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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.

**REPLY BRIEF OF APPELLANT CITY OF BAINBRIDGE
ISLAND**

James E. Haney, WSBA #11058
Attorney for Appellant
OGDEN MURPHY WALLACE, PLLC
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215
Email: jhaney@omwlaw.com

Table of Contents

I. INTRODUCTION1

II. ARGUMENT3

 A. The Clarks’ brief contains numerous misstatements of fact and unsupported factual assertions.3

 B. The Clarks bear the burden of proof in this matter; *Post v. City of Tacoma* and BIMC chapter 1.26 are inapposite.....7

 C. The trial court erred in raising issues *sua sponte*.....9

 D. The Hearing Examiner’s decision was correct as a matter of law and fact, and the Clarks have failed to show otherwise.12

 1. The Hearing Examiner correctly interpreted the VMP.....12

 2. The Hearing Examiner correctly interpreted chapter 16.22 and used it guide his interpretation of the VMP.....16

 E. The Hearing Examiner’s decision affirming revocation is constitutional, and the Clarks have not shown otherwise. .20

 1. The 20% clearing limit is not an “exaction” at all, much less an unconstitutional one, nor does it violate RCW 82.02.020.....20

 2. The vested rights doctrine does not apply to this case.....23

III. CONCLUSION.....24

Table of Authorities

Cases

Aho Construction I v. City of Moxee, 6 Wn. App. 441, 468, 430 P.3d 1131 (2018)..... 1, 5, 10, 11, 21

Chinn v. City of Spokane, 173 Wn. App. 89, ¶ 8, 293 P.3d 401 (2013) 7

Clyde Hill v. Roisen, 111 Wn.2d 912, 920-21, 962 P.2d 1375 (1989) 15

Conrad v. Univ. of Wash., 119 Wn.2d 519, 527-28, 834 P.2d 17 (1992). 11

Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) 22

Girton v. City of Seattle, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999).. 20

Habitat Watch v. Skagit County, 155 Wn.2d 397, ¶ 22, 120 P.3d 56 (2005) 10, 21

Hanson v. City of Snohomish, 121 Wn.2d 552, 557, 852 P.2d 295 (1993) 11

Kitsap Alliance of Property Owners v. Cent. Puget Sound Growth Mgmt. Hr’gs Bd., 160 Wn. App., 250, 272, 255 P.3d 696 (2011) 21

Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604-05 (2013) 22

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).. 22

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).. 22

Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 622-23, 465 P.2d 657 (1970) 11

Mercer Island Citizens for Fair Process v. Tent City 4, 156 Wn. App. 393, ¶ 21, 232 P.3d 1163 (2010)..... 10, 11

Nickum v. City of Bainbridge Island, 153 Wn. App. 366, ¶ 32, 223 P.3d 1172 (2009)..... 11

<i>Niesche v. Concrete Sch. Dist.</i> , 129 Wn. App. 632, 641-42, 127 P.3d 713 (2005).....	23
<i>Nollan v. Cal. Coastal Comm’n</i> , 483 U.S. 825, 837 (1987).....	22
<i>Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hr’gs Bd.</i> , 166 Wn. App. 172, ¶ 35, 274 P.3d 1040 (2012).....	21
<i>Penn Central Transportation Co. v. New York City</i> , 438 U.S. 104 (1978).....	22
<i>Post v. City of Tacoma</i> , 167 Wn.2d 300, 310-11, 217 P.3d 1179 (2009)...	8
<i>Town of Woodway v. Snohomish County</i> , 180 Wn.2d 165, 169-70, 322 P.3d 1219 (2014).....	23

Statutes

RCW 36.70A.050.....	17
RCW 36.70C.130.....	4, 7, 10, 20
RCW 82.02.020	2, 20, 21

Regulations

WAC 222-16-050.....	18
---------------------	----

Ordinances

BIMC 16.22.030.A.1	17
BIMC 16.22.050	16
BIMC 16.22.050.A	17
BIMC 16.22.060	passim
BIMC 16.22.060.A.1	passim

BIMC 16.22.060.B.....	18
BIMC 16.22.097.A	8
BIMC 16.22.115	8
BIMC 2.16.020.R.1.a.....	8
BIMC table 2.16.010-1	8

I. INTRODUCTION

This case is about two permits issued by the City of Bainbridge Island to Paul and Jennifer Clark—a clearing permit and a vegetation management permit (“VMP”)—and how those two permits interact with each other. It is uncontested that the clearing permit issued to the Clarks authorized clearing of 7,000 square feet of forest on their property. It is also uncontested that the VMP, issued several months after the clearing permit, authorized additional clearing. The pivotal issue in this case is how much additional clearing this VMP authorized. The Clarks say the VMP authorizes 20,000 square feet of clearing on top of the 7,000 square feet authorized by the clearing permit.¹ The City argues that the VMP only authorizes such additional clearing amount as brings the total site clearing up to 20,000 square feet, inclusive of the 7000 square feet authorized by the clearing permit. The Hearing Examiner agreed with City, and thus found that the Clarks’ clearing of 33,278 square feet exceeded the bounds of the VMP. He therefore affirmed the City’s revocation of the VMP.

¹ The Clarks also allege that a building permit authorized an additional 5,000 square feet of clearing. The Clarks never introduced this permit into the record, and Josh Machen, the City’s Planning Manager, testified that the building permit did not authorize this clearing. CP 663:5-10. The Clarks also argue that a stormwater inspection document authorizes additional clearing. *See* CP 270-71. It does not, *id.*; moreover, the Clarks never raised this argument before the Hearing Examiner, and it is waived here. *See Aho Construction I v. City of Moxee*, 6 Wn. App. 441, 468, 430 P.3d 1131 (2018).

The Hearing Examiner's decision was clearly the right one because (1) the plain language of the VMP limits total clearing on the site to 20,000 square feet, and this limit on clearing includes areas already cleared under the clearing permit; (2) the Clarks' own representations on their application materials represent a total clearing limit of 17,000 to 18,000 square feet, and show an area to be cleared that is much smaller than the area they eventually cleared; and (3) the City's interpretation is the only reasonable one in light of the City Code requirements limiting total clearing on the Clarks' parcel to 20% (roughly 20,000 square feet). For all these reasons, the Hearing Examiner's interpretation of the VMP and his affirmation of the revocation is not only not "clear error," but it is the only reasonable conclusion to be drawn from the record.

In response, the Clarks raise four core arguments: (1) that the Hearing Examiner's interpretation of the VMP amounts to "revoking" the Clarks' clearing permit; (2) that this alleged revocation violates the Clarks' constitutional rights and LUPA finality principles; (3) that the 20% limit on the Clarks' clearing in the City Code constitutes an unlawful exaction under RCW 82.02.020 and takings case law; and (4) that the Clarks' property is not in fact subject to a 20% clearing limit under chapter 16.22 Bainbridge Island Municipal Code ("BIMC").

Only the last argument is a permissible challenge to the Hearing Examiner's decision; the rest are impermissible collateral attacks on the unappealed VMP. However, even if the Court reviews the Clarks' arguments, they all fail. As to issues 1 and 2, the VMP clearly does not "revoke" the clearing permit; the 7,000 square feet of clearing allowed in the clearing permit is still allowed under the VMP. The only question is how much additional clearing the VMP allows. As to issue 3, even if the Clarks could raise these constitutional arguments, the doctrines the Clarks cite are entirely inapposite to this case. As to issue 4, the Clarks' code-based arguments ignore the Code's plain language, which clearly subjects the Clarks to a 20% clearing limit.

Because the only reasonable interpretation of the VMP is that it allows clearing up to a total of 20,000 square feet, inclusive of the 7,000 square feet cleared under the clearing permit, the Clarks' violated their VMP, and this Court should affirm the Hearing Examiner's decision.

II. ARGUMENT

A. The Clarks' brief contains numerous misstatements of fact and unsupported factual assertions.

Before addressing the Clarks' legal argument, the City must address some of the numerous inaccuracies, misstatements, and unsupported

assertions in the Clarks' statement of the case. The City asks the Court to carefully review the materials cited by both parties² and review the record in this matter for itself. While the City emphasizes several specific factual discrepancies in the Clarks' briefing here, this list is by no means exhaustive.

First, as a general matter, the Clarks' statement of facts essentially summarizes Mr. Clark's hearing testimony, rather than dealing with the record as a whole (or the substantial evidence standard, RCW 36.70C.130(1)(c)) in any serious way. Worse, the Clarks frequently cite to their own petition or briefing as if these documents are of evidentiary value, which they clearly are not. *See, e.g.*, Resp'ts' Br. at 13 (citing CP 293:4-17, the Clarks' statement of appeal, for the idea that Mr. Clark received assurances from the City that his work was compliant). They also cite to Mr. Clark's hearsay testimony as if quoting the original speaker. *Id.* (citing CP 597:12-13). These types of citations misrepresent the record to the Court.

² The City observes that many of the Clarks' citations to the Clerk's Papers appear to be off by one page. The City suggests that the Court add one page to the Clarks' Clerk's Papers citations to the Hearing Examiner report of proceedings, CP 534-767, and subtract one page from most of the Clarks' other Clerk's Papers citations. In this brief, the City has adjusted the Clarks' citations to the pages the City believes the Clarks intended to cite, with the hope of facilitating the Courts' review of the record.

Second, and relatedly, the Clarks make several assertions for which there is little or no evidence in the record. For instance, the Clarks claim that their building permit authorized 5,000 square feet of clearing in addition to the 20,000 square-foot limit in the VMP, citing only Mr. Clark's testimony on his point. *See* Resp'ts' Br. at 16 (citing CP 564:19-21, 567:12-22). As explained in the City's opening brief, the Clarks failed to submit actual documentation regarding their building permit, and Mr. Machen testified that the building permit did not authorize any specific amount of clearing. *See* City's Br. at 17 (citing CP 663:5-10). Moreover, this argument is clearly belied by the fact that the "homesite" was listed as one of the areas proposed for clearing in the Clarks' VMP site plan. CP 448. By the same token, the Clarks' claim that a stormwater permit issued to the Clarks authorized some unspecified amount of additional clearing is completely unfounded; they cite only to the testimony of a City engineer which does not support this assertion, *see* Resp'ts' Br. at 16 (citing CP 552), and the stormwater document itself does not authorize any clearing, *see* CP 270-71.³

³ Moreover, the Clarks did not make any such argument before the Hearing Examiner. *See generally* CP 534-767 (Hearing Examiner transcript); CP 381-91 (Clarks' pre-hearing brief to Hearing Examiner) and are barred from doing so here. *See Aho Construction I v. City of Moxee*, 6 Wn. App. 441, 468, 430 P.3d 1131 (2018).

Third, the Clarks repeatedly assert that the City’s staff report for the VMP “confirmed that the Clearing Permit, home construction, and other specified activities were exempt from the VMP.” *See* Resp’ts’ Br. at 19 (with no record citation); *see also* Resp’ts’ Br. at 15 (no citation to the staff report). The only citation to the staff report in the Clarks’ entire brief is to CP 227 (they presumably meant CP 229) and CP 232, which pages simply refer to the clearing permit as a “separate” permit. There is no question that the clearing permit is “separate” from the VMP—the issue is whether the clearing limits in the VMP include areas already cleared under the clearing permit. The Clarks’ citations to the staff report do not address this issue.

Finally, the Clarks’ brief contains at least one flat-out misstatement: they assert that their forest practices permit approves 40,000 square feet of clearing. Even if the forest practices permit’s terms were relevant here, the Clarks’ forest practices permit did not approve 40,000 square feet of clearing. This 40,000 square foot number came from a misconception by the trial court—which the Clarks latched onto—that a document prepared to show the extent of the Clarks’ permit violations was part of the forest practices permit. *See* RP Vol. 3 (Nov. 9, 2018) at 11 (court’s remarks); CP 266-67 (DNR permit); CP 268 (over-clearing documentation). For all the reasons explained in the City’s supplemental briefing to the trial court, this

is clearly not the case.⁴ To claim that this document is part of the Clarks' DNR permit is patently false.

At best, the above discrepancies amount to strained representations of the record. Given the above, the City asks the Court to carefully review the cited materials and compare them to the Clarks' and the City's briefing.

B. The Clarks bear the burden of proof in this matter; *Post v. City of Tacoma* and BIMC⁵ chapter 1.26 are inapposite.

LUPA and corresponding case law are crystal clear that the party challenging a land use decision bears the burden of proof in a LUPA appeal. *See* RCW 36.70C.130(1); *Chinn v. City of Spokane*, 173 Wn. App. 89, ¶ 8, 293 P.3d 401 (2013) (“The party appealing the . . . land use decision . . . bears the burden . . .”). Ignoring this authority, the Clarks argue that the City bears the burden of proof in this matter because this is a code

⁴ As explained in the City's reply to the Clarks' supplemental briefing to the Superior Court at CP 1178-80, the document at CP 268 is plainly identical to the document at CP 449, which was Exhibit 41 in the Hearing Examiner proceedings. *See* CP 224 (index of administrative record). Mr. Grant, the City's surveyor, testified that Exhibit 41 was prepared by the City in order to document the Clarks' over-clearing. *See* CP 728:10-749:16. It was also prepared several months after the forest practices permit was issued (October versus July), and therefore can't be part of the DNR permit.

⁵ BIMC refers to the Bainbridge Island Municipal Code, which is available online at <https://www.google.com/search?q=bainbridge+island+municipal+code&rlz=1C1GCEU-enUS890US890&oq=bainbridge+island+municipal+code&aqs=chrome.69i59j0j69i60.1529j0j7&sourceid=chrome&ie=UTF-8>. Chapters 16.18 and 16.22 have been repealed since 2017; these code chapters are available in Appendices A & B to the City's Opening brief to this Court.

enforcement action. *See* Resp'ts' Br. at 23 (citing BIMC § 1.26.033 and *Post v. City of Tacoma*, 167 Wn.2d 300, 310-11, 217 P.3d 1179 (2009)).

These authorities are inapposite. First, the Hearing Examiner explicitly held that this this was not a code enforcement appeal under BIMC chapter 1.26, and the Clarks admitted as much. CP 467; CP 764:12-25. Second, *Post v. City of Tacoma* is inapposite because it is not a LUPA case. In *Post*, the Court specifically held that the code enforcement action at issue was not subject to LUPA because the City of Tacoma did not provide for an administrative appeal of the civil infraction penalties at issue, meaning the penalties were appealable only to municipal or district courts under chapter 7.80 RCW. *Post*, 167 Wn.2d 300, ¶¶ 17-21. This in turn triggered the LUPA exception for decisions appealable only to courts of limited jurisdiction. *Id.* ¶¶ 17-21 (quoting RCW 36.70C.020(1)(c)).

Here, the decision to revoke the Clarks' permit clearly was appealable to the Hearing Examiner.⁶ Unlike *Post*, this is therefore a LUPA

⁶ The Clarks cited the relevant Code provisions that authorized appeal to the Hearing Examiner. *See* CP 288. Some of those provisions—namely, the relevant provisions of BIMC table 2.16.010-1—have since been repealed, but others have simply been recodified. *See, e.g.*, BIMC 2.16.020.R.1.a (recodifying BIMC 2.16.020.P.1.a) (providing for administrative appeals to the Hearing Examiner of “[a]ll administrative decisions, departmental rulings and interpretations made in accordance with administrative review procedures of BIMC 2.16.030”). The VMP provisions in effect in 2016 and 2017 also contemplate appeals to the Hearing Examiner. *See also* BIMC 16.22.097.A; BIMC 16.22.115 (contemplating Hearing Examiner appeals of revocation).

appeal subject to LUPA's standards of review. The very fact that the Clarks chose to appeal the revocation to the Hearing Examiner and then to the Superior Court under LUPA undermines their claim that this is somehow a "court of limited jurisdiction" case exempt from LUPA under *Post*. Because this is a LUPA action, the Clarks bear the burden of proof.

C. The trial court erred in raising issues *sua sponte*.

The trial court raised issues *sua sponte* surrounding the constitutionality of the City's Code, whether the code was in conflict with or preempted by the Forest Practices Act or Growth Management Act ("GMA"), and whether the Clarks were exempt from the VMP requirement. *See* RP Vol. 2 (Nov. 9, 2018) at 34-40. None of these issues were raised by the Clarks before the Hearing Examiner or in their LUPA petition, where the Clarks focused (quite properly) on the Hearing Examiner's interpretation of the VMP, not the validity of the City Code or VMP itself. CP 288-97 (Clarks' appeal statement to Hearing Examiner); CP 1-52 (Clarks' LUPA petition).

Not only do the Court's comments violate the general judicial policy against consideration of unbriefed arguments (especially constitutional ones), but they were outside the Superior Court's jurisdiction because they all attacked the legality of the VMP, which was a final and binding land use

decision unassailable under LUPA. See *Habitat Watch v. Skagit County*, 155 Wn.2d 397, ¶ 22, 120 P.3d 56 (2005); *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, ¶ 21, 232 P.3d 1163 (2010) (“[F]ailure to challenge a land use decision in a LUPA petition bars any claims that are based on challenges to that land use decision, including those alleging due process violations.”).

The Clarks argue that the Superior Court did not raise these issues *sua sponte* and, if it did, that it has the authority to do so. Neither is true. First, while the Clarks did cite constitutional case law in their Hearing Examiner appeal and LUPA petition, the Clarks quite properly limited their constitutional challenges to the revocation of the VMP, not the VMP itself. See CP 295-96 (Hearing Examiner appeal); CP22-23 (LUPA petition). The trial court’s *sua sponte* issues went well beyond this, raising impermissible collateral attacks on the VMP itself on constitutional, statutory, and code-based grounds. See RP Vol. 3 (Aug. 9, 2019) at 2-7, 8, 11.

Second, the Clarks are flat wrong in asserting that the Superior Court and this Court have authority to consider these issues. Their only purported support for this assertion are (1) RCW 36.70C.130(1)(f), which allows LUPA petitioners to challenge land use decisions on constitutional grounds; (2) *Aho Construction I v. City of Moxee*, 6 Wn. App. 441, 468, 430 P.3d

1131 (2018), which suggests that LUPA petitioners need not raise constitutional arguments before hearing examiners in order to preserve those arguments; and (3) general, non-LUPA case law regarding appellate courts' consideration of new issues on appeal. *See* Resp'ts' Br. at 26 (citing *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 622-23, 465 P.2d 657 (1970); *Conrad v. Univ. of Wash.*, 119 Wn.2d 519, 527-28, 834 P.2d 17 (1992); *Hanson v. City of Snohomish*, 121 Wn.2d 552, 557, 852 P.2d 295 (1993); RAP 2.5(a), RAP 12.1(b), RAP 7.3, RAP 1.2).

None of these arguments gets to the core issue here. Of course LUPA petitioners can challenge land use decisions on constitutional grounds, but they cannot challenge unappealed land use decisions on constitutional (or any other) grounds. *Mercer Island Citizens for Fair Process*, 156 Wn. App. 393, ¶ 21. And, even assuming that *Aho* does not require preservation of constitutional issues before hearing examiners, it still does not authorize collateral attacks on final land use decisions. By the same token, RAPs and associated case law regarding appellate courts' consideration of new arguments on appeal does not apply to LUPA cases; in LUPA cases, the bar on collateral attacks to final decisions is jurisdictional, and may not be waived or altered by RAP or appellate case law. *See Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, ¶ 32, 223

P.3d 1172 (2009) (holding that the finality principles under LUPA are jurisdictional, not merely procedural).

This Court should recognize that all of the bases supporting the Superior Court's decision are collateral attacks on the VMP itself rather than the Hearing Examiner's decision affirming revocation, and should hold that the Superior Court erred by raising these issues *sua sponte*.

D. The Hearing Examiner's decision was correct as a matter of law and fact, and the Clarks have failed to show otherwise.

1. The Hearing Examiner correctly interpreted the VMP.

The key question in this case is not whether the VMP "revokes" prior permits, as the Clarks claim. Rather, the question is how much new clearing the VMP authorized. The Clarks believe the VMP approves 20,000 square feet of new clearing. The City believes the VMP approved whatever clearing would bring total clearing on the site up to 20,000 square feet.

The City's and the Hearing Examiner's interpretation are supported by four essential facts. First, while Condition 4 of the VMP limits the "[t]otal of clearing under this approval" to 20,000 square feet, Condition 2 makes clear that "this approval" included the areas already cleared under the clearing permit because it "extends to the clearing of vegetation within the 'Revised Garden Area,' 'Haul Route,' and homesite area represented on

the revised site plan submitted and date stamped July 12, 2016” CP 40. The areas described in Condition 2 are the same areas authorized under the clearing permit. *Compare* CP 398 (clearing permit site plan proposing to clear large area of property surrounding proposed home and driveway) *with* CP 448 & Appx. C to City’s Opening Br (VMP site plan proposing to clear more or less the same area, if not a smaller area). Second, the Hearing Examiner’s and City’s interpretation is consistent with Mr. Clarks’ own representations in his application materials, which said he was clearing 17,000 or 18,000 square feet on his property, and that this proposed clearing included areas (such as the building footprint) that he now claims were “in addition” to the VMP clearing limits. *See* CP 238 (Clarks’ VMP application); CP 448 (Clarks’ VMP site plan stating, “Proposed area to be cleared = 17,000”). Third, the Hearing Examiner correctly looked to the clearing limits for VMPs under the BIMC to guide its interpretation of the permit; those provisions limit total clearing on a property to 20%. *See* BIMC 16.22.060.A.1. All of these facts lead to the inevitable conclusion that the VMP authorizes only enough new clearing to bring total clearing on the site up to 20,000 square feet, which limit includes clearing already performed under the clearing permit.

The Clarks argue that the Hearing Examiner’s decision is clearly erroneous because it amounts to a “revocation” of the clearing permit, the building permit, and the stormwater permits.⁷ Neither the City nor the Hearing Examiner ever claimed that the VMP supersedes or revokes prior clearing permits, nor have they contested the fact that the clearing permit was a “separate” approval from the VMP. The Hearing Examiner’s decision simply answers the question of how much additional clearing the VMP authorizes. The Hearing Examiner concluded that the VMP only allowed enough clearing to bring total site clearing up to 20,000 feet. This is the better interpretation, and it does not “revoke” the prior approvals.

The Clarks also argue that “[t]he City came up with its ‘one permit’ interpretation after-the-fact” and that “Mr. Clark had no opportunity to conform to the City’s cumulative permits interpretation made without notice. . . .” Resp’ts’ Br. at 28. To the contrary, Mr. Clark had ample opportunity to conform—by simply reading the face of the permit. As the Hearing Examiner noted, “it is hard to argue either that the City intended to create an approval for an additional 20,000 of clearing or that Mr. Clark could reasonably have believed such an interpretation.” CP 469.

⁷ As explained in Part II.A, the Clarks have failed to show that the building permit or stormwater approvals authorize any clearing at all.

The Clarks argue that it was somehow improper to respond to neighbor complaints about over-clearing, and that the City's investigation of their over-clearing was politically motivated. This claim is absurd. It is not surprising that the City would investigate and enforce, as applicable, the terms of the VMP in response to neighbor complaints; most code enforcement in this state depends on neighbors or others to alert the governing jurisdiction regarding violations because code enforcement officers cannot be everywhere at all times. *Cf. Clyde Hill v. Roisen*, 111 Wn.2d 912, 920-21, 962 P.2d 1375 (1989) (“[The city] relies on its citizens and others to bring to its attention alleged violations.”).

The Clarks' brief paints Mr. Clark as helpless and “shocked” by the City's interpretation. This characterization is starkly at odds with Mr. Clark's own representations on his permit applications, which clearly show areas already cleared under his clearing permit as part of the proposed clearing areas, and which clearly indicate that he proposed to clear 17,000 or 18,000 square feet. The dissonance between reality and the Clarks' portrayal becomes even more stark when comparing Mr. Clark's hand drawn VMP clearing map at CP 240 and his ultimate clearing activities documented in CP 268, which were much, much larger. As the Hearing Examiner noted, “one the basic rules of the land use permitting game is that

the scope of an applicant's approval is limited to the development actually submitted for review." CP 472. Even the most unsophisticated permittee should and would have had a twinge of conscience on realizing that his clearing activities well exceeded what he told the City he would do. It is neither erroneous nor unfair to subject the Clarks' clearing to the plain language of the VMP and find that they violated the VMP's terms.

2. *The Hearing Examiner correctly interpreted chapter 16.22 BIMC and used it guide his interpretation of the VMP.*

Under BIMC 16.22.060.A.1, clearing on residential parcels that are being converted to a nonforest use may not exceed 20% of the area of the site. This requirement informed the Hearing Examiner's interpretation of the VMP because it supported the idea that the VMP only authorized sufficient additional clearing to bring total site clearing up to 20% (i.e., roughly 20,000 square feet).

The Clarks argue that the clearing limits in BIMC 16.22.060.A.1 do not apply to their property because this section also requires a conversion harvest plan, and the City did not require one. *See Resp'ts' Br.* at 29-30. The Court should reject this conversion-harvest-plan argument. The 20% clearing limit in BIMC 16.22.060.A.1 applies to the Clarks regardless of whether the Clarks created a conversion harvest plan because BIMC

16.22.050, which governs VMPs, requires VMP applicants to meet the same clearing limits to which conversion harvest plans are subject under BIMC 16.22.060. *See* BIMC 16.22.050.C.1. There is no question that the Clarks were required to obtain a VMP under BIMC 16.22.050, because they were converting to a nonforest use,⁸ *see* BIMC 16.22.030.A.1, A.5; BIMC 16.22.050.A, and because the Clarks never challenged the necessity of obtaining a VMP under LUPA, that fact is binding in this appeal.

The Clarks also argue that the vegetation management standards in BIMC 16.22.060.B apply to their property instead of those in BIMC 16.22.060.A. This argument ignores the plain language of BIMC 16.22.060.B, which clearly applies only to clearing that requires a Class I, II, or III forest practices permit (which the Clarks' did not). The Clarks

⁸ The Clarks' argue that they were not converting land to a nonforest use because their land was not formally designed as forest under the GMA and/or the FPA. First, nothing in Chapter 16.22 BIMC incorporates the GMA definition of "forestlands," nor is this definition applicable by analogy, as the GMA uses a completely different term ("forestlands" versus "forest," *see* RCW 36.70A.050(1)). Second, chapter 16.22 *does* designate "all forested areas within its jurisdiction as 'lands with a likelihood of future conversion' from forest use" as defined under the Forest Practices Act and associated regulation. BIMC 16.22.010.A. The term "forest" and "forested" in chapter 16.22 therefore clearly covers all land on the Island that meets the common definition of that term. There is also ample evidence in the record that the Clarks' property was forested before development. *See, e.g.*, CP 450-62 (photos showing forested state of Clarks' property); CP 399 (same); CP 240; Appx. C to City's Opening Br. (Clarks' own site plan for CMP, which marks entire property as existing stands of trees under BIMC 16.22.070.J.2). Finally, the City emphasizes that the Clarks never contested the forested state of their property before the Hearing Examiner; the deep dive into the Forest Practices Act and associated terms and definitions was instigated by the Superior Court *sua sponte*.

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argue their property is still subject to part B of BIMC 16.22.060 because their property does not fall under BIMC 16.22.060.A.1 through 4., thus triggering BIMC 16.22.060.A.5, which kicks to BIMC 16.22.060.B. Reading subsections A and B holistically, as we must, subsection A applies where an applicant is converting to a nonforest use and has a Class IV forest practices permit, while subsection B applies where an applicant has the *potential* to convert to a non-harvest use under a Class I, II, or III forest practices permit. *Cf.* WAC 222-16-050 (defining different classes of forest practices permits, and explaining that Class IV forest practices permits apply where land is being converted to nonforest uses, while Classes I, II, and III apply where an applicant is actively timbering land). In light of this, the clear limiting language in BIMC 16.22.060.B governs, and this section applies only to land subject to Class I, II, or III forest practices permits, which the Clarks' is not.

The Clarks argue that clearing permits are exempt from the VMP process, and that clearing authorized by a clearing permit therefore must be in addition to the 20% limit in BIMC 16.22.060.A.1. The second part of this argument does not flow from the first. Clearly, where an applicant is only clearing up to 5,000 board feet of timber, they are exempt from the VMP requirements and need only obtain a clearing permit. However, when

an applicant clears more than 5,000 board feet of timber, the VMP provisions apply. Those provisions limit clearing to 20% of the entire property. See BIMC 16.22.060.A.1 (“Any property which is converting . . .”); *id.* (limiting “percent of area” that may be cleared). The area cleared under a clearing permit is clearly part of this percentage, as it is on the same property to which the 20% limit applies. The only basis the Clarks abandon this obvious and common-sense interpretation is that “the Clarks’ application for a VMP could only be for new, prospective work.” Resp’ts’ Br. at 33. The City agrees the VMP was for new, prospective work—the issue is how much work. The clear answer under both BIMC 16.22.060.A.1 and the plain language of the permit is 20,000 square feet minus whatever was already cleared.

Finally, the Clarks claim the City’s and Hearing Examiner’s interpretation “leads to the illogical result of depriving the Clarks of permit rights they already enjoyed.” Resp’ts’ Br. 33. As explained above, the Hearing Examiner’s determination did not deprive the Clarks’ of their permit rights under the clearing permit—it is not as though the VMP brings total clearing on the site to a level less than the 7,000 square feet authorized by the clearing permit. It authorized new, additional clearing, up to a total of 20,000 square feet, inclusive of the area already cleared under the

clearing permit. Any other interpretation would allow applicants to bypass the 20% clearing limit for parcels under BIMC 16.22.060.A.1 by obtaining a series of piecemealed clearing permits. This is a truly absurd result.

E. The Hearing Examiner’s decision affirming revocation is constitutional, and the Clarks have not shown otherwise.

Finally, the Clarks argue that the Hearing Examiner’s revocation decision is unconstitutional. The Clarks bear the burden of showing the unconstitutionality of the Hearing Examiner’s decision. RCW 36.70C.130(1)(f). Because legislative enactments are presumed to be constitutional, and because the Clarks’ constitutional arguments all essentially challenge the City’s 20% clearing cap under BIMC 16.22.060.1.A, the Clarks must prove unconstitutionality “beyond a reasonable doubt.” *Girton v. City of Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999). The Clarks cannot meet this burden.

1. The 20% clearing limit is not an “exaction” at all, much less an unconstitutional one, nor does it violate RCW 82.02.020.

The Clarks argue that the Hearing Examiner’s decision violates RCW 82.02.020 and the unconstitutional exactions doctrine because the 20% clearing cap (or, as they put it, the 80% set-aside) under Chapter 16.22 BIMC lacks a “nexus” to their development.

First, these arguments are barred. If the Court agrees that BIMC 16.22.060.A.1 and the VMP limit clearing on the property to 20,000 square feet, the Clarks' arguments at this point regarding whether that limit is unconstitutional or violative of RCW 82.02.020 are not legally relevant, as the VMP is now beyond attack. *Habitat Watch*, 155 Wn.2d 397, ¶ 22. The Clarks' argument under RCW 82.02.020 is doubly barred because the Clarks did not mention RCW 82.02.020 whatsoever in their Hearing Examiner appeal or their LUPA Petition. See CP 288-97 (Clarks' appeal statement to Hearing Examiner); CP 1-52 (Clarks' LUPA petition). They cannot raise these issues now. *Aho Construction I v. City of Moxee*, 6 Wn. App. 441, 468, 430 P.3d 1131 (2018); *Kitsap Alliance of Property Owners v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 160 Wn. App., 250, 272, 255 P.3d 696 (2011) (holding that a party was barred from raising chapter 82.02 in a LUPA appeal because it failed to do so at the administrative level); *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 166 Wn. App. 172, ¶ 35, 274 P.3d 1040 (2012) (same).

Even if the Court could consider the Clarks' chapter 82.02 and exactions arguments, these arguments fail. RCW 82.02.020 essentially codifies the "nexus" and "proportionality" requirements of the exaction doctrine under *Nollan/Dolan*. RCW 82.02.020 and *Nollan/Dolan* are not

applicable here. Under the Washington and U.S. Constitutions, an “exaction” is a “special application” of regulatory takings principles to governmental attempts to obtain private property or in money through the adjudicative permitting process. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-05 (2013); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The specialized exactions doctrine does not apply to straightforward application of legislatively enacted regulations to property because such regulation does not involve the special concerns at issue in the exactions context, namely that applicants are “especially vulnerable” in situations where a government is attempting to take property as a condition of some underling development. *Koontz*, 570 U.S. at 604. Thus, even if the Clarks’ could raise their RCW 82.02 and exactions argument, the Court should reject them because this is simply not an exactions case. The only way the Clarks could possibly show an unconstitutional taking—which, again, they are barred from doing here—is if they could meet the complex, fact-based analysis under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), which they have not even attempted to do.⁹ Finally, even if the

⁹ Nor have the Clarks attempted to show that the VMP regulations are a “per se” taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) or *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Clarks could argue exactions, they have built no record and made no real argument surrounding the “nexus” and “proportionality” analysis. The Court should reject the Clarks’ exactions claims.

2. *The vested rights doctrine does not apply to this case.*

Finally, the Clarks argue that the Hearing Examiner’s interpretation of the VMP “revokes” their prior permits and therefore violates their “vested rights.” The vested rights doctrine does not apply to this case. Under Washington’s “early vesting” doctrine, an applicant for certain types of permits has a right to have those permits considered under the development standards in effect on the date of their submittal of a complete application, despite later regulatory changes. *See, e.g., Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 169-70, 322 P.3d 1219 (2014), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 705, 451 P.3d 694 (2019).¹⁰ While the vested rights doctrine originated out of common law, the doctrine is now entirely statutory, and it applies only to building permits, subdivision applications, and development agreements.

¹⁰ The Clarks also cite *Niesche v. Concrete Sch. Dist.*, 129 Wn. App. 632, 641-42, 127 P.3d 713 (2005). This case appears to have no relevance at all to the issues here; it deals with statutory entitlements (sometimes referred to as “new property” in procedural due process case law, *see Goldberg v. Kelly*, 297 U.S. 254, 262 n.8 (1970) (citing Reich, *The New Property*, 73 Yale L. J. 733 (1964)) and when those entitlements amount to “property” deserving of procedural due process protections under the 14th Amendment. That issue is not connected to this case in any way.

Id. ¶ 13. This case does not involve a regulatory change between application and approval, nor does it involve a building permit, subdivision application, or development agreement. The vested rights doctrine does not apply.

Moreover, the VMP is not a collateral attack on the clearing permit under LUPA finality principles. The VMP does nothing to alter or nullify the approved clearing permit. It simply allows additional clearing, but only such clearing as brings total clearing on the site to 20,000 square feet, inclusive of the 7,000 square feet authorized by the clearing permit. This is not “revocation” or “collateral attack” on the clearing permit, and it is certainly not an infringement on vested rights. The Clarks have failed to show any defect here.

III. CONCLUSION

The VMP the City revoked granted the Clarks the right to clear up to 20,000 square feet of area on their property total. This meant that the clearing the Clarks already conducted under the clearing permit was part of the 20,000 square-foot allocation. The plain language of the permit condition, the approved site plan and other application materials, and the City’s Code all support this interpretation. The Hearing Examiner therefore agreed with this interpretation and affirmed the revocation of the Clarks’

permit where they cleared over 13,000 square feet more than was allocated in the permit.

The Clarks have failed to show any error here. Contrary to their arguments, the Hearing Examiner’s interpretation of the VMP does not “revoke” their clearing permit. All activity authorized under the clearing permit is still authorized under the VMP; the VMP simply authorizes less additional clearing than the Clarks would like. The Hearing Examiner correctly interpreted and relied on the clearing limits in the City Code to aid his interpretation of the permit. The Clarks have failed to show any constitutional defects in the Hearing Examiner’s decision—indeed, the constitutional doctrines they invoke are largely irrelevant to this appeal and are entirely barred under LUPA. As such, this Court should reverse the Superior Court’s erroneous reasoning and affirm the City’s Hearing Examiner in this appeal.

RESPECTFULLY SUBMITTED this 30th day of July, 2020.

OGDEN MURPHY WALLACE, PLLC

By /s/ James E. Haney

James E. Haney, WSBA #11058

Attorney for Appellant

DECLARATION OF SERVICE

On July 30, 2020, I served a true and correct copy of the foregoing

REPLY BRIEF OF APPELLANT CITY OF BAINBRIDGE ISLAND

on counsel of record stated below via the Washington Courts E-Portal:

Stephanie Marshall
BENNU LAW, LLC
354 Greenwood Ave., Suite 213
Bend, OR 97791
stephanie@bennulaw.com

DATE this 30th day of July, 2020 at Seattle, Washington

By

/s/ Kenya Owens

Kenya Owens, Legal Assistant

OGDEN MURPHY WALLACE, PLLC

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