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No. 34743-1

(Kitsap County Superior Court No. 01-2-01773-1)

IN THE COURT OF APPEALS, DIVISION TWO
FOR THE STATE OF WASHINGTON

HOME BUILDERS ASSOCIATION OF KITSAP COUNTY,
HILLANDALE HOMES LLC, JEFFERSON PROPERTIES, INC. AND
ANDY MUELLER CONSTRUCTION, CO.,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND, a municipal corporation,

Respondent.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

RCW 82.02.020 is intended to prohibit municipalities from gouging building permit applicants by shifting the cost of general public benefits to this discrete class of people. The statute limits municipality authority to the collection of “reasonable fees” that cover only the costs of a limited class of activities, namely “processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW.” RCW 82.02.020. Yet, the City’s brief essentially argues that its authority to impose such fees is limitless and exempt from any meaningful judicial review. The City’s position renders the statute unenforceable and should be rejected.

Defendants imply throughout their brief that Plaintiffs are micro-managing the City’s internal affairs to ensure mathematical exactitude in building permit fees. However, Plaintiffs are not feuding over a few dollars. Rather, Plaintiffs’ evidence showed the City of Bainbridge Island imposes extravagant costs, such as office space in excess of ten times the relevant market rate, VRP at 203-04; overhead costs that exceed direct costs by 400 percent, Ex. 11, at Schedule 15; and total permit costs per permit that are quadruple those of other jurisdictions, Ex. 11, at Schedule 2. This is not quibbling about minor discrepancies, but deviations from reasonableness by multiple orders of magnitude.

RESPONSE TO CITY’S STATEMENT OF FACTS

Several of the “facts” presented by the City merit a response by

Plaintiffs. Such a response is not only necessary because these facts are incorrect, but also because they contain legal conclusions that are the ultimate issues for resolution in this case. While the City's alleged facts or characterization of the evidence may be rebutted by Plaintiffs' evidence, such banter by the parties provides little assistance to this Court. Avoiding re-enactment of the trial in the appellate briefs is a central purpose of requiring the trial court to issue findings of fact that resolve the factual issues. *See People's Nat. Bank of Washington v. Birney's Enter., Inc.*, 54 Wn. App. 668, 670, 775 P.2d 466 (1989) (interpreting CR 52(a)(1) to require formal findings "on *all* disputed facts" in bench trials) (emphasis added).

Nonetheless, the trial court's failure to issue findings of fact about the reasonableness of City's costs being shifted to building permit applicants is apparent—it believed that the reasonableness of the costs being recouped from the applicants was a political judgment beyond the scope of judicial review. *See* CP at 1181, Finding of Fact 17. Indeed, it would have been difficult for the Court to issue detailed findings supporting the reasonableness of the City's extravagant costs, since both of the City's two witnesses expressly disclaimed any opinion as to whether the City's costs were "unreasonable or too high." VRP at 372:23-376:5; 559-60.

Despite the lack of findings resolving multiple critical issues of fact, Plaintiffs will address some of the factual assertions made by the City as they arise in the argument section of this brief, lest the appellate Court believe that

the City's "facts" are the only possible view of the evidence. As stated above, neither the parties, nor this Court, knows how the trial court perceived the vast majority of the factual disputes in this case.

At the outset, the City boldly declares that "[t]he City's fees for processing building permits do not cover the costs of processing applications or reviewing plans filed with the applications." City Br. at 8. This statement is about as conclusory as the trial court's similar finding, even though the central issue in this case is whether, under RCW 82.02.020, the City's fees "cover the cost to the city, town, county, or other municipal corporation of processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW." Thus, the City's observation is entirely dependant upon how one defines these specific cost categories.

Specifically, the City states that from 2001 to 2003 it transferred varying amounts of money from the general fund to the Building Subfund because building permit fees were inadequate to cover its costs. *Id.* at 9, 15.¹ Plaintiffs do not dispute that the City has any particular "cost" of operating the City. However, Plaintiffs disputed at trial that certain costs, as a matter of law, are not the costs of "processing applications, inspecting and reviewing

¹ Based on this assertion that the fee revenues do not cover the costs, the City claimed that it could increase the fees by 10% in Resolution 99-31. As previously indicated, the trial court did not resolve an issue as to the potential relief available to the Plaintiffs. *See* Apps' Opening Br. at 4-6 (citing VRP at 11:6-13). Immediately prior to trial, the City claimed that the Plaintiffs sought a refund of only the 10%. Plaintiffs contend that the City knew well in advance of trial through discovery that the scope of relief sought was the entire extent to which fee revenues exceed the specific costs which may be shifted to fee applicants under RCW 82.02.020. VRP at 6-8. The trial court decided to review the evidence to determine

plans, or preparing detailed statements required by chapter 43.21C RCW.”
RCW 82.02.020. Unfortunately, notwithstanding these disputed contentions,
no findings were entered in this regard.

ARGUMENT

I.

THE CITY CANNOT SIDESTEP THE BINDING PRECEDENT OF *ISLA VERDE*, WHICH REQUIRES REVERSING THE TRIAL COURT FOR MISALLOCATING THE BURDEN OF PROOF

The trial court made an obvious and fatal error when it placed the burden of proof on Plaintiffs to demonstrate the invalidity of the City’s fees under RCW 82.02.020. Binding Washington State Supreme Court precedent clearly places the burden of proof on the City. *See Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 755-56, 49 P.3d 867 (2002).

Although the City makes every attempt to avoid *Isla Verde* in its brief, this Court is obligated to faithfully follow such precedent.

A. *Isla Verde* Is a Model of Clarity and Unequivocally Places the Burden of Proof on the Government Under RCW 82.02.020.

The disposition of this case centers on one statute, and one statute only—RCW 82.02.020. *Isla Verde* is the most authoritative jurisprudence from our Washington State Supreme Court that addresses the allocation of the burden of proof under the precise statute at issue in this case:

Under RCW 82.02.020, however, the City has the burden of showing that **one of the statute’s exemptions applies.**

whether the fee was unreasonable as a whole, without deciding whether the Plaintiffs, if successful, were limited to the 10% surcharge. VRP at 11:6-13.

Id. at 755-56 (emphasis added). *Accord Vintage Const. Co., Inc. v. City of Bothell*, 83 Wn. App. 605, 611, 922 P.2d 828 (1996); *Sparks v. Douglas County*, 127 Wn.2d 901, 913, 904 P.2d 738 (1995).

Apparently, the City is stupefied by *Isla Verde*'s clarity. Thus, the City expends eight pages of briefing implicitly attempting to rationalize why *Isla Verde* must be wrong. Perhaps even more remarkably, however, the City attempts to do so with authorities that do not even address RCW 82.02.020 (or if they do, they pre-date *Isla Verde*). If the City believes that *Isla Verde* is wrong, its remedy lies at the Washington State Supreme Court, not here.

B. The City's Authorities, Which Fail to Address RCW 82.02.020, Provide No Guidance to This Court.

The City's first attempt to circumvent *Isla Verde* is to assert that, in general, a party challenging fee legislation has the burden to prove its invalidity. See City Br. at 22 (citing *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 180, 931 P.2d 208 (1997); *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 732 P.2d 1013 (1987); *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985)). However, as previously observed, *Thurston County Rental Owners* did not involve RCW 82.02.020, which provides an "absolute prohibition" on development fees followed by narrowly circumscribed exceptions. *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 242, 877 P.2d 176 (1994). Instead, *Thurston County Rental Owners* involved a different statute, RCW 70.05.060, which affirmatively authorizes counties to impose certain fees. *Prisk* also involved

a different statute, RCW 35.92.025, which expressly authorizes connection charges for sewer or water.

Similarly, *Teter* addresses the validity of sewer charges under RCW 35.67.010(3), a statute that also affirmatively authorizes such charges. The City's other authorities all rely on *Teter* and its same feature, not present in RCW 82.02.020. See *Hillis Homes, Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 105 Wn.2d 288, 714 P.2d 1163 (1986) (citing to *Teter* for same principle); *Lincoln Shiloh Assocs., Ltd. v. Mukilteo Water Dist.*, 45 Wn. App. 123, 724 P.2d 1083 (1986)(citing *Teter* and *Hillis*).

The City's next attempt to avoid *Isla Verde* is to assert that Plaintiffs bear the burden of proof because ordinances are "presumed constitutional." City Br. at 21. Although the City subsequently makes a strained argument that in fact Plaintiffs' claim is constitutional in nature, the City's argument can be fairly described as incoherent. *Id.* at 22-23. Plaintiffs' complaint alleges a violation of RCW 82.02.020. This is clearly a statutory claim, and not a constitutional one.

Next, the City cites to *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 29 P.3d 709 (2001) and *Housing Authority v. City of Pasco*, 120 Wn. App. 839, 86 P.3d 1217 (2004), for the proposition that fees are "presumed valid" where there is an alleged statutory violation. Again, the City's avoidance of *Isla Verde*, which rejects this rule in the context of RCW 82.02.020 because of this statute's express language, is amusing. *Heinsma* does not address

RCW 82.02.020, and in fact predates *Isla Verde*. Similarly, *Housing Authority* does not address RCW 82.02.020 and, even if it did, must yield to the Supreme Court's analysis in *Isla Verde*. This court should follow *Isla Verde* and its unequivocal placement of the burden of proof.

C. The City's Analysis of the Text of RCW 82.02.020 Was Rejected in *Isla Verde* and Is Simply Inaccurate.

Finally, after countless pages of citing to any and every authority, **except those that directly address RCW 82.02.020**, the City argues that RCW 82.02.020 does not alter the general presumption of the validity of fees. City Br. at 24. However, the City's argument is nothing more than a generalized rationalization of why it believes that *Isla Verde* was wrongly decided, a ruling not available in the Court of Appeals.

The City commences its argument regarding RCW 82.02.020 by criticizing Plaintiffs for characterizing the statute as an absolute prohibition of taxes, fees, and charges on development followed by narrow exceptions. *See* City Br. at 25-26. Yet, RCW 82.02.020 begins with an otherwise absolute prohibition on "any fee, tax or charge, either direct or indirect, on the construction . . . of . . . buildings." What follows is a list of exceptions to the general rule, including the one at issue here for application fees to cover the cost of inspecting and reviewing plans. This characterization is consistent with relevant case law interpreting RCW 82.02.020. *See, e.g., Isla Verde*, 146 Wn.2d at 754 n.9 (RCW 82.02.020 is a "general prohibition" on

fees followed by certain “exceptions.”); *R/L Associates, Inc. v. City of Seattle*, 113 Wn.2d 402, 408, 780 P.2d 838 (1989) (same).

In light of the structure of RCW 82.02.020, it is not surprising that the *Isla Verde* court expressly held that “[u]nder RCW 82.02.020, however, the City has the burden of showing that one of the statute’s exemptions applies.” This is because Washington Courts have long recognized the principle that one claiming an exception to a rule has the burden of proof. *See, e.g., Hall v. Corp. of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 801, 498 P.2d 844 (1972). The City does not rebut this rule of statutory interpretation.

The City cites to *Prisk* and *Lincoln Shiloh*, both of which are Court of Appeals opinions that pre-date the Washington State Supreme Court decision in *Isla Verde*, to further rationalize why it believes *Isla Verde* is wrong. The cases simply do not alter the binding nature of *Isla Verde*, which this Court is bound to uphold. Similarly, the City cites *Hillis Homes*, which was actually superseded by the passage of RCW 82.02.020, and which obviously predates *Isla Verde*’s authoritative interpretation of RCW 82.02.020 by 20 years.

Finally, after nearly eight pages of briefing regarding the burden of proof, the City dedicates a paltry single sentence to *Isla Verde*, which is the Washington State Supreme Court’s most recent pronouncement regarding the applicable burden of proof under RCW 82.02.020. *See City Br.* at 27. The City’s dismissive approach to *Isla Verde* is predictable inasmuch as the

express language of the opinion requires the government to bear the burden of proof for *every* exception to RCW 82.02.020.

D. The City’s Spurious Procedural Arguments Regarding Waiver Merely Reinforce the Fact That City’s Substantive Arguments Are Unsupported by Law.

The City’s primary,² and transparently desperate, procedural argument is that “[a]ppellants waived their argument regarding burden of proof by not raising it at trial.”³ City Br. at 20. In light of *Isla Verde*’s clarity, which places the burden of proof on the City, the Court should not be surprised by the City’s distressed procedural argument. In truth, Plaintiffs thoroughly briefed the issue regarding burden of proof to the trial court on multiple occasions.

On September 20, 2002, the trial court heard Plaintiffs’ Motion for Summary Judgment. Plaintiffs’ briefing unequivocally stated their position regarding the burden of proof under RCW 82.02:

The City bears the burden of proving that its surcharge on the construction of buildings fits into this exception.

² The City makes an additional argument that Defendants “failed to submit any trial brief.” City Br. at 20. The local rules for Kitsap County Superior Court do not require submission of a trial brief. *See* Dale Forman, *Washington Trial Handbook* at 166 (1998) (“a trial brief is not always required in state court”). Shortly before trial, the Court heard the City’s motion for summary judgment, which addressed the very same legal issues to be decided at trial. Accordingly, Plaintiffs requested the trial court to consider their summary judgment briefs as their trial briefs, so as to avoid repetitive and burdensome pleadings. *See* App. A. at 1.

³ Although the City tries to characterize its argument as Plaintiffs’ alleged failure to raise the issue “at trial,” relevant authority indicates that the obligation is to raise issues to “the trial court.” RAP 2.5(a). This distinction is significant, especially on a legal argument in a bench trial. Pretrial motions are an appropriate vehicle for apprising the court of the parties’ positions. Judge Costello received thorough briefing from all parties regarding their respective positions regarding the burden of proof.

...

The most recent Washington Supreme Court decision applying that statute is *Isla Verde*... In that case, the Supreme Court explained that under RCW 82.02.020, the burden is on the municipality, not the fee payer, to show that a fee is reasonably necessary as a direct result of the development...

CP at 23. Plaintiffs' Motion was denied on Oct. 7, 2002. *See* CP at 219-22.

In light of the above, the City's argument that Plaintiffs never raised the issue before the trial court is a blatant falsehood.

Moreover, on January 14, 2005, the trial court heard the City's Motion for Summary Judgment. The City's briefing asserted that the burden of proof was on Plaintiffs to demonstrate invalidity of the fees under RCW 82.02.020. *See* CP at 393. In response to the City's argument, Plaintiffs thoroughly briefed the burden of proof issue for a second time. *See* CP at 478-79. The City's Motion was granted in part and denied in part and the case proceeded to trial. *See* CP at 962-65.

After trial, Judge Costello issued a memorandum decision on April 13, 2005, which resolved the parties' dispute regarding the allocation of the burden of proof under RCW 82.02.020:

Generally, ordinances such as 99-31 are presumed constitutional and the burden of showing otherwise rests on the party challenging the ordinance. The party challenging the charge has the burden of proof that the charge is unreasonable... It appears to this Court that the fees...are reasonable.

CP at 1149. The City submitted proposed Findings of Fact and Conclusions of Law allocating the burden of proof *in accordance with the Judge's*

Memorandum Decision. The City criticizes Plaintiffs for not raising the issue when Findings were proposed (City Br. at 21). Although Plaintiffs respectfully disagreed with that decision, they were not obliged to object once Judge Costello had made his ruling and proposed Findings of Fact and Conclusion of Law were entered that were consistent with that ruling.⁴ The mere existence of this finding demonstrates that Judge Costello was aware of the parties' competing positions regarding the burden of proof.

The City's argument that Plaintiffs failed to object is a disservice to this Court. The law does not require Plaintiffs to repeatedly object once a judge has made a ruling.

II.
**NOTHING IN RCW 82.02.020 SUGGESTS THAT CITIES
MAY CHARGE MORE THAN COVERING THEIR COSTS OF
THE SPECIFIED ACTIVITIES, LET ALONE "GROSSLY"
EXCEED THOSE COSTS**

The trial court ruled that a plaintiff claiming that a government charge violates RCW 82.02.020 must prove more than the fee is excessive in relation to reasonable costs; it must prove that the fees are "grossly disproportionate to the municipality's costs of regulation." As previously indicated, Plaintiffs identify two major problems with the trial court's creation of this new "test."

First, the statute speaks of "reasonable fees to cover the cost." RCW 82.02.020. It says nothing about allowing municipalities to charge more

⁴ See, e.g., *State v. Hortman*, 76 Wn. App. 454, 459, 886 P.2d 234 (1994) ("The trial court had adequate opportunity to consider the State's objection prior to its ruling. Nothing would

money than covering its costs as long as the overage is not “gross” or “grossly disproportionate” to the actual costs. Thus, it is not surprising that the City makes every attempt to justify this standard by citing to cases from other jurisdictions, none of which address a statute even remotely similar to RCW 82.02.020. Second, RCW 82.02.020 lists three specific activities for which costs may be recovered from building permit fee applicants and does not allow the shifting of the entire “cost of regulation” onto permit applicants.

A. The Trial Court Erred in Adopting the “Grossly Disproportionate” Standard Because It Conflicts with the Straight Forward Language in RCW 82.02.020 Itself.

Because RCW 82.02.020 was not written for the City’s benefit, the City attempts to adopt a standard more favorable to their position from other jurisdictions that do not have similarly strong statutory mandates. The City justifies this sleight of hand by stating that “no Washington case has discussed the costs that may be recovered through building permit fees...” City Br. at 29. Under such circumstances, however, the City’s argument should find its genesis in the express language of RCW 82.02.020 itself; it does not. The reality is that nothing in RCW 82.02.020 supports the “grossly disproportionate” standard.

Plaintiffs adequately briefed and demonstrated the inapplicability in Appellant’s Opening Brief of the vast majority of cases relied upon by the

be gained, therefore, by requiring the State to renew its objection at the time the court entered its findings of fact and conclusions of law”).

City in their Response Brief.⁵ Plaintiffs assert that this Court should be guided by RCW 82.02.020, and not jurisprudence from other jurisdictions that are not bound by a similar statute.

RCW 82.02.020 speaks of “reasonable fees to cover the costs.” RCW 82.02.020. As previously argued by Plaintiffs, RCW 82.02.020 says nothing about allowing municipalities to charge more money than covering its costs as long as the overage is not “gross” or “grossly disproportionate” to actual costs. Inasmuch as “a court must not add words” to a statute, the grossly disproportionate standard must be rejected. *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

The portion of the City’s brief regarding the “grossly disproportionate” standard fails to answer Plaintiffs’ challenge to justify this standard based upon the express language of RCW 82.02.020. Instead, the best that the City can muster is to incorrectly allege that Plaintiffs’ only evidence at trial was that the City’s costs, as opposed to fees, were not reasonable. Such evidence should be entirely irrelevant because the City concedes that the standard of review for this “grossly disproportionate” issue is a pure question of law that this court reviews *de novo*. See City Br. at 1.

⁵ See Appellant’s Opening Br. at 23-26 (thoroughly discussing *Area Plan Comm’n. of Evansville v. Evansville Outdoor Adver., Inc.*, 789 N.E.2d 96 (Ind. App. 2003), *Orange & Rockland Util. v. Town of Clarkston*, 80 A.D. 2d 846 (N.Y. A.D. 1981), *Suffolk County Builders Ass’n v. Suffolk County*, 389 N.E.2d 133 (N.Y. 1979), *Groudeau v. City of Cleveland*, 507 N.E.2d 373 (Ohio App. 1985); *Bainbridge, Inc. v. Douglas County*, 964 P.2d 575 (Colo. App. 1998); *Ocean City v. Purnell-Jarvis Ltd*, 586 A.2d 816, 826 (Md. App. 1991); *Margolis v. Tully*, 89 Misc.2d 969, 972 (N.Y. 1977); *Mobile Sign Inc. v. Town of Brookhaven*, 670 F. Supp. 68 (E.D. N.Y. 1987); *Lodge of the Ozarks v. City of Branson*, 796

B. RCW 82.02.020's Narrow Exemption from the Prohibition on Fees Is More Limited Than the "Costs of Regulation."

Just as the trial court erred in inserting the phrase "grossly disproportionate" into RCW 82.02.020, the trial court similarly erred by stating that the City could charge fees to cover the "costs of regulation." As previously argued by Plaintiffs, the phrase "costs of regulation" is much more expansive than the plain language of RCW 82.02.020, which limits fees to the "cost of processing applications, inspecting and reviewing plans."

Perhaps the most readily obvious area in which this arises is in the context of enforcement of the City's codes. For the City to prosecute someone for failing to obtain a building permit is arguably part of the "cost of regulation." However, prosecuting someone for failing to apply is not processing any application, inspecting or reviewing plans. Moreover, the distinction is not without a reasonable policy basis. While it may be fair to charge building permit applicants the cost of processing their applications, it is unfair to charge permit applicants the cost of pursuing those who fail to file applications. The cost of pursuing lawbreakers should be borne by the public as a whole, rather than those who comply with the law.

S.W.2d 646, 656 (Mo. App. 1990)).

C. The City’s Procedural Argument Regarding Waiver Merely Repeat the Falsehoods of Its Prior Duplicate Argument.

The City attempts, yet again, to make a transparently desperate, procedural argument that “[a]ppellants presented no argument...to rebut [the] law on the level of proof required to overturn a fee.” City Br. at 28. Again, Plaintiffs thoroughly briefed the issue regarding that standard for invalidating fees under RCW 82.02.020 on multiple occasions.

On September 20, 2002, the trial court heard Plaintiff’s Motion for Summary Judgment. Plaintiffs’ brief unequivocally stated its position regarding the standard for invalidating fees which, quite simply, was the language of RCW 82.02.020 itself. Plaintiffs argued that fees are authorized only if they “cover the cost to the city, town, county, or other municipal corporation of processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C. RCW.” CP at 23-24 (quoting RCW 82.02.020).

Moreover, on January 14, 2005, the trial court heard the City’s subsequent Motion for Summary Judgment. The City’s briefing asserted that the City could collect fees as long as they were not “grossly disproportional” to the costs of regulation. *See* CP at 393-97. In response to the City’s argument, Plaintiffs thoroughly briefed the issue for a **second** time. *See* CP at 483-86. Plaintiffs again reiterated the same language from RCW 82.02.020 and responded to more than a dozen of the cases from foreign jurisdictions that the City cited as authority in support of its “grossly

disproportional” standard. *Id.* The City’s Motion was granted in part and denied in part and the case proceeded to trial. *See* CP at 962-65.

Judge Costello issued a memorandum decision on April 13, 2005, which resolved the parties’ dispute regarding the standard for invalidating fees under RCW 82.02:

The Court concludes that, generally, a fee such as the one in question, will be found excessive only where it is grossly disproportionate to the municipality’s cost of regulation.

CP at 1149. The City submitted proposed Findings of Fact and Conclusions of Law setting forth the grossly disproportionate standard *in accordance with the Judge’s Memorandum Decision*. As previously indicated, although Plaintiffs respectfully disagreed with that decision, they were not obliged to object again after Judge Costello had made his ruling.

III.
RCW 82.02.020 DOES NOT ALLOW THE
CONCLUSION THAT A FEE IS REASONABLE
IF IT COVERS COSTS THAT ARE UNREASONABLE

The City offers little to counter Plaintiffs’ argument that the trial court erred in determining that the reasonableness of costs under RCW 82.02.020 is a political judgment beyond the scope of judicial review.

The City’s primary response regarding this issue is the same argument that it repeats *ad nauseam*, that under RCW 82.02.020, the court may only look to determine whether the City’s *fee* is reasonable, and not whether its *costs* are reasonable. *See* City Br. at 34-35; VRP at 314-15. This argument is simply unsupportable.

One must consider the logical outcome of the City's argument. If the Court cannot look at the reasonableness of the costs imposed on building permit applicants either based on parsing the words in RCW 82.02.020 or the trial court's assumption that incurring costs is a judicially unreviewable political decision, then the following result is possible. The City could incur extravagant costs, then gouge building permit applicants without running afoul of RCW 82.02.020 because the Court will never look at the reasonableness of the costs underlying a fee. Moreover, this is not a mere hypothetical since the undisputed evidence in this case was that the City of Bainbridge Island charges permit applicants over \$250,000 per year for space that based on market rates should cost one tenth that amount. VRP at 203-04. The City's argument that RCW 82.02.020 requires the Court to refuse to look at costs renders the statute meaningless.

Next, the City predictably extols sources that stand for the proposition that, in general, municipal powers are broad. The City's implication is clear and consistent with the trial court's view that decisions to incur costs are political; it believes its actions are wholly insulated from judicial review. Yet, it is telling that the City divorces its analysis of its powers from the plain language of RCW 82.02.020, which acts as a limitation on the exercise of both their police and taxing powers.

As creatures of the State, cities "may exercise only such power as is delegated to it by the Legislature." *Employco Personnel Servs., Inc. v. City*

of Seattle, 117 Wn.2d 606, 617, 817 P.2d 1373 (1991). Although the Legislature has granted municipalities broad power over many local affairs, it has expressly limited their ability to saddle building permit applicants with the responsibility for paying exorbitant expenses.

The City clearly does not understand the difference between being entitled to some degree of deference, which it appears to advocate for, and a determination that its actions are wholly insulated from judicial review as political questions. As previously indicated, Washington Courts have never before considered whether it is a judicially unreviewable “political judgment” as to whether a municipality complies with a state statute which completely governs the activities of cities in this area. To do so would render RCW 82.02.020 meaningless, which is not what the Legislature intended.

**IV.
THE TRIAL COURT ERRED IN SUMMARILY CONCLUDING
THAT THE CITY’S FEES WERE REASONABLE**

Regardless of whether this Court accepts Plaintiffs’ argument that both costs and fees must be reasonable under RCW 82.02.020, even the City concedes that the reasonableness of fees is a proper judicial inquiry.

The parties disagree as to the appropriate standard of review. Plaintiffs assert that the reasonableness of fees is a mixed question of law and fact, and thus is subject to *de novo* review. *See* Br. of App. at 2. In contrast, the City argues that it is an issue of fact that the court reviews under a substantial evidence standard. City Br. at 41. Plaintiffs’ argument is more

persuasive, however, because some costs, as a matter of law, may not be included as the costs for “processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW.” RCW 82.02.020. Such instances simply are not a matter of substantial evidence. For example, the City charges the costs of the instant lawsuit to building permit applicants. VRP at 573. Clearly, the costs of this lawsuit are not the costs of processing applications or inspecting and reviewing plans.

A. The City Cannot Cure the Inadequacy of Findings By Providing a Summary of the Evidence the City Presented at Trial.

However, Plaintiffs contend that the trial court’s findings regarding the reasonableness of fees were wholly insufficient and provide no basis for effective appellate review. In response, Defendants provide nothing more than a sixteen page regurgitation of the evidence that they allegedly presented at trial. The City’s intentional evasion of the trial court’s paltry findings is a tacit admission that the findings were inadequate.

Plaintiffs previously indicated that adequate appellate review requires trial court findings that “show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact that *penetrates beneath the generality of ultimate conclusions*, together with a knowledge of the standards applicable to the determination of those facts.” *State v. Jones*, 34 Wn. App. 848, 664 P.2d 12 (1983) (citing *Groff v. Dept. of Labor & Ind.*, 65 Wn.2d 35, 40, 395 P.2d 633 (1964)). Not surprisingly, the only finding that the City discusses in its sixteen pages of briefing regarding this issue is

the following: “the fees charged to building permit applicants under the Resolution are reasonable.” City Br. at 41 (quoting Finding No. 14). Needless to say, this finding does not “penetrate[] beneath the generality of ultimate conclusions.” This finding is clearly inadequate.

Moreover, the City cannot attribute any shortcomings in the trial court’s findings as the fault of Plaintiffs. It is well-settled that the duty to assure adequate findings rests with the prevailing party:

CR 52 requires written findings. This means **formal findings on all disputed facts**. CR 52(a)(1); CR 52(a)(4)... Absence of findings undermines the conclusions of law... Also, absence of a finding will be taken as a negative finding on the issue... **We consider it the prevailing party’s duty to procure formal written findings supporting its position. Prevailing parties must fulfill that duty or abide the consequences of their failure to do so.**

Peoples Nat. Bank, 54 Wn.App. at 670 (citations omitted); emphasis added.

Rather than address the shortcomings in findings alleged by Plaintiffs, the City tritely responds by stating that “[t]he court was not required to enter a finding on every individual costs challenged by Appellants.” Br. of City at 38. This, too, is an admission that there were no findings on all disputed facts. As indicated above, CR 52 requires findings on *all* disputed facts.

In an effort to bolster the trial court’s cursory findings, the City attempts to demonstrate that the conclusory findings were based upon substantial evidence. It makes no difference how much evidence the City can cite to which would support findings that were never made. Because the

findings are limited, this Court has no way of knowing whether the trial court found the evidence cited by the City to be reliable or persuasive.

Plaintiffs do not believe that this is an issue regarding substantial evidence. However, if this Court disagrees, the City's position is still incorrect. CR 52(b) makes it clear that failure to object is not a bar to appellate review:

When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the court an objection to such findings or has made a motion to amend them or a motion for judgment.

CR 52(b).

B. The City's Mischaracterization of the Evidence Submitted at Trial Is a Disservice to this Court and Only Further Supports Plaintiffs' Argument That the Ultimate Conclusion of Reasonableness Is Unsupported by Adequate Findings and Is Error as a Matter of Law.

The City first attempts to demonstrate that its fees are reasonable by stating that it provided evidence at trial that "its building permit fees were comparable to fees charged by other cities." City Br. at 41. Plaintiffs have three responses.

First, the City misleads this Court by stating that Plaintiffs "presented no evidence to rebut the evidence that the City's fee amount was reasonable in comparison to other cities' fees." *Id.* at 41. The evidence demonstrated that the survey of other jurisdictions was based on a hypothetical building permit for a building of a uniform size, using a uniform schedule where only

the cost of construction would vary. *See* Ex. 15 at 6; Ex. 16 at 7. Given all factors except the cost of construction are constant, the survey was nothing more than a comparison of the cost of construction among various cities. VRP at 35, 91-93.

Second, the survey asked responding cities nothing about costs. If the City and the trial court are incorrect in their view of RCW 82.02.02 that the reasonableness of costs is beyond judicial review, then the survey provides nothing to indicate how other cities' fees comport with costs.

Third, the City hopes the Court will ignore that the Plaintiffs used the City's consultant's own survey of building permit fees and costs, which show that the City of Bainbridge Island's per permit cost exceeds all the other jurisdictions by four hundred percent! *Cf.* Ex. 18 at 11 *with* Ex. 11 at Schedule 2. While the City asserts that an average of over 25,000 permits is not a representative sampling, the Court is left with the unfortunate fact that the trial court entered no findings regarding these disputed issues. Clearly, the fact that the City of Bainbridge Island's calculation of costs is quadruple the costs of other cities is relevant to reasonableness.

At trial, Plaintiffs also presented evidence that many of the City's reported costs were not costs "of processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW." RCW 82.02.020. Additionally, Plaintiffs' forensic expert, Steven Roberts, testified that the City's relationship direct and indirect costs was

unreasonable and that it was unreasonable to assign \$4 of indirect, overhead costs for every \$1 of direct permit processing costs as the City has done. *See* Ex. 11. Again, the trial court made no finding as to the reasonableness of the relationship between direct and indirect costs of an activity. The trial court's single conclusory finding in this regard says nothing about this relationship, but rather that "[t]he fees charged to building permit applicants under the Resolution are reasonable." City Br. at 41 (citing CP at 1181). The only evidence that the City cites to support this determination is the testimony of Ms. Dunlap. First, Ms. Dunlap is not an accountant, VRP at 371-72, and, second, she testified that she had no opinion as to the reasonableness of the City's costs. VRP at 376.

Reviewing her testimony to come up with some "method" of determining direct and indirect costs still leaves the City in the position of having indirect, overhead costs vastly exceeding the direct cost of processing building permits. *See* Ex. 18 at 6 (Dunlap's comparison of project specific costs show \$148,822 out of \$1,159,511 of total costs). Ms. Dunlap testified that she had no opinion on whether the relationship between direct and indirect costs was relevant to reasonableness. VRP at 376. Again, the trial court made no finding rejecting the undisputed evidence by Plaintiffs' forensic accountant that indirect, overhead costs should not exceed direct costs, let alone by a factor of four.

The City also tries bolstering this evidence by claiming that they admitted evidence of “accounting standards” at trial, indicating that the City’s accounting was consistent with industry standards. City Br. at 42. Plaintiffs do not allege that the City violated accounting standards, but rather RCW 82.02.020. The City then states “Appellants’ expert’s opinion was not consistent with the pertinent standards.” *Id.* In truth, Plaintiffs’ forensic accountant testified that the City’s practices were not consistent with the highly-relevant OMB A-87 standards because the City ignored market rates. VRP at 661-2. Yet, notwithstanding this competing evidence, the trial court entered no findings in this regard.

The City also criticizes Mr. Roberts’ labor analysis. First, the City states that Mr. Roberts’ calculations allowed no labor costs for any other City staff other than those in the Building Department and imply that no costs were allowed for staff time related to vacation, sick leave, and holidays. City Br. at 18. This revisionist approach to the trial is clearly misleading.

Mr. Roberts reviewed building permit staff time and found that 38.52 percent of labor hours were devoted to processing permits.⁶ VRP at 133.

⁶ To the 38.52 percent of direct labor time spent on processing permits Mr. Roberts added two thirds of 38.52 percent to reach a total of 64 percent. VRP at 133, 143, 150-51. That percentage represents direct labor hours plus a reasonable allocation for administrative time. He then applied that percentage to all of the costs in the building division, including salaries, benefits (including vacation, sick leave etc), office supplies, etc, as a reasonable cost of processing building permits. VRP at 133. It is completely false to suggest that he allocated nothing for the cost of employees to take time off; rather he recognized that it was an appropriate indirect cost of processing permits and, hence, was included in the extra 2/3 added to the direct labor percentage.

Based on his experience of cost accounting and approximately 500 reviews of direct and indirect costs, VRP at 102, he allocated a reasonable fraction of the direct labor hours of 2/3 to account for reasonable administrative support and all indirect costs, including staff benefits. Similarly, the City disparages Mr. Roberts for not including costs in for services performed by the Public Works Department and for Fire Department Review. However, these costs were excluded because they are already directly supported by other fees.⁷

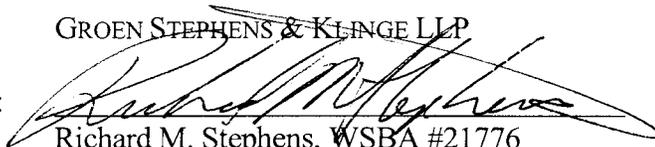
CONCLUSION

Given the improper allocation of the burden of proof, the wrong test to be applied, and the conclusion that the reasonableness of costs to shift to building permit applicants is beyond judicial review, it is no wonder that the trial court failed to issue findings on the evidence at trial. Plaintiffs request that the Court reverse the findings and judgment in this case with appropriate guidance for ultimate resolution.

RESPECTFULLY submitted this 26th day of May, 2006.

GROEN STEPHENS & KLINGE LLP

By:



Richard M. Stephens, WSBA #21776

Attorneys for Appellants

⁷ The City suggests that Plaintiffs have taken an inconsistent position by suggestion that a reasonable amount of legal fees could be spread among fee payers even though not every building permit requires consultation with the City attorney. There is a fundamental difference. Legal fees are basically overhead and Plaintiffs do not dispute that reasonable overhead charges may be spread among fee applicants. That is a far cry from having a fee for inspecting the installation of sprinklers in commercial buildings, having a separate fee for that activity, and allowing the City to impose the deficit on people who will never have a fire marshal inspection, such as those who may be building a garden shed.

DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On May 26, 2006, a true and correct copy of APPELLANTS' REPLY BRIEF was placed in an envelope, which envelope with postage thereon fully prepaid was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington, addressed to the following persons:

Dan S. Lossing
Rosemary A. Larson
Inslee, Best, Doezie & Ryder, P.S.
777 108th Ave. N.E., Suite 1900
P. O. Box C-90016
Bellevue, WA 98009-9016

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 26th day of May, 2006 at Bellevue, Washington.



Linda Hall

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APPENDIX A

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MONDAY
14 FEBRUARY 2005

(The following is opening statements during trial.)

THE COURT: All right. Mr. Stephens, does the plaintiff wish to make an opening statement?

MR. STEPHENS: Briefly.

THE COURT: All right.

MR. STEPHENS: As you know, the court recently heard arguments in summary judgment on this, and so I did not produce a trial brief considering the ideas and the concepts are fresh in the court's mind.

We have called in as a witness -- the testimony that you're going to hear, we believe, will show that the fee is unreasonable because of the magnitude of some of the costs that the city is charging, because of the extent to which the city is reaching for costs to justify the fee, and that the reasonable fees are actually much lower than what the city claims and what the city actually charges.

I will be calling briefly the plaintiff, who will testify -- going to be having the building official, who recently left the city, testify to describe how the permit system works and how the fees work, and we will also be having two experts to testify as to the

1 reasonableness of specific amounts and the overall
2 charge which the city places on building permit
3 applicants. And with that, we'll get back to the court.

4 THE COURT: Mr. Lossing, does the city wish to make
5 opening at this time or reserve?

6 MR. LOSSING: Make a brief statement to the court,
7 Your Honor. Having at least set aside for the moment
8 the issue of what it is that the plaintiffs are claiming
9 here and how we ultimately end up with a resolution of
10 that, it is clear that the challenge is to Resolution
11 99-31, which increased the building fees by 10 percent.
12 It took effect as of December 1, 2000. Effectively it
13 took effect for any permit applied for on or after
14 December 31st, '99. The effect was no one applied for a
15 permit until early 2000.

16 The plaintiffs initially allege that the resolution
17 constituted unlawful tax, because it took money from the
18 building permit applicants and gave it to the Affordable
19 Housing Fund and that claim was rejected.

20 When that claim was rejected, the argument was and
21 you will see it in the testimony of the witnesses for
22 the plaintiffs, testimony was well, you can't charge
23 anything that's not a direct cost, as a permit cost.
24 That argument didn't pass the test of the statute. RCW
25 82.02.020 says that nothing in this section prohibits

1 cities, I'm paraphrasing, from collecting reasonable
2 fees from an applicant to cover the cost to the city,
3 town, county or municipal corporation, processing
4 applications, and so on. Nothing in there says anything
5 about direct costs, and we ended up with then a third
6 iteration, if you will, of the plaintiff's claims. Now
7 we're talking about not just direct costs, but also some
8 indirect costs.

9 I think what Your Honor will hear from the
10 witnesses for the plaintiffs is that there is a
11 conceptual or philosophical inconsistency amongst their
12 arguments, having to do with the idea of a concept of
13 indirect costs, either as to the reasonableness of a
14 number that is ascribed to it by the city in its
15 accounting system, or the inclusion of a particular
16 category of costs at all, as part of the permit fee.

17 And I think that what we start with, or what we
18 start down, I should say, if the plaintiffs are allowed
19 to proceed and to make their claims as they have made
20 them, is we slip on a slippery slope of this court
21 deciding what's reasonable and what's not reasonable,
22 and I think there is a role for the court in that. We
23 have to bear in mind that there is a statutory
24 presumption. There is a case law presumption, that the
25 enactments of the city are presumed reasonable, are

1 presumed valid. And what the plaintiffs are actually
2 saying here, Your Honor, is that they're saying that the
3 action of the city is in violation of a statute, and
4 that carries with it a heavy burden. It carries with it
5 a burden that I don't believe the plaintiffs will be
6 able to carry.

7 The plaintiffs have alleged that in enacting 99-31,
8 the city imposed an unreasonable fee, one which was
9 outside the bounds of 82.02.020, and by casting the
10 argument in that way, they have essentially said that
11 the city's resolution was unlawful. And in order to
12 succeed on a claim that a statute or ordinance or
13 resolution passed by legislative body, such as the City
14 of Bainbridge Island, is unlawful, they have a
15 substantial burden to overcome.

16 We believe, Your Honor, that the plaintiffs are
17 going to be unable to establish that. Beyond that, if
18 the court finds that there is a reason for it to look at
19 the actual number that's charged by the City of
20 Bainbridge Island for a building permit, we believe the
21 testimony will clearly show that the fees charged by the
22 City of Bainbridge Island are reasonable. Put another
23 way, we believe that the plaintiffs will be unable to
24 carry their substantial burden of proving that those
25 fees are unreasonable. And I believe that is the burden

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they have to carry, and I believe that's the burden they
will not be able to carry. Thank you, Your Honor.

(Trial Testimony was taken
at this point.)

* * VERBATIM REPORT OF PROCEEDINGS CONCLUDED * *