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COURT OF APPEALS
DIVISION ONE

DEC 21 2017

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

JONATHAN DREZNER, MD, and)
HEIDI GRAY, MD, husband and)
wife,)

No. 68538-4-I

Appellants,)

v.)

CITY OF SEATTLE,)

Respondent,)

**RESPONSE TO
ADDITIONAL
RESPONDENTS'
SUPPLEMENTAL BRIEF**

And)

DAN DUFFUS; SOLEIL LLC;)
SOLEIL HOMES, LLC; and DL)
DALTON, LLC,)

Additional Respondents.)

ORIGINAL

RESPONSE TO ADDITIONAL RESPONDENTS'
SUPPLEMENTAL BRIEF

TABLE OF CONTENTS

I. INTRODUCTION1

II. LEGAL AUTHORITY AND ARGUMENT.....1

 A. The Court Should Deny the Fees Request Because
 Additional Respondents did not Adequately Brief it in
 Their First Paper2

 B. Where the Permit is Ministerial, Fees are not Available
 Until the Supreme Court Level.....4

 1. The Statute’s Plain Language Does Not Compel an
 Award of Attorneys’ Fees in This Case.....4

 2. Case Law Recognizes a Distinction Between
 Ministerial and Discretionary Permits5

 C. The Court Should Not Grant a Fee Award Under the
 Statute for Dismissal on Timeliness Grounds8

III. CONCLUSION.....10

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Asche v. Bloomquist</i> , 132 Wn. App. 784, 133 P.3d 475 (2006)	passim
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005)	2, 8
<i>McNeal v. Allen</i> , 95 Wn.2d 265, 621 P.2d 1285 (1980)	9
<i>Nickum v. Bainbridge Island</i> , 153 Wn. App. 366, 223 P.3d 1172 (2009)	6
<i>Prekeges v. King County</i> , 98 Wn. App. 275, 990 P.2d 405 (1999)	5, 6, 9
<i>Thweatt v. Hommel</i> , 67 Wn. App. 135, 834 P.2d 1058 (1992)	3
STATUTES	
RCW 4.84.370	4, 5, 7, 9
RCW 4.84.370(1)(a)	4
ORDINANCES	
SMC 23.76.004	6, 7
SMC 23.76.012	6
SMC 23.76.012.A.1	7
SMC 23.76.020.C.1	7
COURT RULES	
RAP 18.1	1, 2
RAP 18.1(b)	3
 RESPONSE TO ADDITIONAL RESPONDENTS’ SUPPLEMENTAL BRIEF - ii	

I. INTRODUCTION

When evaluating a request for attorneys fees, this Court's case law and the plain language of RAP 18.1 suggest that the Court will consider only arguments filed with the requesting party's initial papers. Because Additional Respondents did not adequately support their request for fees in their response brief, the Court should deny their request as improperly made.

The Court also should deny the request on its merits. Under the statute and cases interpreting it, attorney fees are available only after the third unsuccessful challenge to a permit. As set forth in Petitioners' Reply, and as Additional Respondents acknowledge, *Asche v. Bloomquist* unambiguously holds that where there is no opportunity to challenge a permit at the local level (either with the local decisionmaker or in an administrative appeal), the first challenge comes in the superior court and attorneys' fees are not available until an appeal to the Supreme Court.

II. LEGAL AUTHORITY AND ARGUMENT

The Court should deny the request for fees for multiple reasons. First, the request was insufficiently briefed under RAP 18.1, and the Court should not consider additional, untimely briefing. Second, the request fails on its merits. The statute's plain language requires an adversarial process, be it appellate or otherwise, at the local level. No such

adversarial process occurred here. The *Asche v. Bloomquist* case held that, in such a situation, no fee award is appropriate at the appellate court level. To establish the contrary, Additional Respondents rely on *Prekeges*, which is not on point because it did not involve a challenge to a ministerial decision, and dictum in *Habitat Watch*. Finally, on the facts of this case, the Court should resolve any split in the cases in Petitioners' favor.

A. The Court Should Deny the Fees Request Because Additional Respondents did not Adequately Brief it in Their First Paper

RAP 18.1 requires that a request for fees be made in the opening brief, and like any request made to this Court, such a request must be adequately supported with legal authority and argument. Additional Respondents did not so support their request, and they admit that the RAP does not provide for a reply in support of a fee request, yet they offer no explanation for why their request is so unusual that they should be afforded additional briefing when the Supreme Court has provided otherwise in its Rule.

Additional Respondents' request for fees spanned one half of the last page of their brief, citing a single statute and a single case. *See* Brief of Additional Respondents at 35. Although under the RAP, Additional Respondents could have included an additional 15 pages of analysis in their 35-page opening brief, they provided the Court with nothing but the

barest support for their request for fees—no meaningful analysis of the elements of the statute, no substantive argument, and no discussion of the relevant case law. Their Supplemental Brief attempts to do so, but in addition to being incorrect on the merits (as discussed below), it is simply too late.

The Court does not generally consider additional briefing on the legal fees issues. *See, e.g., Thweatt v. Hommel*, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992). In that case, this Court denied a bare request for fees, writing:

RAP 18.1(b) requires more than a bald request for attorney fees on appeal. Where there is *any issue whatsoever* as to a party's entitlement to attorney fees, *the failure to argue the issue requires us to deny the request*, at least insofar as the appeal is concerned.

Id. (emphasis added). As Petitioners' response to the fees request makes clear, there is "any issue whatsoever" regarding Additional Respondents' entitlement to attorney fees. The Supplemental Brief further highlights the existence of issues relating to their original request. If the briefing Additional Respondents seek to file were proper, the Court in *Thweatt* would have asked for additional briefing. Instead, the Court simply denied the fee request, as it should do here.

B. Where the Permit is Ministerial, Fees are not Available Until the Supreme Court Level

1. The Statute’s Plain Language Does Not Compel an Award of Attorneys’ Fees in This Case

Contrary to Additional Respondents’ argument,¹ the plain language of the statute requires that the parties at the local level engaged in an adversarial process. The statute provides an award of attorneys fees if and only if “[t]he prevailing party on appeal was *the prevailing or substantially prevailing party* before the . . . city.” RCW 4.84.370(1)(a) (emphasis added). Here, because the challenged decision involved no adversarial process, and in fact no process at all that involved Appellants, the Appellants were not a “party” before the City. There were only applicant (Additional Respondents) and regulator, and no controversy with Appellants on which the applicant could “prevail.” Put another way, assuming the statute means what Additional Respondents assert, had the City decided against granting the requested permit, the *City* would have “prevailed” before itself. That is not how permitting works.

RCW 4.84.370 is a “three strikes” statute, meaning that project opponents may challenge a permit twice, but if they are unsuccessful three times, they must pay their opponents’ attorney fees. By ignoring the proviso, Additional Respondents construct a scenario where Petitioners

¹ Supplemental Brief at 3.

already had one strike against them before they even saw the permit. That is not what the law says, and as discussed below, it is not what the cases require, either.

2. Case Law Recognizes a Distinction Between Ministerial and Discretionary Permits

In their Supplemental Brief, Additional Respondents concede that *Asche v. Bloomquist*—a case they cited in their brief on the merits, see Response Brief at 32 n.105—stands for the proposition that a ministerial permit (such as that at issue here) does not require a local “decision” that supports an award of attorneys fees under RCW 4.84.370. 132 Wn. App. 784, 802, 133 P.3d 475 (2006). Rather than explain how this holding of *Asche* is anything other than controlling law, however, Additional Respondents simply argue that Division 2 of this Court wrongly decided *Asche*.

Contrary to Additional Respondents’ arguments, *Prekeges* (the only Division 1 case Additional Respondents cite in opposition to *Asche*) is not on point. It involved a challenge to a conditional use permit, 98 Wn. App. 275, 277, 990 P.2d 405 (1999), which is not a ministerial decision made without notice. In addition, the appellant in *Prekeges* filed an administrative appeal to the Hearing Examiner before appealing to the

Superior Court, demonstrating that the project opponent had a chance to challenge the permit prior to the superior court level.² *Id.* at 279.

Additional Respondents mischaracterize Petitioners' argument and thus attack a straw man. Petitioners do not argue that an award of attorneys' fees is available only where there was an administrative *appeal*. Rather, the question is whether there was a meaningful opportunity to *challenge* the permit at the administrative level. That could happen at a hearing on the merits of the permit, at an administrative appeal, or perhaps, even by being afforded notice and an opportunity to "prevail" administratively before the decision is made. Many local land use decisions—such as administrative conditional use permits, for example—are not made until after notice and many opportunities for opponents to be heard. *See, e.g.*, Seattle Municipal Code ("SMC") 23.76.004, Table A (listing Type II decisions, including "Administrative Conditional Use"); SMC 23.76.012 (specifying required notice for Type II, III, IV, and V decisions, requiring no notice for Type I). Some local land use decisions go the hearing examiner to decide in the first instance after a full adversarial hearing with no administrative appeal, as the City of Seattle

² The Division 2 case of *Nickum v. Bainbridge Island* is not on point for the same reason—it involved an unsuccessful appeal to the Hearing Examiner, 153 Wn. App. 366, 372, 223 P.3d 1172 (2009), so the appellants there had an opportunity to challenge the permit at the local level, then at the superior court, then at Division 2 of this Court.

does with preliminary plats. See SMC 23.76.004, Table A (listing preliminary plat decisions as Type III). For these types of discretionary decisions, project opponents get their first “say” at the administrative level, regardless of whether there is an administrative appeal available.

By contrast, with a Type I (or “ministerial”) decision, opponents have no opportunity to contest permit issuance prior to a superior court appeal—indeed, they may not even have notice that an application has been filed, let alone a decision made. See SMC 23.76.012.A.1 (requiring no notice to public of application for Type I permit); 23.76.020.C.1 (requiring no notice to public of Type I decision). It is a challenge to *this* type of permit that *Asche* instructs does not begin until the superior court level. As discussed above, RCW 4.84.370 is a “three strikes” statute, and *Asche* stands for the proposition that where a permit involves only a ministerial decision at the local level—that is, one with no opportunity for the appellant to have “prevailed”—the first “strike” does not occur until the superior court rules. The statute does not provide for attorneys fees after only the second “strike.”

The holding of *Habitat Watch* is not to the contrary, for that case did not address the question presented to this Court.³ First, the key land

³ Highlighting the contrast between Additional Respondents’ view of the law and that of Division 2 of this Court, *Asche* cites as support for its ruling the very dicta of the *Habitat*

use decision at issue in *Habitat Watch* was a special use permit, not a ministerial permit like those at issue in *Asche* and here.⁴ *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 400, 120 P.3d 56 (2005). Second, the discussion in *Habitat Watch* about how the statute works was dictum contained in the Court's disposition of a challenge to the constitutionality of the statute. *Id.* at 414. *Habitat Watch* is no precedent on the question of whether an award of attorneys' fees is appropriate for an appeal of a ministerial permit. *Asche*, by contrast, squarely addressed that very question, and, as Additional Respondents concede, it ruled in the negative.

C. The Court Should Not Grant a Fee Award Under the Statute for Dismissal on Timeliness Grounds

The Court need not even reach this question in light of the arguments above. Nevertheless, as Petitioners mentioned in their Reply Brief, there is a split in this Court regarding whether a dismissal on procedural grounds suffices to support an award of attorneys' fees under RCW 4.84.370. *See* Reply Brief of Petitioners at 21 n.11. Additional Respondents also highlight this split, asserting that the existence of a dispute in the case law means the Court should grant a fee award.

Watch decision relied upon by Additional Respondents. *See Asche*, 132 Wn. App. at 802 (citing *Habitat Watch*, 155 Wn.2d at 413).

⁴ The challengers in *Habitat Watch* also challenged a grading permit, but because that challenge depended on the validity of the underlying special use permit, the appeal was dismissed due to the legality of the underlying decision.

In this case, where there was no challenge at the administrative (i.e., City) level before the superior court dismissed on procedural grounds, the Court should resolve this split in Petitioners' favor. RCW 4.84.370 is in derogation of the common law, and should thus be strictly construed. *See, e.g., McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980). The Court should not strain to grant an award of attorneys' fees in this situation, where the first opportunity petitioners had to challenge the permit was in the superior court, which dismissed the challenge on procedural grounds rather than affirming the decision of the City.

The differences between this case and *Prekeges* highlight the point. There, challenger filed an appeal to the hearing examiner, but the county returned the administrative appeal as untimely—effecting a procedural dismissal at the administrative level. *Prekeges*, 98 Wn. App. at 279. In effect, the county's final decision on the permit was to deny the appeal on timeliness grounds. The superior court and this Court each affirmed this County decision. *Id.* & 286. It made sense under those facts to grant an award of attorneys' fees under RCW 4.84.370 because the permittee had successfully defended the county's decision in three consecutive challenges. In this case, by contrast, the procedural dismissal in the superior court was the first time Petitioners had the opportunity to challenge the permit and the first time Additional Respondents became a

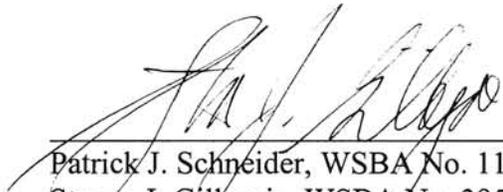
“prevailing party.” Strictly construed, the statute does not authorize an award in this case.

III. CONCLUSION

Additional Respondents’ supplemental briefing is months too late, and under the RAP and the cases, the Court should decline to consider it. In addition, it fails on the merits. The plain language of the statute contemplates an adversarial process (appellate or otherwise) at the local level, but there was none here. Additional Respondents concede that *Asche v. Bloomquist* supports the proposition that an award of attorneys’ fees is inappropriate for appeals to this Court of ministerial permits. Finally, the Court should resolve any split in the cases in Petitioners’ favor due to the total lack of any opportunity to challenge the permit decision at the City before appealing to superior court.

Dated this 21st day of December, 2012

FOSTER PEPPER PLLC



Patrick J. Schneider, WSBA No. 11957

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Attorneys for Appellants

DECLARATION OF SERVICE

I am a legal assistant at Foster Pepper PLLC. I have personal knowledge of the facts in this declaration and am competent to be a witness in the above-entitled proceeding. On December 21, 2012, I caused to be delivered in the manner indicated below a true and correct copy of the foregoing Appellants' Opening Brief to each of the following:

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Dated this 21st day of December, 2012.


Helen M. Stubbert

Subtitle IV

Administration

Division 1 Land Use Approval Procedures

Chapter 23.76
PROCEDURES FOR MASTER USE PERMITS
AND COUNCIL LAND USE DECISIONS

Sections:

Subchapter I
General Provisions

23.76.002 Purpose.

23.76.004 Land use decision framework

23.76.005 Time for decisions

Subchapter II
Master Use Permits

23.76.006 Master Use Permits required

23.76.008 Preapplication conferences for Type II and Type III decisions

23.76.010 Applications for Master Use Permits

23.76.011 Notice of design guidance and planned community development process

23.76.012 Notice of application

23.76.014 Notice of scoping and draft EIS

23.76.015 Public meetings for Type II and Type III Master Use Permits

23.76.016 Public hearings for draft EISs

23.76.018 Notice of final EISs

23.76.020 Director's decisions on Type I and Type II Master Use Permits

23.76.022 Administrative reviews and appeals for Type I and Type II Master Use Permits

23.76.023 Report and recommendation of the Director on subdivisions.

23.76.024 Hearing Examiner open record hearing and decision for subdivisions

23.76.026 Vesting

23.76.028 Type I and II Master Use Permit issuance

23.76.032 Expiration and renewal of Type I and II Master Use Permits

23.76.034 Suspension and revocation of Master Use Permits

Subchapter III
Council Land Use Decisions

23.76.036 Council decisions required

23.76.038 Preapplication conferences for Council land use decisions

23.76.040 Applications and requests for Council land use decisions

23.76.042 Notice of Type IV applications

23.76.044 Notice of scoping and draft EIS.

23.76.046 Public meetings and hearings for draft EISs

23.76.048 Notice of final EISs.

23.76.050 Report of the Director

23.76.052 Hearing Examiner open record predecision hearing and recommendation for Type IV Council land use decisions

23.76.054 Council consideration of Hearing Examiner recommendation on Type IV Council land use decisions

23.76.056 Council decision on Hearing Examiner recommendation for Type IV Council land use decisions

23.76.058 Rules for specific Council land use decisions

23.76.060 Expiration and extension of Council land use decisions

23.76.062 Type V Council land use decisions

23.76.064 Approval of City facilities.

23.76.066 Shoreline Master Program amendments

23.76.067 Amendments to Title 23 to implement RCW 43.21C.420 (SEPA)

23.76.070 Hearing Examiner reports to Council.

Subchapter I General Provisions

23.76.002 Purpose.

The purpose of this chapter is to establish standard procedures for land use decisions made by The City of Seattle. The procedures are designed to promote informed public participation in discretionary land use decisions, eliminate redundancy in the application submittal process, and minimize delays and expense in appeals of land use decisions. As required by RCW 36.70B.060, these procedures provide for an integrated and consolidated land use permit process, integrate the environmental review process with the procedures for review of land use decisions, and provide for the consolidation of appeals for all land use decisions. (Ord. 118012 § 22, 1996; Ord. 112522 § 2(part), 1985.)

23.76.004 Land use decision framework

A. Land use decisions are classified into five categories. Procedures for the five different categories are distinguished according to who makes the decision, the type and amount of public notice required, and whether appeal opportunities are provided. Land use decisions are generally categorized by type in Table A for 23.76.004.

B. Type I and II decisions are made by the Director and are consolidated in Master Use Permits. Type I decisions are decisions made by the Director that are not appealable to the Hearing Examiner. Type II decisions are discretionary decisions made by the Director that are subject to an administrative open record

appeal hearing to the Hearing Examiner; provided that Type II decisions enumerated in subsections 23.76.006.C.2.c, d, f, and g, and SEPA decisions integrated with them as set forth in subsection 23.76.006.C.2.l, shall be made by the Council when associated with a Council land use decision and are not subject to administrative appeal. Type III decisions are made by the Hearing Examiner after conducting an open record hearing and not subject to administrative appeal. Type I, II or III decisions may be subject to land use interpretation pursuant to Section 23.88.020.

C. Type IV and V decisions are Council land use decisions. **Type IV** decisions are quasi-judicial decisions made by the Council pursuant to existing legislative standards and based upon the Hearing Examiner's record and recommendation. **Type V** decisions are legislative decisions made by the Council in its capacity to establish policy and manage public lands.

D. For projects requiring both a Master Use Permit and a Council land use decision as described in this chapter, the Council decision must be made prior to issuance of the Master Use Permit. All conditions established by the Council in its decision shall be incorporated in any subsequently issued Master Use Permit for the project.

E. Certain land use decisions are subject to additional procedural requirements beyond the standard procedures established in this Chapter 23.76. These requirements may be prescribed in the regulations for the zone in which the proposal is located, in other provisions of this title, or in other titles of the Seattle Municipal Code.

F. Shoreline appeals and appeals of related SEPA determinations shall be filed with the State Shoreline Hearings Board within 21 days of the receipt of the decision by the Department of Ecology as set forth in RCW 90.58.180.

G. An applicant for a permit or permits requiring more than one decision contained in the land use decision framework listed in Section 23.76.004 may either:

1. Use the integrated and consolidated process established in this chapter;
2. If the applicant includes a variance, lot boundary adjustment, or short subdivision approval and no environmental review is required for the proposed project pursuant to SMC Chapter 25.05, Environmental Policies and Procedures, file a separate Master Use Permit application for the variance, lot boundary adjustment, or short subdivision sought and use the integrated and consolidated process established in this chapter for all other required decisions; or
3. Proceed with separate applications for each permit decision sought.

H. If notice is required pursuant to this Chapter 23.76, except mailed notice as defined in Section 23.84A.025, it may be provided by electronic means if the recipient provides an e-mail address to the Department. Notice to City agencies may be provided through the City's interoffice mail or by electronic means.

**Table A for 23.76.004
LAND USE DECISION FRAMEWORK¹**

DIRECTOR'S AND HEARING EXAMINER'S DECISIONS REQUIRING MASTER USE PERMITS

TYPE I Director's Decision (Administrative review through land use interpretation as allowed by Section 23.88.020 ²)	
•	Compliance with development standards
•	Uses permitted outright
•	Temporary uses, four weeks or less
•	Renewals of temporary uses, except for temporary uses and facilities for light rail transit facility construction and transitional encampments
•	Intermittent uses
•	Interim use parking authorized under subsection 23.42.040.G
•	Uses on vacant or underused lots pursuant to Section 23.42.038
•	Certain street uses
•	Lot boundary adjustments
•	Modifications of features bonused under Title 24
•	Determinations of significance (EIS required) except for determinations of significance based solely on historic and cultural preservation
•	Temporary uses for relocation of police and fire stations
•	Exemptions from right-of-way improvement requirements
•	Special accommodation
•	Reasonable accommodation
•	Minor amendment to a Major Phased Development Permit
•	Determination of public benefit for combined lot FAR
•	Determination of whether an amendment to a property use and development agreement is major or minor
•	Streamlined design review, pursuant to Section 23.41.018, if no development standard departures are requested
•	Shoreline special use approvals that are not part of a shoreline substantial development permit
•	Adjustments to major institution boundaries pursuant to subsection 23.69.023.B
•	Other Type I decisions that are identified as such in the Land Use Code
TYPE II Director's Decision (Appealable to Hearing Examiner or Shorelines Hearing Board ³)	
•	Temporary uses, more than four weeks, except for temporary relocation of police and fire stations
•	Variances
•	Administrative conditional uses
•	Shoreline decisions, except shoreline special use approvals that are not part of a shoreline substantial development permit ³
•	Short subdivisions
•	Special Exceptions
•	Design review decisions, except for streamlined design review pursuant to Section 23.41.018 for which no development standard departures are requested
•	Light rail transit facilities

•	The following environmental determinations:
	1. Determination of non-significance (EIS not required)
	2. Determination of final EIS adequacy
	3. Determinations of significance based solely on historic and cultural preservation
	4. A decision to approve, condition or deny a project based on SEPA Policies
	5. A decision that a project is consistent with a Planned Action Ordinance and EIS (no threshold determination or EIS required)
•	Major Phased Developments
•	Downtown Planned Community Developments
TYPE III	
Hearing Examiner's Decision (No Administrative Appeal)	
•	Subdivisions (preliminary plats)
COUNCIL LAND USE DECISIONS	
TYPE IV (Quasi-Judicial)	
Council Land Use Decisions	
•	Amendments to the Official Land Use Map (rezones), except area-wide amendments and correction of errors
•	Public projects that require Council approval
•	Major Institution master plans, including major amendments, renewal of a master plan's development plan component, and master plans prepared pursuant to subsection 23.69.023.C after an acquisition, merger, or consolidation of major institutions.
•	Major amendments to property use and development agreements
•	Council conditional uses
TYPE V (Legislative)	
Council Land Use Decisions	
•	Land Use Code text amendments
•	Area-wide amendments to the Official Land Use Map
•	Corrections of errors on the Official Land Use Map due to cartographic and clerical mistakes
•	Concept approvals for the location or expansion of City facilities requiring Council land use approval
•	Major Institution designations and revocations of Major Institution designations
•	Waivers or modifications of development standards for City facilities
•	Planned Action Ordinances
Footnotes for Table A for 23.76.004:	
(1) Sections 23.76.006 and 23.76.036 establish the types of land use decisions in each category. This table is intended to provide only a general description of land use decision types.	
(2) Type I decisions are subject to administrative review through a land use interpretation pursuant to Section 23.88.020 if the decision is one that is subject to interpretation.	
(3) Shoreline decisions, except shoreline special use approvals that are not part of a shoreline substantial development permit, are appealable to the Shorelines Hearings Board along with all related environmental appeals.	

(Ord. 123939, § 17, 2012; Ord. 123913, § 4, 2012; Ord. 123649, § 51, 2011; Ord. 123566, § 5, 2011; Ord. 123565, § 2, 2011; Ord. 123495, § 75, 2011; Ord. 123046, § 56, 2009; Ord. 122816, § 6, 2008; Ord. 122497, § 4, 2007;

Ord. 121828 § 13, 2005; Ord. 121362 § 11, 2003; Ord. 121278 § 7, 2003; Ord. 121277 § 1, 2003; Ord. 119974 § 1, 2000; Ord. 119618 § 7, 1999; Ord. 119096 § 4, 1998; Ord. 118672 § 23, 1997; Ord. 118012 § 23, 1996; Ord. 117598, § 3, 1995; Ord. 117263 § 53, 1994; Ord. 117202 § 11, 1994; Ord. 116909 § 5, 1993; Ord. 113079 § 3, 1986; Ord. 112840 § 2, 1986; Ord. 112522 § 2(part), 1985.)

23.76.005 Time for decisions

A. Except as otherwise provided in this Section 23.76.005 or otherwise agreed to by the applicant, land use decisions on applications shall be made within 120 days after the applicant has been notified that the application is complete. In determining the number of days that have elapsed after the notification that the application is complete, the following periods shall be excluded:

1. All periods of time during which the applicant has been requested by the Director to correct plans, perform required studies, or provide additional required information, until the Director determines that the request has been satisfied;

2. Any extension of time mutually agreed upon by the Director and the applicant;

3. For projects for which an EIS has been required, the EIS process time period established in subsection 23.76.005.B;

4. Any time period for filing an appeal of the land use decision to the Hearing Examiner, and the time period to consider and decide the appeal; and

5. All periods of time during which the applicant has been requested by the Director to pay past-due permit fees, until the Director determines that the request has been satisfied or until the permit is cancelled for failure to pay fees.

B. The time required to prepare an EIS shall be agreed to by the Director and applicant in writing. Unless otherwise agreed to by the applicant, a final environmental impact statement shall be issued by the Director within one year following the issuance of a Determination of Significance for the proposal, unless the EIS consultant advises that a longer time period is necessary. In that case, the additional time shall be that recommended by the consultant, not to exceed an additional year.

C. The time limits established by subsections 23.76.005.A and B do not apply if a permit application:

1. requires an amendment to the Comprehensive Plan or the Land Use Code; or

2. requires the siting of an essential public facility; or

3. is substantially revised by the applicant, in which case the time period shall start from the date at which the revised project application is determined to be complete.

D. Exclusions pursuant to RCW 36.70B.140(1).

1. Type II decisions. There is no time limit for a decision on an application that includes an exception from the regulations for Environmentally Critical Areas, Chapter 25.09.

23.76.011 LAND USE CODE

abuts an unimproved street, the Director shall require either more than one sign and/or an alternative posting location so that notice is clearly visible to the public.

C. For the required meeting for the preparation of priorities for a planned community development, and for a public meeting required for early design guidance, the time, date, location and purpose of the meeting shall be included with the mailed notice.

D. The land use sign may be removed by the applicant the day after the public meeting. (Ord. 123495, § 77, 2011; Ord. 122054 § 82, 2006; Ord. 121476 § 19, 2004; Ord. 118980 § 6, 1998; Ord. 118672 § 24, 1997; Ord. 116909 § 8, 1993.)

23.76.012 Notice of application

A. Notice.

1. No notice of application is required for Type I decisions.

2. Within 14 days after the Director determines that an application is complete, for the following types of applications, the Director shall provide notice of the application and an opportunity for public comment as described in this Section 23.76.012:

a. Type II Master Use Permits;
b. Type III Master Use Permits;
c. Type IV Council land use decisions, provided that for amendments to property use and development agreements, additional notice shall be given pursuant to subsection 23.76.058.C; and
d. The following Type V Council land use decisions:

1) Major Institution designations and revocation of Major Institution designations;

2) Concept approvals for the location or expansion of City facilities requiring Council land use approval; and

3) Waivers or modification of development standards for City facilities.

3. Other Agencies with Jurisdiction. The Director shall provide notice to other agencies of local, state, or federal governments that may have jurisdiction over some aspect of the project to the extent known by the Director.

4. Early Review Determination of Nonsignificance (DNS). In addition to the requirements of subsection A.3 of this Section 23.76.012, the Director shall provide a copy of the early review DNS notice of application and environmental checklist to the following:

a. State Department of Ecology;
b. Affected tribes;
c. Each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal; and

d. Persons who submit a written request for this information and who provide an address for notice.

B. Types of notice required.

1. For projects subject to environmental review, or design review pursuant to Section 23.41.014, the Department shall direct the installation of a large notice sign on the site, unless an exemption or alterna-

tive posting as set forth in this subsection 23.76.012.B is applicable. The large notice sign shall be located so as to be clearly visible from the adjacent street or sidewalk, and shall be removed by the applicant at the direction of the Department after final City action on the application is completed.

a. In the case of submerged land, the large notice sign shall be posted on adjacent dry land, if any, owned or controlled by the applicant. If there is no adjacent dry land owned or controlled by the applicant, notice shall be provided according to subsection 23.76.012.B.1.c.

b. Projects limited to interior remodeling, or that are subject to environmental review only because of location over water or location in an environmentally critical area, are exempt from the large notice sign requirement.

c. If use of a large notice sign is neither feasible nor practicable to assure that notice is clearly visible to the public, the Director shall post ten placards within 300 feet of the site.

d. The Director may require both a large notice sign and the alternative posting measures described in subsection 23.76.012.B.1.c, or may require that more than one large notice sign be posted, if necessary to assure that notice is clearly visible to the public.

2. For projects that are categorically exempt from environmental review, the Director shall post one land use sign visible to the public at each street frontage abutting the site except that if there is no street frontage or the site abuts an unimproved street, the Director shall post more than one sign and/or use an alternative posting location so that notice is clearly visible to the public. The land use sign shall be removed by the applicant after final action on the application is completed.

3. For all projects requiring notice of application, the Director shall provide notice in the Land Use Information Bulletin. For projects subject to environmental review or to design review pursuant to Section 23.41.014, notice in the Land Use Information Bulletin shall be published after installation of the large notice sign required in subsection 23.76.012.B.1.

4. The Director shall provide mailed notice of:

a. applications for variances, administrative conditional uses, temporary uses for more than four weeks, shoreline variances, shoreline conditional uses, short plats, early design guidance process for administrative design review and streamlined administrative design review, subdivisions, Type IV Council land use decisions, amendments to property use and development agreements, Major Institution designations and revocation of Major Institution designations, concept approvals for the location or expansion of City facilities requiring Council land use approval, and waivers or modification of development standards for City facilities; and

b. the first early design guidance meeting for a project subject to design review pursuant to 23.76.014.

5. For a project subject to design review, except streamlined design review pursuant to Section 23.41.018 for which no development standard departure pursuant to Section 23.41.012 is requested, notice of application shall be provided to all persons who provided an address for notice and either attended an early design guidance public meeting for the project or wrote to the Department about the proposed project before the date that the notice of application is distributed in the Land Use Information Bulletin.

C. Contents of Notice.

1. The City's official notice of application is the notice placed in the Land Use Information Bulletin, which shall include the following required elements as specified in RCW 36.70B.110:

a. Date of application, date of notice of completion for the application, and the date of the notice of application;

b. A description of the proposed project action and a list of the project permits included in the application, including if applicable:

1) a list of any studies requested by the Director;

2) a statement that the project relies on the adoption of a Type V Council land use decision to amend the text of Title 23;

c. The identification of other permits not included in the application to the extent known by the Director;

d. The identification of existing environmental documents that evaluate the proposed project, and the location where the application and any studies can be reviewed;

e. A statement of the public comment period and the right of any person to comment on the application, request an extension of the comment period, receive notice of and participate in any hearings, and request a copy of the decision once made, and a statement of any administrative appeal rights;

f. The date, time, place and type of hearing, if applicable and if scheduled at the date of notice of the application;

g. A statement of the preliminary determination, if one has been made at the time of notice, of those development regulations that will be used for project mitigation and the proposed project's consistency with development regulations;

h. A statement that an advisory committee is to be formed as provided in Section 23.69.032, for notices of intent to file a Major Institution master plan application;

i. Any other information determined appropriate by the Director; and

j. The following additional information if the early review DNS process is used:

1) A statement that the early review DNS process is being used and the Director expects to issue a DNS for the proposal;

2) A statement that this is the only opportunity to comment on the environment impacts of the proposal;

3) A statement that the proposal may include mitigation measures under applicable codes, and the project review process may incorporate or require mitigation measures regardless of whether an EIS is prepared; and

4) A statement that a copy of the subsequent threshold determination for the proposal may be obtained upon written request.

2. All other forms of notice, including but not limited to large notice and land use signs, placards, and mailed notice, shall include the following information: the project description, location of the project, date of application, location where the complete application file may be reviewed, and a statement that persons who desire to submit comments on the application or who request notification of the decision may so inform the Director in writing within the comment period specified in subsection D of this Section 23.76.012. The Director may, but need not, include other information to the extent known at the time of notice of application. Except for the large notice sign, each notice shall also include a list of the land use decisions sought. The Director shall specify detailed requirements for large notice and land use signs.

D. Comment Period. The Director shall provide a 14 day public comment period prior to making a threshold determination of nonsignificance (DNS) or publishing a decision on the project; provided that the comment period shall be extended by 14 days if a written request for extension is submitted within the initial 14 day comment period; provided further that the comment period shall be 30 days for applications requiring shoreline decisions except that for limited utility extensions and bulkheads subject to Section 23.60.065, the comment period shall be 20 days as specified in that section. The comment period shall begin on the date notice is published in the Land Use Information Bulletin. Comments shall be filed with the Director by 5 p.m. of the last day of the comment period. If the last day of the comment period is a Saturday, Sunday, or federal or City holiday, the comment period shall run until 5 p.m. the next day that is not a Saturday, Sunday, or federal or City holiday. Any comments received after the end of the official comment period may be considered if material to review yet to be conducted.

E. If a Master Use Permit application includes more than one decision component, notice requirements shall be consolidated and the broadest applicable notice requirements imposed. (Ord. 123913, § 9, 2012; Ord. 123495, § 78, 2011; Ord. 121477 § 46, 2004; Ord. 121476 § 20, 2004; Ord. 119096 § 6, 1998; Ord. 118980 § 7, 1998; Ord. 118794 § 48, 1997; Ord. 118672 § 25, 1997; Ord. 118181 § 4, 1996; Ord. 118012 § 28, 1996; Ord. 117789 § 9, 1995; Ord. 116909 § 9, 1993; Ord. 115244 § 1, 1990; Ord. 112522 § 2(part), 1985.)

3. Notice provided to those persons who provided an address for notice and either received the draft EIS, submitted written comments on the draft EIS, or made a written request for notice; and

4. Filing with the SEPA Public Information Center.

B. The Director shall also distribute copies of the final EIS as required by Section 25.05.460. (Ord. 123913, § 13, 2012; Ord. 112522 § 2(part), 1985.)

23.76.020 Director's decisions on Type I and Type II Master Use Permits

A. Master Use Permit Review Criteria. The Director shall grant, deny, or conditionally grant approval of a Type II decision based on the applicant's compliance with the applicable SEPA policies pursuant to Section 25.05.660, and with the applicable substantive requirements of the Seattle Municipal Code pursuant to 23.76.026. If an EIS is required, the application shall be subject to only those SEPA policies in effect when the draft EIS is issued. The Director may also impose conditions in order to mitigate adverse environmental impacts associated with the construction process.

B. Timing of Decisions Subject to Environmental Review.

1. If an EIS is required, the Director's decision shall not be issued until at least seven days after publication of the final EIS, as provided by Chapter 25.05.

2. If no EIS is required, the Director's decision shall include issuance of a Determination of Nonsignificance (DNS) for the project if not previously issued pursuant to subsection 25.05.310.C.2.

C. Notice of Decisions.

1. Type I. No notice of decision is required for Type I decisions.

2. Type II. The Director shall provide notice of all Type II decisions by:

a. Inclusion in the Land Use Information Bulletin;

b. Publication in the City official newspaper;

c. Notice provided to the applicant and to persons who provided an address for notice and either submitted written comments on the application, or made a written request for notice; and

d. Filing of DNSs with the SEPA Public Information Center and distribution of DNSs as required by Section 25.05.340; and

e. Filing of any shoreline decision in a Master Use Permit with the Department of Ecology according to the requirements in WAC 173-27-130.

D. Contents of notice.

1. The notice of the Director's decision shall state the nature of the applicant's proposal, a description sufficient to locate the property, and the decision of the Director. The notice shall also state that the decision is subject to appeal and shall describe the appropriate appeal procedure.

2. If the Director's decision includes a mitigated DNS or other DNS requiring a 14 day comment

period pursuant to Chapter 25.05, Environmental Policies and Procedures, the notice of decision shall include notice of the comment period.

(Ord. 123913, § 15, 2012; Ord. 121477 § 48, 2004; Ord. 119096 § 7, 1998; Ord. 118794 § 49, 1997; Ord. 118012 § 33, 1996; Ord. 112522 § 2(part), 1985.)

23.76.022 Administrative reviews and appeals for Type I and Type II Master Use Permits

A. Appealable Decisions.

1. Type I decisions listed in subsection 23.76.006.B are subject to administrative review through a land use interpretation pursuant to Section 23.88.020 if the decision is one that is subject to interpretation.

2. All Type II decisions listed in subsection 23.76.006.C are subject to an administrative open record appeal as described in this Section 23.76.022.

B. Shoreline Appeal Procedures. An appeal of the Director's decision to issue, condition, or deny a shoreline substantial development permit, shoreline variance, or shoreline conditional use as a part of a Master Use Permit shall be filed by the appellant with the Shorelines Hearings Board in accordance with the provisions of the Shoreline Management Act of 1971, RCW Chapter 90.58, and the rules established under its authority, WAC 173-27. An appeal of related environmental actions, including a Determination of Nonsignificance (DNS), determination that an EIS is adequate, and the decision to grant, condition or deny the shoreline proposal based on the City's SEPA Policies pursuant to Section 25.05.660, shall be consolidated in the appeal to the Shorelines Hearings Board. An appeal of a decision for limited utility extensions and bulkheads subject to Section 23.60.065 shall be finally determined within 30 days as specified in that section.

C. Hearing Examiner Appeal Procedures.

1. Consolidated Appeals. All appeals of Type II Master Use Permit decisions other than shoreline decisions shall be considered together in a consolidated hearing before the Hearing Examiner.

2. Standing. Appeals may be initiated by any person significantly affected by or interested in the permit.

3. Filing of Appeals.

a. Appeals shall be filed with the Hearing Examiner by 5 p.m. of the fourteenth calendar day following publication of notice of the decision except that if a 14 day DNS comment period is required pursuant to Chapter 25.05, appeals shall be filed by 5 p.m. of the 21st calendar day following publication of notice of the decision. If the last day of the appeal period so computed is a Saturday, Sunday, or federal or City holiday, the period shall run until 5 p.m. on the next day that is not a Saturday, Sunday, or federal or City holiday. The appeal shall be in writing and clearly identify each component of the Type II Master Use Permit being appealed. The appeal shall be accompanied by payment of the filing fee as set forth in Section