Molver has significant experience in design and permitting of development projects for both private and public entities. His experience includes several subdivisions in the City of Duvall prior to submission of Coy's application. *See*, Transcript of Testimony of Jack N. Molver, P.E. ("Molver Tr."), at 12:25 to 14:7, 19:12-19, CP 607-609, CP 614.

his. CP 214-15, ¶ 3; CP 225. On June 8, 2006, the City determined that the application was complete and ready to be processed. CP 215, ¶ 4; CP 227.

Coy's Yacklich property contains a small (approximately 10,000-square-foot) wetland. The wetland had originally extended off-site to the south onto what is now the "Chapman" subdivision. In 2000, however, the City allowed the 6,000 square feet of wetland on the Chapman property to be filled in exchange for off-site mitigation. CP 215, ¶ 5; CP 229-236. Similarly, the wetland on the Coy property had at one time been fed by a hydrologic connection flowing from the north. That flow had been diverted into a City-owned storm system during the City's review and approval of the "Fawn Meadows" subdivision. Finally, Coy's property, including the wetland area, had been previously used, with City approval, for construction of a sanitary sewer line and water line serving both the "Taylor Heights 2" subdivision to the north and the "Rita's Homestead" subdivision to the east. CP 215, ¶ 6; CP 238. Thus, by the time of Coy's 2006 application, the wetland on his property was disturbed, isolated from both upstream and downstream hydrology, and

functioned only minimally as the lowest class “wetland.” CP 215, ¶¶ 6-7.²

Coy’s application proposed filling this isolated, low-quality wetland and either paying a fee “in lieu” or creating an off-site mitigation wetland. Coy’s proposal was consistent with prior dealings Coy had personally conducted with the City as well as his personal knowledge of

² As explained by Coy’s engineer:

Q: So you believed that in applying the sensitive areas ordinance there was a certain amount of subjective element with respect to 14.42.320?

A: (Molver) Especially given the circumstances. The City had already permitted activities on this property that impacted this wetland significantly. And in order to build upon the infrastructure that they had already permitted, additional impacts were going to – well, I’m sure they were anticipated at the time they were approved.

Q: When you say previous activity had occurred, what are you referring to?

A: When a subdivision was approved east of 275th Avenue – I believe it was Rita’s Homestead – they allowed for the construction of a sanitary sewer line through the Chapman Subdivision property as well as the Yacklich property and Mr. Coy’s property to provide service to Rita’s Homestead that went right by the wetland. And they also constructed a storm drain outlet from Rita’s Homestead detention pond through the Yacklich property and constructed a ditch that went right next to the wetland as part of the Rita’s Homestead project.

And then when the Chapman Subdivision was constructed, the City approved the construction of a water line adjacent – on the same utility corridor through the Yacklich property on the eastern margin of the Yacklich wetland.

And, of course, when the subdivision of Chapman Subdivision was constructed, it built a road and utilities with – the road was constructed in such a manner that it was clear the intent was to allow lots to be constructed on the north side of the road on the Yacklich property. The City actually allowed the Chapman Subdivision to acquire an easement from Mr. Coy off of the Yacklich property so that the road could be – could be built along the south side of the wetland.

CP 621-622.

the City's treatment of other projects requiring fill of low-quality isolated wetlands. This included direct knowledge of the City's treatment of the wetland fill for the adjacent Chapman property, and Coy's own Riverview Plaza. CP 216, ¶ 7.

In June, 2006, the City's outside peer review consultant, Hugh Mortensen, visited Coy's property in order to review Coy's wetland evaluation. In a short, four-page letter, Mortensen largely agreed with the wetland boundaries set out by Coy's consultants, the Jay Group – disagreeing only with the placement of the northern boundary. CP 68.³ While Mortensen surmised that the wetland on Coy's property might provide wetland functions such as water quality or habitat, he did not actually perform the required Department of Ecology Wetland Rating analysis to make a determination. CP 69.⁴ In stark contrast, Coy's consultant, the Jay Group, actually had completed the Department of Ecology Wetland Rating process and found that the wetland had “no opportunity” to improve water quality; and “no opportunity” to reduce flooding or erosion. CP 629-639.

³ Contrary to the City's assertion at page 3 of its Motion for Partial Summary Judgment, Mortenson did not conclude that the wetland was “much larger” than mapped by the Jay Group. Indeed, Mortensen's recommended change extended the size of the wetland by only approximately 20%. CP 627.

⁴ *See also*, complete Sensitive Areas Report prepared by the Jay Group. CP 641-687.

While Mortensen was skeptical on whether the wetland could be filled under City Code, he did not reach that conclusion himself. To the contrary, Mortensen made seven recommendations to City Planning staff for further review. CP 71. Mortensen did not review or consider the City's historic actions approving adjacent subdivisions, including the City-approved filling of the very same wetland to the south or the City-approved construction of drainage ditches, sanitary sewer lines or adjacent roads.

On June 29, 2006, the very next day after receipt of Mortensen's June 28, 2006, letter, Lara Thomas, an associate planner with the City, notified Coy's agent that the City had determined, based on Mortensen's review, that it would not allow the filling of the wetland on the Yacklich property under Duvall Municipal Code ("DMC") 14.42.300A. CP 216, ¶ 8; CP 240. Ms. Thomas's letter did not address filling under DMC 14.42.300B or DMC 14.42.320A. *Id.* The City did not conduct, nor require Coy to conduct, *any* of the actions recommended by Mortensen's June 29, 2006, letter. Instead, Ms. Thomas simply concluded that filling the wetland would be inconsistent with the 1996 City Code that Coy had "vested" to. *Id.* Thomas instead suggested that Coy re-apply under the

newer 2006 “Sensitive Area Regulation” she surmised might have allowed him to fill more of the wetland. *Id.*⁵

While Thomas’s June 29, 2006, letter informed Coy that the City had determined he could not fill the Yacklich wetland under DMC 14.42.300A, the letter did not purport to be a “decision to approve, condition or deny” Coy’s development proposal. Nor did the letter state that the determination was appealable. CP 240.

On October 13, 2006, Coy’s agent responded to Thomas’s letter and requested review of the proposed wetland fill on Coy’s property by the City’s Development Review Committee (“DRC”). CP 217; CP 242. At that time Duvall’s “Sensitive Area Regulations” provided clearly that review of projects affecting sensitive areas, including wetlands, were subject to DRC review. *Infra* at 26-27. In addition to asking for review of Coy’s proposal by the DRC, the October, 2006, letter also explained both that the proposed wetland fill was allowed by City Code, and that the City’s rejection of the proposed fill was arbitrary and capricious

⁵ The 2006 regulations, however, would also impose extensive and expensive additional on-site drainage requirements due to a Code update to the Storm Drainage Regulations. Further, the City had also amended its development regulations and added “architectural control” over the look, style and color of homes built, as well as how often a particular plan can be repeated. CP 216, ¶ 8. In Coy’s opinion, the new restrictions would have significantly and negatively affected the value of the project to potential home builders because they do not typically like the added expense for City review of their plans and the loss of discretion over what to build or how it should look. *Id.*

because it was inconsistent with the City's actions on other similar and recent applications. The letter provided examples of recent applications where the City had allowed similar fill and allowed off-site mitigation – including the immediately adjacent Chapman property. CP 242.

Two months later, on December 11, 2006, the City's Planning Director, Doreen Booth, responded and, after apologizing for the delay in responding, reiterated that “[s]taff cannot approve, or recommend approving, the filling of the wetlands under the Sensitive Area Regulations your project is vested in.” CP 217, ¶ 10; CP 244-245. Ms. Booth's letter did not address the examples of previous fills and off-site mitigation approved under the City Code. *Id.* Ms. Booth's letter also failed to address Coy's first request – that the City convene its DRC to review Coy's application as allowed under City Code. Consistent with the Thomas letter from two months earlier, Booth's letter did not purport to be a “decision to approve, condition or deny” Coy's development proposal. Nor did the letter state that it was a “code interpretation.” The letter also did not say that it was an appealable decision. CP 244-46.

When Coy's agent subsequently pointed out that they has specifically asked for review by the DRC, Booth responded in an e-mail that, despite the express Code provision allowing for review by the DRC,

“[t]he DRC no longer acts in the capacity to review the project.” CP 248.⁶ Booth’s e-mail instead declared that it was up to the Planning Director. The e-mail also declared, that her “code interpretation” could be appealed to the Hearing Examiner.

Over the next several months Coy and his agents continued to seek common ground with the City so that the application could move forward in a timely manner.⁷ On May 31, 2007, Coy’s attorneys contacted the City and reiterated once again that the City had previously allowed filling and off-site mitigation for the very same low value isolated wetland on the adjacent Chapman property. CP 250-251. The letter also confirmed that the City Code requirements for wetland fills had not changed between the approval of the Chapman preliminary plat and Coy’s application. *Id.* The letter included a request for all Code interpretations, and similar approval documents. *Id.*

After receiving responsive documents from the City, on October 3, 2007, Coy’s attorneys again wrote the City demanding prompt and immediate action to confirm that the proposed wetland alteration and

⁶ Shockingly, in the City’s September, 2011 Reply Brief it offered, for the first time, a Declaration by Doreen Booth claiming, contrary to her express statements in 2006, CP 248, that the City’s DRC *did* review Coy’s application and continued to do so throughout 2006-2008. CP 774, 781-788.

⁷ While Coy did consider and attempt analyzing the Yacklich proposal under the City’s newer 2006 sensitive area regulations, the City’s outside consultant again appeared to conclude that the new Code would not allow the proposed fill. CP 93-96.

off-site mitigation was authorized under City Code. CP 253-57. The letter reiterated that it has been a full year since Coy's agent had formally requested review by the City's DRC and that the December, 2006, letter from Doreen Booth had failed to address Coy's request for DRC review. CP 253. The letter then explained how Coy's proposal was consistent with City Code and then cited to several significant and recent examples where the City had approved wetland fills with off-site mitigation. Cited examples included: (1) the immediately adjacent Chapman application (6,000 square feet of the same wetland filled with off-site mitigation); (2) Riverview Plaza; (3) Copperhill Square (22,340 square feet filled); and (4) Safeway (22,159 square feet of Class 2 and 3 wetlands filled). The letter explained that of the approximately 13 examples of similar developments with wetland alterations provided by the City, none of the examples supported the City's position on Coy's application. *Id.*

On November 16, 2007, the City's attorney responded. CP 259-261. The City's attorney asserted first that, despite City Code requiring review of proposed wetland alterations by the DRC, the City did not follow this requirement. Instead, the City's attorney asserted, without citation or authority, that the "Planning Director is charged with reviewing and approving or denying these types of requests." CP 259.

The City's attorney did not, however, state that a decision had been made or that a decision had been, or was currently subject to, appeal. *Id.*

The City's attorney next acknowledged, at least implicitly, that the City had indeed previously approved wetland fills with off-site mitigation consistent with the examples provided in the October 3, 2007, letter. While the City Code certainly had not changed, the City's attorney explained that projects identified in Coy's letter "were approved by a different director. Since Ms. Booth became the Planning Director in 2000, the interpretation of the 1996/2005 sensitive area regulations had been consistent." *Id.* But the City's rationale was not true. Doreen Booth (using her maiden name Doreen Wise) had previously approved the Chapman subdivision which allowed filling and off-site mitigation for almost half of the very same wetland that Coy was seeking to fill. CP 229-236. Ms. Booth/Wise had also approved the wetland fill and off-site mitigation for the Riverview Plaza development. CP 689-691.⁸

Finally, while the City's attorney's letter did not concede that wetland alterations with off-site mitigation was authorized under the City Code, it did, for the first time, invite Coy to re-submit additional

⁸ The City ultimately just required Coy to pay \$13,915 to the City in lieu of the off-site mitigation requirement for filling 4,435 square feet of wetlands for the Riverview Plaza project. CP 699. Ms. Booth issued this decision as well.

information that *would* allow the City to approve his proposed wetland fill and off-site mitigation. CP 260. This marked a significant change from the position taken in the City's previous June 29, 2006, and December 11, 2006, letters from Lara Thomas and Doreen Booth.

Over the next seven months, Coy and the City continued extensive investigation and attempts to satisfy the City's concerns. This included extensive analysis (and costs) by Coy's consultants, as well as extensive costs by the City's consultants which were billed to Coy. CP 219, ¶ 16. Finally, on July 14, 2008, over two years after the City's original statement that the wetlands could not be filled, and that off-site mitigation was not appropriate, the City confirmed that they agreed with Coy's original analysis. The City agreed that the wetlands could be filled consistent with DMC 14.42.300 and that off-site mitigation was appropriate if the City and plaintiff could find a suitable location and if not, then an "in lieu of" fee would be appropriate for use at a future viable site. CP 267-268. After the City rejected the off-site locations identified by Coy's consultant, the City ultimately agreed to payment into an off-site mitigation bank. *Id.*

After preparation of an environmental checklist, Coy's application was heard by the Duvall Hearing Examiner on December 16, 2008.

Nobody appeared before the Hearing Examiner in opposition to the proposed preliminary plat, including the proposal to fill wetlands on-site and provide off-site wetland mitigation. On December 23, 2008, the Hearing Examiner approved Coy's Yacklich preliminary long subdivision. The Hearing Examiner's approval came 32 months after Coy's application was deemed complete. CP 220, ¶ 17; CP 270-298. During this 32-month period Coy was significantly damaged.

B. Coy's Resulting Damages

Based on his personal experience developing property, and in particular his experience with the City of Duvall, Coy believed that the Yacklich subdivision should have been granted a preliminary plat within six months of his accepted application – no later than December 31, 2006. CP 220, ¶ 19. The value of the Yacklich subdivision in late 2006/early 2007 was approximately \$75,000 per lot, or \$2,400,000. CP 220-221, ¶ 20; CP 300-348 (Appraisal). Based on his personal knowledge and belief, including conversations with larger home builders in the area, Coy believes that this was a reasonable number, if not low, for that time period. This was well before the recession hit this region. Taking into account his initial investment, and reasonable costs for getting the application through preliminary plat approval of

approximately \$60,000, Coy believes that he stood to make a net profit of approximately \$2,000,000 if he had been able to sell the Yacklich plat in the first quarter of 2007. CP 220-221, ¶ 20. Unfortunately, by the time the Yacklich subdivision actually obtained preliminary plat approval in December, 2008, the local real estate market had all but crashed. As Coy's appraisal concluded, the value had dropped to approximately \$500,000. After taking into account his initial investment and development costs, it would have resulted in zero profit. Thus, Coy suffered a loss in profit of \$2,000,000. CP 221, ¶ 21; CP 300-348.

In addition to this significant loss in profit, Coy was also forced to pay significant and excessive engineering fees during the City's initial refusal then change of mind. CP 221, ¶ 22. Coy also incurred significant interest charges and maintenance charges. His extra design and engineering expenses were approximately \$80,000. His additional maintenance costs were approximately \$90,000. Finally, his additional interest expenses exceeded \$350,000. *Id.*

C. Procedural History

Coy filed a complaint before the King County Superior Court on January 23, 2009, seeking damages against the City of Duvall under RCW 64.40.020. The complaint alleged that the City's delay in

processing Coy's application was arbitrary and capricious. The complaint alleged also that the City had failed to process Coy's application in a timely manner. CP 1-8. After discovery, the City filed a motion for partial summary judgment on August 12, 2011, seeking dismissal of Coy's claim that the City's actions were arbitrary and capricious. CP 16-36.

The Superior Court, Judge Steven Gonzalez, agreed with the City that (1) Coy's action under Ch. 64.40 RCW was untimely; (2) Coy had failed to exhaust administrative remedies; and (3) Coy could not recover damages related to lost property value. The Court rejected the City's claim that its actions were not arbitrary and capricious. CP 791-792. After Coy then dismissed his claim for violation of statutory time limits, the Court granted the City's motion for an award of attorneys' fees and entered judgment against Coy for \$126,224.50. CP 1031-34; CP 1035-37. This appeal followed. CP 798-805.

IV. ARGUMENT

A. Standard of Review

This court reviews the trial court's decision on summary judgment *de novo*. *Campbell v. Reed*, 124 Wn. App. 349, 356, 139 P.3d 419 (2006); *Ret. Pub. Employees Council of Wash. v. Charles*, 148

Wn.2d 602, 612, 62 P.3d 470 (2003). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions before the court demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *id.* In considering a summary judgment motion, the court must view all facts in the light most favorable to Coy, the non-moving party. *Id.* The burden is on the moving party to establish the material facts necessary to support the requested judgment, and to demonstrate the absence of a genuine dispute of material fact. *Atherton Condominium Apartment Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Here, the trial court erred on the law in ruling that Coy's action was untimely and that Coy failed to exhaust administrative remedies. The Court erred also as a matter of law in concluding that damages for lost profits attributable to a decline in market value of property is not a recoverable damage under Ch. 64.40 RCW.

B. Coy's Suit was Timely Under Chapter 64.40 RCW

Neal Coy seeks relief under Ch. 64.40 RCW. The key provision in this chapter is RCW 64.40.020 which provides, in relevant part:

Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from *acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law...*

RCW 64.40.020 (emphasis added). In this case, the City's actions – refusing to treat Coy's application like it had numerous similar applications and therefor significantly delaying its review and ultimate approval – were arbitrary and capricious.

“[C]onclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious.” *Hayes v. City of Seattle*, 131 Wn.2d 706, 717-18, 934 P.2d 1179 (1997); *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998) (holding City of Spokane acted arbitrarily in violation of RCW 64.40.020 by delaying issuance of grading permit). Here the City's actions were arbitrary and capricious because the City ignored its long history of approving wetland fills with off-site mitigation *under the very same Code language* for projects throughout the City, including for another portion of the very same wetland on property adjacent to Coy's. By making this arbitrary determination, the City, in effect, sat on Coy's project for over

two years, until July 14, 2007, before confirming that fill of the isolated low quality wetland on his property would be allowed. CP 267-68.

Relying solely on the definition of “act” in RCW 64.40.010(6), the City sought dismissal claiming that the “final decision” was the Hearing Examiner’s ultimate approval of Coy’s preliminary plat on December 23, 2008. CP 25-27. Because the Hearing Examiner approved the plat, the City argued that the “final decision” and thus the City’s “act” was not arbitrary or capricious. *Id.* The trial court, on summary judgment, agreed. CP 792. The City’s argument, and the trial court’s acceptance of the argument, ignores over two years of arbitrary conduct leading up to the Hearing Examiner’s ultimate approval. The City’s argument ignores that the “final decision” or “act” was the result of an arbitrary process.

Under the City’s reading of the statute, the City can willfully delay processing an application for a discretionary and indeterminate period of time, and immunize itself from liability under RCW 64.40.020 so long as the application is ultimately approved. Under the City’s interpretation, RCW 64.40.020 does not provide a remedy for arbitrary and capricious “interim” conduct resulting in significant delay. So long as the final act is an approval, the City believes RCW 64.40.020 does not

provide a remedy. This City (and the trial court's) interpretation, of course, eviscerates the plain meaning of RCW 64.40.020. Chapter 64.40 RCW was enacted to provide a cause of action for arbitrary delay of application processing, and applies even where the permit sought is ultimately approved because damages may result from the delay itself. *See, e.g., Mission Springs v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998). Courts do not construe statutes to render them ineffective or to lead to absurd results. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (“a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results”).

While a “final decision” under Chapter 64.40 “is the issuance or denial of the sought after permit,” *Hayes v. City of Seattle*, 131 Wn.2d 706, 716, 934 P.2d 1179 (1997), it does not necessarily follow that a positive “final decision” eliminates a cause of action for arbitrary and capricious interim conduct leading to the final decision. Where, as here, the interim actions *leading to* the final decision were themselves arbitrary and resulted in significant delay in reaching the final decision, the “act” may be challenged.

In *Hayes*, for example, the applicant Michael Hayes applied to the City of Seattle for a permit to construct an 80-foot-long building on his

property. While initially approved by the City's Hearing Examiner, after a neighbor appealed the City Council reduced the length of the building to 65 feet. *Id.* at 709. Hayes appealed the City's decision to the superior court, which reversed and remanded for the City to further explain its reasoning. *Id.* at 710. The City subsequently reconsidered and, without explanation, reversed its earlier decision and granted approval for an 80-foot-long building. *Id.* Thus, the City's "final decision" was positive. Hayes received his requested permit.

Thirty days after the City Council's decision reversing itself and approving his requested building permit, Hayes filed a new action in superior court seeking damages, costs, and attorneys' fees under RCW 64.40.020. The superior court found for Hayes and awarded damages, costs and fees. *Id.* at 711. This court upheld the damages and fees, but solely on Hayes's claims under 42 U.S.C. § 1983. This court found that because the action under RCW 64.40.020 had been brought more than 30 days after the Council's first decision reducing the building size, the action was untimely.

The supreme court disagreed:

Underlying our decision is a recognition of the fact that the final action that an administrative body can take in this area is

the issuance or denial of the sought after permit. Although we are not saying that an action in superior court for judicial review is an administrative remedy that must be exhausted prior to commencing an action to recover damages pursuant to RCW 64.40, under these facts, final action on Hayes's request for a permit did not occur until the City Council ultimately approved his application for a master use permit. Therefore, Hayes's action for damages, which was commenced within 30 days of that final action, was timely and is not barred by the statute of limitations.

If we adopted the position advanced by Seattle and approved the reasoning set forth in *R/L Associates*, persons in Hayes's position would, in order to avoid a potential bar of the statute of limitations, be forced to bring an action for damages before final action on their application had been taken by the administrative agency. That makes no sense because it would force applicants for permits to file an action for damages before their cause of action was ripe.

Hayes, 131 Wn.2d at 716.

Here, like *Hayes*, the acts that caused Coy's harm were what the City now characterizes as "interim interpretations" – its arbitrary actions ignoring years of approval of similar proposals under the identical City Code, rejecting Coy's proposal to fill the isolated degraded wetland on his property and replace it with off-site mitigation, and its refusal to allow

review by the DRC. Coy, consistent with *Hayes*, was not required to appeal each of these “interim” acts.⁹ Instead, Coy’s decision, like Hayes, to wait until the City’s final action approving his project, was correct.

Indeed, filing an interim action seeking damages for arbitrary conduct leading to delay would likely have been untimely and subject to dismissal itself. In *Callfas v. Dep’t of Const. and Land Use*, 129 Wn. App. 579, 120 P.3d 110 (2005), an applicant for a City of Seattle master use permit applied for the permit in 1999. After multiple delays, but before the permit was ultimately issued, the applicant filed suit seeking damages under RCW 64.40.020. 129 Wn.2d at 582-586. The permit was subsequently issued and the City sought summary judgment for dismissal asserting that the suit for damages was barred by the limitations period in RCW 64.40.030. *Id.* at 587.

In *Callfas*, both the superior court and this court agreed with the City and dismissed the case. After a lengthy discussion, this court concluded that in order for the limitations period in RCW 64.40.030 to have effect, there must be a “final action” that triggers the limitations,

⁹ As confirmed by the *Hayes* court, Coy was not required to seek interim relief prior to bringing his timely action after the City’s final action. While Hayes *had* appealed the interim decision, the court confirmed that it was both not necessary, and likely inappropriate, as it forces an “an action for damages before a final action on the application has been taken.” 131 Wn.2d at 716.

otherwise “[c]laimants could file suit at any time during a long delay, including before there was a final decision.” 129 Wn. App. at 590-93.

As the court summarized:

while delay in processing or granting a permit may be actionable under RCW 64.40 as an “arbitrary and capricious” final decision, or an “arbitrary and capricious” failure to act within time limits established by law, claims for damages under RCW 64.40 must still comply with the statute[']s time requirements for filing.

Id. at 596. Finally, in response to the Callfases’ claim that the court’s decision precluding an action prior to the agency’s final decision would leave it without remedy, the court of appeals again disagreed. The court explained: “[i]ndeed, a permit applicant like the Callfases would have a claim under RCW 64.40 for delay damages ... without a writ once the tardy permit was issued.” *Id.* at 597.

Here, unlike *Callfas*, Coy did not prematurely seek relief under RCW 64.40. Instead, he properly waited until after the City’s final action. Because Coy filed this action within 30 days of the City’s final action, it was timely and Coy, like *Hayes*, can seek damages for the decisions that occurred prior to and leading up to the City’s final action. The trial court’s decision to the contrary was erroneous.

C. Coy Diligently Sought to Exhaust Administrative Remedies

RCW 64.40.030 requires any action under Chapter 64.40 RCW be “commenced only within thirty days after all administrative remedies have been exhausted.” Exhaustion of remedies is based on several legal policies: “It avoids premature interruption of the administrative process, provides for full development of the facts, and allows the exercise of agency expertise.” *Harrington v. Spokane County*, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005). It also gives administrative agencies the opportunity to correct their own errors and “discourages litigants from ignoring administrative procedures by resort to the courts.” *Id.* But while policies strongly favor exhaustion, “the doctrine is not absolute[:]” policies supporting exhaustion requirements may be “outweighed by consideration of fairness and practicality.” *Orion Corp. v. State*, 103 Wn.2d 441, 457, 693 P.2d 1369 (1985) quoting *Zylstra v. Piva*, 85 Wn.2d 743, 539 P.2d 823 (1975).

Diligence, for instance, relieves a project applicant from continuing futile efforts. In *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989), the supreme court considered a tortious interference claim against the City of Seattle for unreasonably delaying processing of

a master use permit application. *Pleas* reversed an appellate court's ruling that the developer failed to pursue all available remedies:

To insist that a developer must appeal each additional requirement the City imposes in an effort to prevent legitimate development as soon as these are imposed would sorely try the fortunes, let alone patience, of the wealthiest developer.

112 Wn.2d at 808.

Contrary to the City's claim that Coy failed to exhaust administrative remedies, CP 27-28, Coy diligently pursued the legitimate remedies available under the City Code. After the City initially rejected Coy's request to fill the low quality wetlands, Coy's consultants promptly requested review of the decision by the City's DRC. CP 217; CP 242. At that time Duvall's DRC was required to "review land use applications ... for consistency with city codes and regulations." DMC 14.02.080. More importantly, the City's existing Sensitive Area Regulations provided clearly that review of projects affecting sensitive areas, including wetlands, were subject to DRC review. For example, DMC 14.42.300 set out a process for review of projects proposing to alter wetlands or buffers and granted the DRC authority to approve the fill of wetlands where *either* the wetland did not serve "valuable functions"

such as wildlife habitat or natural drainage *or* the proposed development would protect or enhance wildlife, habitat, natural drainage or other valuable functions.¹⁰ Similarly, DMC 14.42.320 provided that the DRC could grant “exceptions” to wetland requirements.¹¹

The City, however, refused Coy’s request for DRC review. Only when pushed specifically on the request for DRC review did the City Planning Director respond by asserting – despite the Code providing otherwise – that she had unilaterally assumed authority to approve fills and off-site mitigation. CP 248; *see also* CP 259.

¹⁰ DMC 14.42.300 provided, in relevant part:

Development proposals on sites containing wetlands shall meet the requirements of this chapter. Wetlands and required buffers shall not be altered *except* as expressly authorized in this chapter and all approved alterations shall have an appropriate mitigation plan where *the development review committee (“DRC”) determines, upon review of the special studies completed by qualified professionals, that either:*

A. The wetland does not serve any valuable functions of wetlands identified in this code, including but not limited to wildlife habitat and natural drainage functions; *or*

B. The proposed development would protect or enhance the wildlife, habitat, natural drainage, and/or other valuable functions of wetlands and would be consistent with the purposes of this chapter..... (emphasis added).

¹¹ DMC 14.42.320 provided, in relevant part:

14.42.320 Wetlands--Permitted alterations.

A. Exceptions. *The development review committee (DRC) may grant exceptions from the wetland requirements of these regulations in accordance with the allowances of this chapter. (emphasis added).*

Over the next 18 months, Coy continued his efforts to satisfy the City's concerns while also incurring extensive costs. In October, 2007, Coy once again continued the effort to exhaust all administrative remedies. Coy, through his attorneys, wrote and asked again that the City agree that it had long interpreted its Code to *allow* filling of wetlands, including wetlands larger than Coy's, with off-site mitigation. CP 253-257. The City responded on November 16, 2007 and, in part, provided the relief requested by authorizing Coy to submit additional materials to demonstrate compliance with the Code. CP 259-261. Coy's effort to exhaust all administrative remedies continued until the City finally approved his project through its Hearing Examiner.

The City argued below, and the trial court accepted, that Ms. Booth's December, 2006 email inviting an appeal of her "code interpretation" established an administrative remedy that Coy failed to exhaust. CP 27-28. According to Booth's email, an appeal was authorized by DMC 14.42.070. The City's argument fails for at least two reasons.

First, the City's Hearing Examiner is a "creature of statute" and limited in jurisdiction to that expressly provided by code. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636-37, 689 P.2d 1084

(1984); *Lejeune v. Clallam County*, 64 Wn. App. 257, 270, 823 P.2d 1144 (1992). The Hearing Examiner's authority to review decisions under the City's Sensitive Area Regulations is contained in DMC 14.42.070. DMC 14.42.070 provides for review by the Hearing Examiner of three types of decisions. First, DMC 14.42.070A provides for an appeal of a "decision to require a special sensitive area study." While the City required that Coy provide a "special sensitive area study," Coy did so and did not seek appeal. Thus, DMC 14.42.070A was inapplicable.

Second, and similarly, DMC 14.42.070B provides for an appeal of a "decision to approve, condition or deny a development proposal based on the requirements of the sensitive area regulation." Further, any such appeal can only be brought "in conjunction with and according to the review procedures for the permit or approval involved." In this case, the City's "interim" 2006 decision that Coy could not fill and mitigate wetlands was not a "decision to approve, condition or deny" his preliminary plat application. Indeed, the City continued to process the application, including inviting additional analysis in its November, 2007, response to the letter from Coy's attorneys. Thus, DMC 14.42.070B was inapplicable.

Third and finally, DMC 14.42.070C provides for review by the Hearing Examiner of “any decision authorized by the sensitive area regulations *where no review process exists for the permit or approval involved beyond the [DRC]...*” (emphasis added). On its face, this provision is applicable only to “decisions authorized by the sensitive area regulations” and where those decisions were reviewed initially by the DRC. Even if Planning Director Booth’s refusal to review or recommend approval of Coy’s proposed wetland fill was a “decision authorized by the sensitive area regulations,” the City refused to allow review by the DRC. Thus, DMC 14.42.070C was inapplicable.

Planning Director Booth’s December, 2006, letter was also not an appealable “code interpretation.” While City Code allows the Planning Director to issue “code interpretations” of the City’s development code, those interpretations are formal, must be made public and must be referenced within the City Code itself. DMC 14.04.070. While the City’s development code also allows for interpretations of specific applications for “allowed or conditional uses,” DMC 14.04.080, as well as interpretations of the City zoning map, DMC 14.04.090, it does not allow for “code interpretations” of whether wetland fill and mitigation is allowed under the City’s Sensitive Area Regulations.

City Code provided one administrative process for review of Coy's proposal to alter wetlands – review by the City's DRC. But the City never allowed Coy to pursue administrative review by the DRC. Under the circumstances, exhaustion was not merely impractical, it was not allowed. Instead, Coy continued to work with the City seeking ultimate relief. The trial court's decision that Coy failed to exhaust administrative remedies was erroneous.

D. The City's Extraordinary Delay in Processing Coy's Application was Arbitrary Under RCW 64.40.020

In entering its order on the City's motion for summary judgment, the trial court correctly refused to enter the City's proposed finding that the City's actions were not arbitrary and capricious. CP 791-792. In anticipation that the City will repeat its argument before this court, Coy offers the following.

RCW 64.40.020 applies where a local government's acts are "arbitrary, capricious, unlawful, or exceed lawful authority[.]" RCW 64.40.020(1). All a party "needs to show to be entitled to recovery under the statute is arbitrary or capricious conduct." *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). "[C]onclusory action taken without regard to the surrounding facts and

circumstances is arbitrary and capricious[.]” *Mission Springs*, 134 Wn.2d at 962 quoting *Hayes*, 131 Wn.2d at 717-718; see also, *Norco Const., Inc., v. King County*, 97 Wn.2d 680, 685, 649 P.2d 103 (1982) (unreasonable delay results in equivalent of exclusion or denial).

The City’s refusal to consider Coy’s proposal for filling the low quality wetlands on his property and providing off-site mitigation or mitigation payment neglected – and even conflicted with – the facts and circumstances surrounding previous interpretations of the very same Code provisions. For example, and as repeatedly pointed out by Coy throughout the process, the City had previously allowed filling and off-site mitigation for the *very same* low value wetland Coy proposed to fill during its review and processing of the Chapman subdivision immediately south of Coy’s Yacklich property. See CP 215, ¶ 5; CP 225; CP 229-236 During its environmental review of the Chapman subdivision the City determined:

One small, isolated, seasonal Class III wetland has been delineated on site by Pentec Environmental... and encompasses approximately 6,098 square feet. Due to site topography, hydrological constraints, constraints from developing rights-of-ways and lack of connectivity of the site to adjacent habitat corridors, the applicant is proposing to fill the wetland.

CP 701-702. In the City's decision, signed by Planning Director Doreen (Wise) Booth on June 1, 2000, the City allowed the wetland fill, requiring only off-site mitigation with a 1:1 ratio along with the submittal of a final mitigation plan. CP 705-712. The fill approved allowed for the construction of additional lots and a road. CP 704.

Similarly, during its review of the proposed "Riverview Plaza," a three-story retail center, the City's environmental review (also signed by Planning Director Doreen Booth in January, 2000) noted that the proposal "includes filling a Class II wetland of approximately 4,435 square feet and providing off-site mitigation for such fill." CP 689-670. This is precisely what the City ultimately approved, requiring only a 2:1 replacement ratio because of the higher Class II wetland. CP 693-695. After complications finding an appropriate mitigation site, in 2007 Planning Director Doreen Booth cancelled the requirement for off-site mitigation and required Coy instead make a straight payment to the City of \$13,915.85. CP 699.

In yet another example, during its 1998 review of the "Copper Hill Square Mixed Use Development," the City approved the filling of over 14,000 square feet of Class III wetlands in order to accommodate

additional buildings and parking. Once again, the City required only a 1:1 ratio for off-site mitigation wetlands. CP 714, 717, 720, 724-732.¹²

The City argued below that the City's prior determinations are not relevant to Coy's claim under Chapter 64.40 because "if mistakes were made in the past, current employees are required to correct those mistakes." But a plain reading of the City's Code supports Coy's proposal. For example, DMC 14.42.320A grants express authority for the City's DRC to "Grant exemptions from the wetland requirements of these regulations in accordance with the allowances of this chapter." Similarly, DMC 14.42.300 provides that wetlands may be altered where the DRC determines, "upon review of special studies," that the wetland either does not serve valuable wetland functions or where the proposal will protect or enhance valuable wetland functions. DMC 14.42.300. Similarly, DMC 14.42.330B(4)(b) expressly provides that the "development review committee (DRC) may consider and approve off-site replacement or enhancement where the applicant can demonstrate

¹² These, of course, are not the only examples where the City – under the same Code that Coy's application was vested to – allowed fill of Class III (and even Class II) wetlands with off-site mitigation. As Coy's attorneys pointed out in their October 3, 2007, letter to the City, in response to a public records request the City had provided multiple examples where the City had taken a position inconsistent with the position it was taking with Coy's application. CP 253-257.

that the off-site location is in the same drainage subbasin and that greater biologic and hydrologic values will be achieved.”

At the time Coy applied, he knew that the City had interpreted the Code to allow project applicants to fill wetlands at other locations within the City with either new wetlands constructed on-site or at off-site locations. Coy also knew that because the City had approved prior construction serving nearby developments, the wetland on his property was disturbed, isolated from both upstream and downstream hydrology, and functioned minimally as the lowest class wetland. He knew the City had previously allowed fill in the *same* wetland he was proposing to fill. In a letter responding to the City’s June, 2006, decision disallowing off-site mitigation, Coy’s consultants specifically identified DMC 14.42.330B(4)(b) in support of the proposal and highlighted facts and circumstances supporting previous application of the Code provision allowing fill of the same wetland on an adjacent site.

The City’s decision to abruptly ignore its long-standing application of the Code and refuse even to consider allowing the fill of Coy’s low function wetlands was purely the type of arbitrary decision RCW 64.40 seeks to guard against. Where a local government takes conclusory action without regard to the surrounding facts and

circumstances, such action is arbitrary and capricious. *Hayes*, 131 Wn.2d at 717. In rendering its decisions and corresponding with the applicant, the City refused to even acknowledge that the City had on all prior occasions uniformly interpreted the Code to allow fill and off-site mitigation. The City's decision was conclusory and issued without regard to the facts and circumstances.

The City also acted arbitrarily in ignoring City Code and refusing to allow Coy an opportunity to address his proposal before the City's Design Review Committee. As discussed above, *supra* at 26-27, City Code makes clear that the DRC was required to play a major role in reviewing land use applications and in determining whether an exception could be made to the Sensitive Area Regulations allowing fill and mitigation. *See* DMC 14.02.080; DMC 14.42.300; DMC 14.42.320A. Yet, despite these clear City Code provisions, on December 11, 2006, Ms. Booth e-mailed Coy's agent and announced that the "DRC no longer acts in the capacity to review the project..." and that it was instead a "planning director decision." CP 248.¹³ Booth's unilateral decision to

¹³ While this code reversal alone was arbitrary and capricious, as it turns out, it was not even true. In the City's September, 2011 Reply Brief it offered, for the first time, a Declaration by Doreen Booth claiming that, contrary to her express statements in 2006, CP 248, the City's DRC *did* review Coy's application and continued to do so

ignore the City Code and deprive Coy review by the DRC as he was allowed under the law he was vested to was without support or basis in law.¹⁴

E. Coy is Entitled to Non-speculative Damages Under Chapter 64.40 RCW

As discussed above, Coy suffered two types of damages as a result of the City's arbitrary treatment of his preliminary plat application. First, he was required to expend significant amounts for extra engineering costs to respond to the City's changing positions. The delay similarly resulted in significant additional interest and maintenance costs. In all, the delay resulted in over \$520,000.00 in actual losses. CP 221, ¶ 22. These damages were not disputed. The trial court did not rule on the validity of these losses.

Coy also suffered a significant loss in profit because the City's delay pushed approval of his preliminary plat until well after the well-known collapse of the local real estate market. Coy offered testimony of an appraiser to demonstrate that he lost approximately \$2,000,000 as a result of the City's arbitrary delay in the processing and

throughout 2006-2008. CP 774, 781-788. This again demonstrates that the City acted arbitrarily in its review of Coy's preliminary plat application.

¹⁴ While City Code was revised in 2006 to allow for review of sensitive areas by the Planning Director, this was not the code in effect at the time Coy applied.

approval of the Yacklich subdivision. *Supra* at 14-15. Relying on RCW 64.40.010(4), the City argued, and the trial court agreed, that Coy could not recover for lost profits due to the decline in the value of his property. CP 792.

This issue was addressed by this court in *Cox v. City of Lynnwood*, 72 Wn. App. 1, 863 P.2d 578 (1993). In *Cox*, the City of Lynnwood delayed approval of a boundary line adjustment by 2½ months resulting in the loss of a full summer construction season. The delay resulted in “increased construction costs, additional interest payments, professional fees, and lost profits in a declining market.” 72 Wn. App. at 5. The trial court awarded \$28,548.72 pursuant to RCW 64.40.020. In response to the City’s claim that damages due to a decline in property value were not appropriate under RCW 64.40.020, this court responded:

Damages, under the statute, are defined broadly to include “reasonable expenses and losses”, excluding speculative losses or (speculative lost) profits, not nonspeculative losses. In Washington lost profits are generally permissible elements of damage. If the evidence affords a reasonable basis for estimating the loss, courts will not permit a wrongdoer to benefit from the difficulty of determining the exact amount of the loss. Thus, the statute excludes mere fluctuations in property value, but, when the property in question has been sold and its fair market

value at the time the cause of action arose has been determined, the loss is not so speculative as to be excluded.

72 Wn. App. at 9-10 (internal citations omitted).

Thus, under *Cox*, the determinative factor is whether the lost profits are speculative. *Cox* simply demands that an aggrieved plaintiff *prove* the loss. *Coy* met this burden with testimony of a certified appraisal.

F. The Trial Court Erred in Awarding of Attorneys' Fees Under RCW 64.40.020 to the City

Because the trial court erred in its dismissal, its award of \$126,224.50 in attorneys' fees under RCW 64.40.020(2) should also be reversed.¹⁵ In the event, however, that this Court agrees that dismissal was appropriate, then the Court should review the trial court's award of attorneys' fees. The trial court's attorneys' fee award was erroneous for

¹⁵ There is some confusion in the record. In the October 12, 2012 "Order Granting Defendant's Motion for Award of Attorney's Fees, Judgment, Summary and Judgment," the Court awarded attorneys' fees under RCW 64.40.020(2). CP 1031-1033. In the October 12, 2011, Order Granting Motion for Attorneys' Fees, the court finds Plaintiff's complaint "frivolous and advanced without reasonable cause." CP 1035-1036. The City's Motion for fees was based on RCW 64.40.020. CP 809-816. The City did not argue, and *Coy* certainly never had an opportunity to respond to, an argument for fees under RCW 4.84.185. An award of fees under RCW 4.84.185 requires the moving party to demonstrate that the action, as a whole, was frivolous and advanced without reasonable cause. *Biggs v. Vail*, 119 Wn.2d 129, 135, 830 P.2d 350 (1992). An action is not frivolous if it "can be supported by *any rational argument*." *Timson v. Pierce County Fire District No. 15*, 136 Wn. App. 376, 386, 149 P.3d 427 (2006) (emphasis in original). Here, the trial court denied the City's proposed finding that the City's actions were not arbitrary or capricious. CP 791-792. *Coy's* case was not frivolous supporting an award under RCW 4.84.185.

at least two reasons. First, because the City did not prevail on the merits but instead on jurisdictional grounds, fees were not appropriate. Second, even if the City was the prevailing party, the trial court abused its discretion in awarding the full fees requested by the City.

1. The City did not prevail on the merits and is not entitled to fees pursuant to RCW 64.40.020(2)

The City did not “prevail” on the merits of the case. While the Court did dismiss Coy’s claims, it did so based on a lack of subject matter jurisdiction. The first two arguments in the City’s motion for partial summary judgment were jurisdictional. The City argued, first, that RCW 64.40 applied only to challenges of “final decisions” of an agency and not “interim” decisions. Therefore, according to the City, dismissal was appropriate because Coy’s challenge failed to meet the statutory requirement of RCW 64.40. The City argued, second, that RCW 64.40.030 requires a plaintiff to first exhaust all administrative remedies. Therefore, according to the City, dismissal was appropriate for failing to exhaust administrative remedies because Coy failed to appeal a 2006 “interpretation” issued by the City’s Planning Director. Neither of these arguments addressed the merits of the case. Instead they challenged whether the court had jurisdiction over the case. The Court expressly

accepted both of these arguments in entering its Order Granting Partial Summary Judgment.¹⁶

Because the Court dismissed on jurisdictional grounds instead of the merits of the case (arbitrary and capricious conduct), attorneys' fees are not appropriate. Appellant has found no reported cases discussing whether an award of attorneys' fees is ever appropriate for a government defendant under RCW 64.40.020(2). Nor has appellant found reported cases discussing whether attorneys' fees are appropriate for a government defendant where dismissal of an RCW 64.40 claim was based on subject matter jurisdiction rather than the merits. The Court should therefore consider cases interpreting a similar fee-shifting statute as useful guidance.

There are multiple cases addressing whether attorneys' fees are appropriate under a similar, almost parallel, statute. RCW 4.84.370, similar to RCW 64.40.020, applies to the appeal of land use decisions. RCW 4.84.370 provides that attorneys' fees and costs "shall be awarded

¹⁶ While the court also found that Mr. Coy's alleged lost profits derived from the decline in property value did not satisfy the definition of "damages" in RCW 64.40, this finding was not dispositive of Coy's claims – it only reduced his recoverable damages.

to the prevailing party or substantially prevailing party on appeal.” *Id.*¹⁷ Cases interpreting RCW 4.84.370 have uniformly denied attorneys’ fees where the party prevailed on issues related to jurisdiction as opposed to the merits. *See, Richard v. City of Pullman*, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006) (“[d]ismissal for want of jurisdiction is not the same as a final decision on the merits.”); *Overhulse Neighborhood Ass’n v. Thurston Cy.*, 94 Wn. App. 593, 601, 972 P.2d 470 (1999); *Quality Rock Products, Inc., v. Thurston County*, 126 Wn. App. 250, 275, 108 P.3d 805 (2005); *Witt v. Port of Olympia*, 126 Wn. App. 752, 759-60, 109 P.3d 489 (2005). The rational of these cases is that attorneys’ fees are not appropriate when the reviewing court dismisses the case without reaching the merits of the plaintiff/appellants’ arguments.

The same rational should be applicable here. Mr. Coy brought suit under RCW 64.40.020 claiming that the City of Duvall acted arbitrarily in refusing to consider his proposal to fill and mitigate wetlands on his property and therefore arbitrarily delaying consideration of his application for almost two years. The City did not prevail on the merits of Mr. Coy’s claim. The City prevailed instead by obtaining a dismissal of Coy’s action for his failure to exhaust remedies and attempt

¹⁷ Unlike the discretion provided in RCW 64.40.020(2), an award of fees and costs under RCW 4.84.370(1) is mandatory.

to challenge an “interim” as opposed to final action. Attorneys’ fees should not be awarded where the City did not prevail on the merits of the case.

2. Even if awarded, the City’s fees should be significantly reduced

In the event the Court decides that attorneys’ fees are appropriate, the trial court abused its discretion in not reducing the fees requested by the City. While a trial court has broad discretion in fixing the amount of an award of attorney’s fees, *e.g.*, *In re Renton*, 79 Wn.2d 374, 485 P.2d 613 (1971), such awards must be reasonable, exercised on tenable grounds and for tenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). One of the seminal cases on the reasonableness of a discretionary fees award is *Bowers v. Transamerica Title Insurance Company*, 100 Wn.2d 581, 675 P2d 193 (1983). It ruled that, in setting a reasonable fee, the trial court should consider the number of hours reasonably expended in light of the type of work performed; experience and expertise of the attorneys who performed the work; and, the time spent on unsuccessful claims, duplicated effort, and otherwise unproductive time.

Merely because a party prevails does not require an award of attorney's fees under a discretionary statute like RCW 90.58.230. *E.g.*, *Matter of Estate of Niehenke*, 117 Wn.2d 631, 818 P.2d 1324 (1991) (attorneys fees under RCW 11.96.140 inappropriate); *Chemical Bank v. Washington Public Power Supply System*, 104 Wn.2d 98, 702 P.2d 128 (1985) (upholding denial of attorneys fees under RCW 4.28.185(5)); *Brower Co. v. Noise Control of Seattle, Inc.*, 66 Wn.2d 204, 401 P.2d 860 (1965) (Trial Court did not abuse its discretion in disallowing attorney's fees under RCW 60.04.130).

While Coy did not dispute that the hourly rates charged by the Tierney Law Firm are reasonable, considering the City prevailed on jurisdictional grounds and not the merits, the number of hours spent on this case were extraordinary. While Coy strongly believes that the trial court erred by dismissing the case on jurisdictional grounds, the "facts" that formed the basis for the City's successful motion for partial summary judgment were in the City's hands from the outset and required little, if any, discovery.¹⁸ Because the minimal facts necessary to support the

¹⁸ The City's first successful defense – that Coy's "complaint was directed to an interim code interpretation and not a 'final decision' within the meaning of RCW 64.40" was based on facts alleged in the initial complaint.

City's two jurisdictional challenges were available to the City from the outset, it is entirely unreasonable for the City to have spent over \$125,000.00 to defend this case and even more unreasonable for the City's insurer to seek recovery of these fees from Mr. Coy.

The trial court's award of over \$126,000.00 in fees failed to assess the number of hours reasonably expended on the successful claims and was an abuse of discretion.

V. CONCLUSION

For the foregoing reasons, the court should reverse the trial court's dismissal on summary judgment and award of attorneys' fees and remand this matter for trial.

Dated this 18th day of November, 2011.

Respectfully submitted,

GENDLER & MANN, LLP

By:



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Attorneys for Appellant

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Similarly, the City's claim – that Coy failed to exhaust administrative remedies – was based on a City e-mail sent by Ms. Booth to Coy's agent and thus available to the City at the outset.

APPENDICES

Chapter 64.40 RCW
PROPERTY RIGHTS—DAMAGES FROM
GOVERNMENTAL ACTIONS

Sections

64.40.010	Definitions—Defense in action for damages.
64.40.020	Applicant for permit—Actions for damages from governmental actions.
64.40.030	Commencement of action—Time limitation.
64.40.040	Remedies cumulative.
64.40.900	Severability—1982 c 232.

64.40.010 Definitions—Defense in action for damages. As used in this chapter, the terms in this section shall

have the meanings indicated unless the context clearly requires otherwise.

(1) "Agency" means the state of Washington, any of its political subdivisions, including any city, town, or county, and any other public body exercising regulatory authority or control over the use of real property in the state.

(2) "Permit" means any governmental approval required by law before an owner of a property interest may improve, sell, transfer, or otherwise put real property to use.

(3) "Property interest" means any interest or right in real property in the state.

(4) "Damages" means reasonable expenses and losses, other than speculative losses or profits, incurred between the time a cause of action arises and the time a holder of an interest in real property is granted relief as provided in RCW 64.40.020. Damages must be caused by an act, necessarily incurred, and actually suffered, realized, or expended, but are not based upon diminution in value of or damage to real property, or litigation expenses.

(5) "Regulation" means any ordinance, resolution, or other rule or regulation adopted pursuant to the authority provided by state law, which imposes or alters restrictions, limitations, or conditions on the use of real property.

(6) "Act" means a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed. "Act" also means the failure of an agency to act within time limits established by law in response to a property owner's application for a permit: PROVIDED, That there is no "act" within the meaning of this section when the owner of a property interest agrees in writing to extensions of time, or to the conditions or limitations imposed upon an application for a permit. "Act" shall not include lawful decisions of an agency which are designed to prevent a condition which would constitute a threat to the health, safety, welfare, or morals of residents in the area.

In any action brought pursuant to this chapter, a defense is available to a political subdivision of this state that its act was mandated by a change in statute or state rule or regulation and that such a change became effective subsequent to the filing of an application for a permit. [1982 c 232 § 1.]

64.40.020 Applicant for permit—Actions for damages from governmental actions. (1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

(2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.

(3) No cause of action is created for relief from unintentional procedural or ministerial errors of an agency.

(4) Invalidation of any regulation in effect prior to the date an application for a permit is filed with the agency shall not constitute a cause of action under this chapter. [1982 c 232 § 2.]

64.40.030 Commencement of action—Time limitation. Any action to assert claims under the provisions of this chapter shall be commenced only within thirty days after all administrative remedies have been exhausted. [1982 c 232 § 3.]

64.40.040 Remedies cumulative. The remedies provided by this chapter are in addition to any other remedies provided by law. [1982 c 232 § 4.]

64.40.900 Severability—1982 c 232. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1982 c 232 § 5.]

Duvall Municipal Code

- D. The Duvall comprehensive plan shall be the basis for designating land use zones, applying development and shoreline requirements, and guiding development in areas presently outside the city but which may be annexed subsequent to the adoption of the UDR. The Duvall UDR is to be used as a guide by other governmental agencies when taking action within the Duvall urban growth area (UGA).

(Ord. 1056 § 1 Exh. A (part), 2007)

14.04.040 - Conformity required.

- A. No use or structure shall be established, substituted, expanded, constructed, altered, moved, maintained, or otherwise changed except in conformance with the UDR and all other provisions of the Duvall Municipal Code (DMC).
- B. Creation of or changes to lot lines shall conform with the use provisions, dimensional, and other standards, and procedures of the UDR.
- C. All land uses and development authorized by the UDR shall comply with other regulations and requirements of this title, the DMC, and the laws or regulations of any other local, state or federal agency that has jurisdiction over land uses and development. Where a difference exists between this title and other regulations, the more restrictive requirements shall apply.
- D. Where more than one part of this title or other portions of the DMC apply to the same aspect of a proposed use or development, the more restrictive requirement shall apply.
- E. All public improvements constructed in conjunction with development under this title shall also be subject to the standards set forth in Title 8 of this code and may be varied in accordance with Title 8

(Ord. 1056 § 1 Exh. A (part), 2007)

14.04.050 - Minimum requirements.

In interpretation and application, the requirements set forth in this title shall be considered the minimum requirements necessary to accomplish the purposes of the UDR. Any act or activity regulated in this title shall also comply with all other applicable requirements of city code, laws and regulations.

(Ord. 1056 § 1 Exh. A (part), 2007)

14.04.060 - Interpretation—General.

- A. The more specific regulation applies to a land use application. Regulations, conditions or procedural requirements that are specific to an individual land use shall supersede regulations, conditions or procedural requirement of general application.
- B. A land use includes the necessary structures to support the use unless specifically prohibited or the context clearly indicates otherwise.
- C. Chapter and section headings, captions, illustrations and references to other sections or titles are for reference or explanation only and shall not be deemed to govern, limit, modify, or in any manner affect the scope, meaning or intent of any section. In case of any ambiguity, difference of meaning or implication between the text and heading, caption or illustration, the text and the permitted use tables shall control. All applicable requirements shall govern a use whether or not they are cross-referenced in a text section or land use table.
- D. The word "shall" is mandatory and the word "may" is discretionary. The word "should" is mandatory unless waived by the director due to special circumstances.
- E. Unless the context clearly indicates otherwise, words in the present tense shall include past and future tense, and words in the singular shall include the plural, or vice versa. Except for words and terms defined in this title, all words and terms used in this title shall have their customary meanings.

(Ord. 1056 § 1 Exh. A (part), 2007)

14.04.070 - Interpretation.

- A. Criteria. The director may issue interpretations of the UDR. The interpretations shall be based on:
1. The defined or common meaning of the words of the provisions;
 2. The general purpose of the provision as expressed in this title;
 3. The logical or likely meaning of the provision viewed in relation to the comprehensive plan;
 4. Input and recommendations from other members of the development review committee; and
 5. Input and recommendations from the city attorney.
- B. An interpretation of the UDR will be enforced as if it is part of the UDR. Code interpretations shall be considered superseded if amendments are made by the city council to the code section which was previously interpreted. If the interpretation of the director is modified on appeal, the director shall amend the interpretation to include the modification and change any reference in the codification of this title.

- C. All interpretations of the UDR, filed sequentially, shall be available for public inspection and copying at City Hall during regular business hours. The director and city attorney, when codifying revisions to this title, shall also make appropriate references in the DMC revisions to code interpretations affecting particular code sections.
- D. Any aggrieved party may appeal an interpretation issued by the director. Appeals of the director are set out in DMC Chapter 14.08.
- E. The applicable department director may at any time amend an administrative decision to correct ministerial errors clearly identifiable from the public record. Such a correction does not affect any time limit provided for in this title. The applicable department director may at any time clarify a statement in a written administrative decision as long as the clarification does not alter the intent or effect of the decision.

(Ord. 1056 § 1 Exh. A (part), 2007)

14.04.080 - Interpretation—Allowed or conditional uses.

- A. The director shall determine whether a proposed land use not specifically listed in a land use table is allowed in a zone, either as an outright permitted use or as a conditional use. The director shall take into consideration the following when making a determination:
 - 1. Whether or not the proposed use in a particular zone is similar in impact to other allowed or conditional uses and complements or is compatible with other uses; and
 - 2. Whether or not the proposed use is consistent with the zone's purposes as set forth in DMC Chapters 14.12 through 14.32.

(Ord. 1056 § 1 Exh. A (part), 2007)

14.04.090 - Interpretation—Zoning map.

Where uncertainties exist as to the location of any zone boundaries, the following rules of interpretation, listed in priority order, shall apply:

- A. Where boundaries are indicated as paralleling the approximate centerline of the street right-of-way, the zone shall extend to each adjacent boundary of the right-of-way. Nonroad-related uses by adjacent property owners, if allowed in the right-of-way, shall meet the same zoning requirements regulating the property owner's lot.
- B. Where boundaries are indicated as following approximately the lot lines, the actual lot lines shall be considered the boundaries.
- C. Where boundaries are indicated as following lines or ordinary high water, or government meander line, the lines shall be considered to be actual boundaries. If these lines should change, the boundaries shall be considered to move with them.
- D. If none of the rules of interpretation described in the above subsections apply, then the zoning boundary shall be determined by map scaling.

(Ord. 1056 § 1 Exh. A (part), 2007)

14.04.100 - Interpretation—Right-of-way.

- A. Except when such areas are specifically designated on the zoning map as being classified in one of the zones provided in this document, land contained in rights-of-way for streets or alleys shall be considered unclassified.
- B. Within street or alley rights-of-way, uses shall be limited to street or other public purposes, including parks.
- C. Where such right-of-way is vacated, the vacated area shall have the zone classification of the adjoining property with which it is merged.

(Ord. 1056 § 1 Exh. A (part), 2007)

~~14.04.110 - Administration.~~

~~The director, as the duly authorized representative of the mayor, is charged with the responsibility of carrying out the provisions of the comprehensive plan and UDR for Duvall. The director shall serve in an advisory capacity to the hearing examiner, planning commission and city council in comprehensive planning and land use matters. The director, while retaining overall responsibility, may delegate specific tasks to other staff members.~~

~~(Ord. 1056 § 1 Exh. A (part), 2007)~~

14.04.120 - Permit review authority.

Chapter 14.42 Sensitive Area Regulations.

14.42.010 Purpose.

The purpose of this chapter is to identify environmentally sensitive areas and to supplement the development requirements contained in the various use classifications by providing additional controls without violating any citizens constitutional rights. Erosion, flood, landslide, seismic, steep slope and streams, wetlands and protective buffers, as defined in this chapter, constitute environmentally sensitive areas that are of special concern to Duvall. The standards and mechanisms established in this overlay district are intended to protect these environmentally sensitive features in Duvall. By regulating development and alterations to sensitive areas this overlay district seeks to implement the goals and policies of the Washington State to:

- A. Protect members of the public and public resources and facilities from injury, loss of life, property damage or financial losses due to flooding, erosion, landslides, seismic events, soil subsidence or steep slope failures;
- B. Protect unique, fragile and valuable elements of the environment including wildlife and its habitat;
- C. Mitigate unavoidable impacts on environmentally sensitive areas by regulating alterations in and adjacent to sensitive areas;
- D. Prevent cumulative adverse environmental impacts to water availability, water quality, wetland and streams;
- E. Protect the public trust as to navigable waters and aquatic resources;
- F. Meet the requirements of the National Flood Insurance Program and maintaining Duvall as an eligible community for federal flood insurance benefits;
- G. Alert members of the public including, but not limited to appraisers, owners, potential buyers or lessees to the development limitations of sensitive areas;
- H. Provide city officials with sufficient information to protect sensitive areas;
- I. Implement the policies of the State Environmental Policy Act, Revised Code of Washington (RCW) 43.21C, the Washington State Growth Management Act (GMA), and the Duvall comprehensive land use and utility plans which call for protection of the natural environment and the public health and safety. (Ord. 765 § 1 (part), 1996)

14.42.020 Applicability.

A. When any provision of any other chapter of this code conflicts with this chapter, that which provides more protection to the sensitive areas shall apply unless specifically provided otherwise in this section; provided, however, that municipal provisions shall not conflict with preemptive controlling state regulations such as the Shorelines Master Program, Chapter 173-19 WAC.

B. Prior to fulfilling the requirements of the sensitive area regulations, Duvall shall not grant any approval or permission to alter the conditions of any land, water or vegetation, or to construct or alter any structure or improvements including but not limited to the following:

1. Building permit, commercial or residential;
2. Binding site plan;
3. Conditional use permit;
4. Street use permit;
5. Grading and clearing permit;
6. shoreline conditional use permit;
7. Shoreline environmental redesignation;
8. Shoreline substantial development permit;
9. Shoreline variance;
10. Special use permit;
11. Subdivision (short or long);
12. Unclassified use permit;
13. Variance;
14. Zone reclassification; or
15. Any subsequently adopted permit or required approval not expressly exempted by this chapter. (Ord. 765 § 1 (part), 1996)

14.42.030 Sensitive area review.

A. When a development proposal includes or is adjacent to one or more sensitive areas the applicant shall meet with the development review committee (DRC) prior to the submission of any development application to discuss the goals, purposes, objectives and requirements of this overlay district.

B. The development review committee (DRC) shall perform a sensitive area review for any application for a development proposal on a site which includes or is adjacent to one or more sensitive areas unless otherwise provided in this chapter. As part of all development applications, Duvall shall verify the information submitted by the applicant to:

1. Confirm the nature and type of the sensitive areas;
2. Evaluate the need for any special sensitive area studies or the adequacy of any such studies submitted with the application;
3. Determine whether the development proposal is consistent with these sensitive area regulations;
4. Determine whether any proposed alterations to sensitive areas are necessary;
5. Determine if the mitigation and monitoring plans and bonding measures proposed by the applicant are sufficient to protect the public health, safety and welfare consistent with the goals, purposes, objectives and requirements of this overlay district.

C. The development review committee (DRC) shall include in every report recommendation or administrative decision on a development application such findings as may be necessary to address the provisions of this chapter.

D. The city may approve, approve with conditions, or deny any development proposal in order to comply with the requirements of this chapter and to carry out the goals, purposes and objectives of these regulations.

E. Approval of a development proposal pursuant to the provisions of this chapter does not discharge the obligation of the applicant to comply with the other provisions of this code. (Ord. 765 § 1 (part), 1996)

14.42.040 General exemptions.

The following are exempt from the provisions of this chapter and any administrative rules adopted thereunder:

- A. Emergencies that threaten the public health, safety and welfare;
- B. Structures lawfully in existence on the date these regulations become effective and that do not meet the setback or buffer requirements of these regulations for wetlands, streams or steep slope hazard areas may be remodeled, reconstructed or replaced provided that the new construction or related activity does not further intrude into a stream, wetland, steep slope, or associated buffers and is subject to the restrictions of the flood hazard areas for reconstruction; provided further, however, that new construction or related activity shall not be considered further intruding into an associated buffer so long as the footprint of the structure lying within the sensitive area is not increased by more than one thousand (1,000) square feet and no portion of the structure is located closer to the stream, wetland or steep slope than the existing structure;
- C. For the following agricultural activities in existence on the date these regulations become effective:
 1. Grazing of livestock within any animal density limitations established by these regulations,
 2. Mowing of hay, grass or grain crops,
 3. Tilling, discing, planting, seeding, harvesting, and relative activities for pasture, food crops, grass seed or sod, provided that such activities shall not involve the conversion of any Class 1 or 2 wetland or buffer of Class 1 or 2 stream or buffer not currently under agricultural use and shall not take place on steep slopes,
 4. Normal and routine maintenance of existing irrigation and drainage ditches; provided, however, that this exception shall not apply to any ditches used by salmonids,
 5. Normal and routine maintenance of farm ponds, fish ponds and livestock watering ponds; provided that, such activities shall not involve conversion of any wetland not currently being used for such activity;
- D. For the following electric, natural gas, cable communications and telephone utility-related activities:
 1. Normal and routine maintenance or repair of existing utility structures or right-of-way,
 2. Relocation of electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of fifty-five thousand (55,000) volts or less only when required by a local governmental agency which approves the new location of the facilities,

Duval Municipal Code

shall issue a final decision. The fee and costs, procedural and appellate provisions established in this code shall apply.

C. The hearing examiner, in recommending approval of the reasonable use exception, must determine that:

1. Application of the sensitive area regulations would deny all reasonable use of the property;
2. There is no other reasonable use with less impact on the sensitive area;
3. The proposed development does not pose an unreasonable threat to the public health, safety or welfare on or off the development proposal site;
4. Any alterations permitted to these sensitive areas shall be the minimum necessary to allow for reasonable use of the property.

D. Any authorized alteration of a sensitive area under this section shall be subject to conditions established by the city and shall require mitigation under an approved mitigation plan.

E. The procedures and fees applying to zoning variances shall also apply to applications for reasonable use exceptions. (Ord. 765 § 1 (part), 1996)

14.42.070 Appeals.

A. Any decision to require a special sensitive area study pursuant to this chapter may be appealed by the applicant to the hearing examiner. The fee and costs, procedural and appellate provisions established in this code for variances shall apply.

B. Any decision to approve, condition or deny a development proposal based on the requirements of the sensitive area regulation may be required in conjunction with and according to the review procedures for the permit or approval involved.

C. Any decision authorized by the sensitive area regulations where no review process exists for the permit or approval involved beyond the development review committee (DRC), may be appealed by an aggrieved party to the hearing examiner pursuant to this title. The fee and costs, procedural and appellate provisions established in this title for variances shall apply. (Ord. 765 § 1 (part), 1996)

14.42.080 Variances.

A. Variances from the standards of this chapter may be authorized in accordance with the procedures set forth in this title. The appeal provisions of this title shall apply to variance applications under the sensitive area regulations of this chapter.

B. In granting a variance from the provisions of the sensitive area regulations the following standards shall apply:

1. Because of special circumstances applicable to the subject property, including size, shape, topography, location or surroundings, or the size or nature of the sensitive area, the strict application of the sensitive area regulations would deprive the subject property of rights and privileges enjoyed by other properties in the vicinity and in the same zone.

2. The granting of the variance is the minimum necessary to accommodate the development proposal and will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated, or contrary to the goals and purposes of the sensitive area regulations. (Ord. 765 § 1 (part), 1996)

14.42.090 Density credits.

A. Sensitive areas and their buffers may be used in the calculation of allowed residential density whenever two or more residential lots or two or more multifamily dwelling units are created subject to the following limitations:

1. Full density credit shall be allowed for erosion and seismic hazard areas. Flood hazard areas outside of streams, wetlands, or associated buffers shall be counted for full density credit.

2. No density credit shall be allowed for streams and wetlands.

3. Partial to full density credit shall be allowed for steep slopes, landslide hazard areas and required buffers for any sensitive area according to the following table:

Percent of Site in Buffers and/or Sensitive Areas	Density Credit
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maintained and the buffer shall be extended beyond these limits as required to mitigate landslide and erosion hazards, or as otherwise necessary to protect the public health, safety and welfare.

2. The buffer may be reduced to a minimum of ten (10) feet when an applicant demonstrates to the development review committee (DRC) pursuant to a special study that the reduction will adequately protect the proposed development and the sensitive site.

B. Sensitive Areas Tracts. Any continuous steep slope hazard area and its buffers shall be placed in separate sensitive areas tracts in development proposals.

C. Building Setback Lines. A building setback line will be established at a distance of fifteen (15) feet from the edge of the buffer.

D. Alterations to steep slopes shall be allowed only as follows:

1. Steep slopes may be used for approved surface water conveyance as specified in the King County Surface Water Design Manual. Installation techniques shall minimize disturbance to the slope and vegetation.

2. Construction of public and private trails may be allowed on steep slopes provided they receive site specific approval by the DRC as guided by the construction and maintenance standards in the US Forest Service "Trails Management Handbook" (FSH 2309.18, June 1987 as amended) and "Standard Specifications for Construction of Trails" (EM 7720-102, June 1994 as amended) but in no case shall trails be constructed of concrete, asphalt or other impervious surfaces which would contribute to surface water run-off, unless such construction is necessary for soil stabilization or soil erosion prevention.

3. Construction of public and private utility corridors may be allowed on steep slopes provided that a special sensitive area study indicates that such alteration will not subject the area to the risk of landslide or erosion.

4. Limited trimming and limbing of vegetation on steep slopes shall be allowed for the creation and maintenance of view provided that the soils are not disturbed and the activity is subject to the approval by the development review committee (DRC).

E. Limited Exemptions. The following are exempt for the provisions of this section:

1. Slopes forty (40) percent and steeper with a vertical elevation change of up to twenty (20) feet may be exempted from the provisions of this section based on the DRC's review of a soils report prepared by a geologist or geotechnical engineer which demonstrates that no adverse impact will result from the exemption.

2. Any slope which has been created through previous legal grading activities may be regarded as part of an approved development proposal. Any slope which remains equal to or in excess of forty (40) percent following site development shall be subject to the protection mechanisms for steep slopes.

F. Removal or Introduction of Vegetation on Landslide or Steep Slopes. Unless otherwise specified, the following restrictions apply to vegetation removal or introduction in steep slope hazard areas, landslide hazard areas and their buffers:

1. There shall be no removal of any vegetation from any steep slope hazard area or buffer except for the limited plant removal necessary for surveying purposes and for the removal of hazardous trees determined by the development review committee (DRC) to be unsafe.

2. On slopes which have been disturbed by human activity or infested by noxious weeds, replacement with native species or other appropriate vegetation may be allowed subject to approval by the development review committee (DRC) of an enhancement plan. (Ord. 765 § 1 (part), 1996)

14.42.300 Wetlands--Provisions.

Development proposals on sites containing wetlands shall meet the requirements of this chapter. Wetlands and required buffers shall not be altered except as expressly authorized in this chapter and all approved alterations shall have an appropriate mitigation plan where the development review committee (DRC) determines, upon review of special studies completed by qualified professionals, that either:

A. The wetland does not serve any of the valuable functions of wetlands identified in this code, including but not limited to wildlife habitat and natural drainage functions; or

B. The proposed development would protect or enhance the wildlife, habitat, natural drainage, and/or other valuable functions of wetlands and would be consistent with the purposes of this chapter. The required studies may include habitat value, hydrology, erosion, and deposition, and/or water quality studies. Such studies shall include specific recommendation for mitigating measures which should be

required as a condition for any approval for such development. The recommendations may include, but are not limited to construction techniques, or design, drainage or density specifications.

C. There shall be no introductions of any plant or wildlife which is not indigenous to the Pacific Northwest into any wetland sensitive area. (Ord. 765 § 1 (part), 1996)

14.42.310 Wetlands--Standards.

A. Buffers.

1. All buffers are measured from the wetland edge as marked in the field.
2. The following buffers are minimum requirements:
 - a. Class 1 wetlands shall have a one hundred (100) foot buffer.
 - b. Class 2 wetlands shall have a fifty (50) foot buffer.
 - c. Class 3 wetlands shall have a twenty-five (25) foot buffer.
 - d. Any wetland restored, relocated, replaced or enhanced because of wetland alterations should have at least the minimum buffer required for the highest wetland class involved.
 - e. Wetlands within twenty-five (25) feet of the toe of slopes equal to or greater than thirty (30) percent but less than forty (40) percent, shall have the following minimum buffers:
 - i. Where the horizontal length of the slope including small benches and terraces is within the buffer for that wetland class, the buffer width shall be the greater of:
 - A. The minimum for that wetland class;
 - B. Twenty-five (25) feet beyond the top of the slope.
 - ii. Where the horizontal length of the slope extends beyond the minimum buffer for that wetland class, the buffer shall extend to a point twenty-five (25) feet beyond the minimum buffer for that wetland class.
 - iii. The development review committee (DRC) may recommend buffer averaging instances where it will provide additional resource protection provided that the total area on-site contained in buffers remains the same.

B. Additional Buffer Requirements for Wetlands. The development review committee (DRC) may recommend increased buffer widths as necessary to protect wetlands. The additional buffer widths and other issues may be determined by criteria set forth in administrative rules and include, but are not limited to, critical drainage areas, location of hazardous materials, critical fish and wildlife habitat, landslide or erosion hazard areas adjacent to wetlands, groundwater recharge and discharge, and the location of trail or utility corridors.

C. Sensitive Area Tracts and Setback Areas for Wetlands. Wetlands and their tracts shall be placed in a separate sensitive area tract and/or setback area.

D. Building Setback Lines. Unless otherwise specified, a minimum setback line of fifteen (15) feet shall be required from the edge of a wetland buffer. Prohibitions on the use of hazardous or toxic substances and pesticides or certain fertilizers in this setback area may be imposed.

E. Permanent Survey Marking, Signs and Fencing.

1. Prior to altering any sensitive area on a development proposal site, the applicant shall mark the sensitive area and buffers.
2. Prior to approval or issuance of permits for master plan developments, subdivisions, short subdivisions, commercial or residential building permits, the common boundary between a wetland or associated buffer and the adjacent land shall be identified using permanent signs as required in this chapter. (Ord. 765 § 1 (part), 1996)

14.42.320 Wetlands--Permitted alterations.

A. Exceptions. The development review committee (DRC) may grant exceptions from the wetland requirements of these regulations in accordance with the allowances of this chapter.

B. Utilities.

1. Construction of utilities shall be permitted in wetland buffers only when no practical alternative location is available and the utility corridor meets the criteria established by the development review committee (DRC) including but not limited to requirements for installation, maintenance and replacement of vegetation.

2. Construction of sewer lines may be permitted in wetland buffers when the applicant demonstrates it is necessary for gravity flow and meets the requirements of this section. Joint use of the sewer utility corridor by other utilities may be allowed.

a. Corridors shall not be allowed when the wetland and buffer is used by species listed as endangered or threatened by the federal government or state, or the presence of critical or outstanding actual habitat for those species or heron rookeries or raptor nesting trees.

b. Corridor alignment, including any allowed maintenance roads, shall follow a path beyond a distance from wetland edges equal to seventy-five (75) percent of the buffer width.

c. Corridor construction and maintenance shall protect the wetland and buffer environment, shall be aligned to avoid cutting trees greater than twelve (12) inches in diameter at breast height when possible, and shall not use pesticides, herbicides, and other hazardous or toxic substances.

d. Corridor shall require an additional, adjacent undisturbed buffer width equal to the proposed corridor width including any allowed maintenance roads.

e. Corridors shall be revegetated with appropriate vegetation at preconstruction densities or greater immediately upon completion of construction or as soon thereafter as possible and the sewer utility shall ensure that such vegetation survives.

f. Any additional corridor access for maintenance shall be provided as much as possible at specific points rather than by a parallel road. If parallel roads are necessary they shall be of a minimum width but no greater than fifteen (15) feet; shall be maintained without the use of herbicides, pesticides, or other hazardous or toxic substances; and shall be contiguous to the location of the utility corridor on the side away from the stream.

C. Surface Water Management. The following surface water management activities may be allowed only if they meet the following requirements:

1. New surface water discharges to wetlands from detention facilities, presettlement ponds, or other surface water management structures may be allowed provided that the discharge does not increase the rate of flow nor decrease the water quality of the wetland.

2. Wetlands shall not be used for retention/detention facilities.

3. Use of wetland buffers for activities such as energy dissipators and associated pipes may be allowed only if the applicant demonstrates:

a. No practical alternative exists;

b. The functions of the buffer or the wetland are not adversely impacted.

D. Trails. Construction of public and private trails may be allowed in wetland buffers only upon approval of the development review committee (DRC) and pursuant to the following guidelines:

1. Trail surfaces shall not be of impervious materials.

2. Where trails are provided, buffers shall be expanded, where possible, equal to the width of the trail corridor including disturbed areas.

E. Docks. Construction of a dock, pier, moorage, float or launch facility may be permitted subject to the approval of the development review committee (DRC).

F. Isolated wetlands are Class 3 wetlands whose total size is less than two thousand five hundred (2,500) square feet excluding buffers, where they are hydrologically isolated from other wetlands or streams, and which do not have permanent open water. Up to three isolated wetlands per twenty (20) acres may be altered per development proposal site by combining their functions and values into one large wetland relocated on site pursuant to a mitigation plan. The replacement wetland shall include enhancement for wildlife habitat. (Ord. 765 § 1 (part), 1996)

14.42.330 Wetlands--Mitigation requirements.

A. Mitigation shall be conducted pursuant to the requirements of this chapter.

B. Standards for restoration, enhancement or replacement:

1. Restoration is required when a wetland or its buffer has been altered in violation of sensitive area regulations or any prior regulations. The following minimum performance standards shall be met for the restoration of a wetland, provided that if it can be demonstrated by the applicant that greater functional and habitat values can be obtained, these standards may be modified:

a. The original wetland configuration should be replicated including depth, width, length and gradients at the original location.

b. The original soil type and configuration should be replicated.

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

NEAL COY,

Appellant,

v.

CITY OF DUVALL,

Respondent.

NO. 67737-3-I

DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, DENISE BRANDENSTEIN, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal secretary for Gendler & Mann, LLP, attorneys for appellant herein. On the date and in the manner indicated below, I caused the Brief of Appellant to be served on:

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Michael B. Tierney
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(Attorneys for Defendant/Respondent)

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Federal Express/Express Mail
- By Electronic Mail

DATED this 18th day of November, 2011, at Seattle, Washington.


DENISE BRANDENSTEIN

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