

No. 36756-4-II

DIVISION II  
COURT OF APPEALS OF THE STATE OF WASHINGTON

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ROBERT OLSON and SANDRA OLSON, a marital community

Appellants

v.

CITY OF TACOMA, acting through its Department of Building and Land  
Use Services,

Respondents / Cross Appellants

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OPENING BRIEF OF APPELLANTS  
ROBERT OLSON and SANDRA OLSON,

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CAROLYN A. LAKE  
WSBA #13980  
GOODSTEIN LAW GROUP PLLC  
Attorney for Petitioners  
1001 Pacific Suite 400  
Tacoma, Washington 98402  
(253) 229.6727

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**I. ASIGNMENTS OF ERROR**

**A. THE TRIAL COURT ERRED IN GRANTING THE CITY'S SUMMARY JUDGMENT BASED ON LACK OF STANDING TO BRING CHAPTER 64.40 RCW CLAIM WHERE OLSONS HAD AN INTEREST IN REAL PROPERTY?**

**II. ISSUES RELATED TO ASSIGNMENT OF ERROR NO. ONE**

**A. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT WHERE MATERIAL FACTS ARE DISPUTED? YES.**

**B. DO THE OLSONS HAVE A RECOGNIZED PROPERTY INTEREST IN A LAND USE PERMIT GRANTING DEVELOPMENT RIGHTS & GRANTING RIGHT OF ACCESS TO PROPERTY? YES**

**C. DO THE OLSON'S PROPERTY INTEREST SUPPORT A VALID CLAIM UNDER CHAPTER 64.40? YES**

**D IS APPELLANT OLSONS' DRIVEWAY PERMIT AN INTEREST IN REAL PROPERTY? YES**

**E. IS RIGHT OF ACCESS AFFORDED BY PERMIT A PROPERTY INTEREST? YES**

**F. DID THE TRIAL COURT ERR BY GRANTING ORDER OF SUMMARY JUDGMENT ON "FACTS" WHICH ARE INCORRECT/DISPUTED/NOT SUPPORTED BY THE RECORD? YES**

**G. DID THE TRIAL COURT ERR AS SUMMARY JUDGMENT IS INCORRECT AS A MATTER OF LAW? YES.**

### III. INTRODUCTION

In this case, the retired owners of a single family residence, the Olsons, obtained City permits and began construction of driveway improvements legally and under the authority of a City driveway permit. While construction was on-going, a City Department different from that which issued the permit, brought a nuisance action against Olson claiming his driveway improvements were “un-permitted.” After a City Supervisor testified at Olson’s appeal hearing that Olson applied for the correct permit and abided by the permit terms, the City withdrew its action.<sup>1</sup>

Nevertheless, the City, without the benefit of any due process or permit revocation process, has again changed its mind and issued notice of its intent to unilaterally remove Olson’s driveway improvements. The Olsons sought and received a preliminary restraining Order against the City, and also sought Chapter 64.40 RCW damages to be made whole from the cost incurred expending monies in obtaining the permit, defending the permit, and constructing

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<sup>1</sup> The City now disagrees with the validity of the permit that it issued to the Olsons. However, the City failed to timely appeal the permit. It cannot now directly challenge the validity of the permit, so it seeks to impermissibly attack the permitted improvements via other means. *Asche v. Bloomquist* (2006) 133 P.3d 475 and see *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005). *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wash.2d 169, 175, 4 P.3d 123 (2000).

the improvements. The Chapter 64.40 RCW action is proper because the Olsons have a clear legal and equitable property right to the permit and the conduct approved by the permit. At all times, Olson has acted consistent with the mandate of the permit, and now the City intends to deprive Olson of his property rights without due process and without support in the law.

Prior to Trial, the Respondent City asked the Court for Summary Judgment on a variety of issues. The Court denied three of the four rationales claimed by the City. Transcript of July 27 oral ruling and written Order dated 7 September 2007 attached. However, in ruling in favor of the City on the fourth basis, the Court overlooked facts in the record, and or misapplied the law. The City and the Court granted claimed Summary Judgment on the following issue:

1. *Whether Appellants' RCW 64.60.020 claim should be dismissed on the basis of standing as Appellants do not have an interest in the real property in question.*

The Court erred, and the City misstates the statute. Chapter 64.40 RCW merely requires “ownership of a property interest;” not ownership of the property itself, as the City claims.<sup>2</sup> The Olsons’ right to construct the driveway is a ‘property right,’ one with which the City

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<sup>2</sup> See RCW 64.40.020.

improperly interfered. This Court should grant the Olsons' appeal and remand for Trial.

#### IV. FACTS.

On or about April 20, 2005, Mr. Olson applied for a permit to construct a driveway improvement on public right of way within the City of Tacoma (Special Permit No. 40000049204 "Street Improvements" (Driveway Permit). CP 313-316. As part of the process to obtain the Driveway Permit, Mr. Olson described the work he was about to undertake, and sought and received instruction and guidance from the City of Tacoma Staff about which type of permit to obtain. CP 317-325. Transcript of Hearing Examiner Hearing at pages 27-33. Mr. Olson also sought and received instruction and guidance from the City of Tacoma Staff about what information he needed to submit as a pre-requisite for obtaining the Driveway Permit. *Id.* Mr. Olson applied for precisely the type of permit which City Staff advised was needed, and Mr. Olson submitted all information necessary for such a Driveway Permit, as described by City Staff. *Id.*

On or about April 20, 2005, Mr. Olson received his approved Driveway Permit from the City of Tacoma. CP 313-316. Mr. Olson thereafter began to construct his driveway in the right of way, in accordance with his Driveway Permit. *Id.* After construction began, Olson

received a Notice of Alleged Nuisance Violation from a different department within the City of Tacoma, purportedly based on TMC Chapter 8.30 Nuisances, TMC 8.30.070. *Id.* and CP 326-328. The Notice dated May 20, 2005, provided no information on what allegedly constituted the alleged “nuisance. *Id.*” The Notice included an “Inspection Report”, however, that did not describe with any degree of specificity exactly what was the complained of “nuisance.” Because descriptive information was lacking from the City’s Notice, the Notice was difficult to respond or defend against.<sup>3</sup> CP 326-328.

Mr. Olson timely responded to the City Notice pursuant to the City adopted and applicable reconsideration and appeal process.<sup>4</sup> CP 399-400.

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<sup>3</sup> Included with the Notice and Inspection Report, was a checklist containing text which parallels the language of the City code. There was also a column for the inspector to provide “Comments.” The comments added by the inspector were also fairly generic, making it difficult to respond to. The Notice referred in many places to “un-permitted” activity, or activity associated with “un-permitted activity.” To the extent that Mr. Olson could decipher the activity that was complained of, it appeared to relate to activity undertaken pursuant to Mr. Olson’s lawfully obtained Driveway Permit. CP 326-328.

The City’s Violation notice claimed the following allegations in support of its issuance/penalty: Accumulation of construction materials and un-secure structures inappropriately placed in the right of way, Erection and Maintenance of unsecured structures in the right of way; Un-permitted development intruding upon the ability of neighbors to use or enjoy their property; Loud, unnecessary, untimely, and discordant noises related to un-permitted development; Erection and maintenance of unfinished structures constructed through inappropriate means and methods. CP 326-328.

<sup>4</sup> Initially the City’s Building Official notified Mr. Olson that his request was not timely. Mr. Olson requested reconsideration of that decision, which was ultimately granted. TMC 8.30.080 provides that a person shall have ten calendar days to request administrative review of a Notice of violation. In this case, the Notice of Violation was dated May 20, 2005. The tenth calendar under rules for computation time was May 31<sup>st</sup>. By letter received June 3, the

Mr. Olson noted in his appeal that because the on-going driveway construction was performed pursuant to Mr. Olson's lawfully issued City of Tacoma Driveway Permit, all the allegations contained in the Notice were factually incorrect, and legally without basis.<sup>5</sup> CP 400.

Mr. Olson appealed a total of three Manager Decisions to the City's Land Use Hearing Examiner.<sup>6</sup> The Hearing before the Land Use Examiner on Appellant Olsons' appeal was held 30 January 2006.<sup>7</sup> CP 401.

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Building Official notified Mr. Olson that the appeal was untimely. The applicable state law provides: The time within which an act is to be done, as herein provided, shall be computed by excluding the first day, and including the last, unless the last day is a holiday, Saturday, or Sunday, and then it is also excluded."RCW 1.12.040, "Computation of time". In this case, the first day of the ten day appeal period (May 20, 2004) was to be excluded. The tenth calendar day thus falls on May 31<sup>st</sup>, the date the appeal was filed. Accordingly, the appeal was timely filed. CP 400 at fnt 2.

<sup>5</sup> Thereafter, by letter dated June 3, 2005, the City imposed a \$125 penalty upon Mr. Olson. Mr. Olson timely requested review of the penalty, and asked the Manager of the Building and Land Use Services to consolidate the two requests for review. Thereafter, by letter dated June 22, 2005, the City imposed a \$250 penalty upon Mr. Olson. Mr. Olson timely requested review of the penalty by letter dated June 27, 2005. Subsequently, the Manager of Building and Land Use Services denied Mr. Olson's request, and upheld the Inspector's Notice of Violation and Penalty. By letter dated June 29 and received July 1, 2005, the Manager also denied Mr. Olson's request for review of the Second Penalty.

<sup>6</sup> While the appeal to the Examiner was pending, Olson received a third notice of Penalty for an alleged Nuisance Violation dated July 1, 2005, imposing a penalty of \$1,000.00. All City violation/penalty notices were appealed to the Examiner and were eventually consolidated.

At a September 21, 2005 pre-hearing conference, the City Attorney's office agreed to revise the number of charges which the City believes defined the "nuisance" allegedly present on the Olson's property, and to "stay" issuance of any additional penalties while the appeal was pursued.

<sup>7</sup> At the hearing, the City presented testimony from two Staff members from a city department that does not oversee the City's driveway / access permits. Those City Staff persons testified that Mr. Olson did not obtain the correct type of permit for the work

Mr. Olson presented testimony that he acted in good faith when he relied on City Staff advice about what permit to obtain, what information was needed to support his application permit, and that he abided by his permit conditions. CP 317-325, pages 27-33 from Transcript of Hearing Examiner Hearing and CP 401.

Under subpoena, Kris McColeman, City Supervisor in the City's Public Works Department testified in **support** of Appellant Olsons. Mr. McColeman testified that he supervises the City Department which actually oversees and issues the type of permit that was issued to Mr. Olson, that he had worked for the City for over twenty years, that Mr. Olson had applied for the correct permit, that the City routinely issues hundreds of these types of permits a year, that he had personally inspected Mr. Olson's site while the driveway was under construction, and that he had found the work to be in complete compliance with the permit issued to Mr. Olson.<sup>8</sup> CP 336-341, **Transcript of Olson Examiner Proceeding** at Page 57-60, and CP 401.

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undertaken, that Mr. Olson did not submit the correct plans for such a permit and that his construction of the driveway improvement was a "nuisance", not with standing Mr. Olson's Driveway Permit.

<sup>8</sup> CP 336-341; **Transcript of Olson Examiner Proceeding** at Page 57-60,:

- 4 Q. First of all, what's your duty with the city?  
5 A. I currently hold the position of construction  
6 inspector supervisor for the public works construction  
7 division.  
8 Q. As part of your duties, do you do things like  
9 inspect driveway permits and follow-up on them?

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10 A. I do become involved in the inspection of those,  
11 but my general duties are to supervise the 15 inspectors  
12 that hold that day-to-day duty.  
13 Q. How long have you had that position?  
14 A. I've been employed within the public works  
15 department in the construction division for a little over 20  
16 years and have been the supervisor for more than 9.

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17 Q. And I understand this may be a little bit of an  
18 awkward position for you. Did you have a conversation with  
19 Mr. Olson regarding the improvements on his property?  
20 A. Yes, I did. It was actually on two occasions.  
21 Q. In your opinion, did you find that what he was  
22 constructing there was consistent with permits that he was  
23 issued?  
24 A. I actually instructed Mr. Olson that that was the  
25 permit that he needed to take out to accomplish the work

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1 that had been proposed.  
2 Q. And when you saw it in the field, did you find it  
3 in compliance with the permit?  
4 A. That's correct. I guess in compliance with what  
5 Mr. Olson had described what he was going to construct  
6 there, it was in compliance with that.  
7 Q. And the enhancements that had been described  
8 Mr. Olson described as guardrails, do you agree that you use  
9 those as landscape enhancements or cosmetic features?  
10 A. That's correct. They are unusual, but that's  
11 correct; that's how I viewed them, as a rockery or a  
12 landscape improvement.  
13 Q. Is it your experience that other types of rockery  
14 has been built in association with the type of permit that  
15 Mr. Olson was issued?  
16 A. Actually, that worked the landscaping and  
17 rockeries and keystone walls are a non regulated item that  
18 the city does not issue a permit for.

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24 Q. About how many permits similar to those obtained  
25 by Mr. Olson are issued by the city per year?

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1 A. I don't have that knowledge right now, but the one  
2 you spoke of, the 300 or so that didn't sound out of  
3 character.  
4 Q. In your opinion, was the guardrails, were they  
5 unsecured structures?  
6 A. I guess I'm not familiar with the unsecured  
7 structure. I had looked at them as I would a keystone wall  
8 or a rockery wall or something of that nature.

The City's Hearing Examiner also independently questioned City Supervisor McColeman and verified that Mr. Olson applied for the correct permit and abided by the permit terms. CP 337-341, pages 65-69 from Transcript of Hearing Examiner Hearing<sup>9</sup> and CP 402-403. Testimony was

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9 Q. Did they look solid and secure to you?  
10 A. Yeah, as constructed they were a rock or a brick  
11 mortared together with some grout inside of them.  
12 Q. So they weren't falling down?  
13 A. No.

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1 Q. In your two visits, was Mr. Olson being orderly in  
2 his construction activities?  
3 A. I guess I don't understand as far as orderly.  
4 Q. Was there an unusual accumulation of construction  
5 debris or materials around the site?  
6 A. Not that I recall.

<sup>9</sup> See **Transcript of Olson Examiner Proceeding** at Page 66-67, attached to Declaration of Carolyn Lake as **Exhibit E**:

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2 **THE COURT:** So you met with Mr. Olson the first  
3 time out on the site?  
4 **THE WITNESS:** On site.  
5 **THE COURT:** And Mr. Olson described to you what  
6 his plans were for his temporary access driveway from 17th  
7 Street?  
8 **WITNESS:** That is correct.  
9 **THE COURT:** And that discussion included the  
10 construction of the rock walls at the culvert site on both  
11 sides of the roadway and the use of pavers in that  
12 particular area.  
13 **WITNESS:** That is correct.  
14 **THE COURT:** And you told him as a result of that  
15 conversation what he needed was a temporary driveway  
16 permit.  
17 **WITNESS:** That is correct.  
18 **THE COURT:** And Mr. Olson then obtained a  
19 temporary driveway permit.  
20 **WITNESS:** Yes, he did.  
21 **THE COURT:** And that it was your understanding at  
22 the time of issuance of that driveway permit exactly what  
23 he was constructing.  
24 **WITNESS:** That is correct.  
25 **THE COURT:** And what he partially constructed out

also presented that the complaints which triggered the City's Nuisance Violation Notices and Penalties were raised by one or two adjacent property owners, one of whose son worked in the City Department that issued the Notice of Violation (Building and Land Use Services). CP 542, and CP 404.

At conclusion of the hearing, the Examiner stayed any ruling for thirty days in order that the parties could pursue possible settlement. CP 542. On or about February 24, 2006, and during that thirty day time period following the hearing, the City wrote to the Examiner notifying him that the City would be withdrawing its violations based on a review of the testimony presented at the hearing. CP 342.

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1                   there is consistent with your understanding of what he told  
2                   you.  
3 WITNESS:    Yes, it is.  
4 THE COURT:  And so subsequent to obtaining the  
5                   driveway permit, you went out and inspected the  
6                   construction.  
7 WITNESS:    Yes, I did.  
8THE COURT:  Have you seen in any of the  
9                   photographs that have been admitted into evidence which  
10                  shows that construction in its current state?  
11WITNESS:    Not recently.  
12 THE COURT:  But you have been out there and asked  
13                   him to stop when the construction -- when the project was  
14                   partially constructed?  
15 WITNESS:    That is correct.  
16THE COURT:  And it still remained consistent even  
17                   at that point with what your understanding of the  
18                   construction was to be in terms of the temporary driveway.  
19 WITNESS:    Yes, it was.

On March 7, 2006, The Examiner issued an Order of Dismissal of the Violations against Appellant based on the City's withdrawal. CP 343. However, on 9 March 2006, the City renewed its demand to Mr. Olson to apply for a different type of permit, evidencing the City's continued failure to recognize Mr. Olson's Driveway Permit, notwithstanding the outcome of the Hearing Examiner Appeal. CP 345.

On April 5, 2006, Olson filed a complaint for damages based on Chapter 64.40 RCW, seeking damages to be made whole from the cost incurred expending monies in obtaining the permit, defending the permit, and constructing the improvements. CP 1-29. Nevertheless, the City, without the benefit of any due process or permit revocation process, has again changed its mind and issued notice of its intent to unilaterally remove Olson's driveway improvements. Thereafter, on August 4, 2006, the City filed a public notice of their unilateral intent to dismantle Olson's driveway improvements. CP 346-54. The Olsons sought and received a Preliminary Injunction against the City pending trial. CP \_\_.<sup>10</sup>

### **COURT'S SUMMARY JUDGEMENT RULINGS**

Prior to Trial, the Respondent City asked the Court for Summary Judgment on a variety of issues. The Court ruled in favor of the Olsons as to three of the four rationales cited by the City as a basis for Summary

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<sup>10</sup> CP\_\_, to be assigned pursuant to Appellants' Supplemental Designation of Clerk's Papers filed simultaneous hereto.

Judgment CP 644-653, but granted Summary Judgment to the City in the following issue:

1. *Whether Appellants' RCW 64.60.020 claim should be dismissed on the basis of standing as Appellants do not have an interest in the real property in question.*

The Court erred, and the City misstates the statute. Chapter 64.40 RCW merely requires "ownership of a property interest;" not ownership of the property itself, as the City claims.<sup>11</sup> The Olsons' right to construct the driveway is a 'property right,' one with which the City improperly interfered. This Court should grant the Olsons' appeal and remand for Trial.

The Olsons Moved for Reconsideration, which the Court denied on October 8, 2007. CP 684—685. The Olsons timely appealed that Order as well. The Trial Court stayed all further action below pending this appeal. CP \_\_\_\_.<sup>12</sup>

## V. ANALYSIS

### A. TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE MATERIAL FACTS ARE DISPUTED.

In General Summary judgment is appropriate only where there is no genuine issue of material fact and the movant is entitled to a

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<sup>11</sup> See RCW 64.40.020.

<sup>12</sup> CP \_\_\_, to be assigned pursuant to Appellants' Supplemental Designation of Clerk's Papers filed simultaneous hereto.

judgment as a matter of law. *Chauvlier v. Booth Creek Ski Holdings, Inc.* (2001) 109 Wash.App. 334, 35 P.3d 383.

In ruling on a motion for summary judgment, the facts and reasonable inferences therefrom are construed most favorably to the nonmoving party. *Korslund v. Dyncorp Tri-Cities Services, Inc.* (2005) 156 Wash.2d 168, 125 P.3d 119. *Osborn v. Mason County* (2004) 122 Wash.App. 823, 95 P.3d 1257, *reconsideration denied, review granted* 154 Wash.2d 1002, 113 P.3d 481, *reversed* 157 Wash.2d 18, 134 P.3d 197.

If defendants move for summary judgment, the burden is on the Appellant to establish specific and material facts that would support a prima facie case on each element of the claim. *Estate of Jones v. State* (2000) 107 Wash.App. 510, 15 P.3d 180, *reconsideration denied, review denied* 145 Wash.2d 1025, 41 P.3d 484.

At the very least, the Olsons demonstrated in the record that the City is **not** entitled to Summary Judgment either because the pleadings, affidavits, and depositions present genuine issues of material fact. *First Class Cartage, Ltd. v. Fife Service and Towing, Inc.* (2004) 121 Wash.App. 257, 89 P.3d 226.

## **2. Standard of Review.**

The Court of Appeals reviews summary judgment orders de novo, and views all evidence in the light most favorable to the nonmoving party. *Port of Seattle v. Lexington Ins. Co.* (2002) 111 Wash.App. 901, 48 P.3d 334.

The appellate court reviews the superior court's grant of summary judgment de novo to determine whether the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Malang v. Department of Labor and Industries* (2007) 139 Wash.App. 677, 162 P.3d 450.

The party moving for summary judgment bears the initial burden to show the absence of any issue of material fact. *Parrott Mechanical, Inc. v. Rude* (2003) 118 Wash.App. 859, 78 P.3d 1026, corrected.

In an appeal arising from a trial court order granting summary judgment, the appellate court reviews the order of summary judgment de novo, engaging in the same inquiry as the trial court, which is to consider all facts submitted in the record and reasonable inferences in a light most favorable to the nonmoving party. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles* (2002) 148 Wash.2d 224, 59 P.3d 655, *certiorari denied* 123

S.Ct. 2221, 538 U.S. 1057, 155 L.Ed.2d 1107. *D.L.S. v. Maybin* (2005)  
130 Wash.App. 94, 121 P.3d 1210.

## **B. OLSONS HAVE A RECOGNIZED PROPERTY INTEREST**

### **1. Court Erred In Accepting City's Anemic Definition of "Property Interest"**

The City's request Summary Judgment rests primarily on the City's incorrectly framed issue that because the Olsons don't own the Chrystal Springs right of way, no "property interest" is at risk. The City's anemic characterization of the "property interest" as that term is used in Chapter 64.40 RCW is blatantly misleading and completely unsubstantiated in established Washington Law. Once "property interest" is correctly defined as the Olson's right of access and the development right in their approved permit, the City's entire argument collapses like a house of cards. The City offers no viable law in support of its narrow reading. The Court erred in granting the City's Motion.

### **2. Property Interest Properly Defined.**

Respondent City erroneously claims that because the Olsons do not own the Crystal Springs right of way, therefore the Olsons do not have viable claims under Chapter 64.40 RCW or under the Washington Constitution article I, section 3.

**The City misconstrues the law.** Chapter 64.40 RCW merely requires “ownership of a property interest;” not ownership of the property itself.<sup>13</sup> Here, the Olson’s property interest exists in their right to construct the driveway because it was “a reasonable expectation of entitlement deriving from” the Tacoma Municipal Code.<sup>14</sup> Moreover, Olson’s right to access the public right of way is undeniably a property right.<sup>15</sup>, one with which the City improperly interfered.

**C. THE OLSON’S PROPERTY INTEREST SUPPORTS A VALID CLAIM UNDER CHAPTER 64.40 RCW.**

RCW 64.40.020 creates a cause of action for “**owners of a property interest**” to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority<sup>16</sup>:

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

RCW 64.40.020. The statute defines a property interest as “**any interest or right in real property in the state.**” See RCW 64.40.010(3)(emphasis added). Contrary to Respondents’ claims, the statute does not limit its

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<sup>13</sup> See RCW 64.40.020.

<sup>14</sup> See *Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (2006).

<sup>15</sup> See *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977).

<sup>16</sup> Note: RCW 64.40 applies to cities. See RCW 64.40.010(1).

scope to property owners, but instead to any person or entity with “any interest or right in real property.”

Statutory interpretation is a question of law. *See Callfas v. Department of Const. and Land Use*, 129 Wn.App. 579, 120 P.3d 110 (2005)(citations omitted). Courts interpret statutes so that all the language is given effect. *Id.* (citations omitted). The Courts will not construe a statute that is unambiguous. *Id.* at 590 (citations omitted). However, if the statute is ambiguous, “the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences.” *Id.* (citations omitted).

The City asks the Court to interpret Chapter 64.40 RCW to exclude all parties who do not actually own the property which is subject to the permit. However, such an interpretation is in direct contradiction with the language of the statute which expressly applies to “owners of a property interest,” i.e. one who owns “**any interest or right in real property in the state.**” The purpose of the statute was to provide “some measure of relief for applicants who are mistreated” by arbitrary and capricious government action. *See Smoke v. City of Seattle*, 79 Wn.App. 412, 902 P.2d 678 (1995)(citing Senate Journal, 47th Legislature (1982), at 1449).

## **D. THE OLSONS' DRIVEWAY PERMIT IS AN INTEREST IN REAL PROPERTY.**

### **1. Supreme Court's *Mission Springs* Applies.**

The Olsons have a constitutionally cognizable property right in the Driveway Permit they obtained. *See Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, P.2d 250 (1998). In *Mission Springs*, the Washington State Supreme Court held that a developer had a constitutional property right in the grading permit it sought:

Mission Springs had a constitutionally cognizable property right in the grading permit it sought. **The right to use and enjoy land is a property right.** *State ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654 (1928); \*963 *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *West Main Assocs. v. City of Bellevue*, 106 Wash.2d 47, 50, 720 P.2d 782 (1986) (“ ‘**Although less than a fee interest, development rights are beyond question a valuable right in property.**’ ”) (quoting *Louthan v. King County*, 94 Wash.2d 422, 428, 617 P.2d 977 (1980)); *Ackerman v. Port of Seattle*, 55 Wash.2d 400, 409, 348 P.2d 664, 77 A.L.R.2d 1344 (1960) (“**Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal.**” (Citations omitted.)) (quoting *Spann v. City of Dallas*, 111 Tex. 350, 355, 235 S.W.513, 19 A.L.R. 1387 (1921)).

*Id.* at 962-963 (emphasis added). Moreover, in *Mission Springs*, the Supreme Court held that the developer had constitutional rights respecting the issuance of the permit. *Id.* at 963.

In *Mission Springs*, the Spokane City Council voted to withhold a grading permit from Mission Springs even though the company had met

all the city's requirements. *Id.* at 956-57. The Supreme Court held that the city council did not have a right to withhold a grading permit in order to allow the city time to undertake further studies regarding the project. *Id.* at 961. In making its ruling the Supreme Court recognized that the developer had asserted a cognizable cause of action for wrongful interference in its property rights, and that the members of the city council individually were not immune from liability. *Id.* at 972. The Court reasoned that “(a) building or use permit must issue as a matter of right upon compliance with the ordinance.” *Id.* at 960-961 (citations omitted). In addition, in analyzing the due process claims brought by the developer **the Supreme Court affirmed that the developer had property rights in the permit sought to be obtained, and the process relating to obtaining said permit.** *Id.* At 962-963.

Likewise, in the present case Olson obtained a valid permit from the City of Tacoma to construct a driveway improvement on the public right of way (Crystal Springs Rd.) adjacent to his house. CP 313-316. Thus, the Olsons has a constitutionally recognizable property right in the permit they obtained and the process they engaged in to obtain said permit.

Furthermore, the records substantiates that Olson acted in good faith when they relied on City Staff advice about what permit to obtain,

what information was needed to support his application permit, and that he abided by his permit conditions. In fact, the City's Public Work's supervisor confirmed the legitimacy of the permit sought and that Olson constructed the improvements in compliance with the permit:

Lake: In your opinion, did you find that what he was constructing there was consistent with permits that he was issued?

McColeman: **I actually instructed Mr. Olson that that was the permit that he needed to take out to accomplish the work that had been proposed.**

Lake: **And when you saw it in the field, did you find it in compliance with the permit?**

McColeman: **That's correct.** I guess in compliance with what Mr. Olson had described what he was going to construct there, it was in compliance with that.

CP 331, and pages 57:21-58:6 of the Transcript Of Hearing Examiner Hearing.

To date, the City has not revoked the Olson's permit.<sup>17</sup> A permit is granted "pursuant to a previously existing zoning ordinance, subject to certain guides and standards laid down therein." *Durocher v. King*

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<sup>17</sup> 2 A. Okay. I also understand from our office that  
3 Victor Workman put a verbal stop work order on it.

4 Q. Have you seen --

5 A. I talked to Victor.

6 Q. **So there's no record of a stop work order?**

7 A. **No. This again, too, is after my inspection and**  
8 **my report, the date on it.**

CP 364, Transcript of Hearing Examiner Proceedings at p. 111.

*County*, 80 Wn.2d 139, 492 P.2d 547 (1972). Only if the **use exceeds that envisioned in the permit** will it be subject to enforcement or modification.

The City's intent to ignore the permit ignores this legal truism. Olson was issued a "Temporary Driveway Approach Permit" pursuant to TMC 10.14. Olson applied for the correct permit and has acted in accordance with said permit. Pursuant to code, the driveway remains permanent unless and until "such time as standard curbs and gutters or sidewalks are constructed." *See* TMC at TMC 10.14.050 (C)(2). Thus, Olson's driveway permit and improvements are valid as a matter of law. Although Title 10 of the TMC does not provide a specific process for revocation of said permit, there is no question that Olson is entitled to due process for any said revocation. *See Mission Springs*, at 963. Nevertheless, no revocation has occurred. In sum, the Olsons have a clear legal and equitable right property right in the permit they obtained for the driveway improvements constructed.

The City cites *Mission Springs* for the proposition that Chapter 64.40 RCW only applies to property owners. However, in *Mission Springs*, the Washington State Supreme Court made **no** distinction between permit applicants who are land owners and permit applicants who are not land owners. Rather, the Court simply held that a developer had a

constitutional property right in the grading permit it sought because “development rights are beyond question a valuable right in property.” *Id.* (citations omitted). Thus, RCW 64.40 does not distinguish between a property owner who seeks a permit versus a non-property owner who has a permit, so long as that party can establish that he or she has “any property interest.”

## **2. The Division III Westway Case is Not Controlling**

The City pressed the Court heavily to rely on *Westway Const., Inc. v. Benton County*, 136 Wash.App. 859, 151 P.3d 1005, (Wash.App. Div. 3,2006) to support a finding that the Olson lacked standing. The Court agreed. This is error. In *Westway*, the Division III Court of Appeals found an aggrieved construction company (Westway) and property owner (Phelps) who applied for a special use permit to mine and crush rock lacked standing to bring action against county under Chapter 64.40 RCW. In that case, the construction company and property owner appealed after the county imposed a date restriction on the special use permit. After the appealing parties prevailed, they then filed an amended complaint for damages, alleging the County violated chapter 64.40 RCW because its actions in issuing the permit were arbitrary and capricious. They also sued under various tort theories.

At the Trial Court level, Benton County filed a motion for summary judgment. Rather than responding to this motion, Westway and Mr. Phelps filed an objection to the motion, claiming it was premature. The motion for summary judgment was granted. Westway and Mr. Phelps filed a motion for reconsideration that included new evidence. The court denied the motion on both substantive and procedural grounds. On appeal in a scant *three page* decision, Division III found the property owner had no standing because he did not file the application for the permit, and construction company that filed the application had no standing because it had no property interest. The *Westway* case is distinguished and does not control for at least the following reasons.

Read fairly, the three page Division III Appeals Court *Westway* decision primarily is based on the Appellants' failure to respond in any way to the County's Summary Judgment, and or on Appellants' untimely submittal of new facts as part of their Reconsideration Motion.

Further, the sparse opinion contains no compelling analysis of the critical issue of what constitutes a "property interest". In fact, in its opening summary paragraphs, the Division III Court characterized the Chapter 64.40 RCW statute as applying to "**property owners** aggrieved by a decision on a permit application". The sum total of the Westway Court's property interest analysis is:

Mr. Phelps had a property interest, but did not apply for the permit. Westway applied for the permit. But as the contractor, it had no property interest. Thus, neither party had standing to bring a claim under RCW 64.40.020.

*Westway Const., Inc. v. Benton County*, 136 Wash.App. 859, 151 P.3d 1005, (Wash.App. Div. 3,2006) at 866. The passing attention paid to the definition of “property interest” by the Division III Court of Appeals simply cannot trump the reasoned analysis of the Washington Supreme Court in *Mission Springs*, which found: “ ‘**Although less than a fee interest, development rights are beyond question a valuable right in property.**’ ” (quoting *Louthan v. King County*, 94 Wash.2d 422, 428, 617 P.2d 977 (1980)); *Ackerman v. Port of Seattle*, 55 Wash.2d 400, 409, 348 P.2d 664, 77 A.L.R.2d 1344 (1960)

In analyzing the due process claims brought by the developer **the Supreme Court in Mission Springs affirmed that the developer had property rights in the permit sought to be obtained, and the process relating to obtaining said permit.** *Id.* at 962-963.

Next, the *Westway* case is factually distinguished. In *Westway*, the Division III Court apparently found it significant that the permit applicant was not the property owner. Here, the Olsons are **both** the holders of the approved permit, **AND** are also the owners of the property benefitted by the driveway access permit.

Finally, the *Westway* case is legally distinguished. Westway and the property owner sought damages based on the County's offending action to limit Westway's permit as part of the County's application processing (by attaching limiting conditions to the permit). In *Brower v. Pierce County*, 96 Wash. App. 559, 984 P.2d 1036, Wash. App. Div. 1, 1999, the *Brower* court recognized the distinction between an *expectation in a property right* (as a land use applicant), and an assault on an *already perfected vested right*. The latter supports damages pursuant to Chapter 64.40 RCW. "... *Mission Springs*, unlike the *Browers*, *had vested rights* in the permits that the Council refused to issue." *Id.* Similarly, here, Olsons did **not** merely have an expectation in the driveway permit, the permit had already issued, transforming the expectation to a perfected, vested right, which the City then attempted eviscerate.

"Delaying or refusing to issue a permit **to which a person is lawfully entitled** violates the applicants statutory and constitutional rights if he **either has a vested right to the permit or has satisfied all relevant statutory and ordinance criteria and is thus entitled to it.** *Mission Springs* at 959-60, 954 P.2d 250." *Callfas v. Department of Const. and Land Use*, 129 Wash. App. 579, 120 P.3d 110 (Wash. App. Div. 1 Sep 16, 2005) (NO. 53890-0-I), as amended on reconsideration (Nov 22, 2005), as amended on reconsideration (Jan 19, 2006), reconsideration

denied (May 31, 2006), citing to *Mission Springs*, 134 Wash.2d at 954-57, 954 P.2d 250. *In accord: Moore v. City of North Bend* 99 Wash. App. 1018, Not Reported in P.3d, 2000 WL 122695, Wash. App. Div. 1, 2000. citing to *Mission Springs* at 134 Wn2d at 962, (“In contrast to the Millers, the permit applicant in Mission Springs had a 'constitutionally cognizable property right in the grading permit it sought.' We decline to extend the Mission Springs definition of a property right to include the *processing of a permit* to which the applicant has **no claim of entitlement.**”)

Critical to the holding in *Brower* is the Court’s finding that Brower sought relief prematurely for acts of the County *prior to* Brower actually having in hand a valid permit. “Here, the Browers were merely *in the application process* and had no vested land use rights”. *Brower* at 562. The same rationale also distinguishes the *Westway* case from the present matter.

The situation is different here, where the Olsons had in-hand the lawfully issued driveway permit. The Respondent City’s misplaced nuisance action attempted to eviscerate that vested property right. Here, the Olsons stand in the same position as the plaintiffs in *Mission Springs*, where damages were awarded under RCW 64.40, based on government attempts to erode a 'constitutionally cognizable property right in the ...permit”. *Id.*

### **3. Tacoma Code Does Not Diminish the Property Interest Embodied in Permit**

In the present case, the Olsons do have a property interest in the permitted activity. The Olsons were issued a “Driveway Approach Permit” pursuant to TMC 10.14. The Olsons applied for the correct permit and has acted in accordance with said permit.

Pursuant to Tacoma code, **the driveway remains permanent** unless and until “such time as standard curbs and gutters or sidewalks are constructed.” *See* TMC at 10.14.050 (C)(2). Although Olson does not own the City’s right of way, it is undisputed that he was entitled to the right to construct a “Temporary Driveway,” which provides access via the Chrystal Springs Right of way, and which is to remain in effect until curbs and gutters or sidewalks are constructed.

In *Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (2006), Division Two for the Washington State Court of Appeals held that a family had a “property right” in preventing their neighbor from building a structure over 28 feet high. *Id.* at 797. The court reasoned that the “property right” was derived from a local ordinance which merely provided that buildings “may be built up to 28 feet.” Thus, the Court ruled that a constitutional property right could be derived from local ordinance: “A property right is protected by the United States Constitution when an

individual has a reasonable expectation of entitlement deriving from existing rules that stem from an independent source such as state law.” *Id.* at 797.

Likewise, in this case, local ordinance established that the Olsons were entitled to construct the driveway with the permit. (“No person...shall grade, pave, level, alter, construct, repair, remove or excavate any...driveway...without first obtaining a permit in writing from the Director of Public Works so to do.” See TMC 10.22.020.). Moreover, local ordinance allows the driveway to remain in place until “at such time as standard curbs and gutters or sidewalks are constructed.” See TMC 10.14.050(C)(2). Based on the local ordinance and the permit issued, there is no question that the Olsons had a “vested right ” to construct the driveway derived from the Tacoma Municipal Code, and thus a ‘property right,’ in the same.

**E. RIGHT OF ACCESS AFFORDED BY PERMIT IS A PROPERTY INTEREST.**

Moreover, the permit affords the Olsons access to their property which they own in fee. The permit thus is akin to an easement providing access. A right of access is unquestionably a “property interest” in need of protection. *See Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977). **Washington law recognizes that a property owner has a**

**property right in the right of access to a public right of way abutting  
his or her property:**

The right of access of an abutting property owner to a public right-of-way is a property right which if taken or damaged for a public use requires compensation under article 1, section 16 of the Washington State Constitution. *State v. Calkins*, 50 Wash.2d 716, 314 P.2d 449 (1957); *Walker v. State*, 48 Wash.2d 587, 295 P.2d 328 (1956). *See* Power to Restrict or Interfere with Access of Abutter by Traffic Regulations, Annot., 73 A.L.R.2d 689 (1960). The origin of our doctrine is found in *Brown v. Seattle*, 5 Wash. 35, 31 P. 313 (1892), where we held that the right of ingress and egress which the property owner abutting on a street has is property and that interference with such right was a damage within the meaning of the constitutional provision. *Lund v. Idaho & Wash. N. R. R.*, 50 Wash. 574, 576, 97 P. 665 (1908).

*See Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977).

In *Keiffer*, the Plaintiffs sought damages from King County on the basis that King County's "installation of curbing along the adjacent road right-of-way" impaired the Keiffer's access to their property such that an unconstitutional taking occurred. *Id.* at 370. In upholding the trial court's decision that a 'taking' had occurred, the Supreme Court unequivocally declared that a property owner has a property right in the access to a the public right-of-way adjacent to his/her property. *Id.*<sup>18</sup>

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<sup>18</sup> The Supreme Court's ruling was unaffected by the fact that after King County constructed the improvements to the right of way, Keiffer still maintained some access points: "Before the improvements, respondents had access to their property at all points along their frontage and parking for approximately 18 cars was available on respondents' property in front of their buildings. Subsequent to the improvements, respondents' access was limited to two curb cuts approximately 32 feet long located near each end of the frontage. *Id.* at 370-371.

Likewise, the Olsons have a property right in the right of access to the Crystal Springs Right of Way, which was established by the permit. The Crystal Springs Right of Way on which the driveway is located provides the Olsons access in two ways: (1) it connects South 16<sup>th</sup> with the Olson's property, and (2) it connects South 17<sup>th</sup> with the Olson's property. It meets the Tacoma Code statutory definition of a 'driveway,' because it is "an area...between the roadway of a street and private property to **provide access** for vehicles from the roadway of a street to private property." TMC 10.14.020F. This interpretation is also consistent with the understanding of the Tacoma Public Works Supervisor who issued Olson the permit:

McColeman: I've been employed with the public works department in the construction division for a little over 20 years and have been the supervisor for more than 9

The Court: So you met with Mr. Olson the first time out on the site?

McColeman: On Site

The Court: And Mr. Olson described to you what the plans were for his temporary access driveway from 17<sup>th</sup> Street?

McColeman: That is correct.

The Court: And that discussion included the construction of the rock walls at the culvert site on both sides of the roadway and the use of pavers in that particular area.

McColeman: That is correct.

The Court: And you told him as a result of that conversation what he needed was a temporary driveway permit.

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McColeman: That is correct

CP 331, & CP 338, pages 57:14-57:16; 66:2-66:16 of Transcript of Examiner's Hearing.

**The Olson's property right of access became vested and is perfected because there was no mistake of fact or violation of the law when the permit was issued to the Olsons. See *Industrial Hydraulics v. City of Aberdeen*, 27 Wn.App. 123, 619 P.2d 980 (1980).**

The City's refusal to recognize the permit as proper (CP345-Exhibit H) and the City's publicly announced proposed action to demolish Olson's driveway improvements and convert access from vehicle to pedestrian is on-going City interference with Olsons' right of access.

In addition to establishing that the Olsons have a "property interest," in the driveway permit and the access rights to the right of way, the Olsons can satisfy the remainder of the elements under Chapter 64.40 RCW because (1) the Olsons filed for a permit application, (2) the Respondent City acted arbitrarily and capriciously in first issuing a valid permit for the driveway improvements and then later ordering the Olsons to cease construction, followed by its proposal to demolish said improvements, and (3) the Respondent City knew or it should have been reasonably known to the Respondent City that issuing nuisance violations

and acting to demolish permitted activity was in excess of lawful authority.<sup>19</sup>

**F. THE COURT ERRED BY GRANTING ORDER OF SUMMARY JUDGMENT ON “FACTS” WHICH ARE INCORRECT/DISPUTED/NOT SUPPORTED BY THE RECORD.**

In its verbal ruling, the Court cited to and relied the following “facts”, critical to this appeal, the last two of which are incorrect/disputed and or not supported by the record:

1. The Olsons filed an application for the permit. Transcript 4:23-24.
2. The Olsons’ work in the right of way led to the adverse action by the City. Transcript 4:18-20.
3. The claim for arbitrary and capricious action included nuisance claims predicated in un-permitted work or alleged un-permitted work in the right of way. Transcript 4:5-8.
4. The alleged un-permitted work in the right of way consisted of building stone walls on both sides of the right of way. Transcript 4:8-10.

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<sup>19</sup> The City’s attempt to re-wind its permit approval via the Declaration of Becky Heath and the issue of contractor license is an obvious red herring. No contractor license is required where the permittee owner performs the work themselves. See RCW 18.27.010(4).

5. There was no showing that the property interest created by the permit involved the entire Crystal Springs right of way adjacent to the Olson homestead. Transcript 5:4-7.

The Court's "facts", cited in its verbal ruling at Transcript 4:8-10 and Transcript 5:4-7 are error, and when corrected, support granting this appeal and remanding for trial.

**1. Transcript 5:4-7 INCORRECT- The Record Does Show That The Property Interest Created By The Permit Involved The Crystal Springs Right Of Way, As Well As Work On The Olson Homesite.**

The Court stated in its verbal ruling that "There was no showing that the property interest created by the permit involved the entire Crystal Springs right of way adjacent to the Olson homestead." Transcript 5:4-7. This is error as to a critical fact – In fact, the record shows that the Olsons' permit covered the right to undertake work in the right of way. Therefore, the City's issuance of the permit created a "property interest," which was then interfered with by the City's later arbitrary and capricious action in filing the nuisance violation for "un-permitted" work.

The record shows that the property interest created by the permit included work in the Crystal Springs right of way, as well as work on the private property consisting of the Olson homestead. These facts primarily are supported by the testimony of Kris McColeman, City Supervisor in the City's Public Works Department, who testified in **support** of Appellants

Olsons. Mr. McColeman testified that he supervises the City Department which actually oversees, issues, and inspects the temporary driveway permits, which is precisely the type of permit that was issued to Mr. Olson, that he had worked for the City for over twenty years, that Mr. Olson had applied for the correct permit, that the City routinely issues hundreds of these types of permits a year, that he had personally inspected Mr. Olson's site while the driveway was under construction, and that he had found the work to be in complete compliance with the permit issued to Mr. Olson.<sup>20</sup> CP 331-334.

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<sup>20</sup> CP 331-334. **Transcript of Olson Examiner Proceeding** at Page 57-60.

- 4 Q. First of all, what's your duty with the city?  
5 A. I currently hold the position of construction  
6 inspector supervisor for the public works construction  
7 division.  
8 Q. As part of your duties, do you do things like  
9 inspect driveway permits and follow-up on them?  
10 A. I do become involved in the inspection of those,  
11 but my general duties are to supervise the 15 inspectors  
12 that hold that day-to-day duty.  
13 Q. How long have you had that position?  
14 A. I've been employed within the public works  
15 department in the construction division for a little over 20  
16 years and have been the supervisor for more than 9.
- 57
- 17 Q. And I understand this may be a little bit of an  
18 awkward position for you. Did you have a conversation with  
19 Mr. Olson regarding the improvements on his property?  
20 A. Yes, I did. It was actually on two occasions.  
21 Q. In your opinion, did you find that what he was  
22 constructing there was consistent with permits that he was  
23 issued?  
24 A. I actually instructed Mr. Olson that that was the  
25 permit that he needed to take out to accomplish the work

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1 that had been proposed.

21 Q. In your opinion, did you find that what he was  
22 constructing there was consistent with permits that he was  
23 issued?  
24 A. I actually instructed Mr. Olson that that was the  
25 permit that he needed to take out to accomplish the  
work

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2 Q. And when you saw it in the field, did you find it  
3 in compliance with the permit?  
4 A. That's correct. I guess in compliance with what  
5 Mr. Olson had described what he was going to construct  
6 there, it was in compliance with that.  
7 Q. And the enhancements that had been described  
8 Mr. Olson described as guardrails, do you agree that you use  
9 those as landscape enhancements or cosmetic features?  
10 A. That's correct. They are unusual, but that's  
11 correct; that's how I viewed them, as a rockery or a  
12 landscape improvement.  
13 Q. Is it your experience that other types of rockery  
14 has been built in association with the type of permit that  
15 Mr. Olson was issued?  
16 A. Actually, that worked the landscaping and  
17 rockeries and keystone walls are a non regulated item that  
18 the city does not issue a permit for.

58

24 Q. About how many permits similar to those obtained  
25 by Mr. Olson are issued by the city per year?

59

1 A. I don't have that knowledge right now, but the one  
2 you spoke of, the 300 or so that didn't sound out of  
3 character.  
4 Q. In your opinion, was the guardrails, were they  
5 unsecured structures?  
6 A. I guess I'm not familiar with the unsecured  
7 structure. I had looked at them as I would a keystone wall  
8 or a rockery wall or something of that nature.  
9 Q. Did they look solid and secure to you?  
10 A. Yeah, as constructed they were a rock or a brick  
11 mortared together with some grout inside of them.  
12 Q. So they weren't falling down?  
13 A. No.

60

1 Q. In your two visits, was Mr. Olson being orderly in  
2 his construction activities?  
3 A. I guess I don't understand as far as orderly.  
4 Q. Was there an unusual accumulation of construction  
5 debris or materials around the site?  
6 A. Not that I recall.

CP 331. **Transcript of Olson Examiner Proceeding** at Page 57. The permit the City Supervisor instructed Mr. Olson to obtain was a “temporary driveway improvement permit”. Id. The temporary driveway improvement permit covered the work **in the right of way**, as shown from the testimony of Kris McColeman, when cross examined by the City attorney. Mr. McColeman explained that the driveway permit allowed **improvements to be placed in the city right of way:**

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3 Q. I guess this term, temporary, Mr. McColeman, this  
4 looks rather permanent to most people that look at this  
5 structure. Do you know the difference between permanent  
and  
6 temporary?

7 A. **My understanding of the term temporary in this**  
8 **permit this allows use of the right-of-way, that it's a**  
9 **temporary use of the right-of-way rather than a**  
10 **permanent**  
11 **use of the right-of-way.**

12 Q. So if the city said remove it, the owner would  
13 have to remove it?

14 A. I don't know under this permit if the language is  
15 that strong to have the owner or the abutting owner bear the  
16 cost of the removal or whether **it's just notice that it**  
17 **doesn't have the right to permanently occupy the**  
18 **right-of-way.**

19 It has been my experience when these structures  
20 are removed at the time of LID construction or the  
21 right-of-way improvement that the LID or the construction  
project bears the cost of removal of those items.

CP 522. **Transcript of Olson Examiner Proceeding** at Page 61.

Mr. McColeman's testimony also explained that extent of the driveway permit extended within the City right of way **and** onto the Olson's private property:

64

2 Q. Just going back to this term driveway versus  
3 temporary driveway approach, can you tell the  
4 examiner in  
5 your opinion what the difference is?

6 A. The permanent driveway approach is  
7 constructed in

8 conjunction with curb and gutter. **A temporary  
9 driveway**

10 **approach is constructed to attach access** -- I don't  
11 want to

12 say (inaudible) but it can be commercial. **It can be  
13 many**

14 **different accesses to private property.** And  
15 without a

16 permanent or the curb and gutter being constructed  
17 on the

18 street, **that approach or that tie between street  
19 right-of-way and private property would be done  
20 under a**

21 **temporary driveway approach.** So if you're  
22 driving down the

streets through the city of Tacoma and do not see  
curb and

gutter constructed, all of those accesses to those

businesses to those apartment buildings to the  
private

dwellings...

Q. Those would all be considered temporary?

A. Correct.

Q. **What is your understanding of how far was  
he going**

**to pave with asphalt on Crystal Springs? Do  
you know how**

**far?**

23       A.    It was an extension of 17th Street to the  
         garage  
24       that was built and the brick pavers across the  
         culvert  
25       crossing.

CP 523. Transcript of Olson Examiner Proceeding at Page 64.

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5   THE COURT:    And Mr. Olson described to you  
                  what  
6                   his plans were for his temporary  
                  access driveway from 17th  
7                   Street?

8   THE WITNESS:  That is correct.

9   THE COURT:    And that discussion included the  
10                  construction of the rock walls at  
                  the culvert site on both  
11                  sides of the roadway and the use of  
                  pavers in that  
12                  particular area.

13   THE WITNESS:  That is correct.

14   THE COURT:    And you told him as a result of  
                  that  
15                  conversation what he needed was  
                  a temporary driveway  
16                  permit.

17   WITNESS:       That is correct.

18   THE COURT:    And Mr. Olson then obtained a  
19                  temporary driveway permit.

20   WITNESS:       Yes, he did.

21   THE COURT:    And that it was your  
                  understanding at  
22                  the time of issuance of that  
                  driveway permit exactly what  
23                  he was constructing.

24   WITNESS:       That is correct.

2   THE COURT:    And what he partially constructed  
                  out

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and CP 318-9, **Transcript of Olson Examiner Proceeding** at Page 46.<sup>22</sup>

These aerials clearly show that the driveway permits routinely were issued for **construction which intrudes onto the City right of way.** The exhibits demonstrate that the City routinely used the temporary driveway approaches to allow private construction by the adjacent property owners of driveway and other improvements such as landscaping and retaining walls. This is precisely why Kris McColeman advised Mr. Olson to obtain the temporary driveway improvement permit.

The testimony of City employees and exhibits admitted at the nuisance hearing and submitted to this Court as part of the Summary

- 
- 10 Q. Does the aerial photo depict the lot line? It may  
11 be hard to read.
- 12 A. Yeah, there's a red dashed line that goes up off  
13 the edge of the improved portion of the road to in front of  
14 the subject property.
- 15 Q. Does the aerial photo show that the improvements  
16 were created off the lot itself and in the right-of-way?
- 17 A. Yes.
- 18 Q. Following up on that address, attached as part of  
19 Exhibit 22 are two photos, can you identify those photos?
- 20 A. Yes. Those are photos that I took that shows the  
21 nature of the improvements, which appears to be some asphalt  
22 work along with a retaining wall and landscaping.
- 23 Q. And this is what you saw built in the field as a  
24 result of the temporary driveway permit?
- 25 A. Yes, correct.
- 22 46
- 16 Does the aerial photo depict the lot line in the  
17 area of the driveway work?
- 18 A. Yes, it does.
- 19 Q. The driveway work outside of the lot property?
- 20 A. Yes.
- 21 Q. In response to this permit, did you visit the site  
22 and take a photo?
- 23 A. Visited the site and took a photo and observed the  
24 asphalt driveway as per the application.

Judgment actions amply demonstrate that the Olsons did make a showing that the property interest created by the temporary driveway permit included authorization to build in the Chrystal Springs right of way.

On appeal from a motion for summary judgment, the court must consider all facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP* (2002) 110 Wash.App. 412, 40 P.3d 1206. Here, the trial Court erred in its understanding and application of this incorrect fact, upon which the grant of Summary Judgment was based. The Olsons do have standing under Chapter 64.40 RCW because they held a property interest in the Chrystal Springs right of way via the permit which authorized them to construct the improvements in the right of way, with which the City later arbitrarily interfered. On appeal, the Summary Judgment Order should be reversed.

**2. Transcript 4:8-10 INCORRECT- The City's Nuisance Action Incorrectly Alleged ALL Work In The Driveway Was Unpermitted.**

The Courtly correctly recognized that the Olson's claim of City arbitrary and capricious action is based on the City's pursuit of nuisance enforcement action against the Olsons. The City's nuisance action was predicated on a claim that the Olsons were performing work in the City right of way without the requisite permit. (Transcript 4:18-20) However,

the Court is *incorrect* in its statement of fact at Transcript 4:8-10, where the Court believed that the City's objection was limited to the stone walls. In fact, the record shows that that the City's nuisance complaint of alleged "unpermitted work" covered any and all work done by the Olsons in the right of way. The record also shows that all work in the right of way – including building the stone walls **and the driveway improvements** (pavers) was included within the scope of the City permit issued to the Olsons – making the entirety of the City's nuisance action totally baseless, and rendering the city's action arbitrary and capricious. At the very least, the extent of the permit coverage is a disputed material fact which would foreclose Summary Judgment.

**First**, the testimony of the City enforcement staffer shows that the City enforcement was based on all of the Olsons' work in the right of way:

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6 I thought it was appropriate to issue a notice  
7 under the nuisance code because this work was not  
currently  
8 permitted. There was no permit in place, so it really  
9 wasn't necessarily at this point an issue with respect to a  
10 building permit or a wetlands permit. In fact, there could  
11 be several permits involved.  
12 **There's also the issue of whether the work should**  
13 **even be constructed in the right-of-way and did Mr.**  
**Olson**  
14 **have the necessary authorizations to construct a road or**  
**a**

15     bridge within the right-of-way.

CP 536, Transcript of Olson Examiner Proceeding at page 116.

Second, the testimony of the City Supervisor within the Department that issued the permit makes it clear that all the Olson work in the right of way was in fact covered within the scope of the permit.

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2 THE COURT:     So you met with Mr. Olson the first  
3                     time out on the site?  
4 THE WITNESS:    On site.  
5 THE COURT:     And Mr. Olson described to you what  
6                     his plans were for his temporary access  
7                     driveway from 17th  
8                     Street?  
9 WITNESS:        That is correct.  
10 THE COURT:     **And that discussion included the**  
11                     **construction of the rock walls at the**  
12                     **culvert site on both**  
13                     **sides of the roadway and the use of pavers**  
14                     **in that**  
15                     **particular area.**  
16 WITNESS:        That is correct.  
17 THE COURT:     **And you told him as a result of that**  
18                     **conversation what he needed was a**  
19                     **temporary driveway**  
20                     **permit.**  
21 WITNESS:        **That is correct.**  
22 THE COURT:     And Mr. Olson then obtained a  
23                     temporary driveway permit.  
24 WITNESS:        Yes, he did.  
25 THE COURT:     And that it was your understanding at  
                    the time of issuance of that driveway permit  
                    exactly what  
                    he was constructing.  
WITNESS:        That is correct.  
THE COURT:     And what he partially constructed out

1 there is consistent with your understanding  
of what he told  
2 you.  
3 WITNESS: Yes, it is.  
4 THE COURT: And so subsequent to obtaining the  
5 driveway permit, you went out and  
inspected the  
6 construction.  
7 WITNESS: Yes, I did.  
8 THE COURT: Have you seen in any of the  
9 photographs that have been admitted into  
evidence which  
10 shows that construction in its current state?  
11 WITNESS: Not recently.  
12 THE COURT: But you have been out there and asked  
13 him to stop when the construction -- when  
the project was  
14 partially constructed?  
15 WITNESS: That is correct.  
16 THE COURT: **And it still remained consistent even**  
17 **at that point with what your**  
**understanding of the**  
18 **construction was to be in terms of the**  
**temporary driveway.**  
19 WITNESS: **Yes, it was.**

CP 524, Transcript of Olson Hearing Examiner Proceeding at page 66-  
67.

24 A. I actually instructed Mr. Olson that that was  
the  
25 permit that he needed to take out to  
accomplish the work

1 that had been proposed.  
2 Q. And when you saw it in the field, did you  
find it  
3 in compliance with the permit?

4 A. That's correct. I guess in compliance with  
5 what  
6 Mr. Olson had described what he was going  
7 to construct  
8 there, it was in compliance with that.  
9 Q. **And the enhancements that had been  
10 described**  
11 **Mr. Olson described as guardrails, do  
12 you agree that you use  
13 those as landscape enhancements or  
14 cosmetic features?**  
15 A. That's correct. They are unusual, but that's  
16 correct; that's how I viewed them, as a  
17 rockery or a  
18 landscape improvement.  
19 Q. **Is it your experience that other types of  
20 rockery  
21 has been built in association with the type  
22 of permit that  
23 Mr. Olson was issued?**  
24 A. **Actually, that worked the landscaping  
25 and  
26 rockeries and keystone walls are a non  
27 regulated item that  
28 the city does not issue a permit for.**

In sum, the record supports that the City's nuisance action, alleging un-permitted work, was issued for **precisely the same work** that was included within the scope of the permit, or for which no permit was required. This clear statement of facts shows that the City's action was arbitrary and capricious as a matter of law. The Court erred and it is *incorrect* at Transcript 4:8-10, where the Court believed that the City's objection was limited to the stone walls.

**G. THE TRIAL COURT ERRED AS SUMMARY JUDGMENT IS INCORRECT AS A MATTER OF LAW.**

On the basis of the above facts, articulated in its verbal ruling, the Court made the following statements of law:

1. The right to use and enjoy land is a property interest. Transcript 4:13-15.
2. The Court rejects the City's claim that the driveway permit is not a permit or a land use decision as a matter of law. Transcript 5:8-14.
3. Development rights can create a property interest even in a permit. Transcript 4:15-16.
4. The Olsons hold a permit in this case as required under 64.40. Transcript 5:8-14.
5. The Olsons meet the second prong of Chapter 64.40 RCW, i.e. they filed an application for a permit. Transcript 4:23-24.
6. The permit granted to the Olsons created a limited property interest. Transcript 5:3-5.
7. The property interest created by the temporary driveway approach permit doesn't run to the entire right of way. Transcript 5:4-7.
8. Petitioners have no interest in fee or otherwise in the Chrystal Springs right of way. Transcript 4:16-19
9. The petitioners have no real property interest in fee in the Chrystal Spring right of way beyond the temporary driveway approach. Transcript 4:1-3.
10. The Olsons do not meet the first prong of Chapter 64.40 RCW, i.e. they are not owner of a property interest. Transcript 4:20-23.

11. The Petitioner Olsons lack standing to bring the action pursuant to Chapter 64.40 RCW. Transcript 6:4-6.

However, in fact Appellants' RCW 64.60.020 claim should **NOT** be dismissed on the basis of standing as Appellants **do** have an interest in the permit which includes the Chrystal Springs Right of Way. On appeal, the Court should correct the Trial Court's errors of law at TR Transcript 5:4-7, 4:16-19, 4:1-3, 4:20-23, 6:4-6, (Transcript statements 7, 8, 9, 10 and 11 as numbered herein).

The Court erred by its inconsistent rulings: At Transcript 5:3-5, the Court agrees that Chapter 64.40 RCW merely requires "ownership of a property interest;" not ownership of the property itself, as the City claimed.<sup>23</sup> This correct statement of law should have led to a conclusion that the Olsons' right to construct the driveway within the Chrystal Springs Right of way is a 'property right,' one with which the City improperly interfered. Instead the Trial Court erred with the inconsistent ruling that: "The Olsons do not meet the first prong of Chapter 64.40 RCW, i.e. they are not owners of a property interest". Transcript 4:20-23.

On appeal, the Court should find that the Court erred and that "Property interest" is correctly defined as the Olson's right of access and development right in their approved permit. Chapter 64.40 RCW merely requires "ownership of a property interest;" not ownership of the property

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<sup>23</sup> See RCW 64.40.020.

itself.<sup>24</sup> The Olsons' property interest exists in their right to construct the driveway **in the right of way** because it was "a reasonable expectation of entitlement deriving from" the Tacoma Municipal Code.<sup>25</sup> Moreover, Olson's right to **access** the public right of way is undeniably a property right.<sup>26</sup> Finally, the Olsons' constitutional right to due process is not diminished simply because the Olsons do not own the right of way. The Olsons' right to construct the driveway is a 'property right,' one with which the City improperly interfered.

**1. Olson's Property Interest Supports Valid Claim Under Chapter 64.40 RCW.**

RCW 64.40.020 creates a cause of action for "**owners of a property interest**" to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority<sup>27</sup>: The statute defines a property interest as "**any interest or right in real property in the state.**" See RCW 64.40.010(3) (emphasis added).

The Court properly concluded that the Olsons hold a permit, and that the permit created a property interest in the Chrystal Springs right

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<sup>24</sup> See RCW 64.40.020. **Owners of a property interest** who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

<sup>25</sup> See *Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (2006).

<sup>26</sup> See *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977).

<sup>27</sup> Note: RCW 64.40 applies to cities. See RCW 64.40.010(1).

of way. Nothing more is required to create a cause of action and defeat the City's Summary Judgment. The Court however inconsistently concluded, that "The property interest created by the temporary driveway approach permit doesn't run to the **entire** right of way. Transcript 5:4-7, and therefore, "Petitioners have no interest in fee or otherwise in the Chrystal Springs right of way. Transcript 4:16-19". On this basis the Court found the Olsons lacked standing. However, there is no basis in law for making the fine distinction of a "limited" property interest.

Statutory interpretation is a question of law. *See Callfas v. Department of Const. and Land Use*, 129 Wn.App. 579, 120 P.3d 110 (2005)(citations omitted). Courts interpret statutes so that all the language is given effect. *Id.* (citations omitted). The Courts will not construe a statute that is unambiguous. *Id.* at 590 (citations omitted). However, if the statute is ambiguous, "the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences." *Id.*(citations omitted).

Here, the Trial Court's interpretation of a "limited" property interest is in direct contradiction with the language of Chapter 64.40 RCW which expressly applies to "owners of a property interest," i.e.

one who owns “any interest or right in real property in the state.”

The purpose of the statute was to provide “some measure of relief for applicants who are mistreated” by arbitrary and capricious government action. *See Smoke v. City of Seattle*, 79 Wn.App. 412, 902 P.2d 678 (1995) (citing Senate Journal, 47th Legislature (1982), at 1449). The Olsons, having obtained the correct permit from one City Department and then being prosecuted for claimed lack of the correct permit by another city Department, are exactly the folks the remedial statute Chapter 64.40 RCW was enacted to protect.

#### VI. CONCLUSION.

Access and development rights conferred by a permit are “property interests,” which are within the scope of the protections afforded by Chapter 64.40 RCW. The Court should grant the appeal and remand for trial.

DATED this 3<sup>rd</sup> day of June 2008.

GOODSTEIN LAW GROUP PLLC

By:   
\_\_\_\_\_  
Carolyn A. Lake, WSBA #13980  
Attorneys for Appellants Olson

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

ROBERT OLSON and SANDRA OLSON, a marital community  Appellants/ Cross Respondents,  v.  CITY OF TACOMA, acting through its Department of Building and Land Use Services,  Respondents/Cross Appellants	NO. 36756-4-II  DECLARATION OF SERVICE
---	--

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following document:

1. OPENING BRIEF OF APPELLANTS ROBERT OLSON and SANDRA OLSON

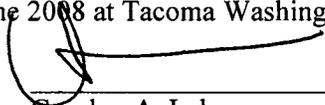
to be served on 4 June 2008, on the following parties and in the manner indicated below:

Jean P. Homan, WSBA #27084  
Tacoma Municipal Building, Rm. 1120  
747 Market Street  
Tacoma, Washington 98402

- by United States First Class Mail  
 by Legal Messenger  
 by Facsimile  
 by Federal Express/Express Mail  
 by Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4 day of June 2008 at Tacoma Washington.

  
\_\_\_\_\_  
Carolyn A. Lake

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DIVISION II  
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STATE OF WASHINGTON  
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