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DIVISION II

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STATE OF WASHINGTON
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No. 36756-4-II

DIVISION II
COURT OF APPEALS OF THE STATE OF WASHINGTON

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

REPLY TO CITY OPENING BRIEF &
RESPONSE BRIEF OF APPELLANTS
ROBERT OLSON and SANDRA OLSON,

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

ORIGINAL

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I. INTRODUCTION

One Department within the City of Tacoma issued the Olsons a valid permit to construct a driveway access for a single family residence. The permit specifically is authorized a “driveway approach.” By this clear language and by the sworn testimony of the City supervisor who both inspected the site and whom directed the property owners to obtain precisely the type of permit for the work they sought to undertake, the permit authorized the Appellant homeowners to build the driveway on City right of way, to connect their property with the unopened city street.

A wholly separate city department without consulting with the issuing department, and without timely appealing the issued permit, collaterally attached the validity of the permit by bringing a series of “nuisance actions” against the homeowners, on the alleged basis that the driveway work was “un-permitted”. After the hearing on homeowners’ appeal of the nuisance action in which the City’s own staff provided devastating testimony against the City and in favor of the appellant homeowners, the City turn tail, and withdrew all it unfounded nuisance charges.

However, instead of ending the matter, the City once again attempted a flanked assault, this time unilaterally declaring its intention to remove the permitted driveway construction. As a result, the homeowners

were required to pursue (successfully) a preliminary restraining order against the City, which remains in place today, and to seek damages under Chapter 64.40 RCW.

The City in this litigation, by way of defense, seeks to re-write the history of this matter in light more favorable to the City's dark actions against this retired couple, by ignoring its own permit application process, its history of how these driveway permits are used, and by inserting an alleged environmental violation into the process as attempt to eviscerate the issued permit.

The Court should see through the City's revisionist and self-serving blurring of the facts of this case. These property owners sought city staff advice, relied on that City staff advice, were issued a city permit, from which no appeal was taken, constructed exactly what the permit authorized, only to later be bullied and hounded by city enforcement agents. There can be no clearer set of facts that warrant the protection that Chapter 64.40 RCW was designed to remedy. The Court should grant the Olson's appeal, reverse the Summary Judgment awarded to the City and either remand for trial, or direct Summary Judgment in favor of the Olsons.

II. CORRECTION TO CITY'S "FACTS"

The Appellant Olsons respond to the City's "Corrections to Olsons' Factual Assertions" (City Brief at 2-5) as follows:

1. City's Alleged "Corrected Facts," No. 1. **The Driveway Approach Permit Does Authorize Construction In the Right of Way.** –

The City continues to misstate the scope of the relevant permit. The record shows the City routinely and historically issued Temporary Driveway Approach permits precisely to allow construction which **builds on and links** city right of way with private property, i.e., to accomplish the purpose of a driveway, to provides access from the private property to the right of way. The City ignores the plain wording of the permit in an attempt to change the facts: The Appellant Olsons here did not apply and receive a "driveway permit", they applied and received from the City a driveway *approach* permit.

The City Inspector who advised the Olsons knows the correct scope of the permit. Mr. McColeman testified that he supervises the City Department which inspects exactly 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 permit allows work with the city right of way**, 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, that he had found the work to be in complete compliance with the permit issued to Mr. Olson.¹

¹ See CP 331-334 & CP 338 -**Transcript of Olson Examiner Proceeding** at Page 57-60, and page 66 ,Olson Reply Opposing SJ **Exhibit D:**

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.

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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**

58

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

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.**

66

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

Mr. McColeman explained that these types of driveway permis
allow **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 alias to use of the right-of-way, that it's a**
9 **temporary use of the right-of-way rather than a permanent**
10 **use of the right-of-way.**

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

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

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

6 his plans were for his temporary access driveway from 17th
7 Street?

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.

See CP 521, **Transcript of Olson Examiner Proceeding** at Page 61, Third Dec of Lake.

Mr. McColeman's testimony 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 constructed in
7 conjunction with curb and gutter. **A temporary
8 driveway
9 approach is constructed to attach access --** I don't
10 want to
11 say (inaudible) but it can be commercial. **It can be
12 many
13 different accesses to private property.** And
14 without a
15 permanent or the curb and gutter being constructed
16 on the 11 street, **that approach or that tie
17 between street
18 right-of-way and private property would be
19 done under a
20 temporary driveway approach.** So if you're
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**

21 to pave with asphalt on Crystal Springs? Do you
know how
22 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.

See CP 522, **Transcript of Olson Examiner Proceeding** at Page 64,
Third Dec of Lake.

Although the City now re-characterize their own 20 year
Supervisor's advice as "erroneous," they fail to explain away or overcome
that the Summary Judgment record includes a copy of a sampling of the
366 driveway approach permits which the Olsons had obtained from the
City pursuant to public records request. See CP 516-**Transcript of Olson
Examiner Proceeding** at p. 42& 43, Third Dec of Lake. These permits
along with accompanying aerials also in the record clearly substantiate
Mr. McColeman's sworn testimony 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.

2 & 3. City's Alleged "Corrected Facts," No(s). 2, and 3-Unsupported by Citations to the Record. The City fails to support their alleged "Corrected Fact" Nos. 2 & 3 with any supporting Clerks Paper designation in the record. The Court should disregard the unsupported allegations. RAP 10.3(a)(5).

4. City Alleged "Corrected Fact" No 4 – City Did Interfere with Permit which Conferred Olson Access. The City misunderstands /mis-construes the Olsons' position. It is irrelevant that the Olson may have other access to their property. What is relevant is that the City-issued permit conferred additional access to the Olsons, with which the City then impermissibly interfered.

5. City Alleged "Corrected Fact" No 5. - Olsons Did Not Allege the "Fact" in Need of Correcting. The City misunderstands /mis-construes the Olsons' briefing. The City argues that the Olsons "suggest" that the Superior Court entered into formal conclusions of law, which the City maintains is incorrect. In fact, the Olsons make no such suggestion. The Olson merely point out those portions of the Court's ruling, for which the Olsons assign error. The record speaks for its self on the Trial Court's actions. Here, the City manufactures an alleged fact, which it then unnecessarily "corrects".

III. REPLY TO CITY CROSS APPEAL –ANALYSIS

A. COURT’S SUMMARY JUDGMENT RULINGS

Prior to Trial, the Respondent City asked the Court for Summary Judgment on a variety of issues. The Trial Court ruled in favor of the Olsons and denied three of the four rationales cited by the City as a basis for Summary Judgment. CP 644-653, as follows, from which the City appeals:

1. *Plaintiffs’ RCW 64.40.020 claim should **not** be dismissed on the basis that the Olsons driveway permit is not a land use decisions and or that the Olsons failed to file a permit application as required Chapter 64.40 RCW.*

In so ruling, the Trial Court correctly found that a building permit is a land use decision. *Asche v. Bloomquist* 132 Wash. App. 784, 133 P.3d 475 Wash. App. Div. 2, 2006 at 790. Land use decisions are defined by the state to be decisions on “An application for a **project permit or other governmental approval** required by law before real property may be improved, developed, modified, sold, transferred, or used...” See RCW 36.70C.020(1)(a). See Section III.B herein.

2. *Whether plaintiffs’ RCW 64.40.020 claim should be dismissed as moot as they obtained the relief that they sought from the Hearing Examiner.*

The Trial Court correctly found that Olsons request for relief is **not** moot. The City’s argument of “no harm, no foul” despite the City’s

shameful actions against the Olsons, fails on legal and factual grounds. The City's unfounded acts did not merely offend the Olson's expectations, nor were the Olsons merely "applicants;" here, the City improperly tampered with the Olsons' perfected, vested rights conferred by the issued permit. *Brower's* shield claimed by the City does not apply; *Mission Springs* damages are in order.

Further, the City strains credulity to argue the Olsons have achieved "full relief". To this day, the City continues to impermissibly attack the Olsons' driveway permit. In fact, the Olsons were forced to (successfully) obtain a preliminary Order issued by this Court, restraining the City tearing down the improvements authorized by the permit. See Section III.C herein.

3. *Whether plaintiffs' RCW 64.40.020 claim should be dismissed as the City's order to stop work in the right-of-way was not arbitrary and capricious, since plaintiffs were filing protected wetlands without permit or approval.*

The Trial Court found that material questions of fact precluded summary judgment on this basis, and **denied** the City's Summary Judgment Motion on this basis.

On appeal, this Court should uphold that ruling and find that the City's claim is unfounded in at least four critical ways. **First**, the City is factually incorrect. The City did not issue a "Stop work Order".

Second, the Olsons' claim of City arbitrary and capricious action is based **not** on a stop work order that never issued, but rather on the City's pursuit of nuisance enforcement action against the Olsons.

Third, the City did **not** pursue **wetland violations** through its nuisance action, even though that option was available to them.

Instead the City pursued various other nuisance theories, most based on the incorrect claim that the driveway work was "un-permitted".

Fourth, the City presents **no proof** to supports its claim that the Olsons actually filled a wetland as part of constructing the driveway improvements. Mr. Olson's driveway lays on the unopened right of way consist of a sand base (which is not impervious), and a brick-lined driveway. He then added a sandstone railing for aesthetic purposes.ⁱ The work does not disturb the culvert water flow in any way. Nor did Mr. Olson "fill" any "wetland". See Section III.D herein.

B. OLSONS' PERMIT IS UNQUESTIONABLY A "LAND USE DECISION" TO WHICH CHAPTER 64.40 RCW APPLIES.

A building permit **is** a land use decision. *Asche v. Bloomquist* 132 Wash.App. 784, 133 P.3d 475 Wash.App. Div. 2, 2006 at 790.

Land use decisions are defined in the statute to be a "final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination" on:

- (a) **An application for a project permit or other governmental approval** required by law before real property may be improved, developed, modified, sold, transferred, or used....
- (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and
- (c) **The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property...RCW 36.70C.020(1)(a)-(c).**

Id at 791; Emphasis added. See also *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wash.2d 440, 54 P.3d 1194 Wash., 2002 at 1199.

RCW 36.70B.020(4) also reads:

(4) "Project permit" or "project permit application" means *any land use or environmental permit or license required from a local government for a project action*, including but not limited to building permits, subdivisions ... permits or approvals required by critical area ordinances, site-specific rezones....

Here, the Olsons sought and received a driveway permit under the City's building codes and ordinances which regulate the improvement, development modification, maintenance or use of real property. The driveway permit was a "governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used". Because no appeal of the permit was timely made, the counter staff who made the decision to issue the permit was the officer with the highest

level of authority to make the determination, absent an appeal. The driveway permit is a land use decision pursuant to RCW 36.70C.020(1)(b).

The City also incorrectly asserts that a “Land use decision” must necessarily require an application. The City is wrong, as borne out by the state definition: A “**land use decisions is** : a “final determination by a local jurisdiction's body or officer ...on ”: “(a) **An application** for a project permit **or other governmental approval** required by law before real property may be improved, developed, modified, sold, transferred, or used....” The Olsons obtained their driveway permit approval from the City pursuant to See TMC 10.22.020, which states: “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.” The driveway permit unquestionably was a permit or approval required by law in order for the Olsons to improve, or develop and or obtain access via the Chrystal Springs right of way. There is no question that the City Driveway permit is a “land use decision,” as defined by state law.²

² The City may attempt to argue it can trump state definition of land use decision by application of a local ordinance. However, in adopting Chapter RCW 36.70C the Land Use Petition Act, the state evidenced its clear intent to pre-empt inconsistent local land use codes. LUPA is the exclusive means of judicial review of land use decisions. RCW 36.70C.030.

C. OLSONS' CLAIM UNDER CHAPTER 64.40 RCW IS NOT MOOT.

1. City Impermissibly Attacked Olsons' Vested Permit via Its Nuisance Action.

The City inaptly relies on *Brower v. Pierce County*, 96 Wash. App. 559, 984 P.2d 1036, Wash. App. Div. 1, 1999 to claim that because the nuisance charges were ultimately dismissed by the City Hearing Examiner, that the Olsons have no remaining actionable claim against the City. However, the City glosses over the important distinction between *Brower* and the present facts. 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 Browns were merely *in the application process* and had no vested land use rights". *Brower* at 562.

The situation is different here, where the Olsons had in-hand the lawfully issued driveway permit. The City's mis-placed 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, even after the Plaintiffs there received relief from the government agency.

Citing *Mission Springs, Inc. v. City of Spokane*, the Browsers next argue that RCW 64.40.020 entitles them to damages despite having received a favorable administrative remedy”.

There, the Spokane City Council refused to issue certain construction and grading permits to which Mission Springs, a land developer, had vested rights. Within weeks of that refusal, Mission Springs filed a complaint seeking, among other things, damages under RCW 64.40.020. The following month, the Council rescinded its earlier decision and issued the permits. Our Supreme Court, on direct review from the trial court's summary dismissal of Mission Springs' claims, held that Mission Springs **was entitled** to money damages because the delay in issuing the permits was unlawful.

Brower, Id at 565.

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 *Browsers*, **had vested rights** in the permits that the Council refused to issue.” 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.

“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.**”)

The City’s argument of “no harm, no foul” despite the City’s shameful actions fails on legal grounds. The City’s unfounded acts did not merely offend the Olson’s expectations, nor were the Olsons merely “applicants;” here, the City improperly tampered with perfected, vested rights. *Brower’s* shield does not apply; *Mission Springs* damages are in order.

2. Even after Examiner Ruling, City Continues to Attack Olson Permit

Not only does the City's argument that the Olsons don't qualify for Chapter 64.40 RC W relief because they obtained full relief fail on legal grounds, it also is **not** borne out by the facts. To this day, the City continues to impermissibly attack the Olsons' driveway permit.

On March 7, 2006, the Examiner issued an Order the Violations against the Olsons dismissed, based on the City's withdrawal. CP 343-4, **Exhibit G** to Olson Reply Opposing SJ. However, *nearly immediately thereafter*, 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 -**Exhibit H** to Olson Reply Opposing SJ. On April 5, 2006, Olson filed a complaint for damages based on Chapter 64.40 RCW. Thereafter, on August 4, 2006, the City filed a public notice of their unilateral intent to dismantle Olson's driveway improvements. CP 346-354, **Exhibit I** to Olson Reply Opposing SJ.

The Olsons were forced to (successfully) obtain a preliminary Order issued by this Court, restraining the City tearing down the

improvements authorized by the permit. The City strains credulity to now argue the Olsons have obtained “full relief”.

3. City’s Continued Attempts to Attack Issued Permit is Barred and Supports Finding City Continues to Act Arbitrarily and Capriciously.

The Olsons obtained the proper permit for Olson improvements. As a matter of law, the City is barred from now contesting the validity of that permit. The City’s repeated attempts to further attack the permit is legally barred, and supports this Court finding that the City continues to Act arbitrarily and capriciously. Summary Judgment in favor of the Olsons, not the City, is supported because the issue of the appropriate permit was litigated before the Hearing Examiner, with the result that the City withdrew its complaint. To the extent that the City now asserts a contradictory position, the City’s claim is barred by the doctrines of priority of action, collateral estoppel and/or res judicata.

An additional and whole independent basis to award Summary Judgment to the Olson and which defeat the City’s assertion that the Olsons cannot rely on their approved City driveway permit is a long line of recent and strongly worded post- Land Use Petition Act, Chapter 36.70C RCW (LUPA) land use permitting decisions issued by the Washington Courts. In a case directly on point, the Washington Supreme Court ruled that LUPA, which is the exclusive means of judicial review of

land use decisions, **pre-empts** a public nuisance action alleging a building permit had been improperly issued (violation of a zoning ordinance height limit). RCW 36.70C.030. *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005).

The reasoning of these emphatic post LUPA Court decisions is briefly summarized:

- LUPA applies to the issuance of building permits because building permits are land use decisions. *Asche v. Bloomquist* (2006) 133 P.3d 475.
- Building permits are ministerial decisions subject to judicial review under Land Use Petition Act. *James v. County of Kitsap* (2005) 154 Wash.2d 574, 115 P.3d 286.
- The Land Use Petition Act (LUPA) is the exclusive means of judicial review of land use decisions, whether they are quasi-judicial or ministerial. *Grandmaster Sheng-Yen Lu v. King County* (2002) 110 Wash.App. 92, 38 P.3d 1040.
- **Before LUPA**, a line of Washington cases held that an improperly approved building permit is void and may be rescinded by the agency which erroneously issued it. **Post-LUPA**, approval of permits, even those of questionable legality, “become valid once the opportunity to challenge each has passed.” *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 175, 4 P.3d 123 (2000).
- **Even illegal decisions** under local land use codes must be challenged in a timely, appropriate manner under the Land Use Petition Act (LUPA), which is the exclusive means of judicial review of land use decisions; this includes defects in land use determinations that would have made the decision void under pre-LUPA cases. *Asche v. Bloomquist* (2006) 133 P.3d 475 and see *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005).
- To allow a local jurisdiction to challenge a land use decision beyond LUPA’s statutory period of 21 days is inconsistent with the Legislature’s declared purpose in enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and

undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner. RCW 36.70C.010. *Chelan County v. Nykreim*, 146 Wash.2d 904, 929, 52 P.3d 1 (2002).

Here, the City now disagrees with the validity of the permit issued to the Olsons. However, the City failed to timely appeal the permit. It cannot now challenge the validity of the permit.

Nor can the City rely on the title of the Driveway Permit (“temporary” Driveway Permit) to claim that the City may arbitrarily revoke the “temporary” permit. The Olsons were issued a “Temporary 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 the City’s 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).

Post LUPA, the Courts give strict enforcement to LUPA appeal procedures to honor strong policies favoring finality in land use decisions and security for landowners proceeding with property development.

Samuel's Furniture, Inc. v. Dep't. of Ecology, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002); *Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001), *Habitat Watch v. Skagit County*, 155

Wash.2d 397, 120 P.3d 56 (2005), *Asche v. Bloomquist* (2006) 133 P.3d 475.

The City's failure to timely challenge the permit now bars any challenge, **validates** the permit, despite any disagreements or deficiencies currently claimed by the City, and renders the City's continued failure to recognize the valid permit arbitrary and capricious as a matter of law.

D. THE CITY'S NUISANCE PROSECUTION AGAINST THE OLSONS WAS ARBITRARY & CAPRICIOUS AND DID NOT PURSUE WETLAND VIOLATIONS.

The City attempts a belated after the fact justification for its post-permit actions against the Olsons. However the Court should carefully parse the City's phraseology and require the City to correctly apply land use phrases that the City at times uses loosely or imprecisely. For example, in its fourth attempted argument for Summary Judgment, the City contended that its "stop work order" was not arbitrary and capricious because the Olsons were (allegedly) filled protected wetlands without permit or approval. The City's argument fails for at least the following four ways.

First, the City is factually incorrect. The City did not issue a "Stop work Order". This is borne out by (1) the sworn testimony at the Examiner's hearing and (2) the City's current failure to produce a copy of any such stop work order.

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.

Transcript of Hearing Examiner Proceedings at 111:2-8.CP 364, **Exhibit J**
to Olson Reply Opposing SJ.

Second, the Olsons' claim of City arbitrary and capricious action
is based **not** on a stop work order that never issued, but rather on the
City's pursuit of nuisance enforcement action against the Olsons. The City
enforcement officer who issued the nuisance violation cited the Olsons for
construction without a permit, yet failed to investigate the actual
requirements for the permit that issued.

7 **In your investigation after you initially took a**
8 **look at Mr. Olson's property, did you go back and**
9 **investigate whether plans are required for a driveway**
10 **permit?**
11 A. **No**, I just looked at the temporary permit that was
12 issued there on April 20 of 2005. And I looked for some
13 attachments to it that would have been attached for
14 something of that nature **that I would have thought** would
15 have been attached.
16 Q. **But you now know through your testimony today and**
17 **through Exhibit 45 the city doesn't require plans**
attached?
18 A. **Yes, I do.**
19 Q. And I thought your testimony was that your

20 justification for issuing some of these sections or
21 subsections of the nuisance list because you would have
22 expected plans, you would have expected there be more
23 detail.
24 A. Yes. Again, after reading the permit, it does not
25 appear to be temporary like the permit issued.

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1 Q. Didn't it appear to be temporary? **Did you check**
2 **with anybody in the department that issued the building**
3 **code**
4 **to determine what they meant by a temporary**
5 **driveway?**
6 A. No, I did not.

CP 361-2, Transcript of Hearing Examiner Proceedings at 108:7-25, and
109:1-4, **Exhibit J** to Olson Reply Opposing SJ.

The Supervisor over the City enforcement officer also was
completely unaware of the City's requirements for a driveway permit and
testified he had *never before been involved* with enforcement of such a
permit.

MR. SOLVERSON: I am looking at Exhibit A 22.

BY MS. LAKE: How many driveway permits have you been
involved with?

A. Specifically I would not be involved in
individual driveway permits.

this is my first -- the first experience I have
had with becoming involved in.

Q. So, this is your first review of an oversight
of a driveway permit, right?

A. yes, in this sense, this specific sense.

CP 377, Transcript of Hearing Examiner Proceedings at 125:4-7, 13-17, **Exhibit J** to Olson Reply Opposing SJ.³

Third, the City did **not** pursue **wetland violations** through its nuisance action, even though that option was available to them. Included with the City's Notice and Inspection Report Form is a checklist containing text which parallels the language of the City code. The Form includes a column for the inspector to provide "Comments." The Notice referred in many places to "un-permitted" activity, or activity associated with "un-permitted activity." The City's Violation notice claimed many allegations in support of its issuance/penalty, but did **not** pursue wetland violations. Instead the City charged the Olsons with: 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.

³ The City enforcement officer also failed to contact the Olsons prior to issuing the nuisance violations.

20 Q. Did you ever talk to Mr. Olson?

21 A. No, I have not.

CP 357, Transcript of Hearing Examiner Proceedings at 104:20-21, **Exhibit J** to Olson Reply Opposing SJ.

Further, the City enforcement officer also conceded at hearing that the City was **not** pursuing wetland violations:

- 3 Q. **I'm looking at Exhibit 51, which actually**
4 **has a**
5 **checklist for types of alleged nuisances.**
6 And I'm drawing
7 your attention to "E" and "F," which are on
8 the checklist as
9 potential nuisance violations. And "E" is
10 **"discharging into**
11 **the storm drainage and or the**
12 **unauthorized interference or**
13 **damage to habitat areas, wetlands,**
14 **etcetera.**
15 **Neither one of those two alleged violations**
16 **are checked off.**
- 10 A. That's my fault.
- 11 Q. We're not accepting fault or anything, but
12 that
13 **they're just not checked off.**
- 13 A. **Yes, they are not.**
- 14 Q. And this was in our exhibits provided to
15 Mr. Olson.

CP 359, Transcript of Hearing Examiner Proceedings at 106: 3 -15,
Exhibit J to Olson Reply Opposing SJ. That same City enforcement officer testified at hearing that the City rarely used its building enforcement division to enforce land use wetland violations:

- 14 Q. Do you normally enforce wetland violations
15 through
16 a nuisance process?
- 16 A. It's not a norm, but yes, we have. It's not
17 something we do normally because most
people kind of come in

18 -- I would have to say in compliance with
that issue because
19 it's such a -- with the storm water
management act and other
20 issues, it's such a hot button right now. I
think most
21 people pretty much comply and try to take
care of the
22 situations. So we don't normally have to
deal with wetlands
23 as a nuisance, but we have.⁴

A. Yeah, I would -- the way it works in Building and Land Use Services is we have permitting, we have plan Review, so the permit is taken in and we do a review and it could be for a building code or land use code, and then we have inspections.

16 Q Okay, (inaudible) a long time to get to the
17 (inaudible). You just described the three departments that
18 were involved in it. What department does Kris McColeman
19 fall in?

20 A. There is three departments, two departments
21 involved.

22 Q Okay, which department does Kris McColeman work
23 for?

24 A He is in Public Works within a different division
25 than Building and Land Use Services.

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1 Q. So he is Public Works, and what division?

2 A. Construction division.

3 Q. And then we have the Building folks.

4 A. Building and Land Use Services.

5 Q. That's where planning is?

6 A. That's where Land Use Administration is.

7 Q. Okay, and you are in Public Works, but what
8 division?

9 A. Building and Land Use Services.

10 Q. You are in Building and Land Use Services.

11 A. That's right.

12 Q. What division?

13 A. Building and Land Use Services is a division.

14 Q. Of what?

15 A. Public Works.

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1 Q. Pardon my -- but we have the division of public
2 works and construction that issues the permits, we have
3 building and land Use Services with the land use portion

9 Q. Now, if I understand it, public works issued the driveway permits to Mr. Olson, correct?

11 A. **Public works has issued** a number of permits to Mr. Olson including the driveway permit, yes.

21 Q. I'm not going to beat a dead horse, but rather than do specific wetland violation enforcement, which the city has, there's one of its enforcement tools, instead you pursued enforcement under the nuisance code, correct?

25 A. We did, yes. The nuisance code is what was used.

1 Q. **And you heard Mr. McConaughy's testimony that, in fact, his second report does not indicate any wetlands violation, correct?**

2
3
4 A. He also had an earlier report, which I believe was May 20. And we had a subsequent meeting. So I'm not sure that was in the original or this one. But I do know, it's my understanding it's within the nuisance code, a wetlands

4 finding objection based on wetland violations, and then you
5 have your portion of the Building and Land Use Services that
6 issues the (inaudible).

7 A. Yeah, the -- that responded to a complaint of, you
8 know, activity in the right-of-way.
9 MS. LAKE: Thank you, sir.

8 violation would fall under the nuisance code
too.
9 Q. It can?
10 A. It can.

19 Q. I'll get back to that. But wasn't that really --
20 at this point you would agree that on Exhibit
51, which is
21 the checklist for nuisance subsection "E"
and "F" where it
22 talks about would be the place where
wetlands violations
23 would be noted, correct?
24 A. It looks like "F." "E" looks like it has to do
25 with illegal discharges into the storm sewer
system.

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1 Q. Right. And "F"?
2 A. "F" is the interference whether damage to or
3 polluting of designated habitat areas
publically owned,
4 restoration sites, streams, creeks, lakes or
wetlands or
5 tributaries or similar areas.
6 Q. **And that's not checked?**
7 A. **That's not checked on this report.**

CP 370-374, Transcript of Examiner Proceedings at 118:14- 122:1-7,
Exhibit J to Olson Reply Opposing SJ.

Fourth, the City presents **no proof** to supports its claim that the
Olsons actually filled a wetland. Although the City claims the Olson
“filled a wetland” and “changed surface water system,” no where does the
City provide any actual description **what**, if any, alleged wetland filing

occurred with respect to the structures in general, **where** it occurred, or **how, or even if** any alleged surface water flows are affected.

In support of its allegation of wetland filling, the City relies on a 2006 affidavit of City Staffer Pete Katich. However, that pleading does **not** include any statement based on personal knowledge that the Olson filled any wetland. The Trial Court was urged to carefully read paragraphs 11 & 12, wherein Mr. Katich offers conclusory allegations, **not** supported by personal knowledge: “At the time Mr. Olson proposed these additional improvements in the undeveloped Chrystal Springs right of way, he had **apparently** already made alterations the right of way...Specifically he had **apparently** replaced a pre-existing culvert and had added additional fill to the wetland/stream...” This is the sole “evidence” cited by the City in support of its claim of a “filled wetland”, and should be rejected by the Court as improper.

In reviewing summary judgment orders, a Court to consider supporting affidavits and other admissible evidence that is based on the affiant's **personal knowledge**. CR 56(e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 359, 753 P.2d 517 (1988).

The Court should consider only **admissible** evidence in a motion for summary judgment. *King County Fire Protection Dist. No. 16*, 123

Wash.2d at 826, 872 P.2d 516; *Dunlap v. Wayne*, 105 Wash.2d 529, 535, 716 P.2d 842 (1986).

A fact for purposes of summary judgment motion is a reality rather than supposition or opinion. *McBride v. Walla Walla County* (1999) 95 Wash.App. 33, 975 P.2d 1029, *review denied* 138 Wash.2d 1015, 989 P.2d 1137, *as amended*, 990 P.2d 967.

Conclusory statement of building's chief engineer that building owner "absolutely" retained control was not an assertion of fact and was not admissible evidence, for summary judgment purposes, on the issue of whether building owner exercised actual control over the work performed by fireworks company that employed injured worker. *Space Needle v. Kamla* (2001) 105 Wash.App. 123, 19 P.3d 461, *review granted* 144 Wash.2d 1009, 31 P.3d 1184, *affirmed in part, reversed in part* 147 Wash.2d 114, 52 P.3d 472, *reconsideration denied*.

The facts required to defeat a summary judgment motion are evidentiary in nature; ultimate facts or conclusions of fact and conclusory statements of fact are insufficient. *Overton v. Consolidated Ins. Co.* (2002) 145 Wash.2d 417, 38 P.3d 322, *reconsideration denied*.

In true fact, the area of the Olsons' driveway activity is the City's Chrystal Springs unopened right of way. Although the Defendant City currently describes the area as a "wetland" or a "critical area", in fact the

City constructed a piped sewer line that runs within this exact area. Perpendicular to the City's piped sewer line, was also a city-installed metal culvert which carries runoff from the City roads located upstream.ⁱⁱ CP 508-9; Attachment One, *End Note 2 -Transcript of the Hearing Examiner Hearing, page 12:23-25, 13:1-25, 14:1-25, 15:1-25, 16:1-20.*

This culvert is the watercourse that the City alternatively refers to as "wetlands," critical areas," and "surface water". This typical piped urban infrastructure is similar to many other piped sewer, water, storm water and utility lines that regularly run under other city roadways, the only difference is that these pipes are located in unopened right of ways (i.e. the City has yet to build the actual road bed.)ⁱⁱⁱ Attachment One, CP 507, *End Note 3 -Transcript of the Hearing Examiner Hearing, Page 8:15-25.*

Years earlier as part of building his home, Mr. Olson replaced the City's failed culvert, via a permit obtained from state reviewing agencies.^{iv}CP 509-10. Attachment One, *End Note 4 -Transcript of the Hearing Examiner Hearing, , page 17:9-25, 18:1-25, 19:1-25, & 20:1-17.* The previous City culvert was crushed and was failing. The culvert installed by Mr. Olson via state permit remains today and was unchanged by any work associated with the driveway improvements. Thus, both before and after Mr. Olson built his permitted structure on the existing right of way, water

ran **under** the right of way **via the city's culvert**. The culvert was **not** changed in any way by the work associated with the driveway permit. In fact, Mr. Olson's driveway lays on the unopened right of way consist of a sand base (which is not impervious), and a brick-lined driveway. He then added a sandstone railing for aesthetic purposes.^v CP 321-22, Attachment One, *End Note 5 -Transcript of the Hearing Examiner Hearing*, page **29:16-25, 30:1-25**. The work does not disturb the culvert water flow in any way. Nor did Mr. Olson "fill" any "wetland". See Second Declaration of Robert Olson dated and filed 29 September 2006. CP 157-8.

The Court should reject the City's after the fact attempt to justify its baseless enforcement action against the Olsons. The Olsons' claim of City arbitrary and capricious action is based **not** on a stop work order that never issued, but rather on the City's pursuit of the unfounded nuisance enforcement action against the Olsons. The City did **not** pursue **wetland violations** through its nuisance action, even though that option was available to them. Instead the nuisance action rested on the City's incorrect claim that the Olsons failed to obtain a permit for the work.

The City now disagrees with the validity of the permit issued to the Olsons. However, the City failed to timely appeal the permit. **As a matter of law**, the City cannot now challenge the validity of the permit. *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).

IV. REPLY IN SUPPORT OF OLSON APPEAL

The Trial Court erred in granting Summary Judgment to the City on the issue of standing:

4. *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.⁵ The Olsons’ right to construct the driveway is a ‘property right,’ one with which the City improperly interfered. The Court’s statements in support of its ruling reflect an error as to the facts presented or misapplied the law. See Appellants’ Opening Brief. In either case, this appeal should be granted to reverse the grant of Summary Judgment to the City.

A. Olsons Have a Valid RCW 64.40 Action.

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 authority⁶:

⁵ See RCW 64.40.020.

⁶ Note: RCW 64.40 applies to cities. See RCW 64.40.010(1).

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

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 Defendants’ claims, the statute does not limit its scope to property owners, but instead to any person or entity with “any interest or right in real property.”

B. Property Interest Properly Defined.

The Trial court erred. RCW 64.40 merely requires “ownership of a property interest;” not ownership of the property itself.⁷ Olson’s property interest exists in their permit which conveyed the right to construct the driveway because it was “a reasonable expectation of entitlement deriving from” the Tacoma Municipal Code.⁸ This right to build a “driveway approach” covers **both** the Olsons’ private property and extends onto the right of way, via construction of the approach linking the two areas.

⁷ See RCW 64.40.020.

⁸ See *Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (2006).

In addition, the Olsons' right to access the public right of way is undeniably a property right.⁹ 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.

C. Plaintiff Olsons' Driveway Permit is an Interest in Real Property.

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.*

⁹ See *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977).

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).

D. Permit Includes Right to Build on City Unopened Right of Way

A wholly independent second way the permit embodies an “interest in property” is that the permit conveyed the right to undertake the work actually performed in the unopened right of way. As such, 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.

Here, facts in the record **do** show 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 come via the testimony of Kris McColeman, City Supervisor in the City’s Public Works Department, who testified in **support** of Plaintiff Olsons. The permit he 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.** CP 521
Transcript of Olson Examiner Proceeding, Page 61, Third Dec of Lake.

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:

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- 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 constructed in
7 conjunction with curb and gutter. **A temporary**
8 **driveway**
9 **approach is constructed to attach access** -- I don't
10 want to
11 say (inaudible) but it can be commercial. **It can be**
12 **many**
13 **different accesses to private property.** And
14 without a
15 permanent or the curb and gutter being constructed
16 on the
17 street, **that approach or that tie between street**
18 **right-of-way and private property would be done**
19 **under a**
20 **temporary driveway approach.** So if you're
21 driving down the
22 streets through the city of Tacoma and do not see
23 curb and
24 gutter constructed, all of those accesses to those
25 businesses to those apartment buildings to the
26 private
27 dwellings...

CP 522, **Transcript of Olson Examiner Proceeding Page 64, Third Dec**
of Lake.

66

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 THE WITNESS: That is correct.
18 THE COURT: And Mr. Olson then obtained a
19 temporary driveway permit.
20 THE 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 THE WITNESS: **That is correct.**
25 THE COURT: And what he partially constructed
out
67
1 there is consistent with your
understanding of what he told
2 you.
3 THE WITNESS: Yes, it is.

CP 522, Transcript of Olson Examiner Proceeding Page 66-67, Third
Dec of Lake.

Additionally, the Summary Judgment record includes a copy of a sampling of the 366 driveway permits which the Olsons had obtained from the City pursuant to public records request. CP 516. **Transcript of Olson Examiner Proceeding** Page 42 and 43, Third Dec of Lake The sampling of permits were admitted without city objection in the City's nuisance appeal hearing as Examiner Exhibits 22 - 39. CP 516-519 **Transcript of Olson Examiner Proceeding** Pages 44- 54, Third Dec of Lake. Most exhibits include a copy of the City Driveway permit, and aerials or photos taken of the subsequent driveway improvements. The aerials, printed from the City's GIS system, includes a map legend depicting the right of way line. CP 516, **Transcript of Olson Examiner Proceeding** Page44-45,¹⁰

10

44

23 On Exhibit 22, can you describe for the record
24 precisely how -- what the name of this permit is for, how it
25 describes the activity.

45

1 A. It's a permit to install a **new temporary driveway.**
2 Q. A single family dwelling?
3 A. Single family dwelling at the aforementioned
4 address.
5 Q. And the date of that is?
6 A. That was issued on 1/23/04.
7 Q. What's attached on the second page of the permit?
8 If you could, identify that for the record.
9 A. **That's an aerial photo of the site.**
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.

Third Dec of Lake and CP 517 **Transcript of Olson Examiner Proceeding** Page 46, Third Dec of Lake.¹¹ 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 Judgment actions amply demonstrate that the Olsons did make a showing

-
- 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.**

- 11 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.

that the property interest created by the temporary driveway permit included authorization to build in the Chrystal Springs right of way.

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. Based on this showing, the Court should grant the Olson's Appeal and deny the City's summary judgment Motion.

E. Permit Confers Access Right

Finally, the Olsons have a property right in the right of access to the Crystal Springs Right of Way, which was established by the permit. 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).

The Crystal Springs Right of Way on which the driveway is located provides the Olsons access in two ways: (1) it connects South 16th with the Olson's property, and (2) it connects South 17th 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.

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 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.

V. CONCLUSION.

The Olsons have a "property interest," both in the driveway permit and the access rights to the right of way. The Olsons also satisfy the remainder of the elements under RCW 64.40 because (1) the Olsons filed for a permit application, (2) the Defendant 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 Defendant knew or it should have been reasonably known to the Defendant that issuing nuisance violations and acting to demolish permitted activity was in excess of lawful authority.

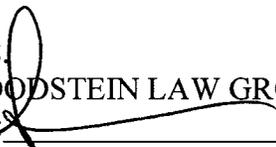
Here, the Trial Court's interpretation of a "limited" property interest is in direct contradiction with the language of Chapter 64.40 RCW which

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. There can be no clearer set of facts that warrant the protection that Chapter 64.40 RCW was designed to provide. The Court should grant the Olson’s appeal, reverse the Summary Judgment awarded to the City and either remand for trial, or direct Summary Judgment in favor of the Olsons.

DATED this 2nd day of September 2008.

GOODSTEIN LAW GROUP PLLC

By: 

Carolyn A. Lake, WSBA #13980

Attorneys for Appellants Olson

ATTACHMENT ONE

ⁱ CP 395-6, **Description of driveway. Transcript page 29:16-25, 30:1-25. Exhibit K to Olson Reply Opposing SJ.**

29

16 Q. Can you identify what the photo Exhibit 17
17 depicts?

18 A. 17 shows the west guardrail with a little
19 dollhouse in there is my meter base for the house and then I
20 actually ran a circuit 200 amp service from that point to
21 the garage. And so that's what I was trying to protect.
22 And it's built right on the ground. There's no suspension.
23 It's not supporting anything. It was just built right on
24 the ground and is pretty much that was there. And this side
25 was built basically to protect that meter.

30

1 Q. How long has the meter been there?

2 A. Since I built the -- actually, since we were well
3 underway with the house. Well, it was there...

4 Q. Prior to construction?

5 A. Prior to construction. It was delayed because
6 Karla wouldn't let us bring power down there at the time and
7 we had to start the house with generators, and the neighbors
8 can contest to that. We had generators running constantly
9 until we almost finished the house and they finally allowed
10 us to bring power in.

11 Q. So this was permitted by the city?

12 A. Absolutely.

13 Q. So as I understand it, the travel portion is along
14 Crystal Springs under the right-of-way and then you flanked
15 the driveway with what you're calling the guardrails here?

16 A. Right.

17 Q. Can you identify Exhibit 18?

18 A. 18 is broader view of both sides of it. This is
19 the east side of the guardrail. And there's a culvert that
20 we permitted earlier. And basically we just planned on
21 putting an asphalt driveway in here but because I put the
22 guardrails in, I thought, well, I had a bunch of brick
23 pavers that I bought from a guy in Lakewood. And I thought
24 well, to make it more authentic looking I would use pavers
25 on that portion of it.

ii CP 508-9, **Description of watercourse, *Transcript* page 12:23-25, 13:1-25, 14:1-25, 15:1-25, 16:1-20.**

12

23 Q. [By Ms. Lake]: Mr. Olson, a couple of times
24 you've used the term creek. Do you do some hydrological
25 assessment with Exhibit 5? Does it have any comment about

13

1 the nature of what you've been calling a creek?

2 A. Well, it's more like storm water runoff. It's
3 water that's been collected in the streets above and
4 directed on to the property.

5 Q. Is that information that you're summarizing from
6 the report? Does that appear on page 3 where it talks about
7 the small surface water drainage flow?

8 A. Yes, it does. And also in the other larger print
9 that we have, the pipes are running across streets.

10 Q. Did you read this report as indicating that the
11 surface water drainage flow that you've been calling a creek
12 may not have been there that long and that it was a product
13 of storm water?

14 A. It certainly increased it. There's probably
15 springs there. But I'm sure that with the additional water
16 that had been added to it, certainly increased the amount of
17 water coming through there.

18 Q. And if that report reflects that, the 1959
19 topography map doesn't delineate the drainage flow on your
20 property?

21 A. That's right.

22 Q. What other observation did it make to show that
23 the drainage force may not have been there that long?

24 A. Well, it said the erosion in the land was not deep
25 enough like in a permanent water flow; that the erosion

14

1 would have been much greater than it is.

2 Q. Did you come across any other information from the
3 city records that might have explained what was contributing
4 to that particular water flow?

5 A. Yes, we pulled the prints when they built those

6 two houses at the bottom of the hill on 17th Street.
7 Q. And let's refer to Exhibit 4.
8 A. The two houses at the end of the street, which is
9 Joyce Walker's house and this other (inaudible) somebody.
10 Q. The house immediately next door?
11 A. Right, going just due east of it. They extended
12 this 17th Street down a dead-end that would be Crystal
13 Springs right-of-way. And at that point they put in
14 conduits or culverts across the street picking up additional
15 catch basins and directing water from across here on to
16 Jeannie Velling's property.
17 MS. LAKE: Let's have this marked as Exhibit 6.
18 Q. [By Ms. Lake]: First of all, what is the
19 (inaudible) what's been marked as Exhibit 6?
20 A. For the city.
21 Q. And first just kind of generally identify what
22 Exhibit 6 is.
23 A. It's actually a print that they're putting a road
24 through to service these two homes. They placed the --
25 Q. Is it storm drainage planning?

15

1 A. Well, it's not that much storm drainage. The main
2 sewer line went through here originally, and that's
3 indicated on 17, which is like 17 feet deep, which indicates
4 there's been a lot of backfill in the area. But this
5 particular one, on the intersection of Brookside Drive and
6 Terrace and 17th, they placed a catch basin on the east side
7 of the road and had a 12-inch pipe over to another catch
8 basin and into a manhole. And from that manhole they ran a
9 24-inch culvert over to, it says right here, "existing
10 private storm service system." And that's on Jeannie
11 Velling's yard. And that extends on to my property through
12 her private storm sewer system.
13 Q. So just to be clear here, the storm drain catch
14 basin is depicted on Exhibit 6 correspond to the aerial
15 photo in Exhibit A4?
16 A. Right, in the green.
17 Q. Where's -- depict if you will down hill using the
18 --

19 A. My property would be down in this area. Crystal
20 Springs would be across the bottom of the -- the drawing
21 indicates catch basins and risers that were put in. And
22 definitely it does show that they had to rebuild one of the
23 catch basins on the Velling property to accommodate the
24 larger 24-inch culvert because it was too small to start
25 with. And then it exits in a 12-inch culvert.

16

1 Q. Just to recap, taking across 17th in a 24-inch
2 culvert?

3 A. 24-inch culvert from this area, which the crick
4 comes down through this area. And this is all picked up on
5 Sunset up above. And it seems to be draining from 19th the
6 15th and then there's one crossing at 1701, 1702 Sunset and
7 it brings the water down to this point. And when they put
8 this road in, then they ran the 24-inch culvert picking up
9 additional water from there and directing it into Velling's
10 yard.

11 Q. And the size of the culvert after that is what
12 size?

13 A. 12-inch.

14 Q. And the culvert continues downward through your
15 property?

16 A. It goes in and out of culverts through Velling's
17 yard through ponds and whatnot, and then eventually does
18 wander down through here, all through this area through
19 culverts and ponds. And then it opens at this point and
20 then goes into another culvert on to my property.

iii CP 507 Description of Chrystal Springs Road. *Transcript* Page 8:15-25.

8

15 Q. Is this Crystal Springs Road?

16 A. There's no road there. It's just a private --

17 Q. And it's an unopen right-of-way; is that correct?

18 A. Right. I installed blackberries when I bought it
19 and it came to be a garbage dump for the neighbors. They
20 throw all their yard waste in there and so forth.
21 (Inaudible) quality of blackberries through that area and
22 nobody ever drove through it.

23 Q. How wide is that right-of-way?

24 A. 30 feet. And there is a sewer line that goes down
25 through there.

iv CP 509-10, **Description of Culvert, Transcript page 17:9-25, 18:1-25,
19:1-25, & 20:1-17**

17

9 Q. [By Ms. Lake]: I'm going to pull from the file
10 entitled "Comment." As part of the initial construction of
11 your house, I imagine you met with the city and there were a
12 number of conditions imposed, the condition of constructing
13 your home?

14 A. Yes.

15 Q. Can you identify this document? Let me have it
16 marked as 7. For the record, 7 has a number 55 up in the
17 right-hand corner and it's entitled "Public Works Department
18 Building and Land Use Services Review Panel Minutes." Can
19 you identify this as notes of one of the meetings at the
20 city involved with the construction of your property?

21 A. When I bought the property and cleared some of
22 the blackberries out of the area that we could see what was
23 going on the culverts that the city put in when they put in
24 the sanitary sewer was broken and the water was just going
25 into the ground and it was all mucky around there.

18

1 Q. Again, this is at the point where it crosses
2 (inaudible.)

3 A. Right. And I asked Christopher Johnson about
4 that. I said if the city put that in, you'd think they'd at
5 least maintain it. And he more or less agreed with the fact
6 that they should. He went back to his boss and his boss
7 said they (inaudible.) So we got a permit to do that.

8 Q. Okay. And this is a city of Tacoma document that
9 indicates that the stream what they're calling a stream
10 should be put into a culvert under the access to the site.

11 A. Right.

12 MS. LAKE: Move admission of 7.

13 THE COURT: Any objection to the admission of A7?

14 MR. CREWS: No.

15 THE COURT: A7 will be admitted.

16 Q. [By Ms. Lake]: That was in March of 2000,
17 correct?

18 A. Right.

19 Q. So after that, did you contact an agency and
20 obtain a permit to install that culvert?

21 A. Yes, we did.
22 Q. I'll have the permit laws entitled Hydraulic
23 Projects Approval be marked as 8. Can you identify Exhibit
24 8?

25 First of all, we'll start with the date, August
19

1 14, 2001. Is that about the time you installed the
2 replacement culvert?

3 A. I think it was earlier than that. That must have
4 been it because Karla at that point called in to the state
5 and said you can't do this or whatever. We had to get a
6 state permit too. I think that's what this is. And there
7 was a guy from the Department of Fisheries Mark Hickey, I
8 believe.

9 Q. Is that who's the copy of --

10 A. That's right.

11 Q. And he's from Washington Department of Fish and
12 Wildlife; is that correct?

13 A. That's right.

14 Q. Does the culvert replacement permit indicate that
15 the city was copied with this permit?

16 A. Absolutely they were aware of it.

17 Q. And, in fact, on page 2 of 4 marked at the bottom
18 of Exhibit 8 looks like there's a carbon copy to the
19 indicated to the city of Tacoma.

20 A. Right.

21 MS. LAKE: Move admission of 8.

22 THE COURT: Any objections to 8?

23 MR. CREWS: No.

24 THE COURT: 8 will be admitted.

25 Q. [By Ms. Lake]: I'll ask you to identify what will
20

1 be marked as 9. This is an (inaudible) engineer's report
2 from the report file. Can you identify that as an
3 engineering report that you had prepared for the city of
4 Tacoma that reviewed the culvert replacement activity?

5 A. Yes, it is. I think what's her name Kathy Osbrig
6 was the engineer that did that. And they wanted us to
7 basically to spread water in the same culvert and
8 (inaudible). It was all approved by the state. Karla was a
9 little unhappy about it but that state what you have to do.

10 Q. And, in fact, on Exhibit 9 there's in addition to
11 the description of the work in the culvert that was provided
12 to the city there's a copy of the state's report, copy of

13 Exhibit 8, correct?
14 A. Right.
15 Q. And was that work straight out consistent with the
16 engineering report from --
17 A. Absolutely.

^ CP 321-322, **Description of driveway. Transcript page 29:16-25, 30:1-25.**

29

16 Q. Can you identify what the photo Exhibit 17
17 depicts?
18 A. 17 shows the west guardrail with a little
19 dollhouse in there is my meter base for the house and then I
20 actually ran a circuit 200 amp service from that point to
21 the garage. And so that's what I was trying to protect.
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23 pavers that I bought from a guy in Lakewood. And I thought
24 well, to make it more authentic looking I would use pavers
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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY cm
DEPUTY

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. Response Brief of Appellants Robert Olson and Sandra Olson

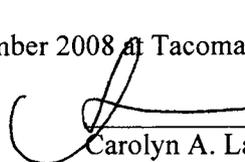
to be served on September 2, 2008, on the following parties and in the manner indicated below:

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 2 day of September 2008 at Tacoma Washington.



Carolyn A. Lake