

FILED
Court of Appeals
Division II
State of Washington
5/11/2020 2:50 PM
No. 54370-2-II

COURT OF APPEALS,
DIVISION II,
OF THE STATE OF WASHINGTON

**CITY OF BAINBRIDGE ISLAND, a Washington
municipal corporation, and its DEPARTMENT OF
PLANNING AND COMMUNITY DEVELOPMENT,**

Appellant,

v.

PAUL and JENNIFER CLARK,

Respondents.

**OPENING BRIEF OF APPELLANT CITY OF
BAINBRIDGE ISLAND**

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I. INTRODUCTION

Appellant, the City of Bainbridge Island and its Department of Planning and Community Development (“the City”) respectfully requests the Court of Appeals to reverse the superior court’s Order Vacating Decision of Hearing Examiner (“Trial Court Decision”) filed on November 5, 2019. CP 1191-92. The Trial Court Decision reversed and vacated a decision of the Bainbridge Island Hearing Examiner upholding the revocation of a vegetation management permit (“VMP”) issued to Respondents Paul and Jennifer Clark (“the Clarks”). The Trial Court Decision should be reversed because it was based on issues raised *sua sponte* by the trial court that were outside the superior court’s jurisdiction and because the superior court incorrectly applied the burden of proof and standard of review under the Land Use Petition Act (“LUPA”), Chapter 36.70C RCW, to the Hearing Examiner’s decision.

Pursuant to Chapter 16.22 of the Bainbridge Island Municipal Code (“BIMC”),¹ the City issued a VMP to the Clarks on July 13, 2016. CP 264-

¹ Chapter 16.22 BIMC was repealed in 2018 by City of Bainbridge Island Ordinance No. 2018-11. A copy of Chapter 16.22 BIMC as it existed at times relevant to this appeal is attached as Appendix B to this Brief. It also appears in the record at CP 837-850 and CP 1106-17.

65.² The VMP authorized the Clarks to clear vegetation within areas designated “Revised Garden Area,” “Haul Route,” and “homesite area” on a site plan dated July 12, 2016, but provided that the “[t]otal of clearing under this approval shall not exceed 20,000 square feet of area.” CP 265. After issuance of the permit, the Clarks cleared vegetation from 33,278 square feet of their property. CP 719:1; CP 195:12; CP 198:3-18. Based on this over-clearing, the City revoked the VMP on October 6, 2016. CP 286. The Clarks filed an administrative appeal of the revocation on October 20, 2016. CP 288-302.

On October 27, 2017, after conducting a full hearing and after delaying his decision to allow settlement negotiations between the City and the Clarks to take place, the Bainbridge Island Hearing Examiner denied the Clarks’ appeal. CP 489-96. In doing so, the Hearing Examiner rejected arguments by the Clarks that they had not “cleared” the vegetation but had merely “disturbed” it by grading over it with a bulldozer, and that a previous clearing and grading permit and a building permit for their home allowed additional clearing beyond the 20,000 square feet. CP 493-95. In short, the

² The Clerk’s Papers (“CP”) provided herein contain both the Administrative Documentary Record before the Bainbridge Island Hearing Examiner at CP 221-511 and the Verbatim Report of Proceedings before the Hearing Examiner at CP 534-767. References in this Brief to documents in the Clerks Papers are to the CP pages only, e.g., CP 264. References in this Brief to the Verbatim Report of Proceedings before the Hearing Examiner are to the CP page and lines, e.g., CP 565:25.
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Hearing Examiner held that “the [Clarks] have failed to demonstrate that the Director’s decision revoking the VMP issued to them on July 13, 2016, was unsupported by substantial evidence, was arbitrary and capricious or contrary to law. The Director’s revocation decision is affirmed and the appeal denied.” CP 495.

On appeal under LUPA, the superior court reversed and vacated the decision of the Hearing Examiner and reinstated the VMP. CP 1191-92. Before doing so, however, the superior court heard oral argument from the parties on July 30, 2018 and called the parties in for an additional conference on November 9, 2018. RP Vol. 1 (July 30, 2018); RP Vol. 2 (November 9, 2018). On both occasions, the superior court, *sua sponte*, raised issues regarding the validity of the City’s VMP regulations and the validity of the VMP itself – issues that were not raised by the Clarks in their original petition for judicial review and that were outside the superior court’s jurisdiction. *Id.* While the superior court paid lip service to the “erroneous interpretation of law” and “clearly erroneous” standards for LUPA review found in RCW 36.70C.130(1), the extra-jurisdictional issues clearly colored the superior court’s judgment and formed the basis for the Trial Court Decision. RP Vol. 3 (August 9, 2019). This was error that should be corrected by this Court.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error. The City assigns error to the following portions of the Trial Court Decision, CP 1191-92:

1. Paragraph 1 of the Trial Court Decision stating that “Petitioners’ appeal is **GRANTED** and the October 27, 2017 decision of the City’s Hearing Examiner is hereby **REVERSED**.”

2. Paragraph 2 of the Trial Court Decision stating that “the City Hearing Examiner’s decision is erroneous and is hereby **VACATED**. The vegetation management permit is reinstated.”

B. Issues Pertaining to Assignments of Error.

1. Did the superior court err when the court, sua sponte, raised issues regarding the validity of the City’s VMP regulations and the validity of the VMP issued to the Clarks, given that the VMP was not appealed and was therefore conclusively valid under LUPA?

2. Was the October 27, 2017 decision of the Bainbridge Island Hearing Examiner upholding revocation of the VMP supported by substantial evidence in the record?

3. Was the October 27, 2017 decision of the Bainbridge Island Hearing Examiner an erroneous interpretation of the law?

4. Was the October 27, 2017 decision of the Bainbridge Island Hearing Examiner upholding revocation of the VMP clearly erroneous?

5. Did the Hearing Examiner's decision upholding revocation of the VMP violate the Clarks' constitutional rights?

III. STATEMENT OF THE CASE

The Clarks own 2.34 acres (approximately 102,000 square feet) of land located at 7501 Twin Ponds Road in the City of Bainbridge Island. CP 568:8-9; CP 576:21-25. The land is zoned R 0.4, a designation that allows the construction of one single-family residence for each 2.5 acres of land, with a minimum lot size of 100,000 square feet. CP 227; BIMC 18.06.010.³ Prior to the issuance of the permits at issue in this case, the Clark property was vacant and heavily forested. CP 226; CP 240; CP 263; CP 450-62. The Clarks purchased the property with the intent of building a home and raising their family there. CP 565:25; CP 566:1-13.

On February 23, 2016, the Clarks applied for a clearing permit from the City of Bainbridge Island as the first step toward residential

³ BIMC 18.06.010 and other BIMC sections cited in this Brief (other than Chapters 16.18 and 16.22 BIMC) can be found online at <http://www.codepublishing.com/WA/BainbridgeIsland/>.

construction. CP 392-99. Under BIMC 16.18.030⁴ and 16.22.040.E, a clearing permit could be used to authorize the cutting or removal of up to 5,000 board feet of timber for personal use, while a vegetation management permit was required if more than 5,000 board feet of timber will be removed. *See*, Appendices A and B to this Brief. The clearing permit application indicated that the Clarks desired to “remove 4-5 trees to get the property ready for a driveway and well.” CP 393. A site plan submitted with the application showed the driveway and well site areas proposed to be cleared in red. CP 398.

The City granted the clearing permit on March 2, 2016. CP 400-01. The clearing permit contained seven specific conditions, most notably conditions limiting the amount of timber to be removed to 5,000 board feet, limiting the total area to be cleared to 7,000 square feet, and providing that the clearing was only be conducted within the confines of an accessway an well site to be constructed by the Clarks and shown on the project site plan. CP 400.

After receiving the clearing permit, the Clarks cleared approximately 11,000 square feet of their property, more than 150% of the

⁴ Chapter 16.18 BIMC has been substantially amended since the dates relevant to this appeal. For ease of reference, Chapter 16.18 as it existed on the relevant dates is attached to this Brief as Appendix A. It also appears in the record at CP 1099-1105. {KDH2152029.DOCX;1/13023.050039/ }

7000 square feet authorized by the permit. CP 575:25.⁵ Despite this clear violation of the clearing permit, the City did not take enforcement action against the Clarks at that time, but instead, in recognition of the fact that additional clearing would be necessary to construct the single-family residence the Clarks desired to build, the City told the Clarks they needed to obtain a VMP. CP 583:6-12.

In response, the Clarks submitted a VMP application on March 9, 2016. CP 233-40. The application described the Clarks' proposal as being to "[r]emove trees and stumps in order to prepare land for well, septic, and house." CP 236. The application stated that the total amount to be cleared was to be 18,000 square feet and that the limits of removal were to be "based on site plan." CP 238. While the Clarks' site plan went through several iterations as their development ideas progressed, CP 584:11-14, the site plan on which the City's initial review of the VMP was based is dated April 12, 2016 and is found at CP 262 and CP 448. Under BIMC 16.22.070.J as it existed at the time of the Clarks' application, *see* Appendix B to this Brief, the Clarks were required to submit a site plan showing twelve separate items, including "proposed areas to remain in forest" (item 4), "proposed

⁵ The City later measured the area of the clearing under the clearing permit at 8,321 square feet, but this did not include the area of the driveway that had been included in this permit. CP 718:17.
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areas to be cleared of vegetation” (item 5), “proposed areas to be thinned of trees” (item 6), and “proposed log landing areas” (item 8). In keeping with this code section, the April 12, 2016 site plan showed the only two areas proposed to be cleared in pink cross-hatch: (1) a teardrop shaped building envelope labeled “House” located in the north central portion of the property, and (2) a rectangular area labeled “Garden/Yard” in the western portion of the property. CP 262; CP 448; Appendix C to this Brief. The remainder of the site, shown in olive cross-hatch, was proposed to remain in its pre-development forested state. *Id.* According to a notation in the upper left of corner of the site plan, the total area proposed to be cleared under the VMP application was 17,000 square feet, or roughly 17% of the 2.34-acre site. *Id.*

At the same time the VMP application was submitted, the Clarks submitted an environmental checklist in support of that application. CP 241-61. In the checklist, the Clarks described the proposal for which they were seeking the VMP as follows:

I want to clear some trees, install a well, put in a driveway and build a house. Footprint of house will be approx. 1500 ft², size including driveway will be < 4000 ft².

CP 243. The Clarks indicated deciduous trees, evergreen trees, and shrubs would be removed over an area of “Approx. 10-15% of lot size.” CP 248.
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This 10-15% figure was later determined to be incorrect as the actual clearing proposed in the site plan was 17% of the overall site area. *Id.*

Because Mr. Schildmeyer had been assigned to review the Clarks' clearing permit, he was also assigned to process the Clarks' VMP application. CP 648:10-12. During the course of that review, Planning Manager Joshua Machen, who was Mr. Schildmeyer's supervisor at the time, determined that there were three major flaws in the April 12, 2016 site plan: (1) the potential that trees left between the western edge of the "Garden/Yard" area and the western property line might not be in "wind-firm" condition because of the narrowness of this area; (2) there was no haul route shown between the "Garden/Yard" area and the "House" site, which Mr. Machen understood would need to be cleared to allow the Clarks to harvest the trees in the "Garden/Yard" and haul them out; and (3) using the scale of 1" = 40' shown on the plan, the amount of clearing appeared to exceed the 17,000 square feet noted in the upper left corner. CP 649:10-25; CP 650:1-24. Mr. Machen sent Mr. Schildmeyer back to the Clarks to obtain a revised site plan addressing these issues. CP 650:19-24.

On July 12, 2016, the Clarks submitted a revised site plan in response to the comments made by Mr. Machen and Mr. Schildmeyer. CP

240; CP 852; Appendix C to this Brief.⁶ The July 12 revised site plan was very similar to the site plan submitted on April 12, but it differed from that plan in two significant respects: (1) the area proposed to be cleared for the “Garden/Yard” area was reduced in size from the large rectangle shown in pink cross-hatch in the April 12 site plan and offset from the property’s western boundary to the red square shown in the July 12, site plan abutting the property’s western boundary; and (2) a haul route was shown in red on the July 12 plan extending from the “Revised Garden Area” (also shown in red) to the purple cross-hatched area shown to be cleared for the “House.” *Id.* Mr. Machen and Mr. Schildmeyer determined that the revised July 12, 2016 site plan resolved the flaws that had been identified in the April 12, 2016 site plan, and the July 12 plan was ultimately approved. CP 655:13-16.

On July 13, 2016, the City approved the Clarks’ VMP. CP 264-65. The approval was subject to six specific conditions, including Condition 2, limiting the approval “to the clearing of vegetation within the ‘Revised Garden Area,’ ‘Haul Route,’ and homesite area represented on the revised

⁶ Prior to oral argument before the superior court, counsel for the City noticed that the colors on the July 12, 2016 site plan at CP 240 had washed out somewhat in the copying of the Hearing Examiner’s record. With the permission of the Clarks’ counsel, a better, darker, more color-legible copy of the site plan was presented to the trial court as CP 852 and is attached to this Brief as Appendix C.
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site plan submitted and date stamped July 12, 2016,” and Condition 4, which provided that “Total of clearing under this approval shall not exceed 20,000 square feet.” *Id.* Although the Clarks had only sought permission to clear 17,000 square feet, the City placed a 20,000 square foot limit on Clarks’ proposed clearing under Condition 4 in order to be consistent with the maximum amount of clearing allowed under the BIMC. CP 660:12-17.⁷

The Clarks did not appeal the VMP or its conditions and began clearing soon after issuance.⁸ At some point after the VMP was issued, the Clarks were issued a building permit to construct a single-family residence on the property. While Paul Clark later claimed at the appeal hearing before the Bainbridge Island Hearing Examiner that the building permit authorized him to clear up to an additional 5000 square feet of his property, Mr. Clark’s testimony was inconsistent with the building permit and permit file, which reflected no such approval. CP 663:5-10.⁹

⁷ Under BIMC 16.22.060.A.1 as it existed at the time the Clarks applied for their permit (attached as Exhibit A), land clearing on properties zoned R-0.4 in order to prepare for nonagricultural development was limited to 20% of the total site area. Because the Clarks’ property is 100,930 square feet in size, the total amount of clearing that could be authorized under BIMC 16.22.060.A.1 was 20,186 square feet (100,930 X .20 = 20,186). *See*, BIMC 16.22.060.A.1 in Appendix B to this Brief.

⁸ BIMC 2.16.020.P.1.d requires appeals of permit decisions to be filed within 14 days of permit issuance and the record does not reflect any such appeal having been filed here.

⁹ The Clarks did not submit a copy of the building permit at the evidentiary hearing before the Hearing Examiner, but Joshua Machen testified that he had reviewed the building {KDH2152029.DOCX;1/13023.050039/ }

Almost immediately after the VMP was issued, the City's Code Compliance Officer began receiving complaints from the Clarks' neighbors that the site was being over-cleared. CP 699:1-15. *See, also*, CP 663:14-19; CP 739:7-12. In response to the complaints, the Code Compliance Officer (Greg Vause) and the Acting Planning Manager (Heather Wright, who was filling in while Mr. Machen was on vacation) conducted a site inspection on August 3, 2016. CP 699:16-17. After taking one measurement across an area of bare dirt and without making and calculations as to the overall area of the clearing, Ms. Wright concluded that no violation had occurred. CP 592:4-7.

The City continued to receive complaints about over-clearing and when Mr. Machen returned from vacation in the middle of August 2016, Mr. Machen decided to perform an inspection on his own. CP 663:14-25; CP 664:1-2. During his inspection, which occurred in the third week of August 2016, Mr. Machen used a measuring tool consisting of a spool of string that can be used to count off feet as one walks. CP 664:8-18. Using this tool in a way that gave the Clarks the benefit of the doubt by rounding off corners, Mr. Machen determined that the area cleared by the Clarks as

permit file and there was no authorization in the file for the 5000 square feet claimed by Mr. Clark.
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of the date of his inspection was approximately 30,000 square feet, well in excess of the 20,000 square feet authorized by the VMP. CP 665:22-25; CP 666:1-2.

Mr. Machen reported the results of his inspection to Gary Christensen, the City's Director of Planning and Community Development and Mr. Vause, the City's Code Compliance Officer. CP 666:3-7. After further internal discussions and the receipt of additional citizen complaints, Mr. Christensen visited the Clarks' property in early October 2016. CP 739:13-22. Based on his observations and the measurements taken by Mr. Machen, Mr. Christensen formally revoked the VMP on October 6, 2016 and referred the matter to the Code Compliance Officer for enforcement. CP 286. On October 13, 2016, the Code Compliance Officer issued a stop work order and a "Warning of Violation & Order to Correct" to prevent further clearing on the Clarks' property and to require the Clarks to bring their property into compliance with the issued permits. CP 341-44; CP 706:20-25; CP 707:1-7. The stop work and order to correct was limited to further clearing and Paul Clark was specifically told by Mr. Vause that he could continue work on his residence. CP 707:15-20.

On October 19, 2016, the Clarks requested that the City’s Planning and Community Development Director, Mr. Christensen, review the Warning of Violation and accompanying stop work order. CP 337-39.

On October 20, 2016, the Clarks filed a timely appeal of the October 7 VMP permit revocation. CP 288-302. The Clarks’ appeal of the VMP revocation did not challenge the validity of Chapter 16.22 BIMC or the validity of the VMP issued on July 13, 2016, and instead argued only that the Clarks had not violated the VMP, *see* CP 294 at ¶¶ 5.2–5.4; that the square-footages approved in the clearing permit and VMP were cumulative, not concurrent, *id.* ¶ 5.5–5.6, 5.8; that the City should not have allowed neighbors to “interfere with the Clarks’ development,” *id.* ¶ 5.7; that the City was estopped from revoking their permit, *id.* ¶ 5.9; that the revocation was an arbitrary and unconstitutional violation of the Clarks’ property and equal protection rights, *id.* ¶¶ 5.10–12, 5.15; and that the City’s revocation violated the Growth Management Act’s protections of property rights and permitting fairness, *see id.* ¶¶ 5.13–5.14.

On October 25, 2016, Mr. Vause visited the Clarks’ property with Robert Grant, the City’s in-house surveyor, to create an accurate representation of what the Clarks had cleared. CP 711:6-19. Mr. Vause and Mr. Grant determined the total area that have cleared by including (1)

those areas that had been cleared under the original clearing permit; (2) the area of the house foundation; and (3) those additional areas that had been “scraped” to bare earth or where tractor prints indicated that equipment had been used and vegetation had been buried or otherwise destroyed. CP 711:23 – CP 714:16. Mr. Grant then used a survey instrument that relies on GPS data received from satellites to accurately measure the perimeter of the cleared areas to within 1/10th of a millimeter. CP 723:1-13. After doing some preliminary calculations at the site, Mr. Grant then used an AutoCAD program back at his office to finalize his calculations and to plot the results. Based upon his measurements, Mr. Grant determined that (1) the area cleared under the original clearing permit (excluding the driveway) was 8,321 square feet; (2) that the area of the house foundation was 742 square feet; and that the total area cleared on the site was 33,328 square feet. CP 718:17-25; CP 718:1; CP 729:4-12; CP 449-50.

Mr. Christensen issued a decision on December 12, 2016 sustaining the Warning of Violation & Order to Correct and the associated stop work order. CP 328-30. The Clarks filed an appeal of the Director’s Review Decision with the Bainbridge Island Hearing Examiner on December 23, 2016. CP 313-353. The parties agreed that because this appeal and the appeal of the permit revocation shared several key issues, the matters should

be consolidated for hearing before the Hearing Examiner. CP 354 at ¶ 2. On April 26, 2017, the Bainbridge Island Hearing Examiner convened a hearing on the two appeals.

At the outset of the hearing, the Hearing Examiner raised a question regarding his jurisdiction to hear the appeal of the Director's Review Decision on the Warning of Violation and associated stop work order. CP 538:19-125 and CP 539:1-17. The parties essentially agreed that the Examiner lacked jurisdiction over the stop work order and agreed that the Clarks' appeal of the Director's Review Decision could be dismissed. CP 764:12-25 and CP 765:1-9; CP 467 at ¶ 4. This agreement was subsequently memorialized in a post-hearing status order of the Examiner. CP 463 at ¶ 3 and CP 464 at ¶ A. Based on this agreement at the outset of the hearing, the Hearing Examiner conducted a full day evidentiary hearing on the permit revocation only. Both the Clarks and the City presented testimony of witnesses, primarily focusing on the Clarks' arguments that the clearing amounts allowed under the clearing permit, building permit and VMP were cumulative and not concurrent, and the Clarks argument that they had "disturbed" the vegetation on their site by grading over it, but had not "cleared" the vegetation. After the testimony was completed, the Hearing

Examiner continued the hearing at the parties' request to enable the parties to engage in settlement negotiations. CP 765:21-25 and CP 766:1-11.

When settlement negotiations proved unsuccessful, the City notified the Hearing Examiner of that fact and requested that the Hearing Examiner issue a decision. CP 465. On October 27, 2017, the Hearing Examiner did so, upholding the City's revocation of the VMP and denying the Clarks' appeal. CP 466-73. The Hearing Examiner rejected the Clarks' "disturbed but not cleared" argument, holding that the definition of "clearing" in the BIMC was "broad enough to include within its ambit killing vegetation by burying it under fill." CP 471 at Conclusion 7.

The Hearing Examiner also rejected the Clarks' claim that the 20,000 square feet of clearing authorized by the VMP was in addition to clearing authorized by other permits. Instead, the Hearing Examiner found that VMP Condition 4 (defining the scope of the authorized clearing as the "Revised Garden Area," "Haul Route," and homesite area shown on the revised July 12, 2016 site plan) had to be read "in conjunction" with VMP Condition 2 (limiting the total clearing to 20,000 square feet), and that

Since the [July 12, 2016] revised site plan both was required by the City to reduce the proposed clearing to a level consistent with the stated 17,000 square foot target and included in this total the areas previously harvested under the clearing permit, it is hard

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to argue either that the City intended to create an approval for an additional 20,000 square feet of clearing or that Mr. Clark could reasonably have believed such an interpretation.

CP 492 at Finding 15. Having made this key finding, the Hearing Examiner went on to construe the relevant City regulation, BIMC 16.22.060.A.1, and concluded as follows:

The critical point to be understood is that pursuant to the section's terms the relevant zoning district clearing area restriction percentage in BIMC 16.22.060.A(1) applies to the conversion parcel itself, and not to each individual permit issued for the parcel. A property owner may not defeat the intent of the conversion regulatory scheme by circumventing the clearing limitation set for the parcel via a strategy of piecemealing City permits. Indeed, if City staff itself were to undertake on a conversion parcel approval of a series of permits for total clearing in excess of BIMC 16.22.060.A(1) limits, such exceedance likely would be found void on its face if challenged as an *ultra vires* action. But where, as here, a clearing permit is obviously just a first step toward obtaining a full VMP, the City has the practical option to defer rectifying a degree of excessive cutting under the preliminary clearing permit because staff knows that it can account for such excess within its later comprehensive VMP review.

CP 493 at Conclusion 3, as modified on reconsideration, CP 511 at B.

Putting his key finding together with his conclusions, the Hearing Examiner held that:

Since the undisputed evidence is that the Clarks cleared 33,278 square feet of forest vegetation, exceeding the maximum legally permissible amount by a rather egregious 12,892 square feet,¹⁰ the City's revocation of the VMP was based on a plain violation of the permit's conditions and thus fully warranted under BIMC 16.22.097.A(2).

CP 494 at Conclusion 4.

Finally, the Hearing Examiner concluded that "The [Clarks] have failed to demonstrate that the Director's decision revoking the VMP issued to them on July 13, 2016, was unsupported by substantial evidence, was arbitrary and capricious or contrary to law. The Director's revocation decision is affirmed and the appeal denied." CP 495 at Conclusion 11.

After a motion for reconsideration alleging bias, the Hearing Examiner modified his October 27, 2017 decision on November 29, 2017 by deleting two findings (17 and 18) which the Examiner, after reflection, determined were "superfluous speculation over why Mr. Clark might have ignored all of the red flags being generated by his rather egregious

¹⁰ The Hearing Examiner based this figure on the difference between the 33,278 square feet actually cleared and the 20,386 square feet the Clarks could have applied to clear under the 20% limitation in BIMC 16.22.060.A.1. In fact the VMP limited the Clarks to 20,000 square feet of clearing, meaning they over-cleared by 13,278 square feet. {KDH2152029.DOCX;1/13023.050039/ }

behavior.” CP 511 at ¶ 5. The Hearing Examiner also added a sentence to his Conclusion 3 in order to further explain that the City could validly not take enforcement action when the Clarks cleared 11,000 square feet under their initial clearing permit because that could be accounted for fully under the later and more comprehensive VMP review. CP 511 at ¶ B. The Hearing Examiner’s resulting order was captioned as an “Order Denying Motion for Reconsideration” but the body of the order stated that the motion was being denied “except that the following modifications to the appeal decision text are hereby adopted. *Id.*

The Clarks then filed a petition for review in the Kitsap County Superior Court under LUPA. CP 1-52. As with their administrative appeal to the Hearing Examiner, the Clarks’ petition for review did not challenge the validity of Chapter 16.22 BIMC or the validity of the VMP issued on July 13, 2016, arguing only that (1) the Hearing Examiner erred in concluding that the Clarks violated the VMP, CP 17 at ¶ 4.15; (2) that the City should not have allowed neighbors to “interfere with the Clarks’ development,” *Id.* at ¶ 4.16; (3) that the Hearing Examiner erred in concluding that the 20% clearing limit in BIMC 16.22.060.A.1 was applicable to the Clark property, CP 17-18 at ¶ 4.17; (4) that the Hearing Examiner erred in determining that the 20,000 square feet authorized by the

VMP included any clearing authorized by the clearing permit and building permit, CP 18 at ¶¶ 4.19, 4.22, 4.24, 4.25 and 4.26; (5) that the Hearing Examiner’s decision was “violative of the doctrines of substantial compliance, permission, and estoppel,” CP 19 at ¶ 4.21; (7) that the Hearing Examiner’s decision conflicted with other City code provisions, CP 19-20 at ¶¶ 4.23, 4.25, and 4.28; (8) that the Hearing Examiner erred in finding a policy against “piecemealing” in the code, CP 20 at ¶ 4.27; and (9) that the revocation was an arbitrary and unconstitutional violation of the Clarks’ property and equal protection rights, and violated the Growth Management Act’s protections of property rights and permitting fairness, CP 21-24, ¶¶ 4.30-4.33.

The case was assigned to the Honorable Judge Jeanette Dalton and, after briefing was completed, the superior court held oral argument on the merits on July 30, 2018. RP Vol 1 (July 30, 2018). Although the Clarks conceded that the only real issue to be decided by the court was whether the Clarks were authorized to clear more than the 20,000 square feet set forth in the VMP because they had separately obtained clearing and building permit, *Id.* at 5, the superior court focused on anything but that issue. First, the court spent a significant amount of time insisting to the City’s counsel that the Clarks’ property was not forested prior to the clearing and was just

covered with shrubs, apparently confusing a remediation plan the Clarks had submitted after the VMP was revoked for the pre-clearing state. *Id.* at 38-41. *See, also*, CP 410 (remediation plan); and CP 450-62 (aerial and site photos showing forested state of site prior to and during clearing). The superior court also spent significant time asking whether the City had the authority to enact its VMP regulations or whether those were preempted under the state’s Forest Practices Act, RCW 76.09, and expressing her concerns that the City’s regulations required small landowners to preserve forested lands while the “big developers or the timber companies get to take everything” under the Forest Practices Act. *Id.* at 49-53. Finally, the court spent significant time lecturing the City’s counsel about whether the Bainbridge Island Hearing Examiner had actually granted the Clarks’ motion for reconsideration by modifying some of his findings and whether the captioning of the Hearing Examiner’s “Order Denying Motion for Reconsideration” was therefore misleading. *Id.* at 61-63 and 77-85.

The superior court did not issue a ruling on July 30, 2018, but instead set a date of August 9, 2018 to do so. The matter was then continued on a couple of occasions until the superior court summoned the parties to appear on November 9, 2018 to announce a request additional briefing. RP Vol. 2 (November 9, 2018). At the November 9, 2018 proceeding the court again

failed to address the central issue in the case, instead requesting that the parties submit briefing on (1) whether Chapter 16.22 BIMC (the VMP chapter) was a valid ordinance consistent with the Growth Management Act's provisions on designation of forest land, and with the Forest Practices Act (RP Vol. 2 (November 9, 2018) at 11-27)¹¹; (2) whether Chapter 16.22 was an unconstitutional denial of due process notice requirements because it was located in Title 16 BIMC (Environment) rather than Title 18 BIMC (Zoning), where the court believed residential property owners would be inclined to look for it¹² (*Id.* at 34-40); (3) whether Chapter 16.22 BIMC controlled the clearing of the Clarks' property or whether the Forest Practices Act preempted the City's regulations (*Id.* at 30-33); (4) whether the appeal was moot because Chapter 16.22 had been repealed after the Clarks' permit was revoked (*Id.* at 27-30)¹³; and (5) whether the court had

¹¹ The court ignored RCW 76.09.240(6)(a), which preserves local land use and permitting authority even where a forest practices permit is required.

¹² The court ignored the language of BIMC 18.03.010, which says that "This title sets forth the permitted uses of land and structures and the types of development that are permitted on platted lots and legal tracts of land in the city of Bainbridge Island. However, it must be read together with additional regulations regarding the use of land and structures in BIMC Titles 2 (Administration and Personnel), 15 (Buildings and Construction), 16 (*Environment*), and 17 (Subdivisions and Boundary Line Adjustments). (Emphasis added).

¹³ This appeal is not moot because (a) civil violations of regulations like BIMC are judged by the laws in effect at the time of the violation, *Heidgerken v. State Dept of Nat. Res.*, 99 Wn. App. 380, 391 n.6, 993 P.2d 934 (2000) and (b) the Clarks have filed a damages action against the City based on the VMP revocation that is now pending in the U.S. District Court for the Western District of Washington at Tacoma under Cause No. C19-6251RBL. {KDH2152029.DOCX;1/13023.050039/ }

the authority to raise these issues *sua sponte* because the Clarks had not raised them in its petition for review or in any of its briefing (*Id.* at 42-44).

After a pause at the parties' request to allow for settlement negotiations, the parties submitted supplemental briefs on the superior court's issues and the matter was set for the superior court to issue its oral ruling. CP 986-1040; CP 1069-1122; CP 1171-1184. Unfortunately, Dennis Reynolds, then counsel for the Clarks, passed away in July 2019 before the court could issue its ruling and the court ultimately convened the parties on August 9, 2019 for that purpose. RP Vol. 3 (August 9, 2019).

On August 9, 2019, the superior court announced that it was reversing and vacating the Hearing Examiner's decision. While the superior court said that the Hearing Examiner had erroneously interpreted the law (RCW 36.70C.130(1)(b)) and had made a clearly erroneous decision (RCW 36.70C.130(1)(d) in holding that the Clarks were limited to 20,000 square feet of clearing on their property, the court based these conclusions on the court's belief that Chapter 16.22 BIMC was inconsistent with the Forest Practices Act (*Id.* at 2-7); that there was no explanation in Chapter 16.22 for why different amounts of clearing could be allowed in different zoning districts (*Id.* at 7); that Chapter 16.22 was an overly burdensome restriction on development (*Id.* at 7); that the Hearing Examiner should have

considered a provision of BIMC 16.22 that might have allowed the Clarks to clear more vegetation if they had applied for it, which they did not (*Id.* at 8); and that Chapter 16.22’s applicability section was “poorly written” (*Id.* at 11). Thus, the superior court based its ruling almost entirely on issues that the court had raised *sua sponte* during the proceedings regarding the validity of the City’s regulations and the validity of the Clarks’ VMP, ignoring the fact that virtually none of these issues had been raised in the Clarks’ administrative appeal, CP 288-302, or in the Clarks’ LUPA petition for review, CP 1-52, that the validity of the regulations was within the sole jurisdiction of the Growth Management Hearings Board under RCW 36.70A.280, and that the VMP was conclusively valid under the finality provisions of LUPA, since it was not challenged at the time it was issued.

On November 5, 2019, the superior court entered the Trial Court Decision. This appeal followed.

IV. SUMMARY OF ARGUMENT

This Court should overturn the Trial Court Decision and affirm the Bainbridge Island Hearing Examiner’s decision upholding revocation of the VMP. While the superior court paid lip service to the “erroneous interpretation of law” and “clearly erroneous” review standards in RCW 36.70C.130, the court’s judgment was compromised by its consideration of

issues that the court raised *sua sponte*, that were not raised in the Clarks' LUPA petition, and that were outside the court's jurisdiction. The Hearing Examiner's decision, by contrast, is well-reasoned and is grounded in thoroughly supported findings regarding the actions of the Clarks, a plain and logical interpretation of the BIMC, and a correct application of Chapter 16.22 BIMC to the evidence presented. The Clarks did not prove before the superior court, and cannot prove in this appeal, that any of the standards set forth in RCW 36.70C.130 were violated by the Hearing Examiner's decision. This Court should overturn the Trial Court Decision and affirm the decision of the Hearing Examiner.

V. ARGUMENT

A. This Court applies the LUPA standards of review directly to the administrative record, and the Clarks bear the burden of meeting those standards of review in this appeal.

In an appeal of a superior court's decision under LUPA, the Court of Appeals stands in the same position as the lower court and applies LUPA's statutory standards of review in RCW 36.70A.130(1)(a)-(f) directly to the administrative record. *Wash. State Dep't of Transp. v. City of Seattle*, 192 Wn. App. 824, ¶ 20, 368 P.3d 251 (2016). "On appeal, the party who filed the LUPA petition bears the burden of establishing one of

the errors set forth in RCW 36.70C.130(1), even if the party prevailed on its LUPA claim at superior court.” *Quality Rock Prods., Inc. v. Thurston County*, 139 Wn. App. 125, 134, 159 P.3d 1 (2007). Thus, this Court may only affirm the superior court’s reversal and vacation of the Hearing Examiner’s decision if the Clarks can prove that the Hearing Examiner in fact committed violated one of LUPA’s standards. This they cannot do.

B. The superior court erred in raising issues regarding the validity of the City’s VMP ordinance and the validity of the Clarks’ VMP *sua sponte* in the proceedings below.

The superior court made several significant errors in raising issues *sua sponte* throughout the proceedings below. First, the superior court’s jurisdiction in a LUPA appeal is limited to those issues raised before the lower administrative tribunal (the Hearing Examiner here) and no other issues may be considered, *sua sponte* or otherwise. *Aho Const. I, Inc. v. City of Moxee*, 6 Wn. App. 2d 441, 458, 430 P.3d 1131 (2918).

Second, the growth management hearings boards have exclusive jurisdiction over the validity of development regulations under the GMA and a superior court may not, under the guise of LUPA, entertain a GMA

challenge as the superior court did here *sua sponte*.¹⁴ RCW 36.70A.280; *Woods v. Kittitas County*, 162 Wn.2d 597, 614-15, 174 P.3d 25 (2007); *Sommers v. Snohomish County*, 105 Wn. App. 933, 943-45, 21 P.3d 1165 (2001).

Third, land use decisions, such as the July 13, 2016 issuance of the VMP in this case, are conclusively valid and cannot be collaterally attacked unless they are appealed under LUPA within 21 days of issuance, which the VMP issued here was not. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (3006); *Chelan County v. Nykreim*, 146 Wn.2d 583, 586, 115 P.3d 286 (2005); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 173, 4 P.3d 123 (2000).

Finally, under the constitutional abstention doctrine, courts lack the authority to raise constitutional issues *sua sponte*, which the court did here in considering whether due process was violated by the fact that the clearing regulations were in the environment title of the BIMC vs. the zoning title. Courts must avoid deciding constitutional controversies where cases may be decided on other grounds. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000).

¹⁴ The superior court's references to the GMA were to its provisions regarding the designation of forest land and the manner of adopting development regulations and not to the property rights goal inconsistency argued in the Clarks' petition for review. {KDH2152029.DOCX;1/13023.050039/ }

Courts “are not in the business of inventing unbriefed arguments for parties *sua sponte*.” *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). Here, that is exactly what the superior court did, over and over, until the court landed on a basis for reversing and vacating the Bainbridge Island Hearing Examiner’s decision. This was clear error which this Court should correct on appeal.

C. The Bainbridge Island Hearing Examiner Correctly Determined that the permits issued to the Clarks authorized a cumulative total of 20,000 square feet of clearing and that the Clarks’ VMP was properly revoked when they cleared 33,278 square feet.

1. Substantial Evidence Supports the Hearing Examiner’s Determination that the 20,000 square feet of clearing authorized by the VMP was the total amount authorized for the Clark property and that the Clarks violated this restriction.

RCW 36.70A.130(1)(c) authorizes a reviewing court to overturn a land use decision when the court finds that it is “not supported by evidence that is substantial when viewed in light of the whole record before the court.” Substantial evidence is “evidence that would persuade a fair-minded person of the statement asserted.” *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 249, 218 P.3d (2009); *Freeburg v. City of*

Seattle, 71 Wn. App. 367, 371, 859 P.2d 610 (1993). Here, the Bainbridge Island Hearing Examiner's determination that the total amount the Clarks were allowed to clear was 20,000 square feet and that the Clarks cleared more than this amount is supported by substantial evidence.

The Clarks' entire case before the Hearing Examiner hinged on whether the 20,000 square feet of clearing authorized under the VMP was in addition to, or included, the clearing that was authorized under the clearing and grading permit and possibly under the building permit. As noted above in the Statement of the Case, the Hearing Examiner specifically found that the VMP clearing limitation was inclusive of the other permits because (a) the VMP was expressly conditioned upon clearing taking place only in the "Revised Garden Area," "Haul Route," and "homesite areas" shown on the revised July 12, 2016 site plan and thus further defined the scope of the 20,000 square feet of authorized clearing; (b) the City required the April 12, 2016 site plan submitted with the VMP application to be revised in order to reduce the square footage of the clearing limits proposed to match the 17,000 square feet requested in the application; and (c) the Revised Garden Area, Haul Route, and homesite areas included the areas previously cleared for the driveway and well under the clearing permit and the area to be cleared for the house under the building permit. CP 469 at

Finding 15. In order for the Court to overturn these findings (which were not addressed at all by the superior court), the Clarks must prove that the findings were not supported by substantial evidence. When the record before the Hearing Examiner is reviewed under this deferential standard, it is clear that substantial evidence in the record supports each of these findings.

First, the VMP conditions of approval expressly contained both a 20,000 square foot limit on clearing (Condition 4) and a limit on the specific areas where that clearing was to take place: “the ‘Revised Garden Area,’ the ‘Haul Route,’ and homesite area represented on the revised site plan submitted and date stamped July 12, 2016” (Condition 2). CP 265. All other areas shown on the July 12, 2016 site plan were indicated by the yellow cross-hatch to be “proposed areas to remain in forest.” CP 240, CP 852, and Appendix C to this Brief¹⁵ While the Clarks consistently asked the Hearing Examiner and the superior court to read the permit as if Condition 2 and the July 12, 2016 revised site plan did not exist, the condition and site plan are indisputably part of the permit and placed specific limits on the locations at which clearing could occur. The Clarks

¹⁵ Item 4 in the legend under the site plan drawing shows yellow cross-hatch and corresponds to subsection 4 of BIMC 16.22.070.J requiring a vegetation harvest plan for a VMP to show “proposed areas to remain in forest.”

never appealed Condition 2 of the permit at the time it was imposed, and the condition was final, valid, and controlling as of the expiration of the appeal period. *Habitat Watch v. Skagit County*, *supra*, 155 Wn.2d at 406-07, 120 P.3d 56 (2005); *Hanna v. Margitan*, 193 Wn. App. 596, 611, 373 P.3d 300 (2016); *Brotherton v. Jefferson County*, 160 Wn. App. 647, 248 P.3d 597 (2011). Substantial evidence thus supports the Hearing Examiner's finding that Condition 2 further defined the scope of the 20,000 square feet of total clearing allowed under the VMP.

Second, the clearing limits shown on the July 12, 2016 revised site plan approved with the VMP were established to reduce the amount of the proposed clearing on the site, not expand it. As Bainbridge Island Planning Manager Joshua Machen testified, the April 12, 2016 site plan submitted with the VMP (CP 448) had several flaws that required its revision. CP 649:10-25; CP 650:1-24. One of those flaws was that the cumulative area of the clearing limits shown on the plan exceeded the 17,000 square feet for which the permit was requested. CP 650:12-18. The City therefore required that the site plan be revised to scale back the clearing limits shown in the April 12, 2016 site plan to match the 17,000 square feet proposed. CP 650:19-24. The revised site plan dated July 12, 2016 (CP 240, CP 852, and Appendix C to this Brief), was the result of this requirement. CP 653:2-8.

Substantial evidence thus supports the Hearing Examiner's finding that the process of arriving at the final July 12, 2016 revised site plan was an indication of both parties' understanding that clearing was not to extend beyond the locations shown on the plan.

Third, when the July 12, 2016 revised site plan approved with the VMP is compared with the February 23, 2016 site plan approved with clearing permit, it is readily apparent that the specific locations authorized for clearing under the clearing permit were included in the locations authorized for clearing in the VMP. The red driveway area labeled "Proposed Driveway" and the red circle area labeled "Proposed Well Site" on the February 23, 2016 clearing permit site plan, CP 398, lie entirely within the areas labeled "House" and "Haul Route" on the July 12, 2016 VMP site plan, CP 240, CP 852, and Appendix C to this Brief. The area the Clarks have claimed they received approval for clearing in their home building permit also lies completely within the pink cross-hatched teardrop-shaped area labeled "House" on the July 12, 2016 revised site plan approved with the VMP.¹⁶ Substantial evidence thus supports the Hearing

¹⁶ The City strongly disagrees that the Clarks received approval for 5000 square feet of clearing under the building permit issued for their home. The Clarks did not submit a copy of the building permit into the record to prove their claim and Mr. Clark's testimony that they received approval for 5000 square feet of clearing under the building permit was inconsistent with the building permit records, according to the testimony of Joshua Machen. CP 663:5-10
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Examiner's finding that the areas harvested or to be harvested under the clearing and building permits were included in, and not in addition to, the areas approved in the VMP.

Given the above, there can be no serious dispute that "the record as a whole supports a finding that the City consistently intended the 20,000 square foot limit to apply to the project as a whole and tried to communicate that to Mr. Clark." CP 468-69, Finding 13. As the Hearing Examiner correctly recognized, the conditioning of the VMP on the specific locations shown in the July 12, 2016 site plan, the fact that the initial site plan submitted with the VMP was reduced in scope to match up with the 17,000 square feet proposed, and the fact that all clearing locations claimed by the Clarks to be "in addition" to the 20,000 square feet authorized by the VMP were included within the locations shown on July 12, 2016 site plan, made it "hard to argue either that the City intended to create an approval for an additional 20,000 (sic) of clearing or that Mr. Clark could reasonably have believed such an interpretation." CP 469 at Finding 15.

Moreover, the Clarks' argument that the 20,000 square feet of clearing authorized by the VMP was in addition to that authorized by the clearing and building permits is absurd on its face. If the authorized clearing

under the VMP was in addition to the authorized clearing under the clearing and building permits, why did the Clarks submit a site plan for approval with the VMP that included all of these “additional” locations within the areas proposed to be cleared and that represented the total area of all such clearing to be 17,000 square feet? The Clarks offered no logical explanation for this at the hearing before the Examiner or the superior court.

With substantial evidence clearly supporting the Hearing Examiner’s findings that 20,000 square feet was the cumulative total of clearing allowed on the Clark property, the only remaining question before the Examiner was whether the Clarks had cleared more than that amount. The Hearing Examiner found that “the total area of clearing on the Clark property was 33,278 square feet,” a figure that the Hearing Examiner termed “indisputably reliable” based on the survey information presented by the City’s witnesses. CP 468 at Finding 12. This finding was not disputed in the Clarks’ petition for review under LUPA, and counsel for the Clarks conceded that this figure was correct in oral argument before the superior court. RP Volume 1 (July 30, 2018) at 5.

Finally, having failed to show that the Hearing Examiner’s factual findings were unsupported, the Clarks resorted to alleging that the Hearing Examiner was “hopelessly compromised,” citing in part findings 17 and 18

made in the Hearing Examiner's original decision, CP 469, in which he speculated on the Clarks' motives for over-clearing and characterized their actions as possible "regulatory indifference." The superior court fixated on these statements, lecturing the City's counsel during oral argument on how inappropriate they were. RP Vol. 1 (July 30, 2018) at 77-85. The superior court refused to acknowledge that the Examiner removed these findings on reconsideration, focusing instead on whether they were truly removed because the Examiner had captioned his order on reconsideration in the form of a denial. *Id.* at 77 and 84-85. But even if they had not been removed, the statements do not evidence prejudice or bias; they simply reflect the Examiner's evaluation of the credibility of Mr. Clark's testimony and the strength of Mr. Clark's legal arguments. They also reflect the Examiner's search for some credible explanation – any credible explanation – for why the Clarks so blatantly violated the clearing limits approved in the VMP. When no credible explanation was offered by the Clarks, the Hearing Examiner was left to reach the only logical conclusion: that the Clarks may have seen the opportunity to clear an area much larger than what the VMP allowed while making a claim later that they thought the permit authorized that clearing.

An adverse ruling, without more, does not support an inference of bias. *See, Rhinehart v. The Seattle Times Co.*, 51 Wn. App. 561, 579-80, 754 P.2d 1243 (1988). Here, the Hearing Examiner's initial statements that were removed on reconsideration reflected his honest evaluation of the legal and factual arguments made by the Clarks and were entirely accurate based on the record. No showing of actual bias or prejudice has been made and the superior court was wrong in concluding otherwise.

2. The Bainbridge Island Hearing Examiner correctly interpreted BIMC 16.22.060.A.1 as applying to the Clarks' property and as allowing only 20% of the Clarks' property to be cleared under all permits issued.

When reviewing an interpretation of a city ordinance, a court must give considerable deference to the construction adopted by those city officials charged with its enforcement. *Pinecrest Homeowner's Ass'n. v. Cloninger & Assoc.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004); *Development Services v. City of Seattle*, 138 Wn.2d 107, 117, 979 P.2d 387 (1999); *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 127, 186 P.3d 357 (2008); *Citizens to Preserve Pioneer Park, LLC v. City of Mercer Island*, 106 Wn. App. 461, 475, 24 P.3d 1079 (2001). In this case, the Clarks made two arguments regarding the City's interpretation of

BIMC 16.22.060.A.1: (a) that the Hearing Examiner incorrectly interpreted this section as applying to their property because they had Class IV Forest Practices Permit, and (b) that the Hearing Examiner incorrectly interpreted this section as requiring the cumulative total of all clearing on their property not to exceed 20,000 square feet. The superior court agreed with the Clarks, but neither of these arguments is supported by the Bainbridge Island Municipal Code.

First, BIMC 16.22.060.A.1 clearly applies to the Clarks' property according to the plain language of that section. BIMC 16.22.060.A provides, in pertinent part, as follows:

Any property which is converting or likely to convert to a nonforest use shall provide either a conversion harvest plan or a selective harvest plan as follows:

- A. Conversion Harvest Plan. The owner of *any property* which is being converted to nonforest use shall provide a conversion harvest plan which meets the standards below.
 - 1. Land clearing is permitted at the following percentages of the area existing in order to prepare for future nonagricultural development. Percentage of area that may be cut.

Zoning District area	Percent of	
R-0.4	20%	...
R-1	40%	
R-2, 2.9, 3.5 and 4.3	60%	

6. *A Class IV general forest practice permit issued by DNR is required.*

(Emphasis added). CP 842-43; CP 1109-110; Appendix B to this Brief at 6.

The term “any property” in the first sentence of BIMC 16.22.060.A is intentionally broad and means exactly what it says: any property on the City of Bainbridge Island that is proposed to be converted or is likely to be converted to nonforest use as the result of clearing under a Class IV forest practice permit must provide a conversion harvest plan and may only be cleared in the percentages listed in the table. Having a forest practices permit thus does not exempt a person from the requirement to obtain a VMP; the forest practices permit is required in addition to the VMP.

Because the Clarks applied to clear their property to convert it from forest¹⁷ to single-family residential use, the plain language of BIMC 16.22.060.A.1 indicates that the section applies.

BIMC 16.22.030.B, cited by the Clarks to the superior court, does not dictate a different result. That subsection is limited to the situation in which a property owner who has applied for a Class I, II, or III forest practices permit desires to avoid a six-year moratorium on development of the property:

A property owner intending to harvest under a *Class I (not exempt in BIMC 16.22.040.E), II, or III DNR forest practices permit* may avoid the six-year development moratorium if the property owner submits to the city and DNR a conversion option harvest plan which meets the standards of BIMC 16.22.060 and is approved by the city prior to the application for a DNR forest practice permit.

(Emphasis added). CP 842-43; CP 1109-110; Appendix B to this Brief at 6. Here, the Clarks admit that they obtained a Class IV forest practices permit, not the Class I, II, or III permit to which BIMC 16.22.060.B applies.

¹⁷ The superior court spent considerable time and energy trying to determine whether the City had designated the Clarks' property as "forest land" under the Growth Management Act and whether the land was "forest" under the Forest Practices Act, two entirely different regulatory schemes from the City's VMP regulations. RP Vol 1 (July 30, 2018) at 49-53. The record does not reflect the City having done so, but it does reflect that the Clark property was heavily treed prior to the clearing, thus constituting forest land in common parlance. CP 450-62.
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Because the Clarks did not obtain a Class I, II, III forest practices permit, the “conversion option harvest plan” referred to in BIMC 16.22.030.B was not required and the Clarks’ argument that the City was required to receive such a plan or submit such a plan to DNR is without merit.

The Clarks also argued, and the superior court agreed, that properties with Class IV forest practices permits are exempt from obtaining a VMP under BIMC 16.22.060.A. But the plain language of BIMC 16.22.060.A.6 subjects properties with Class IV forest practices permits to the clearing limitations in BIMC 16.22.060.A.1. BIMC 16.22.060.A provides that all conversion harvest plans required for VMPs must meet the standards set forth in subsections A.1 through A.6. Subsection A.1 expressly requires the property owner to comply with the clearing percentage restrictions and Subsection A.6 expressly requires that a property owner obtain a Class IV general forest practices permit from DNR. There is no exemption and both permits must be obtained.

The Clarks’ final argument regarding the applicability of BIMC 16.22.060.A was that because removing 5000 board feet or less of timber from a property requires a clearing permit under Chapter 16.18 BIMC and not a VMP under Chapter 16.22 BIMC, that somehow makes the VMP clearing percentages inapplicable to the Clark property. But as the Hearing

Examiner noted, the “critical point to be understood [when interpreting BIMC 16.22.060.A] is that... the clearing area restriction percentage established by BIMC 16.22.060.A(1) applies to the conversion parcel itself, not to each individual permit issued for the parcel.” CP 470 at Conclusion 3; CP 511 at ¶ B. This follows logically from the use of the term “property” in both the preamble to and the first sentence of BIMC 16.22.060.A to describe the area to which the percentage limitations described in the section apply. Use of the term “property” also means exactly what it says: any property on which clearing is to take place can only be cleared in the maximum percentage set forth in the section. As applied to the Clark property, BIMC 16.22.060.A thus limited all clearing to 20,000 square feet (20% of the overall land area) and the Hearing Examiner correctly and logically interpreted this requirement to include all vegetation removal accomplished under the building and clearing permits.

By contrast, interpreting BIMC 16.22.060.A.1 as the Clarks urge the court to do is illogical and would lead to an absurd result. In construing statutes and ordinances, courts are to be guided by reason and common sense and are to avoid interpretations that are “strained, unlikely, or unrealistic.” *Qwest Corp. v. City of Kent*, 157 Wn.2d 545, 551, 139 P.3d 1091 (2006); *Dahl-Smyth, Inc. v. City of Walla Walla*, 110 Wn. App. 26,

32, 38 P.2d 366 (2002). Moreover, statutes and ordinances may not be construed to create an absurd result. *Cherry v. Municipality of Metropolitan Seattle*, 116 Wn.2d 794, 802, 808 P.2d 746 (1991). As the Hearing Examiner pointed out, interpreting BIMC 16.22.060.A.1 as not requiring the conversion harvest plan associated with a VMP to include all areas cleared under other permits would allow a “property owner [to] defeat the intent of the conversion regulatory scheme by circumventing the clearing limitation for the parcel via a strategy of piecemealing city permits.” CP 470 at Conclusion 3; CP 511 at ¶ B.. Such a result is obviously absurd and not what the code intended. The Hearing Examiner’s interpretation avoids this “strained, unlikely, or unrealistic” result and must be upheld.

3. The Bainbridge Island Hearing Examiner’s decision was not clearly erroneous.

A decision is “clearly erroneous” under RCW 36.70C.130(1)(d) only where, after considering the entire record, the court is left with the definite and firm conviction that the decision is incorrect, even if there is evidence to support it. *Lauer v. Pierce County*, *supra*, 173 Wn.2d 242, 253, 267 P.3d 988 (2011) ; *Klineburger v. King County Dept. of Development and Environmental Services Bldg.*, 189 Wn. App. 153, 164, 356 P.3d 223 (2015); *Families of Manito v. City of Spokane*, 172 Wn. App. 727, 736, 291

P.3d 930 (2013), *reconsideration denied, review denied*, 177 Wn.2d 1025, 309 P.3d 504 (2013). In determining whether a land use decision is clearly erroneous, a court must be deferential to factual determinations made by the highest forum below that exercised fact-finding authority. *Citizens to Preserve Pioneer Park, LLC v. City of Mercer Island*, 106 Wn. App. 461, 474, 24 P.3d 1079 (2001). When the Hearing Examiner's decision in this case is reviewed under this standard, it is obvious that the Clarks have failed to meet their burden of proof.

As discussed in detail in the preceding sections, the Hearing Examiner correctly interpreted BIMC 16.22.060.A as requiring that “[t]he minor preliminary vegetation removal done pursuant to a clearing permit is not to be excluded from the later VMP review for the project as a whole.” CP 493 at Conclusion 2. The Hearing Examiner also correctly found that (a) the VMP was expressly conditioned upon clearing taking place only in the “Revised Garden Area,” “Haul Route,” and “homesite areas” shown on the revised July 12, 2016 site plan and thus further defined the scope of the 20,000 square feet of authorized clearing; (b) the City required the April 12, 2016 site plan submitted with the VMP application to be revised in order to reduce the square footage of the clearing limits proposed to match the 17,000 square feet requested in the application; and (c) the Revised Garden

Area, Haul Route, and homesite areas included the areas previously cleared for the driveway and well under the clearing permit and the area to be cleared for the house under the building permit. CP 492 at Finding 15. Finally, the Hearing Examiner correctly found (and the Clarks have not disputed), that the Clarks actually cleared 33,328 square feet of their property, 13,328 square feet in excess of the 20,000 square foot limitation imposed by Condition 4 of the VMP and well outside the locations shown on the July 12, 2016 revised site plan that Condition 2 of the VMP required the Clarks to adhere to. CP 491 at Finding 12. Under these circumstances, the Hearing Examiner's determination that "the City's revocation of the VMP was based on a plain violation of the permit's conditions and thus fully warranted under BIMC 16.22.097.A(2)" was not clearly erroneous and this Court must uphold it.

4. The Hearing Examiner's decision did not violate the constitutional rights of the Clarks.

The Clarks have also argued in these proceedings that the Hearing Examiner's decision to revoke the VMP somehow violates their constitutional rights. The Clarks' argument, however, is not with the revocation decision itself, but with the VMP's imposition of a 20,000 square foot cumulative clearing limit on their property, which they contend is

unconstitutional. The Clarks' failure to timely challenge the VMP precludes their constitutional claim.

Where a litigant fails to timely challenge a land use permit decision under LUPA, the permit becomes conclusively valid and not subject to collateral attack, even if the permit was somehow issued in error or would otherwise have been invalid. *Chelan County v. Nykreim, supra*, 146 Wn.2d at 932; *Habitat Watch v. Skagit County, supra*, 155 Wash.2d at 410–11. Under LUPA, the deadline for filing a petition challenging a land use permit is 21 days from its issuance. RCW 36.70C.040(3). Because the Clarks did not file a LUPA petition challenging the VMP within 21 days of July 13, 2016, the VMP and all of its conditions, including the 20,000 square foot clearing limit, was conclusively valid and not subject to collateral attack in these proceedings, even if, as the Clarks contend (but the City vigorously disputes), the 20,000 square foot limit was excessive. The Clarks' constitutional arguments have nothing to do with the revocation decision at issue in this appeal and are therefore outside the purview of this Court.

VI. CONCLUSION

For all of the reasons set forth above, the Court of Appeals should reverse the Trial Court Decision and uphold the decision of the Bainbridge Island Hearing Examiner. The Clarks cannot prove that any of the LUPA

standards in RCW 36.70C.130 were violated by the decision to revoke the VMP and the Hearing Examiner's decision was supported by substantial evidence, was based on a correct interpretation of the BIMC, was not clearly erroneous, and did not violate the constitutional rights of the Clarks. The Court of Appeals should correct the error of the superior court and uphold the Hearing Examiner's decision.

RESPECTFULLY SUBMITTED this 11th day of May, 2020.

Respectfully submitted,

OGDEN MURPHY WALLACE, PLLC

By /s/ James E. Haney

James E. Haney, WSBA #11058

Attorney for Appellant

APPENDIX A

Chapter 16.18 LAND CLEARING

Sections:

- 16.18.010 Purpose.
- 16.18.020 Definitions.
- 16.18.030 Applicability.
- 16.18.040 Clearing activities not requiring a permit.
- 16.18.050 General requirements.
- 16.18.060 Performance assurance.
- 16.18.070 Appeals.
- 16.18.080 Violation – Enforcement and penalty.

16.18.010 Purpose.

This chapter is adopted for the following purposes:

- A. To promote the public health, safety, and general welfare of the citizens of the city;
- B. To preserve and enhance the city's physical and aesthetic character by preventing indiscriminate removal or destruction of trees and ground cover on undeveloped and partially developed property;
- C. To promote land development practices that result in a minimal disturbance to the city's vegetation and native soil structure and protect infiltration capacity;
- D. To minimize surface water and ground water runoff and diversion and to prevent erosion and reduce the risk of slides;
- E. To minimize the need for additional storm drainage facilities;
- F. To retain clusters of trees for the abatement of noise and for wind protection;
- G. To promote building and site planning practices that are consistent with the city's natural topographical and vegetational features while at the same time recognizing that certain factors such as condition (e.g., disease, danger of falling, etc.), proximity to existing and proposed structures and improvements, interference with utility services, protection of scenic views, and the realization of a reasonable enjoyment of property may require the removal of certain trees and ground cover;
- H. To reduce siltation and water pollution in island waters;
- I. To implement the goals and objectives of the Washington State Environmental Policy Act; and
- J. To implement and further the city's comprehensive plan. (Ord. 2015-03 § 2, 2015: Ord. 2003-16 § 1, 2003. Formerly 15.18.010)

16.18.020 Definitions.

"Clearing" means the destruction or removal of vegetation by manual, mechanical, or chemical methods.

"Significant tree" means: (1) an evergreen tree 10 inches in diameter or greater, measured four and one-half feet above existing grade; or (2) a deciduous tree 12 inches in diameter or greater, measured four and one-half feet above existing grade; (3) in the Mixed Use Town Center and High School Road zoning districts, any tree eight inches in diameter or greater, measured four and one-half feet above existing grade; or (4) all trees

located within a required critical area buffer as defined in Chapter 16.20 BIMC.

“Vegetation” means plant matter, including trees, shrubs and ground cover. (Ord. 2015-03 § 2, 2015: Ord. 2003-16 § 1, 2003. Formerly 15.18.020)

16.18.030 Applicability.

A. No person, corporation, or other legal entity shall engage in or cause clearing in the city without having obtained a land clearing permit from the planning director or designee. No person, corporation, or other legal entity shall cut, trim, remove, clear or damage any vegetation or trees within the following areas without obtaining a clearing permit from the planning director or designee: any critical areas, shoreline areas or their buffers as defined in and regulated by Chapter 16.12 or 16.20 BIMC. This standard also applies to landscape buffers, open space areas, or trees retained through a land use permit under BIMC Titles 17 or 18, including adjacent properties.

B. For properties located outside of the Mixed Use Town Center and High School Road zoning districts, a clearing permit is required for removing more than six significant trees, but no more than 5,000 board feet of timber (including live and dead standing timber) for personal use in any 12-month period. To cut/remove more than 5,000 board feet of timber, a vegetation management permit may be required pursuant to Chapter 16.22 BIMC, in addition to a permit from the Department of Natural Resources. See tree removal permit process flow chart, Figure 16.18.

C. For properties located within the Mixed Use Town Center and High School Road zoning districts, a clearing permit is required for removing any significant tree, as defined by BIMC 16.18.020. For existing development subject to tree requirements or conditions applied through an approved land use or development permit, see exemption in BIMC 16.18.040. C. For other properties in these districts, clearing permits will only be approved if the applicant demonstrates that at least one of the following criteria is met, as determined by the director or their designee:

1. The tree is diseased, dead or otherwise determined to be a hazardous tree as determined by a qualified professional pursuant to BIMC 18.15.010.C.1.c; or
2. The removal is necessary to enable construction or reasonable use of the property, and no other alternative is feasible; or
3. The removal is necessary to maintain utilities, access, or fulfill the terms of an easement or covenant recorded prior to the adoption of the ordinance codified in this chapter.

D. In the event of a conflict between the requirements of this chapter and any other requirement of the Bainbridge Island Municipal Code, the more restrictive requirement shall apply. Additional permits may be required if the activities are regulated by other chapters such as, but not limited to, Chapter 15.20 BIMC, Surface and Storm Water Management, Chapter 16.12 BIMC, Shoreline Master Program, Chapter 16.20 BIMC, Critical Areas, and Chapter 16.22 BIMC, Vegetation Management. Clearing of more than 7,000 square feet shall meet the stormwater management minimum standards outlined in Chapter 15.20 BIMC. See tree removal permit process flow chart, Figure 16.18. (Ord. 2015-03 § 2, 2015: Ord. 2003-16 § 1, 2003. Formerly 15.18.030)

16.18.040 Clearing activities not requiring a permit.

A. Clearing of up to six significant trees, as defined in BIMC 16.18.020, in any 12-month period. This exemption does not apply to: any critical areas, shoreline areas or their buffers as defined in and regulated by Chapter 16.12 or 16.20 BIMC, other protected vegetated areas, or in the Mixed Use Town Center and High School Road zoning districts, pursuant to BIMC 16.18.030;

B. Clearing of up to 2,500 square feet of land in any 12-month period; any amount of clearing is subject to the stormwater pollution prevention standards of Chapter 15.20 BIMC. This exemption does not apply to: any critical areas, shoreline areas or their buffers as defined in and regulated by Chapters 16.12 or 16.20 BIMC, or other protected areas, pursuant to BIMC 16.18.030;

C. Clearing as part of a development where clearing limits and/or tree retention and landscape requirements have been set and erosion control plans approved as part of the approval for the development; provided, that land clearing in connection with such projects shall take place only after a land use or development permit has been issued by the city and shall be in accordance with such permit;

D. The installation and maintenance of fire hydrants, water meters, and pumping stations, and street furniture by the city or utility companies or their contractors;

E. Removal of trees and ground cover in emergency situations involving immediate danger to life or structure or substantial fire hazards. If one is required, a clearing permit shall be obtained as soon as possible after the emergency situation is stabilized;

F. Routine gardening and landscape maintenance of existing landscaped areas on developed lots, including pruning, weeding, planting, mowing, and other activities associated with maintaining an already established landscape;

G. Agricultural management of existing farmed areas;

H. Routine maintenance activities, including tree removal, removal of invasive vegetation, and thinning required to control vegetation on road and utility rights-of-way;

I. Forest practices regulated by the Department of Natural Resources under Chapter 76.09 RCW. (Ord. 2015-03 § 2, 2015: Ord. 2003-16 § 1, 2003. Formerly 15.18.040)

16.18.050 General requirements.

A. Submittal Requirements. A complete application for a land clearing permit shall be submitted on the application form provided by the city, together with information required under Chapter 15.20 BIMC for a completed application, and including the following:

1. A plot plan on a base map provided by the applicant or by the city containing the following information:
 - a. Date of drawing or revision, north arrow, adjoining roadways and appropriate scales;
 - b. Prominent physical features of the property including, but not limited to, geological formations, critical areas and watercourses;
 - c. General location, type, range of size, and conditions of trees and ground cover;
 - d. Identification by areas, of trees and areas of ground cover that are to be removed, and information on how the trees or areas are delineated in the field;
 - e. Any existing improvement on the property including, but not limited to, existing cleared areas, structures, driveways, ponds, and utilities;
 - f. Information indicating the method of drainage and erosion control during and following the clearing operation; and
 - g. Information on how property lines are identified.

2. Payment of the land clearing application fee in the amount established by resolution of the city council.

B. After-the-Fact Clearing Permit. In the event of unauthorized clearing, an after-the-fact clearing permit may be issued if the applicant meets all of the conditions listed in this chapter and any other applicable regulations or remedies. The fee for an after-the-fact clearing permit shall be established by resolution of the city council.

1. If significant trees are removed in the Mixed Use Town Center/High School Road zoning districts, and the criteria of BIMC 16.18.030.C cannot be met, then such an after-the-fact must be denied, and replanting required at a 1:1 tree unit ratio, using the tree unit conversion method described in BIMC 18.15.010.G.5. The city shall also collect a fine equal to the value of the tree(s) determined by the current standards of the International Society of Arboriculture. See BIMC 16.18.080.

C. The planning director shall grant a clearing permit application if the application meets the requirements of this chapter and all other relevant city codes, including but not limited to Chapters 15.20, 16.12, 16.20, and 16.22 BIMC. If the clearing permit is denied, it may be appealed pursuant to BIMC 16.18.070.

D. Approved clearing plans shall not be amended without authorization of the planning director.

E. No work authorized by a clearing permit shall commence until a permit notice has been posted by the applicant on the subject property at a conspicuous location. The notice shall remain posted in said location until the authorized clearing has been completed.

F. Any clearing permit granted under this chapter shall expire one year from the date of issuance. Upon a showing of good cause, a clearing permit may be extended for six months by the planning director.

G. A clearing permit may be suspended or revoked by the planning director because of incorrect information supplied or any violation of the provisions of this chapter.

H. Failure to obtain forest practice application, where applicable, with the stated intent of land conversion as defined in RCW 76.09.020(4) shall be grounds for denial of any and all applications for permits or approvals, including building permits and subdivision approvals, relating to nonforestry uses of the land for a period of six years, in accordance with RCW 76.09.060(3)(b). (Ord. 2015-03 § 2, 2015: Ord. 2003-16 § 1, 2003. Formerly 15.18.050)

16.18.060 Performance assurance.

A. The planning director may require, as a condition to the granting of a permit, that the applicant furnish a performance assurance in a form approved by the planning director to the city to secure the applicant's obligation, after the approved land clearing has been accomplished, to complete any required replanting and the erosion control on the property in accordance with the conditions of the permit. The surety device shall be in an amount equal to the estimated cost of replanting and erosion control and cleanup and with surety and conditions satisfactory to the planning director.

B. In order to stay enforcement, the director may choose to enter into a voluntary correction agreement (VCA). This is a civil contract entered into between the city and applicant. The VCA will outline several performance items that will be required within an agreed-upon time frame. (Ord. 2015-03 § 2, 2015: Ord. 2003-16 § 1, 2003. Formerly 15.18.060)

16.18.070 Appeals.

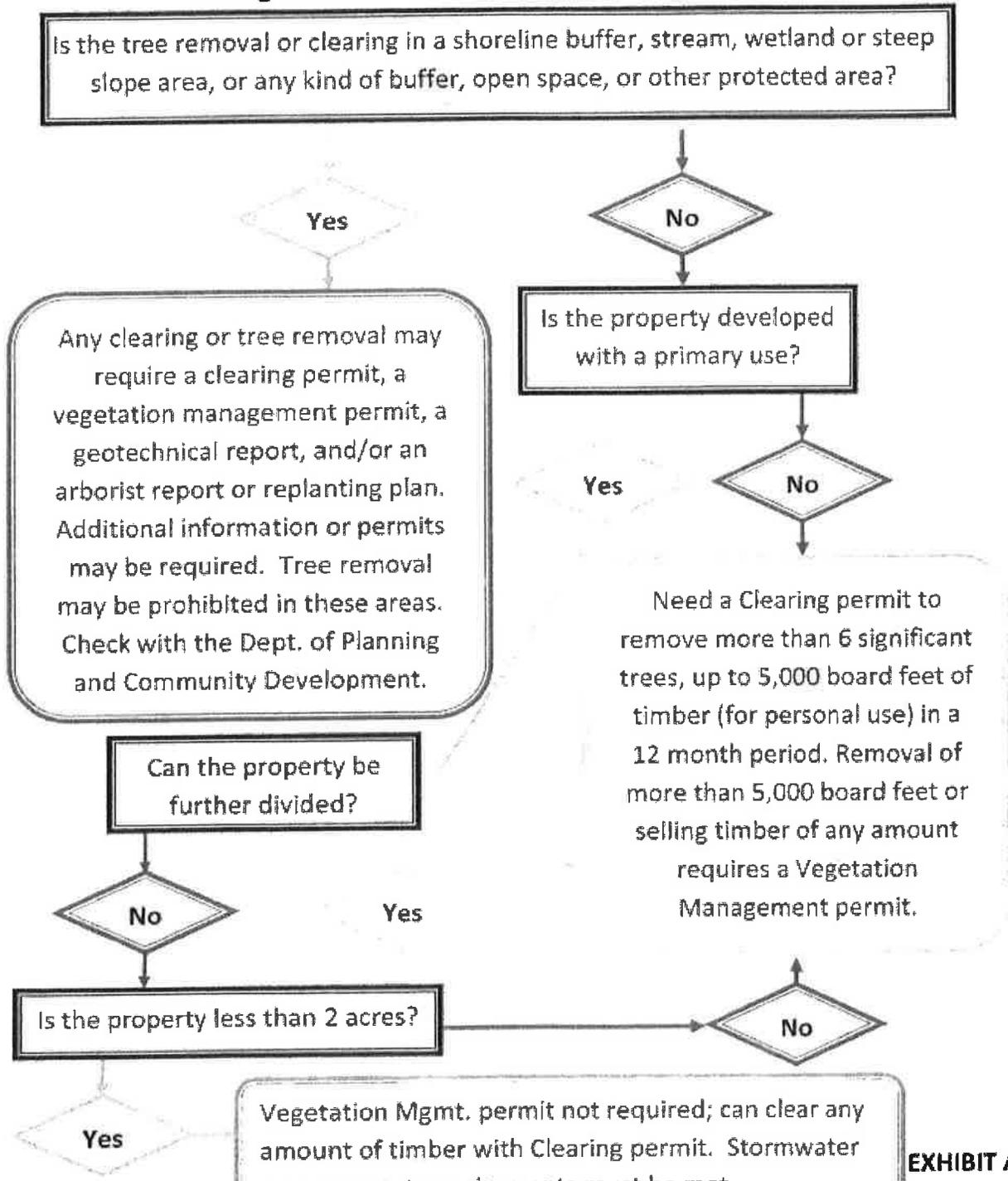
Appeals of the planning director's decision on a land clearing permit application shall be in accordance with the administrative decision procedures established in Chapter 2.16 BIMC. (Ord. 2015-03 § 2, 2015: Ord. 2003-16 § 1, 2003. Formerly 15.18.070)

16.18.080 Violation – Enforcement and penalty.

A. In addition to any other sanction or remedy that may be available, a violation of or failure to comply with any provision of this chapter shall be a civil infraction and shall be subject to enforcement and civil penalties as provided in Chapter 1.26 BIMC.

B. A violation of or failure to comply with any provision of this chapter shall be a misdemeanor punishable, upon conviction, as provided in BIMC 1.24.010.A.

C. Any fines collected through enforcement of this chapter shall be directed to the city's tree fund, Chapter 3.39 BIMC. (Ord. 2015-03 § 2, 2015: Ord. 2003-16 § 1, 2003: Formerly 15.18.080)

Figure 16.18 Tree Removal Permit Process**EXHIBIT A**

management requirements must be met.

(Ord. 2015-03 § 3 (Exh. A), 2015)

The Bainbridge Island Municipal Code is current through Ordinance 2016-24, passed August 23, 2016.

Disclaimer: The City Clerk's Office has the official version of the Bainbridge Island Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

APPENDIX B

Chapter 16.22 VEGETATION MANAGEMENT

Sections:

- 16.22.010 Findings and declaration of purpose.
- 16.22.020 Definitions.
- 16.22.030 Applicability.
- 16.22.040 Exemptions.
- 16.22.050 Vegetation management permit.
- 16.22.060 Vegetation management standards.
- 16.22.070 Submittal requirements.
- 16.22.075 Moratorium relief.
- 16.22.080 Release of moratorium.
- 16.22.090 Decision criteria for release of moratorium.
- 16.22.095 Rescission of moratorium.
- 16.22.097 Permit revocation and penalties.
- 16.22.100 Flowchart for timber harvests.
- 16.22.115 Appeals.

16.22.010 Findings and declaration of purpose.

- A. Forest areas are an integral part of the Island character and enhance the city's appearance and livability, as well as providing significant environmental benefits and natural resource values as identified in the comprehensive plan.
- B. Under the authority of planning and zoning granted to the city under RCW 76.09.240, the city of Bainbridge Island considers all forested areas within its jurisdiction as "lands with a likelihood of future conversion" from forest use as defined under WAC 222-16-060.
- C. Indiscriminate removal of vegetation may cause loss of wildlife and fish habitat, increased soil erosion, water and air quality degradation as well loss of aesthetic value.
- D. Vegetation management is necessary in order to implement the comprehensive plan, the landscape ordinance, the flexible lot design ordinance and to protect the health and safety of citizens.
- E. Vegetative management planning is necessary prior to removal of vegetation in order to reduce harmful effects and promote incorporation of existing vegetation into future land development plans. (Ord. 97-07 § 2, 1997)

16.22.020 Definitions.

- A. "Agricultural land" means farms and farmland as defined in BIMC 16.20.020.
- B. "Basal area of timber" means the cross-sectional area of a tree outside bark, measured at four and one-half feet above the average grade.

16.22.030 Applicability.

A. Permit Required. Unless exempted in BIMC 16.22.040, a vegetation management permit is required for harvesting of trees and/or removal of vegetation in the following areas:

1. Undeveloped properties or developed properties which can be further subdivided, including those properties under two acres in size which are exempt under a Class I forest practice permit;
2. Critical areas and required buffers as defined in Chapter 16.20 BIMC;
3. Designated open space areas;
4. Designated scenic or wildlife corridor areas; or
5. As part of a Class IV general forest practice permit, as regulated under RCW 76.09.050.

B. Optional Permit. A property owner intending to harvest under a Class I (not exempt in BIMC 16.22.040.E), II or III DNR forest practice permit may avoid the six-year development moratorium if the property owner submits to the city and DNR a conversion option harvest plan which meets the standards of BIMC 16.22.060 and is approved by the city prior to the application for a DNR forest practice permit.

C. Development Moratorium. A six-year development moratorium shall be placed on all properties harvested under Class I (not exempt in BIMC 16.22.040.E), II and III DNR forest practices permits in accordance with BIMC 16.20.190.D.2. To avoid the moratorium, a property owner can:

1. Apply for a Class IV general forest practices permit and meet the standard of BIMC 16.22.060; or
2. Obtain an approved DNR conversion option harvest plan. (Ord. 2001-41 § 8, 2001; Ord. 97-07 § 2, 1997)

16.22.040 Exemptions.

A vegetation management permit is not required for the following:

A. Class II and III forest practices regulated by the Department of Natural Resources under RCW 76.09.050; provided, that the city of Bainbridge Island shall not accept and/or issue any land use or building permit for six years from the date of application approval of a Class II or Class III forest practice permit;

B. Class I forest practices as defined under WAC 222-16-050(3), except that WAC 222-16-050(3)(r)(iii), "Any forest practices involving a single landowner where contiguous ownership is less than two acres in size" is not exempt;

C. Culture and harvest of Christmas trees and seedlings;

D. Construction of less than 600 feet of road on a sideslope of 40 percent or less if the limits of construction are not within the shoreline area or designated critical area;

- E. Cutting and/or removal of less than 5,000 board feet of timber (including live, dead and down material) for personal use (i.e., firewood, fence post, etc.) in any 12-month period;
- F. Removal of trees and vegetation for public safety, maintenance of public right-of-way and maintenance of recorded utility corridors or easements if approved by the public works director and not regulated by other city regulations;
- G. Removal of trees and vegetation obstructing private access routes or easements as a result of storms or other major natural events;
- H. Removal of dead trees and vegetation in the residual forest area for safety purposes if a report by a qualified arborist or consulting forester (approved by the city) indicates that such an action is necessary and no feasible alternative to removal exists. Whenever possible felled trees shall remain in order to provide downed material for plants and wildlife;
- I. Routine landscape maintenance which does not include tree removal; or
- J. Harvest trees, such as hybrid poplars, cultivated by agricultural methods in growing cycles of less than 10 years. (Ord. 98-20 § 13, 1998; Ord. 97-07 § 2, 1997)

16.22.050 Vegetation management permit.

A. Application Required. The owner of any property specified in BIMC 16.22.030 that is being converted to a nonforest use or property for which the owner intends to avoid a six-year development moratorium, shall submit a vegetation management permit application for review and approval by the department of planning and community development prior to removal of any vegetation. The application shall be prepared by a consulting forester approved by the city and may be filed jointly with the Washington State Department of Natural Resources (if required by state law) and the city.

B. Application Procedure. The city shall process vegetation management permit applications in accordance with Chapter 2.16 BIMC and the following procedures:

1. A preapplication conference is not required; however, the applicant may submit for a preapplication conference in accordance with the procedures set forth in BIMC 2.16.020.G.
2. The applicant shall submit a complete application as specified in BIMC 16.22.070, Submittal Requirements. A State Environmental Policy Act (SEPA) environmental checklist is required for all vegetation management permits, in accordance with Chapter 16.04 BIMC. Upon receipt of a complete application, the director shall provide notice to the applicant and public in accordance with BIMC 2.16.020.K and commence the application review process. A notice of application with public comment period and a notice of decision shall be required in accordance with BIMC 2.16.020.K for all vegetation management permit applications.

3. Administrative Review. All vegetative management permits shall follow the review procedures set forth in BIMC 2.16.030.

4. An application review, exempt from subsections B.1 through 3 of this section, shall be allowed for removal of diseased or dying trees and vegetation; provided, that a report by a qualified arborist or consulting forester (approved by the city) indicates that such an action is necessary and no feasible alternative to removal exists, and provided that the decision criteria of subsection C.2 through 5 of this section can be satisfied.

C. Decision Criteria. A vegetation management permit may be approved or approved with conditions by the director if the plan can meet the following:

1. Harvesting meets the vegetation management standards of BIMC 16.22.060;
2. Erosion control measures are included as part of the plan;
3. All applicable open space and corridor standards are met;
4. Mitigation measures are proposed which reduce adverse impacts on surrounding property; and
5. All other provisions of this code are met. (Ord. 97-07 § 2, 1997)

16.22.060 Vegetation management standards.

Any property which is converting or likely to convert to a nonforest use shall provide either a conversion harvest plan or a selective harvest plan as follows.

A. Conversion Harvest Plan. The owner of any property which is being converted to a nonforest use shall provide a conversion harvest plan which meets the standards below:

1. Land clearing is permitted at the following percentages of the area existing in order to prepare for future nonagricultural development.
Percentage of area that may be cut.

Zoning District	Percent of area
R-.04	20%
R-1	40%
R-2,2.9,3.5 and 4.3	60%

2. If the property is being converted to agriculture or pasture use, the property owner shall submit a farm plan approved by the Kitsap Conservation District, or the USDA Natural Resource Conservation Service (NRCS) or which is developed by the owner or a consultant using USDA standards for water quality protection. If the land has not been used for agriculture or pasture within the last five years, then a nonfarmed buffer of 25 feet shall be left between the edge of the property and adjoining

nonagricultural parcels. As a condition of the vegetation management permit, the approved farm plan shall be implemented within one year after the completion of the conversion harvest.

3. Residual forest areas shall be in windfirm condition, clustered to the extent feasible and contiguous to other existing stands. Buffering of adjacent, developed properties shall be given high priority.

4. Unless otherwise allowed through an approved open space management plan, no cutting is allowed within any of the following areas:

- a. Critical areas or required buffers, as defined in Chapter 16.20 BIMC;
- b. Previously established noncut buffer areas;
- c. Greenways, scenic road corridors, view corridors or wildlife corridors designated by the comprehensive plan of Bainbridge Island or Bainbridge Municipal Code; and
- d. Any required perimeter landscape buffer that will be required upon development of the site in accordance with BIMC 18.15.010.

5. Remaining forested areas which are not addressed in subsections A.1 through A.4 of this section, may be harvested under a harvest plan approved by the city that meets the standards for tree retention specified in subsection B of this section.

6. A Class IV general forest practice permit issued by DNR is required.

B. Selective Harvest Plan. A property owner intending to harvest under a Class I (not exempt in BIMC 16.22.040.E), II or III, on property that has a potential to convert to a nonforest use shall provide a selective harvest plan which meets the standards below:

1. Up to 50 percent of the existing merchantable volume or 50 percent of the basal area of timber may be cut. A timber cruise report and silvicultural prescription demonstrating how the required volume retention goals will be met may be required.

2. Thinning of stands less than 18 inches DBH is permissible as long as the leave trees number more than 40 percent of the dominant and codominant trees which are disease free and undamaged.

3. In no event shall the total timber stand removal of the property exceed 50 percent of the merchantable volume or basal area of timber.

4. The harvested trees should be well distributed over the entire harvest area. Residual forest areas shall be in windfirm condition, clustered to the extent feasible and contiguous to existing stands. Buffering of adjacent, developed properties shall be given high priority.

5. Unless otherwise allowed through an approved open space management plan, no cutting is allowed within any of the following areas:

- a. Critical areas or required buffers, as defined in Chapter 16.20 BIMC;
- b. Any previously established noncut buffer areas;

- c. Designated greenways, scenic road corridors, view corridors or wildlife corridors unless the director determines that the proposed harvest will not affect the function of the corridor or greenway; and
- d. Any perimeter buffer established in accordance with BIMC 18.15.010.

6. A DNR Class II or III forest practice permit is required if mandated by state law.

C. A property owner intending to harvest under a Class I (not exempt in BIMC 16.22.040.E), II or III, on property that has a potential to convert to a nonforest use, may avoid the six-year development moratorium if the harvest plan meets the standards of subsection A or B of this section, the property owner submits a DNR conversion option harvest plan to the city of Bainbridge Island, and the following standards are met:

1. A property owner providing a DNR conversion option harvest plan shall record the city approved plan with the Kitsap County auditor and provide the city with a copy of the recorded document and the auditor's recording number prior to commencement of the timber harvest.
2. Another DNR conversion option harvest plan shall not be approved within six years from the approval date of a previous plan.
3. Failure to meet the requirements of the DNR conversion option harvest plan shall result in the placing of a six-year development moratorium on the property. (Ord. 2001-41 § 8, 2001; Ord. 97-07 § 2, 1997)

16.22.070 Submittal requirements.

A vegetation management permit application and fee, as established by city council resolution, shall be filed with the department of planning and community development on forms provided by the city, which shall contain the following:

- A. Name, address and telephone number of the property owner and forestry consultant, if any;
- B. Kitsap County tax account number and parcel number for the properties involved;
- C. The proposed dates the vegetation removal will take place;
- D. The approximate acreage of the harvest area, and the approximate acreage of existing forested areas with trees 20 feet or greater in height;
- E. The desired haul route;
- F. A copy of any DNR application, if required;
- G. A statement as to how the trees will be designated for removal or retention;
- H. A statement explaining how property lines will be marked;
- I. A statement as to whether timber harvesting has occurred on any portion of the proposed harvest area in the past six years;

J. A site assessment plan/harvest plan drawn to engineering scale showing the entire property. The harvest plan shall meet the standards of BIMC 16.22.060 and must show the following:

1. All boundaries;
2. Existing stands of trees, specifying predominant species, species mix and age class;
3. Location of critical areas and buffers as designated under Chapter 16.20 BIMC, designated open space, and designated scenic and/or wildlife corridors;
4. Proposed areas to remain in forest;
5. Proposed areas to be cleared of vegetation;
6. Proposed areas to be thinned of trees;
7. All existing and proposed access roads;
8. Proposed log landing areas;
9. Any structures on the property;
10. Topography, at 20-foot intervals. A USGS map is acceptable;
11. All adjacent residences within one and one-half times the height of the trees to be felled; and
12. Name, address and phone number of the timber harvest operator.

K. An erosion control plan;

L. Open space management plan, if applicable;

M. Greenways, scenic road, view or wildlife corridor plans, if applicable;

N. SEPA environmental checklist, if applicable. (Ord. 2001-41 § 8, 2001; Ord. 97-07 § 2, 1997)

16.22.075 Moratorium relief.

Pursuant to the provisions of this chapter, the city may grant relief from development moratoria imposed pursuant to Chapter 76.09 RCW prior to the expiration of the moratoria. (Ord. 99-03 § 1, 1999)

16.22.080 Release of moratorium.

A. Pursuant to the provisions of this chapter, a forest practice moratorium may be lifted prior to its expiration. Any property owner requesting a release of a development moratorium shall submit to the city an application for release of the moratorium on the form provided by the city, together with the fees established by resolution.

B. The city shall refer all applications for the release of a development moratorium to the hearing examiner. The hearing examiner shall review all applications for the release of a development moratorium under this section pursuant to the decision procedures set forth in BIMC 2.16.100.

C. Prior to the public hearing, the director shall provide a minimum public comment period of at least 14 days. Pursuant to the notice requirements of BIMC 2.16.020.K, the city shall provide written notice of the application for release along with notice of the public hearing to:

1. Property owners of record within 300 feet of the subject property;
2. Appropriate state agencies, such as the Washington State Departments of Ecology, Natural Resources and Fish and Wildlife;
3. Appropriate tribal governments; and
4. Any other interested parties requesting notice of the application and public hearing.

D. In considering an application for the release of a development moratorium, the hearing examiner may remand the application to the planning commission for review and recommendation, pursuant to the procedures set forth in BIMC 2.16.030 or 2.16.100.C.

E. Based upon public comment received at the public hearing, the decision criteria of BIMC 16.22.090 and the comments and recommendations of the planning commission, if any, the hearing examiner may authorize, conditionally authorize, or deny a release of the development moratorium. (Ord. 99-03 § 2, 1999; Ord. 97-07 § 2, 1997)

16.22.090 Decision criteria for release of moratorium.

All applications for the release of forest practice development moratoria shall be subject to the following decision criteria:

A. An application shall not be granted unless critical areas and their buffers, as governed by Chapter 16.20 BIMC, and shoreline areas, as governed by the Bainbridge Island shoreline master program, were not disturbed in the forest practice operation, or damage to such areas is reparable through restoration. In any case in which the release of a development moratorium is conditioned upon the restoration of the subject property, a restoration plan for the property shall be reviewed and approved by the director prior to the release of the development moratorium. The restoration plan shall be prepared by a professional whose qualifications and experience are satisfactory to the director. The restoration plan shall include monitoring and correction standards. A substantial part of the restoration work, as determined by the director at the director's discretion, must be completed prior to the issuance of any development permits.

B. Mitigation for the loss of significant trees shall be required prior to the release of any development moratorium. The appropriate mitigation for the loss of significant trees shall depend on the particular facts of each case and may include, but is not limited to:

1. Replacing the lost trees by replanting new trees of a similar species, nature and size. To the extent any lost trees are too large to be immediately replaced by replanting, such trees shall be replaced by the largest possible trees of the same species and nature which may be successfully replanted. The applicant and/or the applicant's successor-in-interest shall have an

obligation to monitor the survival of the replanted trees, and to replace any trees not successfully replanted, until the date the forest practice moratorium, had it not been released, would have automatically expired.

2. Developing a plan that replaces, to the greatest extent biologically practicable, the functions and values lost through the forest practice, such as providing wildlife habitat, visual screening from adjacent areas and storm water reduction.

C. An application shall not be granted unless the applicant places a conservation easement on the property that surrenders development rights to the city equal to the percent described in the table below. The percent of development right reduction below shall be calculated based upon the total number of development rights per acre of the subject property and shall be rounded to the nearest number; provided, that in all cases at least one development right shall remain with the subject property.

Zoning District of Subject Property	Percent of Development Right Reduction
R-.04	80%
R-1	60%
R-2,2.9,3,5 and 4.3	40%

(Ord. 99-03 § 4, 1999: Ord. 97-07 § 2, 1997)

16.22.095 Rescission of moratorium.

Upon application by the property owner, a development moratorium may be rescinded by the director if an approved forest practices application for the property has been withdrawn or expired and no harvest has taken place. (Ord. 99-03 § 5, 1999: Ord. 97-07 § 2, 1997)

16.22.097 Permit revocation and penalties.

A. A vegetation management permit may be revoked by the director upon the finding of any one or more of the following:

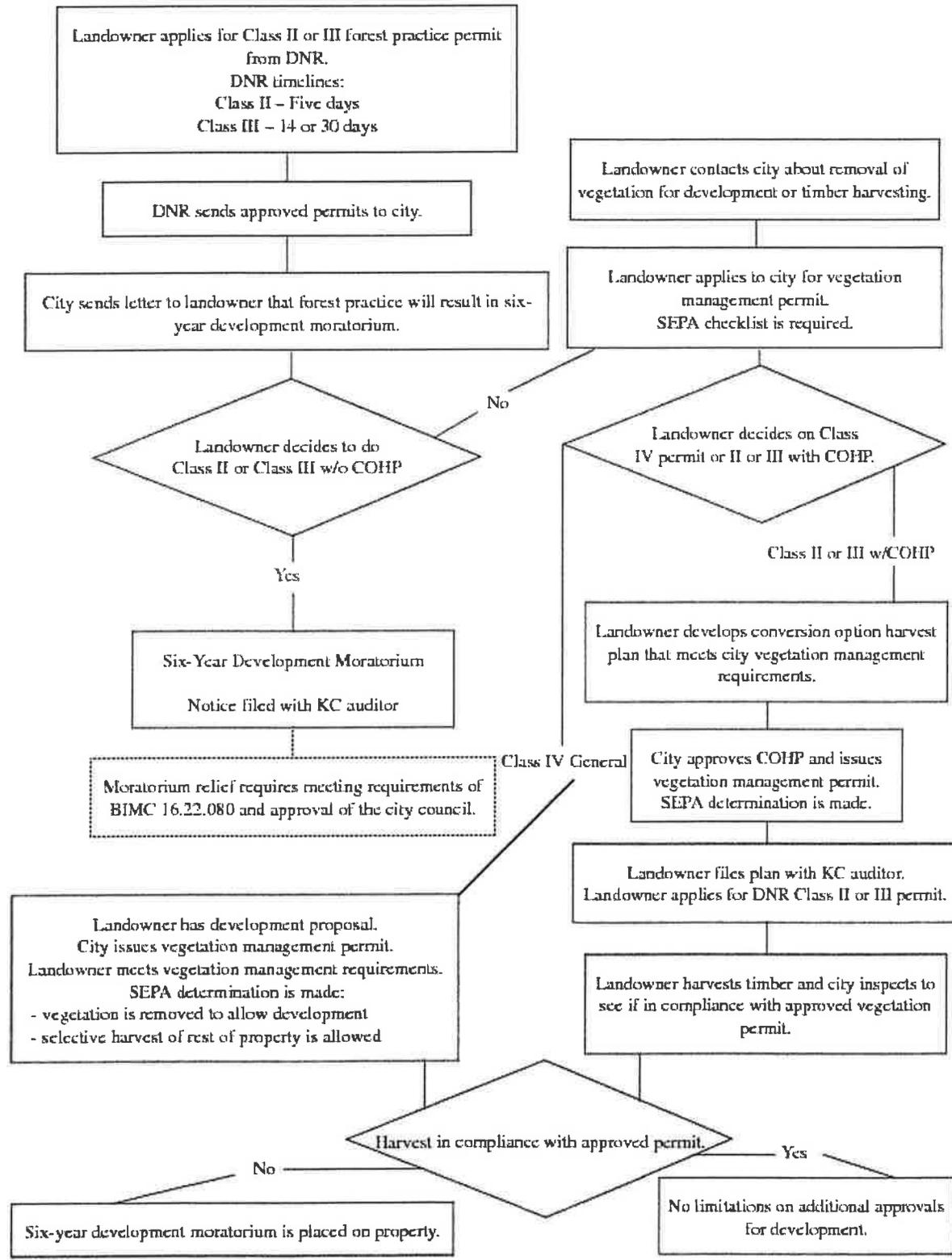
1. That the approval was obtained by deception, fraud or other intentional or misleading representation; or
2. That the permit granted is being exercised contrary to the terms or conditions of such approval; or
3. That the permit for which the approval was granted was so exercised as to be detrimental to the public health or safety.

B. If the owner violates the requirements of an approved harvest plan, the city shall place a six-year development moratorium on the subject property.

C. Any property owner or individual cutting vegetation or timber in violation of this chapter shall replant the property, and to the extent biologically practicable, shall return the property to the condition of the property prior to the violative cutting. The property on which the violation occurs shall be subject to a moratorium on the city's acceptance of a development permit of any kind relating to the property for a period of six years from the last date of the violation.

D. In addition to the penalties set forth above, this chapter shall be enforced, and penalties for violations of this chapter shall be imposed, pursuant to Chapter 1.26 BIMC; provided, that under BIMC 1.26.090, an additional civil penalty shall be imposed on any property owner or individual cutting vegetation or timber in violation of this chapter in the amount of \$20,000 for each acre of forest cut. (Ord. 99-03 § 6, 1999)

16.22.100 Flowchart for timber harvests.



(Ord. 97-07 § 3, 1997)

16.22.115 Appeals.

The decision of the hearing examiner shall be final unless, within 21 days of issuance, it is appealed in accordance with Chapter 36.70C RCW. (Ord. 2003-25 § 11, 2003: Ord. 99-03 § 7, 1999)



APPENDIX C

CERTIFICATE OF SERVICE

I certify under the laws of the United States of America that I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court and served counsel below by the method indicated:

Stephanie Marshall	<input checked="" type="checkbox"/>	U.S. Mail
BENNU LAW, LLC	<input type="checkbox"/>	Messenger
354 Greenwood Ave, Suite 213	<input checked="" type="checkbox"/>	Email
BEND, OR 97791	<input type="checkbox"/>	Facsimile
stephanie@bennulaw.com		

DATED this 11th day of May, 2020.

/s/ Erin Kelly

Erin Kelly
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May 11, 2020 - 2:50 PM

Transmittal Information

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Appellate Court Case Title: Paul & Jennifer Clark, Respondents v. City of Bainbridge Island, Appellant
Superior Court Case Number: 17-2-02397-5

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