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No. 543702-2 II

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

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

Appellant,

v.

PAUL and JENNIFER CLARK,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This appeal involves a family who desired no more than to build a home in the City of Bainbridge Island (the “City”), a use permitted outright on their vacant residential lot, which was not in the shoreline environment nor mapped within critical areas. Because their property required some site prep work, Mr. and Mrs. Clark (“Clarks”) requested guidance from the City Planning and Community Development Department (the “Department”) for permitting.¹

The City issued four separate permits for the work and delineated areas to be cleared. When the work was complete, the City assured the Clarks that they had complied. Relying on this approval and assurance, the Clarks proceeded to create a road, building pad, and a small lawn and orchard. They did not create a pasture from virgin forest.

Then, without notice or warning to the Clarks, the City reversed course, succumbing to political pressure. Despite its prior approval, it suddenly determined that all of the separately permitted work was encompassed within in a single vegetation management permit (“VMP”). It revoked the VMP, imposing penalties and a correction requirement under Bainbridge Island Municipal Code Ch. 1.26 (“BIMC”).

¹Mr. Clark testified he did not know how the City would define “clearing,” and whether it would include disturbance, which is part of the reason he requested and followed technical assistance from the City. CP 634:1-11.

The Clarks, having no idea that the City would take this approach, did not appeal the VMP. On its face, the VMP was limited to additional work not yet completed; it was *not* an after-the-fact validation. The City had already confirmed the Clarks' compliance with each previously-issued permit and found that the work met the 5,000 board feet requirement. None of the permits issued to the Clarks was rescinded, amended, or appealed. The four separate approvals allowed all work on site; the permit language controls.

The City attempts to mislead this Court by claiming that the Clarks cleared 33,278 square feet *after* issuance of the VMP. City Opening Br. at p. 2. This is patently false. Before they had even applied—at the City's direction—for the VMP, the Clarks had already completed a substantial amount of work, all approved by the City and in accordance with a clearing permit, building permit, and stormwater controls.

The Department Director conceded that the City's interpretation regarding "cumulative" approvals was unique. Yet, denying the Clarks' administrative appeals, the Hearings Examiner (the "Examiner") effectively rescinded the previous permits, added new requirements to the VMP, and ignored BIMC limitations. The Examiner's decision, without notice, imposed upon the Clarks an overall 80% set-aside of property—without any governmental purpose.

The facts in this case are a useful backdrop, but they are not the basis upon which the Kitsap County Superior Court (the “Trial Court”) decided this case. The Trial Court granted the Clarks’ Land Use Petition Act (“LUPA”) petition, ruling that the Examiner’s arbitrary imposition of a 20% clearing limit “has no basis in fact, no basis in a governmental interest that has been produced, [and] simply cannot be sustained when it’s a private landowner against the constitutional right to use and enjoy property.” RP² Vol. 3 at p. 13.

Perhaps recognizing that its decision cannot be sustained on legal grounds, the City now argues that the Trial Court improperly raised issues *sua sponte* and focuses on the alleged “substantial evidence” it contends supports the Examiner’s decision. Neither proposition is well taken. The Trial Court’s consideration of the decision’s legality in the context of other state laws is appropriate. The Forest Practices Act (“FPA”), RCW Ch. 76.09, and Growth Management Act (“GMA”), RCW Ch. 36.70A informed the Trial Court’s ruling that the City erred in applying its Code to require an 80% preservation restriction. RP Vol. 3 at pp. 2-9. If governmental action is unlawful and unconstitutional, it is a pointless exercise to examine whether the City’s decision was supported by substantial evidence. “Facts” cannot save a legally flawed decision.

² Report of Proceedings (“RP”).

Over more than twenty months, the Trial Court carefully considered the Petition, parties' motions, oral argument on two occasions, initial briefs, and requested additional briefing. Since their permit applications, more than 4.5 years have passed, and the City continues to fight the Clarks. Enough is enough. The Trial Court properly exercised its jurisdiction, granting relief based on enumerated standards in RCW 36.70C.130(1) and ruling that the City's decision was contrary to law and violative of the Clarks' constitutionally protected rights. RP Vol. 3 p. 14. Its ruling is squarely within its authority under LUPA and grants the relief requested in the Clarks' petition. The ruling should be affirmed.

II. STATEMENT OF ISSUES

A. Respondents' Response to Petitioner's Issues Pertaining to Assignments of Error

Respondents submit a counter-statement of issues in response to Petitioner's Issues Pertaining to Assignments of Error.

B. Respondents' Counter-Statement of Issues.

1. Was the Trial Court exceed its jurisdiction in granting the Clarks' Land Use Petition Act appeal on the basis that the Examiner's decision was clearly erroneous and unconstitutional?

2. Is the question whether the Examiner's decision is supported by substantial evidence relevant where the Trial Court reversed the City on legal and constitutional grounds?

3. Is the Trial Court's decision reversing the Examiner's decision a correct interpretation of the law?

4. Did the Trial Court properly reverse the Examiner's decision on the grounds that it violated the Clarks' constitutional rights?

III. STATEMENT OF THE CASE

A. The Clarks Desire to Build a Home on Residential Property in Bainbridge Island.

Respondents own 2.34 acres of residentially zoned real property in Bainbridge Island. CP 226-27. The property is zoned R-0.4 (one unit per 2.5 acres) and does not contain any environmentally sensitive areas, excepting a stream and stream buffer in the extreme southeastern corner of the lot where no clearing occurred. CP 228. The lot is subject to use standards in BIMC §18.09.010.³ RP Vol. 2, pp. 7-10.

The Clarks intended to develop their property with a single-family home, drainfield, well, access road, and appurtenant structures. CP 226; CP 564:24-25, 565:1-21. They also desired to clear an area for a garden and yard. CP 231. Mr. Clark is not a developer and sought permitting guidance from the City. CP 565:11-12, 593:4-17. Mr. Clark testified that clearing is expensive, and the Clarks desired a "healthy balance" and having an adequate back yard, staying within their budget, and "keeping the land as natural as possible." CP 566:1-5. The Clarks paid \$11,000 in permitting fees to the City. CP 582:17-21.

³The City included as Appendix B to its Opening Brief BIMC Chapter 16.18 (Land Clearing) and former BIMC Chapter 16.22 (Vegetation Management) (repealed). The Clarks do not duplicate the City's Appendix B submission. As the City noted at p.5 n.3 of its Opening Brief, relevant sections of the BIMC cited in its Brief and in Respondents' Brief are online at <https://www.codepublishing.com/WA/BainbridgeIsland/>.

The Clarks followed all directives from City employees in good faith (CP 593:4-17) and cooperated with the City throughout the process. CP 560:17-19. Mr. Clark testified:

[F]rom the very beginning we've, you know, sought technical assistance from the City, everything from the stormwater controls to the original clearing. You know, we -- we were told we needed to mark the trees to be cleared for the clearing permit. We marked them. They came back out later and approved the cleared area. I then secured a vegetation management permit. I was told to mark those trees clearly, which I did. They came out and approved the trees to be marked. I cleared the trees. They came out again, approved the area that I had cleared, and then the next day all I know is that I had somehow violated what they'd asked me to do.

CP 593:4-17. All trees intended to be cleared were clearly marked and approved by a City representative beforehand. CP 636:20-25, 637:1-5, 672. The City presented no evidence that the Clarks cleared areas other than those marked with the City's approval.

A single-family dwelling is an outright permitted use in a residential zone. RP Vol. 2, pp. 8-9. Residential uses may be subject to additional requirements per BIMC §16.12.040(I), RP Vol. 2, p. 9, but there are no specific use standards in BIMC §18.09.030(B)(1) that apply to single-family dwellings in a residential zone. RP Vol. 2, p. 10. The property is not designated forest land. RP Vol. 2, p. 20. Under the Forest Practices Act, RCW 76.09.020(15), "forest land" excludes residential home sites five acres or less. RP Vol. 2, p. 12.

B. The City Issued Four Separate Permits to the Clarks.

1. The Clarks' Building Permit, Clearing Permit, and Stormwater Permit

The City issued the Clarks a Clearing Permit on February 23, 2016 (BLD21401SFR) CP 392-99. That permit allowed clearing to remove trees and stumps to create a building site for the house, well and septic, and for an access way (CP 227, 233; CP 566:12-22, 627). City employee Nate Schildmeyer stated that the Clearing Permit was limited to 5,000 board feet of timber and that the Clarks must designate trees to be removed. BIMC §16.18.050.A1.d. CP 568:16-25, 569:1-2. Mr. Clark marked those trees and sought approval, which was granted. CP 567:10-21, 572:10-23, 569:6-22; *see also* CP 636:20-25, 637:1-5, 682.

Approximately ten trees from an approximately 11,000-square-foot area were removed under the Clearing Permit. CP 574:16-25, 575:1-8. Mr. Schildmeyer and Janelle Hitch, City Engineer, inspected the property after a neighbor complained. CP 574:10-15, 556:1-18. Both verified that no work had occurred in a stream or buffer and noted the trees removed. *Id.*; CP 581:12-21, 672:8-25, 673:1-2, 705. The City determined that logging in the work area had not exceeded the 5,000 board feet limit. CP 697:9-18. The buffer had not been cleared or disturbed. CP 554:21-25. The Clarks were cooperative. CP 560:17-19. The City closed the code

enforcement case within one day. CP 697:9-18. Josh Machen, City Planning Manager, testified, “there isn’t a specified amount that you can do under a clearing permit.” CP 645:14-22.

The City next issued the Clarks a separate building permit, which allowed an additional 5,000 square feet of clearing. CP 563:19-21, 566:12-22. Finally, the City also approved stormwater controls, allowing additional clearing. CP 551. The City did not revoke any of these permits. CP 566:15-17; *see also* CP 696:13-19.

2. The Clarks’ Vegetation Management Permit

City staff directed Mr. Clark to secure a VMP for additional work. CP 581, 582:7-13. The City did not advise the Clarks that the VMP would retroactively apply to completed work, only that it was for “additional” work. CP 582:1-17. In response to a question regarding the City’s position that the 20,000-square-foot limit is cumulative, Mr. Clark testified:

I applied for three separate permits. Each permit had its allowable area to be cleared, and I was never told by any City employee that any of the permits were cumulative.

CP 587:25, 588:1-3. The Clarks understood that the 20,000-square-foot limit was “for the vegetation management.” CP 589:3-6. At the administrative hearing, Mr. Clark testified that he did not tell the City that the 17,000-square-foot figure (in the site plan submitted) included the area

already cleared for the haul road and well “because [he] was applying for additional clearing.” CP 636:1-4.

The VMP Staff Report stated that clearing had been authorized under the Clearing Permit and that home construction had been addressed by the building permit as a separate clearing project, citing BIMC §16.22.040. CP 227. The report noted that the had City field verified compliance with the Clearing Permit. *Id.* At the administrative hearing, the City Attorney also indicated that the Clearing Permit was separate from the VMP, which was necessary for “additional clearing.” CP 622:6-8.

The Clarks applied for a VMP on March 9, 2016. CP 233-40. At that time, VMPs were processed pursuant to BIMC Chapter 16.22, which was repealed in 2018 by Ordinance No. 2018-11. CP 837-50 and CP 1106-07. The Clarks submitted several site plans before the City accepted the plan dated April 12, 2016. CP 583-86. At the City’s direction, that site plan does not distinguish among areas that had already been cleared under the Clearing Permit, areas for home construction, and the additional clearing areas for which the Clarks sought approval in the VMP. Rather, the City instructed the Clarks to show all activities under all permits. CP 585:2-6. The site plan was prepared and submitted after work under the Clearing Permit had been completed. CP 585:7-12. Mr. Clark testified that

the final site plan was “just a part of the vegetation management plan application.” CP 586:3-6.

Mr. Schildmeyer instructed Mr. Clark to mark trees on the property he wanted to remove. CP 567:21-24. Mr. Clark flagged all additional trees to be removed, ensuring that he stayed within a 20,000-square-foot limit. Mr. Schildmeyer approved the delineated area. *Id.* Mr. Clark then proceeded to log and clear based on that approval.

The VMP does not encompass other clearing work; per the plain language of Condition 4, it is limited to “this approval.” CP 232, 266. The areas approved for clearing “extend to” (not encompass) the areas previously cleared areas under the Clarks’ other permits. *Id.* Even the Hearings Examiner questioned, “Wouldn’t you say that an applicant reading [Condition 4] would think that that was a separate allocation rather than one that covered everything before?” CP 758:11-19.

The VMP did not state that previously issued permits were superseded by or encompassed within the VMP. The VMP was not an after-the-fact permit. After the Clarks were issued the VMP (CP 265-66), they applied for a Class IVG forest practices permit from the Department of Natural Resources (the “DNR”). CP 267-70. That DNR permit authorized clearing up to 40,000 square feet. DNR did not require the Clarks to obtain a VMP from the City. RP Vol. 2, p. 31.

C. Political Pressures on the City Regarding Clearing Approvals

At the same time that the Clarks' neighbor was complaining to the City that "too many" trees had been cut, the City was also under pressure from the Squamish Tribe and the State Department of Fish and Wildlife, which openly criticized the City's actions. CP 274-79. Some critics alluded to City staff "errors." CP 277-86, 307-10, 424-27. The Director began to push back, and a City staff member went out to measure the Clarks' clearing because of the "atmosphere around the City." CP 662-63. The Director stopped working with the Clarks, choosing instead to communicate directly with the complainants to (1) resolve the "errors" (CP 420-22) and (2) deal with the Tribe and WDFW CP 425-26, 435; CP 749:2-11. No one appealed the permits issued to the Clarks.

Meanwhile, the City was developing its Critical Areas Ordinance ("CAO") and considering changes to its Comprehensive Land Use Plan, which were adopted on February 28, 2017. *See* CP 771-72. Unlike prior GMA planning, no new growth is allocated to the City's residential zones, of which there are three: R.1, R.2, and R.04. CP 771-72, 799. The Comprehensive Plan concept is to place new growth into four "Designated Centers": Winslow, Lynnwood Center, Rolling Bay and Island Center, plus two Industrial Centers. (Plan., p. LU-3, Figure LU-3). *Id.* The rest of the Island is considered a "*Conservation Area.*" *Id.* The overriding goal

for the residential districts is to increase the “network of conservation lands” (Plan, p LU-5) and to preserve the Island’s “rural character” (Plan, Policy LU 1.2, p. LU-4). *Id.*

On February 27, 2018, the City adopted its CAO, via Ordinance No. 2018-1, codified at BIMC Ch. 16.20, which states that “the entirety of Bainbridge Island is classified as an aquifer recharge area.” BIMC §16.20.100.A. Under the CAO, nearly every potential development, use, or activity requires a critical areas permit. BIMC §16.20.100.B.1; BIMC §16.20.020. Any property located within the R-0.4, R-1, or R-2 zoning designations requires an Aquifer Recharge Protection Area (“ARPA”) critical areas approval. BIMC §16.20.100.B.1 -E.1. The ARPA must include “all existing native vegetation on a site, up to a maximum of 65 percent of the total site area.” BIMC §16.20.100.E.2.b. The Clarks’ permits are vested against the CAO.

D. The City Revokes the Vegetation Management Permit.

In August 2016, after the Clarks completed the additional work, City officials measured the cleared area with a tape measure and concluded that it was less than Mr. Clark had originally planned to clear. CP 567:16-25, 568:1-8. After continued neighbor complaints, City employee Josh Machen went to the property in October 2016 to again inspect the clearing. He determined that the Clarks had cleared “more

than” 20,000 square feet, believing that the clearing previously completed under other permits was encompassed within the VMP. CP 594:2-13. The Code provides total site tree unit requirements (BIMC §18.15.010.2), which the City did not contend were exceeded.

On October 6, 2016, the City revoked the Clarks’ VMP, stating that fines and restoration would be imposed. CP 286. It did not allege the Clarks had exceeded maximum lot coverage requirements. *Id.* Mr. Clark was shocked, having received assurances from City employees that the work was compliant and followed every direction given him. CP 293:4-17. Mr. Clark testified that it had been his intent to conform his behavior to what he understood was approved. CP 293:22-24. He stated:

Well, if they wanted me to act a certain way, they should have told me from the very beginning to act that way. From day one, I’ve acted in accordance to their rules and to their technical guidance, and they’ve approved me along the way as well. You know, they’ve approved what I’ve done on multiple situations.

CP 595:7-12. He continued, “nowhere does it state that these permits are cumulative.” CP 596:12-13. At a meeting with Mr. Clark, Josh Machen, Gary Christiansen, and Joe Levan (City Attorney) conceded, “well, you know, obviously we need to change our policies or we need to be more clear.” CP 596:14-16.

The City did not follow its procedure to modify or rescind the prior permit approvals such that the VMP encompassed them. *See* BIMC

§16.18.050.D. The “cumulative permit” interpretation was made after the VMP was issued, without notice and after the work had been approved.

Mr. Machen testified that he did not “recall” telling Mr. Clark that the clearing for both permits was cumulative. They were subject to separate applications. CP 678:22-24, 679:1-5. He further testified:

Q: It seems like a reasonable position, except what is a guy like Mr. Clark to do when he marks trees and the City says, fine cut them? Is there an answer to that?

A: I don’t know that there is an answer to that.

CP 683:9-13. Greg Vause, City Code Compliance Officer, testified that he reviewed the City file in investigating the complaints and “saw that there was a building permit, a vegetation permit and a housing permit.” CP 698:4-6. The Department Director, Gary Christensen, testified that during his tenure the City had never taken a “cumulative permit” approach. CP 747:23-25, 748:1-17:

Q: Are you aware of any – since you have been Director, has [cumulative permits] ever come up before?

A: I’m not aware of – this is a unique circumstance to me that I’ve not been exposed to before.

Q: So as far as you know, there’s no City policy to go to in terms of determining what to do in this unique circumstance?

A: Yes, I – you know, I consulted with staff and – consulted with staff and discussed with them as to how this was applied, and it seemed reasonable to me.

Q: You are not aware of any precedent or City written policies that can guide you in the cumulative argument?

A: No, I’m not.

CP 748:2-17. Mr. Christiansen also testified that he “viewed each permit as distinct and independent of each other.” CP 752:14-15.

E. The Hearings Examiner Upholds the City’s Decisions.

The Clarks timely appealed the revocation decision. CP 288-302. On October 19, 2016, the Clarks filed a request for Director’s review, which was denied on December 12, 2016. On December 23, 2016, Petitioners filed an appeal of the Director’s Decision to the Examiner. A hearing was held on the administrative appeals on April 26, 2017.

The Examiner issued a written decision on October 27, 2017, which applied a 20% clearing limit on the property—both prior to and after the VMP was issued—and found that the limit had been “exceeded.” CP 467-474. The Examiner found that the City had not erred in creating *ex post facto* this new, cumulative permit standard nor in revoking the prior permits via “merging” with the VMP.

The Examiner did not apply the City’s VMP ordinance exception for a clearing permit. The Examiner found that the limitation on the VMP approval of 20,000 square feet applicable to the “total of clearing under [the VMP] approval” is reduced by the areas previously harvested under the separate Clearing Permit, in direct contradiction of the Staff Report and instructions given to the Clarks. CP 470.

A conversion harvest plan was neither required by the City nor provided by the Clarks. The Examiner declined to apply the broader harvest limits in BIMC §16.22.060.B, limiting those allowances to property owners harvesting under Class I, II, or III DNR permits. The Examiner did not consider BIMC §16.22.060.A.5, which allows any property owner not subject to subsections A.1-A.4 (not just those with Class I, II, or III or DNR permits) to pursue such broader allowances. The Examiner recognized neither the BIMC §16.22.040.E VMP exception for clearing permits nor the BIMC §16.18.040(I) exemption for DNR-regulated forest practices.

F. LUPA Appeal and Ruling

Respondents filed a LUPA petition in Kitsap County Superior Court on December 19, 2017 (“the Petition”). The Petition alleged, among other things, that: (a) the City is bound by its four separate approvals issued to the Clarks for development of their property; (b) the clearing limits set forth in those approvals control over the description of the work and estimated amounts of clearing in the applications; (c) the maximum clearing limits in BIMC §16.22.060.A.1 are limited to the VMP and do not apply to other permits; (d) there is no substantial evidence that the four approvals were orally modified to limit all clearing to 20,000 square feet; (e) in the alternative, the City is estopped to deny it allowed more than

20,000 square feet in clearing; and (f) the City's decision violates the Clarks' constitutionally protected rights.

The Trial Court heard oral argument on July 30, 2018. RP Vol. 1. Among other things, the Clarks addressed the vegetation management scheme of the City vis-à-vis the Department of Natural Resources authority under the FPA. *Id.* at pp. 22:2-13, 18-25, 23:3-7, 24:6-20, 27:1-9. The Clarks argued that the cumulative interpretation of four separate approvals was contrary to due process, noting that they had sought technical assistance from the City because the Code was not clear and that they had followed all City directions. *Id.* at p. 15:14-25, 16:1-8. The four approvals had been issued by three different City departments (Building, Engineering, and Land Development) (*Id.* at p. 17:3-6, 9-10), and the Clearing Permit is specifically exempt from the VMP (*Id.* at p. 9: 1-17, 10:23-25, 11:1-3.) The Court asked about the purpose of the VMP regulations. *Id.* at p. 52:1-16, 21-25, 53:1-12, 21-25. The City raised the issue of the Examiner's alleged bias in an attempt to defend itself. *Id.* at p. 82:14-25, 83: 1-2, 20-23.

The Trial Court reconvened the parties on November 9, 2018, at which time the judge asked for additional briefing to understand: (1) what remedies remained for the City under BIMC Ch. 16.22 (rescinded); (2) whether the Clarks had notice that their property would be subject to an

80% overall preservation restriction and/or that the City would merge the clearing allowances of all permits together in the VMP; (3) the extent of the City's authority under state law to impose an 80% preservation restriction; and (4) what governmental purpose, if any, was served by the restriction on the Clarks' property. RP Vol. 2.

On August 9, 2019, the Trial Court granted the Clarks' Petition and entered an Order Vacating Decision of the Hearings Examiner. CP 1191-92. Petitioner Bainbridge Island challenges the Order in this appeal.

IV. SUMMARY OF ARGUMENT

The Clarks are not above the law, but neither is the City. Under this state's republican form of government, the Clarks' land clearing activities are not a privilege, but a right.⁴ The right to own and use one's private property is protected by the state and federal constitutions. *See* U.S. Const. Amend. V; Wash. Const. art. I, § 16; *Manufactured Housing Cmty. of Wash. v. State*, 142 Wn.2d 347, 368, 13 P.3d 183 (2000).

Predictably, the City now seeks to defend itself by arguing that this matter is only about disputed facts. As set out in the Petition (CP 15-16), the only fact contested is a finding that the City somehow "made it clear"

⁴A regulatory restriction on the right to use one's property "must substantially advance a legitimate state interest." *Lingle v. Chevron*, 544 U.S. 528, 540-41 (2005). The Due Process Clause protects "life, liberty, or property." U.S. Const. amend. XIV, § 1; *see United States v. Carlton*, 512 U.S. 26, 41-42 (1994) ("[T]he Due Process Clause explicitly applies to 'property[.]'" (Scalia, J., concurring)).

to Mr. Clark that he was limited to 20,000 total square feet of clearing, effectively merging all permits into one. The City invented its “one permit” interpretation after-the fact. CP 755. The Clarks did not appeal the VMP, which on its face is limited to “this approval.” CP 232, 266. The City’s directions and Staff Report confirmed that the Clearing Permit, home construction, and other specified activities were exempt from the VMP. The Clarks were blind-sided, unable to understand why they had suddenly lost the right to have their VMP permit stand alone, separate from work they had already completed under permits the City seemed no longer to consider valid. CP 293:4-17.

The Examiner’s rubber-stamping of the Department’s *ex post facto* reversal of course cannot be sustained because it leads to an unprecedented, absurd result: the loss of permit rights already exercised where those permits have not been appealed, amended, or revoked. The Clarks were not directed to apply for an after-the-fact permit. All work completed had been approved as compliant.

Permits are a vested property right protected from arbitrary and discriminatory action—here, the collapsing of cumulative approvals into one overall clearing limit. *See The Town of Woodway v. Snohomish Cty.*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014). The Examiner’s decision

deprived the Clarks of approved development rights, effectively rescinding issued permits for which they had applied and paid.

Contrary to the City's characterization, the Clarks are not haphazard clear-cutters; they desired to preserve the natural state of their property as much as was possible. The Clarks are victims of the City's need to release political pressure valves, scapegoats in its effort to appease environmentalists. From inspections confirming that clearing work was compliant to an admission by the Director that the City's interpretation as to "cumulative approvals" is "unique," (CP 748:2-17), the record shows that the City—not the Clarks—acted in an unbridled manner. It changed the rules without warning, adding new restrictions to defuse political pressure. Its decision-making was capricious, haphazard, arbitrary, and irrational.

"The property rights of landowners shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6). Property rights do not come from government, but must be protected as against government. *See, e.g., Pierce v. King County*, 62 Wn.2d 324, 330, 328 P.2d 628 (1963). The right to develop and use private property is a protected constitutional right. *See Manufactured Housing*, 142 Wn.2d at 364. "Although less than a fee interest, development rights are beyond question a valuable right in property." *West Main Associates v. Bellevue*,

106 Wn.2d 47, 50, 720 P.2d 782 (1986), *abrogated on other grounds in Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019).

Examining the BIMC provisions on vegetation management in conjunction with the FPA and the GMA, the Trial Court determined that the City's interpretation and application of BIMC Ch. 16.22 was legal error and must be reversed. The court properly ruled that the Examiner's decision deprived the Clarks of their property without due process of law. RP Vol. 3, pp. 12-13. The Trial Court's ruling is not a collateral attack on the VMP regulations or the VMP permit. The only sustainable interpretation is one that complies with state statutes and common sense as well as protects constitutional rights. The City's decision does not.

V. ARGUMENT

A. Standard of Review.

Judicial review of land use decisions is governed by LUPA, RCW Ch. 36.70C. *Girton v. City of Seattle*, 97 Wn. App. 360, 362, 983 P.2d 1135 (1999). "By petitioning under LUPA, a party seeks judicial review by asking the superior court to exercise appellate jurisdiction." *Sunderland Family Treatment Servs. v. City of Pasco*, 107 Wn. App. 109, 117, 26 P.3d 955 (2001). Under LUPA, a reviewing court may grant relief under any or all of the six circumstances set forth in RCW 36.70C.130(1). *Id.*

The standards relevant to this case are RCW 36.70C.130(1)(a) (unlawful procedure or failure to follow a prescribed process); (b) (erroneous interpretation of the law); (c) (substantial evidence); (d) (clearly erroneous application of the law to the facts) and (f) (violation of constitutional rights). Reviewing the underlying decision, this Court “stands in the same position as the superior court.” *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Questions of law (RCW 36.70C.130(1)(a), (b), (d) and (f)) are reviewed *de novo*. *James v. County of Kitsap*, 154 Wn.2d 574, 580, 115 P.3d 286 (2005). The “mistake of law” standard applies if the “land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise.” RCW 36.70A.130(1)(b). No deference is due to the City’s interpretation of unambiguous ordinances. *See Sleasman v. Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). A decision is clearly erroneous if, “although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed.” *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 829, 256 P.3d 1150 (2011).

The context of this matter is punitive in that it imposes a civil penalty and revoked the VMP. CP 379. The burden is on the City in an

appeal of a notice of violation decision. BIMC §1.26.033; *see also Post v. City of Tacoma*, 167 Wn.2d 300, 310-11, 217 P.3d 1179 (2009) (citing RCW 7.80.100(3) (“The burden of proof is upon the state to establish the commission of the civil infraction by a preponderance of the evidence”)).

B. The Trial Court Acted Within Its Jurisdiction and Did Not Raise New Issues *Sua Sponte*.

The City argues the Trial Court erred in raising issues related to the validity of the VMP ordinance and the Clarks’ VMP. The City claims the Clarks did not raise these issues to the Hearings Examiner, and thus the Superior Court erred in considering them. The City is incorrect. The Trial Court was well within its authority to consider the constitutionality of the Examiner’s interpretation and application of the VMP ordinance—namely, that the City’s decision constituted a violation of the Clarks’ due process rights to use and enjoy their property, RP Vol. 3 at p. 13:3-9, 14:14-19—even if the Trial Court raised those issues *sua sponte*, which it did not.

The Trial Court did not consider, nor rule on any “GMA challenge” to the VMP ordinance; the City does not cite any evidence it did. Any reference to the GMA was in the context of construction of the VMP ordinance and a determination of the impact of the Examiner’s interpretation on the Clarks’ constitutional rights. Nor did the Trial Court rule the VMP ordinance is invalid in any “collateral attack.” Again, the

City mischaracterizes the court's inquiry and analysis. The Trial Court conducted a detailed review of the VMP ordinance, vis-à-vis the GMA, the FPA, and DNR regulations to determine whether the Examiner's interpretation of the VMP was lawful and constitutional. Case law cited by the City at pp. 27-28 of its Opening Brief is not dispositive.

This Court need not reach the City's argument regarding the constitutional claims in this case, because the Trial Court decided this case on an independently sufficient statutory basis:

“[F]or the hearings examiner to find that [the subject permits] were inclusive is an erroneous application of the law, because the hearings examiner did not look at the fact that there's nothing in any of the statutory provisions that requires inclusion. There's nothing in * * * either of the permits that requires inclusion.”

RP Vol. 3 at p. 9:11-17. The court's constitutional determinations were thus an alternative basis for its ruling, which is proper under RCW 36.70C.130(1)(b) and (d); *c.f. Tunstall ex rel. Turnstall v. Begerson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000). This Court may affirm on the above basis without reaching the City's *sua sponte* assignment of error.

Contrary to the City's argument, the Clarks did raise constitutional issues in their appeal to the Examiner, citing numerous cases on vested rights, exactions, disproportionate impact and takings. CP 279-283 (Appeal of Administrative Decision Revoking VMP at p. 8)); CP 301-344

(Appeal of Administrative Decision Upholding Warning of Violation at p. 10). The City's assertion that such issues were raised *sua sponte* is incorrect. The Clarks' LUPA petition and briefing to the Trial Court addressed the implications of the Examiner's interpretation of the VMP ordinance in the context of the FPA and GMA. CP 1-52; CP 768-801; CP 853-974; CP 986-1040; CP 1171-75.

Even if, *arguendo*, this Court determines that the Trial Court raised issues of constitutionality *sua sponte*, its ruling on those issues was well within its authority. LUPA authorizes a reviewing court to review and decide the constitutionality of a matter appealed under its provisions, RCW 36.70C.130(1)(f), and constitutional grounds may be raised for the first time on appeal of an administrative decision where, as here, a Hearings Examiner has no authority to hold the local laws she implements to be unconstitutional. *AHO Construction I, Inc. v. City of Moxee*, 6 Wn. App. 441, 468, 430 P.3d 1131 (2018). “[LUPA] states nothing of the degree of participation or the specificity with which issues must be raised before an administrative agency or municipality to seek judicial review.” *Id.* at 457. The Examiner lacked authority to consider constitutional arguments, but the Clarks raised the issues below.

Additionally, issues or theories not presented to the Trial Court may be considered for the first time on appeal where such questions are

necessary to serve the ends of substantial justice or to prevent the denial of fundamental rights, such as a constitutional mandate, a statutory commandment, or an established precedent. *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 622-23, 465 P.2d 657 (1970). Matters involving the public interest not raised below also may be considered by a reviewing court. *Id.*; *see also Conard v. Univ. of Wash.*, 119 Wn.2d 519, 527–28, 834 P.2d 17 (1992). The Trial Court’s constitutional ruling in this case fit squarely within the above authority: a constitutional mandate of due process and a matter involving the public interest in protecting property rights.

Finally, this Court may raise issues of manifest error affecting constitutional rights, RAP 2.5(a), and retains wide discretion to determine which issues must be addressed in order to properly decide a case on appeal. RAP 12.1(b)⁵; RAP 7.3; RAP 1.2; *see also Hanson v. City of Snohomish*, 121 Wn.2d 552, 557, 852 P.2d 295 (1993) (“Although the general rule is that an issue or theory which is not presented to the trial court will not be considered on appeal, that rule “is not inexorable and has its limitations,” quoting *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970)). The City’s appeal on this basis is unfounded.

⁵ RAP 12.1(b) provides that “[i]f the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.”

C. The City’s Decision is Clearly Erroneous.

The Trial Court properly determined the Examiner’s Decision is: (1) an erroneous interpretation of the law; and (2) a clearly erroneous application of the law to the facts. RCW 36.70C.130(1)(b), (d). As set forth above, the City – not the Clarks – had the burden of proof before the Examiner because the context of the matter (revocation of permit and civil penalties) was punitive. *Post v. City of Tacoma*, 167 Wn.2d at 310-11. Deference is not due to the City’s interpretation because: (1) the plain terms of the VMP permit are applicable to “this approval”; (2) the Director admitted its “cumulative” permit approach was “unique,” and not based on accepted City policy; and (3) the Examiner’s “interpretation” resulted in effective revocation of other permits issued to the Clarks.

1. The VMP Does Not Supersede Other Permits

The City’s Opening Brief does not address the binding nature of the other permits issued to the Clarks, which were not appealed, rescinded or modified. The VMP does not reference any other approvals. It states: “A separate building permit will be required for the construction of any structures, buildings, roadways, driveways or utilities on this site.” CP 232. Work allowed by the building permit and related stormwater controls approval cannot be part of the VMP. It also states, “No construction activities or installation of permanent roadways or structures is authorized

by the approval of this permit application.” CP 401-02. The Clearing Permit is exempt from VMP regulations under BIMC §16.22.040.E; *see also* BIMC 16.18.040(I). The home construction, stormwater control and utility work allowed by the building permit and related stormwater control approval are not part of the Clearing Permit, nor covered by the VMP. See CP 698:4-6 (Vause testimony: three separate permits in the file).

The City does not address that the Examiner ignored clearing allowances in other approvals. The Examiner ruled that: “the Clark permitting process as a whole made clear the City’s intent to regulated and review all the related clearing on the parcel as a single project.” CP 470. This was in the face of testimony by Josh Machen – the City employee on whom the Clarks relied with respect to permitting, flagging trees for removal and verifying compliance – who admitted he did not tell the Clarks that previously completed clearing would be included in the VMP. CP 678:22-24, 679:1-5. How could he have? The Director testified that the “unique” cumulative permit approach was not based on a City policy and had never been applied before. CP 747:23-25, CP 748:1-17.

The City came up with its “one permit” interpretation after-the-fact. *Id.*; CP 755. Mr. Clark had no opportunity to conform to the City’s cumulative permits interpretation made without notice, although the City

had a duty to provide notice to the Clarks in providing technical assistance under RCW 36.70B.220. *E.g.*, CP 549:225-25, 595:1-12.

The City did not follow procedures for modification of the approvals. BIMC §16.18.050.D (requiring permit changes to be in writing and approved by the Director to meet public requirements in Chapter 2.16). The Examiner erroneously ignored the clearing allowed under three additional binding approvals, even while asking whether the Clarks would have understood the VMP to be limited to additional clearing. CP 758:11-19. The City consistently stated the Clearing Permit and VMP approval were “separate.” CP 752:14-15, CP 227. The City Attorney stated the Clearing Permit was not before the Examiner because the VMP was for “additional clearing.” CP 622:6-8. The Examiner himself made it clear that any allegations regarding the Clearing Permit were not at issue, evidencing the separate status of that permit. CP 697:2-4 (“Be assured that we’re not going to look into violations of the clearing permit.”)

2. The Examiner’s Interpretation of BIMC Ch. 16.22 is Contrary to Law.

Alternatively, the Examiner erred by upholding the City’s imposition of an overall 20,000 square foot clearing limit under BIMC §16.22.060.A.1. The City alleges that the Clarks were not exempt from this provision by virtue of the Class IV FPA. The Clarks property was

zoned residential and thus was not being “converted” to nonforest use⁶; even if it was,, the City did not require a conversion harvest plan such that BIMC §16.22.060.A.1 is inapplicable by its plain, unambiguous terms.

The Clarks obtained a “Class IV, General” Forest Practices Act approval from DNR. A Class IV-G applies where DNR has not transferred its regulatory authority to the local government pursuant to RCW 76.09.240(1); WAC 222-16-050. The property owner can effectuate a transfer if he or she submits, and the local government approves, a “conversion option plan.” If so, the plan is submitted with the application to DNR, which then decides whether the local government can issue the forest practices permit. *See* BIMC §16.22.030.B.

The City states BIMC §16.22.060.A.1 applies to “any property.” But the law specifies that it applies to a “conversion plan,” which is one approved pursuant to BIMC §16.22.030.B. Thus, its terms have to do with approving a conversion plan to submit to the DNR and the “percentage of area that may be cut” pursuant to such plan. The law is not a generic standard applicable to all property. The Examiner applied only one part of

⁶The City admits at p. 40 n.17 of its Opening Brief that the Clarks’ property is zoned residential and the City did not designate it as forest land under the GMA and/or the FPA. The City apparently believes its own characterization (via its attorney and not supported by any expert testimony) of the property as “heavily treed” makes the property “forest land” under “common parlance” is sufficient to put a property owner on notice that their residential property will be treated as forest land. This is another example of the City’s arbitrary decision-making that has serious consequences on private property rights.

BIMC §16.22.060.A.1 concerning land clearing limits under specific zoning districts. He ignored that the City did not require a conversion harvest plan of the Clarks such that subsection A.1 is inapplicable. None of the other subsections apply.⁷ Thus, BIMC §16.22.060.A.5 controls:

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

(emphasis added). The Examiner erroneously applied BIMC §16.22.060.A.1 out of its context and ignored the selective harvest plan option in BIMC §16.22.060.B, available to the Clarks under BIMC §16.22.060.A.5, ***regardless*** of the classification of their FPA permit.

The City argues that BIMC §16.22.060.B only applies to Class I, II and III permits and thus, that it is inapplicable to the Clarks because they were issued a Class IV permit. The City's interpretation cannot be sustained because it reads out the express authorization for "remaining forested areas which are not addressed in subsections A.1 through A.4" to be harvested under a harvest plan that meets the standards for tree retention under subsection B. Because the City did not require a

⁷BIMC §16.22.060.A.2 is inapplicable because the property is not being converted to agriculture or pasture use. BIMC §16.22.060.A.3 pertains to residential forest areas, and is inapplicable. BIMC §16.22.060.A.4 is inapplicable because the property is not characterized by critical areas, buffers, greenways or otherwise restricted.

conversion option plan per BIMC §16.22.060.A, nor was one was filed with DNR, BIMC §16.22.060.A.1 is inapplicable.

The City is bound by BIMC §16.22.060.A.5, which allows harvest under the standards set forth in BIMC §16.22.060.B in excess of the limits in subsection A.1, stating “Up to 50 percent of the existing merchantable volume or 50 percent of the basal timber may be cut.” The Plat Plan (CP 241) meets the definition of a selective harvest plan. *See* BIMC §16.22.060.B. The City wrongly asserts that 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.” Opening Br. at p. 41. The plain language of subsection A.6 does not include that requirement. The Examiner erred in ignoring the availability of an allowance of up to 50% timber cutting in BIMC §16.22.060.B.1, which option was available under BIMC §16.22.060.A.5.

The Examiner also failed to recognize the fact the Code exempts clearing permits from the VMP process. BIMC §16.22.040.E; *see also* BIMC §16.18.040(I) (Forest practices regulated by DNR exempt from clearing permit requirements). The City bootstraps the percentage restrictions in BIMC §16.22.060.A.1 to this analysis, alleging that the restrictions apply to the parcel itself and not each individual permit issued for the parcel. Opening Br. at p. 42. This is clear legal error because the

Clearing Permit had already been issued and work had been completed and approved. The Clarks' application for a VMP could only be for new, prospective work. Any reasonable person would have determined that previous work would not be included in an application and approval for additional work. Even the Examiner acknowledged this fact. CP 758:11-19. The terms of the VMP are limited to "this approval." CP 232, 266.

The City correctly states that, 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." Opening Br. at 42-41.⁸ It would be hard to imagine an example of a more strained, unlikely or unrealistic ruling than that of the City. It is absurd to assert that already completed clearing permit work must be included in a VMP application for new, prospective work. The City's interpretation cannot stand because it leads to the illogical result of depriving the Clarks of permit rights they had already enjoyed – without notice and months later – by including work that had already been approved in the scope of a *subsequent* permit.⁹ This Court should reject the unrealistic and contrary

⁸One of the cases cited by the City for this argument (*Dahl-Smith, Inc. v. Walla Walla*, 110 Wn. App. 26, 38 P.3d 266 (2002)) was reversed in 2003.

⁹The City's interpretation also runs counter to the statutory construction principle that ordinances shall be construed to allow development, because they are in derogation of the common law. *E.g., Keller v. Bellingham*, 20 Wn. App. at 11. Ordinances are not to be extended beyond their express language, and where silent on an issue it is presumed to allow rather than prohibit the same. *Id.* The necessity for notice is especially strong where the effect of the ordinance is to regulate the otherwise free use of property. *State ex rel.*

to common sense interpretation the City advances and uphold the reversal of the Examiner. *See, e.g. Cherry v. Municipality of Metropolitan Seattle*, 116 Wn.2d 794, 802, 808 P.2d 746 (1991).

3. Interpretation of the VMP Ordinance to Limit Work Completed and Approved Prior to the VMP is Legal Error.

Not only is the City's "interpretation" contrary to common sense, it is patently unfair to subject the Clarks to new "policy" made up after the fact. The Clarks were receiving technical assistance from the City under RCW 36.70B.220 and following all instructions; City employees admitted they did not inform the Clarks of the "unique" cumulative interpretation, which was not a written policy. The incorporation of other, previously permitted work into the scope of the VMP deprives the Clarks of the protected property rights under those permits:

Before any governmental agency can impose that level of restriction on a property owner while taking taxes from the property owner for the benefit of everyone, the City needs to ensure that it has notified prospective property owners of those requirements.

So I don't know that a City has a legal right to, by virtue of an ordinance on a land use provision that it didn't even notify the landowner of before it bought the property, I

Weiks v. Tumwater, 66 Wn.2d 33, 35-36, 400 P.2d 789 (1965). A court considers the face of the ordinance but also its application to the person who has sought to comply with the ordinance. This is to limit arbitrary and discretionary enforcement which violates due process rights of applicants. *Anderson v. City of Issaquah*, 70 Wn. App. 64, 76, 851 P.2d 744 (1993).

don't know that there's any legal authority that would allow a landowner, post purchase, to then be notified that in order to use the property as it says in ordinance, for residential purposes -- and, again, in the Bainbridge Island Municipal Code there's nothing that says subject to the permitting restrictions as contained in Chapter 16, 16.22. It doesn't say that.

RP Vol. 2 at pp. 36-37.

The fundamental error committed by the City is its transformation of the VMP permit to become all inclusive. The VMP is limited to "this approval." CP 232, 266. The Clarks were advised, and the Staff Report made clear that other work already completed are not within the scope of the additional work covered by the VMP.

The Trial Court determined that the City's interpretation of the VMP ordinance to impose "restriction percentages" to the parcel overall could not be sustained on a constitutional basis. This was not a ruling that the VMP ordinance was invalid (although it has since been repealed); the court determined the City's application of the ordinance to the Clarks to require an 80% set-aside of residential property through a new cumulative permit policy resulted in a deprivation of procedural due process.

The VMP was not an after-the-fact permit. It was for additional clearing work only. The City confirmed the additional, new work under the VMP complied with its terms, just as it had done for the other permits. Only when the City found itself facing public criticism did it take the

extreme step of changing the VMP such that 20,000 square feet of **additional** work became 20,000 square feet of **all** work.

The Clarks' challenge is not precluded by its "failure" to appeal the VMP. Rather, it is enhanced by that fact. The Clarks did not appeal the VMP because there was no reason to contest it as issued. There was nothing on the face of the VMP, nor in City regulations that stated the VMP superseded and encompassed previously issued permits.¹⁰ The Clarks were following technical permit guidance provided by the City; they are not professional developers. Mr. Clark followed directions, applied for permits he was told were needed, flagged trees with the approval of City Staff and completed work that was approved each time. The Clarks are not precluded from challenging the inclusion of new conditions and standards in the VMP after approval of the work, which set up the Clarks for punitive action and damaged their good name.

D. The City's Decision is Unconstitutional.

The right to own and use one's private property is protected by the state and federal constitutions. *See* U.S. Const. Amend. V; Wash. Const. art. I, §16; *Manufactured Housing Cmty. of Wash*, 142 Wn.2d at 364.

¹⁰The VMP was issued prior to the FPA permit. The FPA allows clearing of over 40,000 square feet and includes no conditions of approval. CP 267-71. Per BIMC §16.18.040(I) forest practices regulated by the DNR under Ch. 79.09 RCW are exempt from City clearing permit regulations.

“Property in a thing consists not merely in its ownership and possession but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.”

Id. There is a fundamental right to use and develop real property. *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987). The doctrine of unconstitutionality applies here in three ways.

First, RCW Ch. 82.02 precludes the requirement of any permit, or imposition of any condition thereto, restricting 80% of a parcel for use and development as a residence where it is not reasonably necessary to mitigate identified impacts of such use under Article XI, §11 of the Washington State Constitution. The City cannot act in conflict with this general law. Second, an 80% restriction is disproportionate to alleged impacts of the Clarks’ proposed development and constitutes an illegal exaction in violation of substantive due process and constitutional private property rights. Finally, the City’s “amendment” of the Clarks’ permits to create an “overall” clearing permit, deprives them of vested property rights in each permit and is arbitrary and capricious.

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1. The City’s Decision is Inconsistent with RCW Chapter 82.02, Contrary to Article 11, Section 11 of the Washington Constitution.

Article XI, § 11 of the Washington Constitution states, “Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” An ordinance is constitutional unless, “(1) the Ordinance conflicts with some general law; (2) the Ordinance is not a reasonable exercise of the County's police power; or (3) the subject matter of the Ordinance is not local.” *State, Dep't of Ecology v. Wahkiakum Cty.*, 184 Wn. App. 372, 377, 337 P.3d 364 (2014).

In determining whether an ordinance is in “conflict” with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.

Weden v. San Juan County, 135 Wn.2d 678, 693, 958 P.2d 273 (1998) (citations omitted).

RCW 82.02.020 applies to ordinances that require developers to set aside land as a condition of development. *E.g., Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 269, 877 P.2d 187 (1994). RCW 82.02.020 is a general law of the State and requires strict compliance with its terms. *Id.* at 270. A tax, fee, or charge, either direct or indirect, imposed on development is invalid unless it falls within one of the exceptions

specified in the statute. *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 247, 877 P.2d 176 (1994), *superseded on other grounds by* RCW 36.70C.030(1).

The City has the burden of proving that a condition is reasonably necessary as a direct result of proposed development:

The statute mandates that a municipality must demonstrate that a dedication is "reasonably necessary as a direct result of the proposed development or plat," and also mandates that, in the case of a payment in mitigation of a "direct impact that has been identified as a consequence " of the proposed development, a municipality must establish that the payment is "reasonably necessary as a direct result of the proposed development or plat." RCW 82.02.020 (emphasis added). We have repeatedly held, as the statute requires, that development conditions must be tied to a specific, identified impact of a development on a community. * * * ***RCW 82.02.020 does not permit conditions that satisfy a "reasonably necessary" standard for all new development collectively; it specifically requires that a condition be "reasonably necessary as a direct result of the proposed development or plat."*** We reject the City's argument that it satisfies its burden under RCW 82.02.020 merely through a legislative determination "of the need for subdivisions to provide for open space set asides ... as a measure that will mitigate a consequence of subdivision development.

Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 761, 49 P.3d 867 (2002) (internal citations omitted) (emphasis added); *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 340, 153 P.3d 231 (2007) . To meet its burden, local government "must show that the development * * * will create or

exacerbate the identified public problem.” *Burton v. Clark County*, 91 Wn. App. 505, 521, 958 P.2d 343 (1998). It must demonstrate a nexus between the condition and the impact caused by development in order for it to legally impose project mitigation. *Id.*

A required set-aside of land in violation of RCW 82.02.020 is invalid. *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 409, 780 P.2d 838 (1989). The Clarks allege that an 80% property preservation requirement imposed by the City via its interpretation and application of the VMP ordinance violates RCW 82.02.020. Because the statute is a general law of the state, this conflict violates Art. XI, §11 of the Washington Constitution. The Trial Court’s ruling details the lack of nexus between the required set-aside of the vast majority of the Clarks’ land, given that there was no identified “impact” of the clearing to be mitigated by the onerous restrictions. (RP Vol. 3 at 13-14) The only identified public purpose to be served was a vague “desire” by the City to maintain aesthetic “special island character” forested lands. [RP Vol. 2 at 7-8. Thus, the City failed to meet its burden of establishing the property restrictions on the Clarks were reasonably necessary as a direct result of the proposed development. They are not.

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2. The City's Decision Constitutes an Illegal Exaction.

The 80% residential property development restriction imposed on the Clarks is an exaction; it is unconstitutional because it goes too far. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). It violates RCW 82.02.020 as an indirect tax, fee, or other charge on development, and thus is unconstitutionally inconsistent with this general law of the state. *See Isla Verde*, 146 Wn.2d at 753-55 (30% open space set aside violates RCW 82.02.020); *Citizens' Alliance for Prop. Rights v. Sims*, 145 Wn. App. 649, 656, 187 P.3d 786 (2008) (clearing limits on property to a maximum of 50% violates RCW 82.02.020).

3. The City's Decision Affects Vested Property Rights.

The City's reversal of course with respect to permits issued prior to the VMP and its interpretation that the VMP required the Clarks to leave 80% of their property undisturbed affects vested property rights. "A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect * * * or conserve for open space purposes * * * constitutes and is classified as real property." RCW 64.04.130. The vested rights doctrine entitles a permit holder or its successor to develop their land free from changes to zoning laws enacted after issuance of a permit or other entitlement. *See The Town of Woodway*, 180 Wn.2d at 179-80; *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632,

641-42, 127 P.3d 713 (2005) (“A protected property interest exists if there is a legitimate claim of entitlement to a specific benefit.”) (quoting *Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984)).

The permit approvals provided to the Clarks are final decisions of the County. BIMC §2.16.020.Q. They were not appealed. The Clearing Permit, Building Permit and Stormwater Permit were not revoked. BIMC §2.16.030.I. Thus, these permits are protected property rights that cannot be taken away by or diminished by the City’s *ex post facto* new policies or interpretations and are vested against subsequently enacted regulatory changes. *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 641-42, 127 P.3d 713 (2005). The permits are binding even if issued in error. *Wenatchee Sportsmen*, 141 Wn.2d at 181-82. The Code does not allow for modification of any of the approvals, unless there are clerical errors which do not materially alter the decision. BIMC §2.16.030.G.

The City’s decision is an unauthorized, collateral attack on its prior permitting decisions. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005). The Clarks have vested property rights in the issued permits and they acted in accordance with the permits, as advised and confirmed by staff. The doctrine of finality prevents revisiting the terms of the permits. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002). But the City has done exactly that.

These protections are founded in due process considerations. *E.g.*, *West Main Assocs.*, 106 Wn.2d at 50. They are codified in RCW 36.70B.030 and .040 (requiring local governments to restrict permit application review to standards set forth in development regulations and comprehensive plan goals), RCW 36.70A.020(7) (requiring predictability and fairness in the processing of land use applications), and RCW 36.70A.020(6) (“The property rights of landowners shall be protected from arbitrary and discriminatory actions”).

The City issued instructions and approvals which were followed in all material respects by the Clark. But then, the City retracted its actions based upon political pressure and essentially voided previously issued permits that allowed clearing work. The City’s interpretation does not change existing laws and the Clarks’ good faith reliance upon such laws and related official directives. Laws must be applied as written with no staff-generated additions. *See Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1987), *superseded on other grounds by* RCW 19.27.095(1), RCW 58.17.033(1); *West Main Assocs.*, 106 Wn.2d at 50.

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4. The City's Decision is a Regulatory Taking and Results in a Deprivation of the Clarks' Due Process Rights.

Case law establishes rigorous requirements for nexus and proportionality under the state and federal constitutions. *See. e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Benchmark Land Co. v. City of Battleground*, 103 Wn. App. 721, 14 P.3d 172 (2000), *aff'd on other grounds in Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 695 (2002). The burden is on local government to meet the nexus and proportionality tests.

State and federal law recognize a property owner may prove a partial taking if a regulation places restrictions on land that "go too far" in affecting its economic viability. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); U.S. Const. Amend V; Washington Const. Art. I, §16. Such claims are adjudicated by examining a "complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Requiring the Clarks to place 80% of their property off-limits to development constitutes a partial taking. *See Manufactured Housing Communities*, 142 Wn.2d at 355, 364.

After the Trial Court's ruling, the Washington Supreme Court clarified the standard for review of substantive due process and regulatory takings cases in *Chong Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019), holding that partial takings cases continue to be analyzed under the test announced in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The Court further clarified that substantive due process claims are subject to the rational basis test, and not a higher standard of scrutiny that may have been applied in previous rulings:

Therefore, a law regulating the use of property violates substantive due process only if it 'fails to serve any legitimate governmental objective,' making it 'arbitrary or irrational.' * * * This test corresponds to rational basis review, which requires only that "the challenged law must be rationally related to a legitimate state interest." Amunrud, 158 Wash.2d at 222, 143 P.3d 571. We therefore apply rational basis review to the plaintiffs' substantive due process challenge to the FIT rule.

451 P.3d at 691. For substantive due process purposes then, the issue is whether the restriction on clearing applicable to 80% of the Clarks' property serves a legitimate government interest. The Trial Court struggled to find one:

This property was found to have no critical areas, no wildlife corridors, etc. And these are arbitrary numbers, without any stated governmental interests that can be sustained. Aesthetic value is not a reason to take a person's property.

The other preliminary criteria that are listed here, the "it will enhance the cities appearance and livability" is vague and cannot be applied to take property. Forest area will provide significant environmental benefits and natural resource value, as identified in the comprehensive plan. But the comprehensive plan does not identify this piece of property as forestland; it says it's a residential piece of property. Water and air quality degradation has not been proved to restrict Mr. Clark from clearing more of his property. There is no loss of wildlife or fish habitat, and there is no increased soil erosion that was identified by the planning department.

So without any corresponding governmental interests, overriding governmental interests that would justify taking 80 percent of a person's property or imposing these arbitrary percentages, without having a process to identify those percentages, is unconstitutional.

RP Vol. 3 at pp. 13-14.

The court in *Anderson v. City of Issaquah*, 70 Wn. App. 64, 76, 851 P.2d 744 (1993) addressed the issue of land regulation based upon aesthetic considerations, ruling that properly defined aesthetic standards may be a proper component of land use regulation, while stating that use of solely aesthetic values for regulation is "unsettled" in Washington law. 70 Wn. App. at 82-83. Here, the Trial Court clearly believed that the aesthetic considerations alone could not justify the taking in this case. It found that "*enhance the cities appearance and livability*" was too vague a purpose to justify the taking and that the tree clearing percentage requirements were arbitrary. RP Vol. 3 at 13-14.

Even under the rational relationship test, the tree clearing limitation fails for lack of a legitimate purpose. The City would preclude any use of the Clarks' property, say a large vegetable garden, as a failure to maintain appearance and liveability. There is simply no ascertainable purpose for this restriction at all, and this Court must find that the Clarks' substantive due process rights were violated in that the restriction applied to them has no rational relation to a defined government objective.

As the Trial Court pointed out in its November 9, 2018 oral ruling: (1) the City cannot regulate residential property as if it were forest land (TR p. 26-27), (2) the City acted illegally when it ordered as a condition of a VMP that a Class 4 general forest permit be obtained (TR p. 31), and (3) if the City wanted to limit use of residential property in this regard, it should have designated the use as "restricted" so that an innocent purchaser would be advised of such limitations before buying property (TR p. 34). Any restrictions on use of property must be strictly construed under BIMC 18.06.010. TR p. 7. The Court's interpretation of applicable code provisions is to be limited so as to err on the side of finding the proposed use authorized. *Sleasman*, 159 Wn.2d at 643 n.4 (land use ordinances must be strictly construed in favor of the landowner).¹¹

¹¹Courts interpret local ordinances the same as statutes. *Sleasman*, 159 Wn.2d at 643. The goal in construing zoning ordinances is to determine legislative purpose and intent. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 472, 61 P.3d 1141 (2003). The court must be

Everything the Clarks reviewed prior to purchasing the property led them to the understanding that they could prepare residential property for single-family development without an 80% limit on the amount of clearing. RP Vol. 2 pp. 34-36. BIMC Ch. 16.22 cannot be interpreted to curtail the Clarks' private property rights after the fact without depriving them of constitutionally protected rights. RP Vol. 2, pp. 40-42. The City's lack of notice to innocent purchasers of restrictions on land clearing for residential development not set forth in the BIMC or the Comprehensive Plan violates due process protections as well. RP Vol. 2, pp. 34-36, 40-42.

5. The City's Decision Violates Ordered Liberty.

The City's outcome-determinative approach violates ordered liberty. Under the 14th Amendment, "property" encompasses more than just tangible physical property; a permit applicant has a cognizable property interest "when there are articulable standards that constrain the decision-making process." There is a constitutionally-protected right to develop land where the applicant has satisfied necessary preconditions.

The Clarks were not put on notice of any purported requirement limiting clearing to 20% for development of residentially-zoned property. RP Vol. 2 pp. 34-36, 40-42. The City cannot regulate residential property

guided by the reasonable expectation and purpose, as expressed in the ordinance or fairly to be inferred therefrom, of the ordinary person who sits in the municipal legislative body and enacts law for the welfare of the general public. 8 E. McQuillin, *The Law of Municipal Corporations*, § 25.71 at 224 (3d ed.2000).

as if it were forest land. RP Vol. 2 pp. 26-27. In interpreting the VMP, the City failed to follow its own regulations that set forth the limitations on the circumstances under which the 20% clearing restrictions in BIMC §16.22.060.A.1 are applied. Those are not present here as discussed *infra*. In addition, the City failed to follow its own regulations that provide clearing permits are exempt and failed to recognize the terms of the DNR-issued tree harvest permit do not require a VMP. RP Vol. 2 pp. 22-23, 26.

The City's result-oriented decision was the product of political pressures and an attempt to "save face" with environmentalists in the context of developing the City's new CAO. Its selective application of vegetation clearing standards, and imposition of a "cumulative permit" policy after it approved the Clarks' clearing work, foreclosed the Clarks from appealing the VMP. The Clarks were relying on the City's technical assistance, cooperating and following all guidance and direction. CP 587:25, 588:1-3.

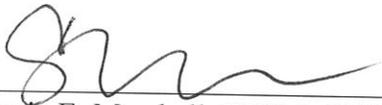
The City now seeks to punish the Clarks for doing exactly what the City told them to do, and for not being able to read the minds of political players who would reverse course on the clearing guidance provided. Where the Examiner even commented that it would be reasonable for the Clarks to read the VMP as limited to "this approval," (. CP 232, 266; CP 758:11-19), the Examiner's application of the VMP ordinance to the

Clarks results in a deprivation of due process and private property rights,
as the Trial Court concluded.

VI. CONCLUSION

For all the foregoing reasons, the Court should deny the City's
appeal and affirm the decision of the Superior Court.

RESPECTFULLY SUBMITTED this 30th day of June, 2020.

By 
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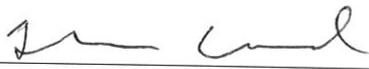
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I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Oregon, that I am now, and have at all times material hereto been, a resident of the State of Oregon, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I am employed by Bennu Law LLC, attorneys for Respondents. I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below.

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DATED at Bend, Oregon this 30th day of June, 2020.



 Frank M. Wood

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