

No. 62993-0-1

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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**Palmer Coking Coal Company, a Washington Partnership, White River Forest, LLC, a Delaware limited liability company, and John Hancock Life Insurance Company, a Massachusetts life insurance company,**

**Petitioners/Respondents/Cross-Appellants,**

**v.**

**King County,**

**Respondent/Appellant.**

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**REPLY BRIEF  
OF PETITIONERS/RESPONDENTS/CROSS-APPELLANTS  
WHITE RIVER FOREST, LLC, AND JOHN HANCOCK LIFE  
INSURANCE COMPANY**

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## I. INTRODUCTION

DDES acted capriciously when it denied the lot recognition applications. It continues its ad hoc and result-oriented approach on appeal. DDES disregards the main purpose of the Ordinance to recognize historical lots. DDES's positions reveal that DDES does not care what the Ordinance or other sections of the Code mean, so long as these lot applications remain denied. The lot recognition applications satisfy the Ordinance. This Court should grant White River<sup>1</sup> relief.

White River has demonstrated that DDES's result-oriented concoction of the FCI and denial of its lot recognition applications is unfair and unjustified by the Ordinance for lot recognition. White River has asked this Court to reverse and remand with direction for approval White River's previously denied lot applications pursuant to KCC 19A.08.070(A) ("the Ordinance"). *Brief of Petitioners/Respondents/Cross-Appellants White River and John Hancock* (hereafter "Brief of White River"), Issues 5 & 6. White River has asked this Court to invalidate the Final Code Interpretation ("FCI"). *Id.*, Issues 1, 2 & 4. In response, DDES argues unpersuasively against this relief, continuing to insist on deference that is not due and to defend the importation of the prospective 1993 Road Standards to the historical lot recognition process. DDES also asks for remand to itself so that it can have another crack at

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<sup>1</sup> "White River" in this Reply refers to Petitioners/Cross-Appellants White River Forest, LLC, John Hancock Life Insurance Company, and Palmer Coking Coal Company.

denying the White River's applications on new grounds. For example, DDES now argues that even without the FCI, the forest roads are not "approved" roads under dictionary meanings. *See Response/Reply Brief of Appellant King County*, pp. 13-17. DDES denied the applications on the specified basis that "Site is not served by an approved road *pursuant to FCI*." AR 702, 802 (emphasis added). White River has shown this ground to be meritless, and recognition of the lots should result upon invalidation of the FCI. Additionally, the roads are "approved" based on the evidence before this Court that the roads meet the Department of Natural Resource's requirements for forest roads. DDES offers nothing to contradict this evidence.

This Court should not remand to DDES. This review is interlocutory. CP 696-99 (certification and stay order). At the conclusion of review, jurisdiction remains in superior court. This Court should remand to the superior court to order approval of the lot applications. Alternatively, this Court should provide the superior court with specific instructions to apply a correct interpretation of the Ordinance to the lot recognition applications. White River is entitled to finality and fairness. Remand to DDES would result in neither. It would also be incorrect procedurally where the superior court retains jurisdiction pursuant to the certification and stay.

DDES suggests that KCC's subdivision provisions, which permit minimum 80 acre subdivisions in the Forestry Zone, has some bearing on White River's applications. *Response/Reply Brief of Appellant King*

*County*, pp. 1-3. This undeveloped suggestion appears in the Introduction without further analysis or discussion. DDES abandoned this meritless argument.

## II. ARGUMENT IN REPLY

### A. THIS COURT SHOULD FACIALLY INVALIDATE THE FCI.

White River detailed DDES's result-oriented effort to concoct new rules designed to result in denial of the lot recognition applications. *Brief of White River*, pp. 17-35. White River demonstrated why the FCI does not merely gap-fill, but creates new meaning not present in the Ordinance. It explained that "approved roads" is not ambiguous, but that even if it were, the FCI imports new meaning and requirements to the Ordinance. White River examined the Director's selective, confusing approach to applying the 1993 Road Standards, an approach that disregards the simple definition of "road" contained in the 1993 Road Standards. White River also documented how an ordinary person cannot decipher the meaning of the FCI, and how DDES staff cannot either. White River argued that the FCI was overbroad and not entitled to deference. The trial court agreed. CP 626-27 at C.4., D.3, and D.4. For these reasons, this Court should facially invalidate the FCI.

DDES cannot establish that the dictionary definitions of "approved" and "roads" do not resolve the meaning of the Ordinance. DDES cannot establish that the FCI is consistent with the Ordinance's purpose and context. It is not. DDES cannot establish that the FCI

provides a complete interpretation of § 1 of the Ordinance. It does not. DDES cannot make reasonable the unreasonable conclusions in the FCI.

**1. “Approved Roads” Is Not Ambiguous.**

To combat White River’s argument that “approved roads” is not ambiguous, DDES must resort to exactly what Washington courts prohibit: “search[ing] for ambiguity by imagining a variety of alternative interpretations.” *See Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). After DDES indulges in this imagining of the different meanings the words could have, it concludes the words are ambiguous. *See Response/Reply Brief of Appellant King County*, pp. 21-22. This Court should not follow this flawed analysis. The plain meaning of these words taken from the dictionary demonstrates that the Ordinance is not ambiguous.

**2. DDES’s Defense of Its Importation of the 1993 Road Standards Remains Meritless.**

DDES’s response brief offers no justification for importation of the 1993 Road Standards to the Ordinance. DDES fails to rebut White River’s contention that if the terms are ambiguous, any interpretation should favor the landowner. While DDES argues that the FCI is “plausible and consistent” with the Ordinance, *see Response/Reply Brief of Appellant*, pp. 24, it is not. The FCI is not plausible because the 1993 Road Standards have nothing to do with the Ordinance. The 1993 Road Standards from a different section of the Code are so discrete that it is implausible to conclude that the Council intended them to be part of the

Ordinance absent an express indication. Importation of the 1993 Road Standards also is not consistent with the Ordinance. The 1993 Road Standards are *prospective* standards. The standards do not even apply to existing County roads, but only to new roads as they are built. The 1993 Road Standards have no place in the context of the recognition of *historical* lots.

DDES asserts the length of the FCI as proof that it is a reasoned, considered interpretation. *Response/Reply Brief of Appellant*, p. 25. The mere fact that the FCI is five-pages does not establish it demonstrates reasoning. The FCI is unreasoned and result-oriented. The Director leaps to the unsupported conclusions that forest roads are not for transportation purposes (*see Brief of White River*, p. 30) and that all forest roads would not meet the 1993 Road Standards. (*Id.*, p. 31.) Rather than adopt the simple definition of road present in the 1993 Road Standards, the FCI “gleans” a definition of road that is so vague DDES staff cannot explain it. *See Brief of White River*, pp. 29, 33. These examples by themselves should convince the Court that the FCI is arbitrary and unreasoned.

DDES rejects without comment the invitation to simply use the definition of “Road” from the 1993 Road Standards, i.e., “A facility providing public or private access including the roadway and all other improvements inside the right of way.” The forest roads are that. Apparently, if DDES cannot have its tortured definition “gleaned” from the 1993 Road Standards, it will have none at all, especially not the clearly stated one.

The FCI acknowledges that “approval” can be established pursuant to any public agency with authority for the road. AR 2949. Despite this concession in the FCI itself, DDES appears to argue that approval established pursuant to the WAC is insufficient because the WAC requirements do not “reflect the same purpose as state and local land use segregation codes, which is to protect the public health, safety and welfare.” *Response/Reply Brief of Appellant*, p. 28. This is arbitrary. The Ordinance does not put such restraints on the approval. The Ordinance does not require an examination of the purposes and intent behind that public agency’s authority. DDES’s argument represents yet another excuse to disqualify roads built pursuant to the standards of the Department of Natural Resources. In addition, the argument is flawed because the purposes behind the WAC are congruous with the purposes behind the land segregation codes.<sup>2</sup>

DDES asserts that this Court should regard it as having “agency expertise” with regard to “Washington State Forest Practice Rules as set forth in the Washington Administrative Code.” *Response/Reply Brief of Appellant*, p. 26. This Court should reject that notion. DDES, a county administrative department, has no agency expertise regarding State rules

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<sup>2</sup> The purposes behind the DNR standards are to ensure that forest roads are “well designed, located, constructed and maintained” to provide access to timberlands while protecting the public resources from damage. WAC 222-24-010 (“A well designed, located, constructed, and maintained system of forest roads is essential to forest management and protection of the public resources.”).

established by the State's Department of Natural Resources. The county is not entitled to deference in interpretation of State rules.

Another failure of the FCI's treatment of "approved roads" is that it does not address the definition of "approved sewer disposal or water systems," the terms in addition to "approved roads" that are included in 19A.08.070(1)(a). The FCI purports to resolve ambiguity in KCC 19A.08.070(1)(a), but it neglects to provide a complete interpretation of the provision that could stand together. The Director's decision to import the 1993 Road Standards to the definition of "approved roads" leaves the public and this Court to wonder what standards or regulations unapparent on the face of the Ordinance DDES might choose to import regarding sewer disposal or water systems. White River argued that DDES's construction makes no sense "because the word 'approved' is also applied to infrastructure other than roads (e.g., sewer and water)." *Brief of White River*, p. 19. DDES did not respond to this argument.

DDES "objects" to White River's "characterization" of the testimony of its managerial employees Joe Miles and Ray Florent. *Reply/Response of Appellant*, p. 5. It is unclear if this is an objection to this Court's consideration of that testimony. DDES makes no effort to show that it raised any objection before the trial court.<sup>3</sup> The trial court

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<sup>3</sup> DDES did not move to strike any of White River's evidence. In a footnote of one brief, DDES "noted" that Ray Florent's deposition "was continued," but made no objection to its consideration. CP 548, note 1. DDES was silent regarding Joe Miles' testimony.

considered the testimony. CP 625, #A.4. DDES has assigned no error to its consideration below. Any issue concerning this testimony is waived. *See* RAP 2.5(a). DDES also did not offer any corrections or competing testimony from the witnesses, who are DDES managerial employees clearly available to DDES. This Court can consider the testimony.

**3. *Cowiche Canyon and Sleasman Support White River, Despite DDES's Attempt to Distinguish These Cases.***

This Court should afford no deference to the FCI. DDES insists on deference to its FCI, yet offers no convincing analysis. *See Reply/Response of Appellant*, pp. 19-21. First, the Ordinance is not ambiguous. Without ambiguity, agency construction is not necessary. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-14 (1992). Second, the FCI conflicts with the Ordinance, as White River has demonstrated to this Court in its opening brief. “[A]n administrative determination will not be accorded deference if the agency’s interpretation conflicts with the relevant statutes.” *Id.* at 815. Third, DDES cannot show an established interpretation consistent with the FCI. *Id.* at 814-15. To the contrary, all of the evidence demonstrates that the FCI represents a change in interpretation created in specific response to the applications at issue. Finally, DDES did not contest that after issuance of the FCI, DDES did not apply the FCI to all applications, as White River stated on page 43 of its Brief citing CP 231, ¶ 9. Selective use does not warrant agency deference.

DDES argues that *Cowiche* and *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007), compel the conclusion that the FCI is an “existing” agency interpretation entitled to deference. These cases compel the opposite conclusion. An agency may not avoid the deference principles contained in *Cowiche* and *Sleasman* simply by issuing a new interpretation immediately prior to applying it in a specific case, as was done here. To deserve deference, the agency interpretation must exist prior to the agency making a specific land use decision or taking action on a specific application. As the *Sleasman* court stated, “Lacey’s claimed definition was not part of a pattern of past enforcement, but a by-product of current litigation.” *Sleasman*, at 646. Lacey took action to fine the Sleasman’s pursuant to its interpretation of the city code. *Id.* at 641. This occurred *before* the Sleasmans resisted and *before* proceedings were initiated in front of a hearings examiner. The Supreme Court considered Lacey’s interpretation of its code to be “a by-product of current litigation.” The same is true here. The FCI is legal argument, not past practice.

The FCI represents an about-face from the uncontroverted pre-existing policy of DDES to approve lot recognition applications for properties served with forest roads and without regard to the 1993 Road Standards. It was only upon receipt of White River’s lot applications that DDES changed its policy in direct response to the applications in order to deny them. There is no “pattern of past enforcement” as the Supreme Court required in *Sleasman*.

The FCI also is not a rule adopted in the regular, administrative course. DDES applied the 2000 Ordinance for years without applying any of the considerations found in the FCI. DDES accepted White River's lot recognition applications pursuant to its past practices and application forms, determined to create new requirements in response to those applications, and issued the new rule on the eve of denial of those applications on grounds never previously applied. DDES is not entitled to deference

The FCI is an "isolated action" as the Supreme Court meant in *Cowiche* in that it was created to deny White River's lot applications and was inconsistent with the past application of the Ordinance.

**4. LUPA Jurisdiction Lies Even if the Director Had No Authority to Issue the FCI Under KCC 2.100**

DDES suggests in a footnote that if the Court holds that the Ordinance is not a development regulation under KCC 2.100.010, no LUPA jurisdiction exists. *Reply/Response Brief of DDES*, p. 24, note 1. DDES conceded LUPA jurisdiction. *See* CP 111 (By DDES: "These appeals come before this court under the [LUPA]."). DDES's suggestion in footnote 1 is flawed. The scope of LUPA is not limited to the scope of a development regulation under KCC 2.100.010. DDES conflates a "land use decision" under LUPA with a "development regulation" under the KCC. The latter is narrower. A land use decision under LUPA is broadly defined to include many local government actions not strictly concerned with development. This includes final determination on a "governmental

approval required by law before real property may be sold,” “An interpretative or declaratory decision regarding the application to a specific property of . . . ordinances or rules regulating the . . . maintenance, or use of real property,” and “the enforcement by a local jurisdiction of ordinances regulating the . . . use of real property.” § 36.70C.020(2). DDES’s FCI and its denials of the lot recognition applications are “land use decisions” under LUPA regardless of how this Court resolves whether the Ordinance is a building regulation under KCC 2.100.010.

**B. THIS COURT SHOULD REVERSE DDES’S DENIAL OF WHITE RIVER’S LOT APPLICATIONS.**

This Court should reverse the denials and should order approval of the lot recognition applications pursuant to § A, §A.1 or § A.4(d) of the Ordinance. White River demonstrated the undisputed facts in the administrative record that the Federal government created these quarter-quarter sections before 1937 and the King County Assessor recognized them as separate lots prior to October 1, 1972. White River demonstrated that the forest roads serving these properties are built to the standards of the Department of Natural Resources under Washington’s Forest Practices Act, Chapter 76.09 RCW. White River demonstrated that these lots are greater than twenty acres and recognized by the Assessor prior to January 1, 2000. DDES can cite no contradictory evidence. Approval is warranted under multiple provisions of the Ordinance.

DDES presents no compelling response to avoid approval of the applications. Palmer's brief, which White River incorporates in its entirety, addresses many of these issues.

**1. The Subdivision Code's 80-Acre Lot Minimum Is Irrelevant to Recognition of Historical Lots.**

King County's subdivision provisions are unrelated to recognition of historical lots. DDES's contrary suggestion, offered without argument or legal support, contradicts its past conduct pursuant to the Ordinance, including its approval of lots from these very lot applications that are lots of 40 acres. *See* AR 109.<sup>4</sup> It also contradicts DDES's admission in the same brief that DDES can recognize lots smaller than 80 acres.<sup>5</sup>

Failure to argue a contention prevents its consideration. RAP 10.3(a)(6) (a party must raise and argue an issue for consideration). Here, DDES opens its response brief with reference to zoning and land segregation codes, but nowhere cites to these codes or presents any argument about them. The Court should not consider the insufficiently

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<sup>4</sup> DDES recognized in a footnote of its Motion for Partial Summary Judgment that in recognizing the 60 lots, it recognized lots smaller than 80 acres where "there was a basis to recognize a smaller lot." CP 109.

<sup>5</sup> DDES states, "[B]efore DDES can grant a legal lot determination application for a parcel smaller than 80 acres it must meet the requirements of KCC § 19A.08.070(A)(1)." *Reply/Response Brief of Appellant*, p. 9. This is an acknowledgement that the minimum lot size requirements elsewhere in the Code do not circumscribe the recognition of historical lots. Nothing supports treating § A.1 differently from § A.4(d) in this regard. Neither is circumscribed.

presented contention that minimum lot size requirements in the Forest Zone for development have any relevance to recognition of historical lots.

Here, the Ordinance is unconcerned with the subdivision process. DDES presumably refers to KCC 21A.12.040.A, which sets forth the minimum 80-acre lot size for development in the Forest Zone. *See also* KCC 21.A.12.010 (“The purpose of this chapter is to establish basic dimensional standards *for development* relative to residential density and as well as specific rules for general application.”) (emphasis added). These development provisions for new lots are not at issue. The purpose of the lot recognition Ordinance is to recognize historical lots that may or may not meet current requirements. Minimum lot sizes for proposed subdivision are irrelevant to the lot recognition process which exists to “grandfather” the existence of historical lots. DDES has offered no actual argument to the contrary.

In all the evidence of Council intent presented to this Court, the Council has never indicated that recognition of historical lots requires any consideration of current provisions regarding minimum lot size. The processes are separate. DDES may not amend the Code by administrative fiat. Amendment of the Code must be accomplished legislatively, including any requirement that lot recognition consider or be constrained by minimum lot size requirements found elsewhere in the Code.

DDES accuses White River of deflecting attention from “the true issue.” *Reply/Response Brief of Appellant*, p. 2. DDES fails to identify what it considers the true issue to be. The true issue appears to be that

DDES does not want to apply the Ordinance as written because DDES has misgivings about the results in the Forest Zone. DDES avoids enforcement of the Ordinance without legal basis. If DDES has concerns, it should go to the Council rather than deny White River the rights in the Ordinance. The Council has the responsibility to make the law, not DDES.

**2. The Record Adequately Demonstrates that the Roads Are Approved.**

The record demonstrates that the forest roads are “approved” under the terms of the Ordinance. White River presented these arguments to this Court initially. White River demonstrated the nature and condition of the roads constructed to the standards of the Department of Natural Resources. *See White River Opening Brief*, p. 9. This included the uncontested testimony of John Davis that the roads “meet the standards required by Department of Natural Resources in accordance with Washington’s Forest Practice Act,” and that the roads “are durable roads that are constructed to exacting standards and maintained in strict accordance with DNR requirements.” *Id.*, citing CP 238, ¶ 7 and WAC 222-24-010, -020, and -030. DDES neither objected to nor disputed this testimony.<sup>6</sup> The roads are documented in the applications by photos and

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<sup>6</sup> Because there was little administrative record, the parties contemplated the submission of new evidence at trial and conducted discovery. *See* CP 48-49. Pursuant to stipulation, the parties agreed to reserve potential objections to new evidence until that evidence was submitted. CP 49, lines 11-18. DDES made no objections to White River’s evidence submitted during the motion practice.

maps. *See id.*, citing AR 210, AR 434-445 (“Section P: Roadway Photos”) and AR 446-457 (“Section Q: Roadway Maps”).

White River then argued that these roads are “approved” pursuant to the Ordinance. *See White River Opening Brief*, p. 19 (“approved” pursuant to plain meaning), p. 22 (DNR can be the source of approval), and p. 25 (forest roads are “access,” i.e., indicia of improvement, intended by Council). White River also argued, and DDES did not dispute, that if “approved roads” is ambiguous, any interpretation should favor the landowner. *Id.* at 21-23.

DDES now seeks to add yet another requirement of a written “approval.” The Ordinance does not require a *written* approval or document. As already briefed, the Council intended to require an indicia of improvement or development. The forest roads are this. They are not deer trails through the forest, or roads of such poor quality they are impassable. They are roads that satisfy DNR’s standards and were constructed pursuant to DNR’s regulatory scheme. DNR has jurisdiction to allow forest roads and define their qualities. DNR’s regulatory scheme is before this Court in the WAC. The uncontested Davis testimony that the roads comply with and were built according to this regulatory scheme is sufficient under the Ordinance. Synonyms of “approve” are sanction and endorse. These roads are sanctioned and endorsed by DNR. They meet the DNR standards.

DDES also makes a misguided argument that gated forest roads can be presumed abandoned. The Ordinance makes no distinction

between a gated or ungated road. Moreover, abandoned roads are not gated as DDES suggests, but are rendered impassable by “blocking” the road “so that four wheel highway vehicles cannot pass the point of closure” and “water crossing structures ... are removed.” See WAC 222-24-052(3). Contrary to DDES’s statement, the use of a gate indicates an active forest road that is maintained pursuant to chapter 222-24 WAC.

DDES argues that the roads do not qualify because they do not connect “two places with distinguishing names.” This over-emphasizes that portion of the dictionary definition that states that a road is a track or transportation between two places “usually” having distinguishing names. A road is still a road even if does not connect named towns or cities. A road is not disqualified from the ordinary, well-accepted meaning of road if it connects places without distinguishing names. Such an argument is a red herring that does not withstand scrutiny. DDES’s arguments demonstrate its continued unreasonableness.

DNR has in place a thorough system to make sure forest roads are adequate for transportation, safety, and protection of the environment. The forest roads satisfy the Ordinance.

Finally, DDES is not entitled to a second bite at the apple to raise new grounds for denial of the applications after this LUPA review. DDES denied the applications on the specified basis that “Site is not served by an approved road *pursuant to FCI.*” AR 702, 802 (emphasis added).<sup>7</sup> DDES

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<sup>7</sup> DDES also denied the applications in some cases because “a private gate prevents access to on-site logging/forest access roads” or “No Right-of-

now argues that even if this Court invalidates the FCI, this Court should uphold the denials on new grounds that forest roads are not “approved roads” under a plain meaning. *See Response/Reply Brief of Appellant King County*, pp. 13-17. DDES denied the applications on the basis of the FCI. If this Court invalidates the FCI, approval is warranted.

**3. Reversal With Direction to Approve the Lot Recognition Applications Complies with the Expressed Intent of the Council, Which Intent DDES Concedes.**

White River documented the Council’s intent to recognize historical lots such as White River’s. DDES made no rebuttal regarding Council intent. DDES agreed with White River on that evidence. The undisputed Council intent supports approval of the applications.

DDES “agrees” with White River that the Council intended the Ordinance to recognize “pre-1937 parcels that had some indicia of development including ‘access.’” *Response/Reply Brief of Appellant*, p. 31. “Approved roads” were one such indicia. The Council viewed the requirement of approved roads as synonymous with “access.” AR 1779, 1131, 1293, 1031. Despite its concession, DDES illogically concludes, “Logging roads are not an indicia of development and their purpose is not to provide public access.” *Id.* at p. 32. It is not for DDES to disqualify

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Way (e.g., an easement) has been devoted to transportation purposes.” White River addressed why these grounds are invalid and should be rejected with the FCI. *Brief of White River*, Issue #3, p. 38. DDES did not defend the ground “No Right-of-Way (e.g., an easement) has been devoted to transportation purposes.” The Court should consider this ground abandoned.

*logging* roads. The Ordinance states that “roads” are an appropriate indicia of development sufficient to satisfy Council intent. *The Council* did not except logging roads from the Ordinance. Similarly, while the Council intended that “access” must be indicated, DDES seeks to rewrite the Ordinance to require “public” access. DDES must add words to the Council’s expression of its intent to reach the conclusions DDES desires. The Council did not say “*public* access.” The Ordinance and the expressed intent of the Council include *private* roads. DDES may not chisel and qualify the Ordinance to suit its purposes.

DDES did not and cannot dispute that when the Ordinance was adopted in 2000, the Council added the requirement that DDES give “great weight to the existence of historic tax record or tax parcels.” *Brief of White River*, p. 26. The Council indicated that it did so to “allow” “the department to protect property owners with historic tax parcels who might otherwise be denied separate lot approval.” *Id.*, citing AR 1136 and CP 279, ¶ 8. Rather than *protect* White River, DDES seeks to single them out and arbitrarily deny status to their lots.

The County record on amendment of the Ordinance in 2004 stated expressly that recognition by the Assessor of a separate tax lot with demonstration of lot infrastructure would satisfy § 1(b)(2), as follows:

EFFECT: This amendment clarifies that to determine legal lot status for pre-1937 lots, a property owner must demonstrate that the lot has infrastructure (sewage disposal or water or roads) and that prior to October 1, 1972 it was

either (1) conveyed to someone as an individual parcel or (2) recognized by the Assessor as a separate tax lot.

CP 413 (DDES's response on summary judgment citing AR 1630).

DDES's current arguments contradict this expression of legislative intent.

DDES is not concerned with the true meaning of the Ordinance. DDES is solely concerned with upholding denial of the lot applications despite their satisfaction of the Ordinance. This Court should intervene where DDES single-mindedly ignores Council intent and seeks to deny lots status for reasons unrelated to the meaning of the Ordinance.

**C. THE REQUESTED RELIEF: THIS COURT SHOULD REMAND TO THE SUPERIOR COURT TO ORDER RECOGNITION OF THE LOTS OR TO CORRECTLY APPLY THE ORDINANCE TO THE LOT RECOGNITION APPLICATIONS STILL BEFORE IT.**

This Court should issue material relief to White River, and provide finality.<sup>8</sup> This Court should reverse the denial of the lot applications and remand to the superior court with a direction to grant White River's motions in full and order approval of the lot applications. Alternatively,

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<sup>8</sup> This Court has the authority to reverse the denial of the lot applications and remand for approval; it also has the authority to remand for "modification or further proceedings." As LUPA states,

The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.

§ 36.70C.140 ("Decision of the court").

this Court should establish the correct meaning of the Ordinance, and direct the superior court to apply that meaning to the lot applications pending before it. This Court should not remand to DDES for continued consideration of the applications. This review is interlocutory. CP 696-99 (certification and stay order). At the conclusion of review, jurisdiction remains in superior court.

If this Court invalidates the FCI, approval of the lot applications should follow. DDES denied the lot recognition applications specifically because “Site is not served by an approved road *pursuant to FCI.*” AR 702, 802 (emphasis added). When that ground is invalidated, approval should result.

**D. THIS COURT SHOULD AWARD WHITE RIVER ATTORNEY FEES SHOULD IT PREVAIL.**

DDES’ one paragraph argument against an award of fees to White River, should it prevail, is baseless. *See Response/Reply Brief of Appellant King County*, p. 33. White River addressed its right to fees under RCW 4.84.370(1) in its first brief. *Brief of White River*, p. 45, Section IX. In opposition DDES asserts that the land use decision at issue “does not involve any of those things” listed in the fee statute. In other words, DDES argues that the decision at issue is not a qualifying decision for purposes of the fee statute. This is incorrect.

The fee statute states,

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys’ fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal

before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.

RCW 4.84.370(1) (emphasis added). DDES fails to address why denials of the lot recognition applications are not a “similar land use approval or decision.” They are. The statute authorizes fees to White River

First, DDES itself argues that White River sought approval of their applications pursuant to a “development regulation.” *Response/Reply Brief of Appellant King County*, p. 22-23 (“under the plain language of KCC 2.100.020(C), KCC 19A.08.070 is a development regulation”). DDES offered this argument to support its view that the Director had authority to interpret the Ordinance pursuant to KCC 2.100 which only provides interpretative authority for a development regulation. DDES’s argument is relevant to the attorney fee issue. It shows that DDES considers the decision at issue to concern approval or denial of an application pursuant to development regulation. DDES’s decisions to deny the applications concerning development, are “similar” to a “*decision . . . to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan.*” This similarity satisfies the fee statute.

The decisions need not involve “development regulations” to qualify for attorney fees. The decision to recognize a lot pursuant to county code is a “similar land use approval or decision.” This broad

phrase in the fee statute evidences the Legislature's intent that the specified list of decisions is not exclusive. The Legislature expressed that review of a similar land use decision qualifies for a fee award even where it does not fit the enumerated list. A decision to recognize or reject a lot is similar to the decisions listed in the statute. Such a decision is site specific. Such a decision directly concerns rights in the property that are subject to government regulation. Such a decision is entirely dependent on county action and application of county code.

White River's right to fees is supported by the Supreme Court's recent decision in *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 701-02, 169 P.3d 14 (2007). In that case, the Supreme Court awarded attorney fees under RCW 4.84.370 to the prevailing party in a dispute concerning a local authority's moratoria on building. The Supreme Court's entire discussion of the fee issue is informative, including its conclusion that "the City's moratorium constitutes 'a land use . . . decision' pursuant to" the fee statute. The Supreme Court stated,

#### Attorney Fees

The Biggerses qualify for reasonable attorney fees and costs under RCW 4.84.370(1)(b) because they were "the prevailing party or substantially prevailing party in all prior judicial proceedings" in a matter that qualifies for the award of attorney fees and costs. The City's moratorium constitutes a "land use ... decision" pursuant to RCW 4.84.370(1). RCW 4.84.370(1) extends not only to the actions expressly listed but also to other, "similar land use approval[s] or decision[s]." The moratorium denial of permit applications falls within this meaning of the statute. Furthermore, the City's moratorium was initiated through a

site-specific determination. Where local government promulgates a moratorium that bans applications from each site, the application of such a moratorium is a “land use ... decision” for purposes of RCW 4.84.370(1).

*Biggers*, 701-02. As in *Biggers*, the application of the FCI to White River’s individual applications and the denials of those applications each constitute a “land use . . . decision” for purposes of the fee statute.

This Court should note that the dissent in *Biggers* argued against fees citing DDES’s authority, *Tugwell v. Kittitas County*, 90 Wn. App. 1, 951 P.2d 272 (1997). *Id.* at 715. The dissent took the view that only an “actual permit *decision*” qualifies under the fees statute, citing *Tugwell*. *Id.* The majority rejected this position. *See Plurality Opinion*, pp. 701-02, *Concurrence* (Chambers, J.), p. 706 (“Because the landowners are the prevailing party challenging a land use decision, I agree with the lead opinion that they are entitled to fees and costs under RCW 4.84.370(1).”). Under *Biggers* fees are appropriate in this case because it concerns an actual, site-specific land use decision.

DDES raised no objection to a fee award other than whether the decisions at issue are of the type contemplated in the fee award statute. They are. This Court should award White River its fees if it prevails here.

### III. CONCLUSION

White River has established these lots are historically created. The Ordinance is intended to recognize historically created lots. It is undisputed that the lots at issue were created prior to 1937, recognized by the King County tax auditor prior to October 1, 1972, accessed by forest

roads built and maintained in accordance with Department of Natural Resource standards, and are greater than twenty acres. These lots qualify for lot recognition under the Ordinance. This Court should reverse the denial of the lot recognition applications. The Court should order that the superior court approve the lot recognition applications. Alternatively, the Court should specify the correct meaning of the Ordinance, including § A.1 and § A.4.d, and direct the superior court to apply that meaning to the applications still pending before the superior court. The Court should facially reject the FCI. It should rely on dictionary meanings of “approved roads.”

DDES tries to justify its arbitrary and capricious conduct as an effort to prevent “gutting” of the Forest Zone. Lot recognition is not related to the County’s development regulations. DDES’s argument is a concession of its result oriented treatment of White River’s applications. The Ordinance authorizes the recognition of these lots without regard to the development regulations. DDES refuses to recognize White River’s historical lots based on overzealous co-opting of the Ordinance to satisfy DDES’s objectives. This is wrong.

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If White River prevails here, this Court should award it attorney fees pursuant to RCW 4.84.370(1).

Respectfully submitted this 16<sup>th</sup> day of November, 2009.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of November, 2009, I caused to be served the foregoing Reply Brief of Petitioners/Respondents/Cross-Appellants White River Forest, LLC, and John Hancock Life Insurance Company on the following parties at the following addresses:

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hand delivery  
facsimile  
electronic service  
other (specify) \_\_\_\_\_

  
\_\_\_\_\_  
Mary A. Williams

# APPENDICES

# **APPENDIX - 1**

**21A.12.010 Purpose.** The purpose of this chapter is to establish basic dimensional standards for development relative to residential density and as well as specific rules for general application. The standards and rules are established to provide flexibility in project design, and maintain privacy between adjacent uses. (Ord. 10870 § 338, 1993).

## **APPENDIX - 2**

**21A.12.040 Densities and dimensions - resource and commercial/industrial zones.**

**A. Densities and dimensions - resource and commercial/industrial zones.**

ZONES	RESOURCE				COMMERCIAL/INDUSTRIAL				
	AGRICULTURE	F O R E S T	M I N E R A L	NEIGHBOR- HOOD BUSINESS	COMMUNIT Y BUSINESS	REGIONAL BUSINESS	O F F I C E	I N D U S T R I A L	
STANDARDS	A-10	A-35	F	M	NB	CB	RB	O	I
Base Density: Dwelling Unit/Acre	0.1 du/ac	.0286 du/ac	.0125 du/ac		8 du/ac (2)	48 du/ac (2)	36 du/ac (2) 48 du/ac (1)	48 du/ac (2)	
Maximum Density: Dwelling Unit/Acre					12 du/ac (3) 16 du/ac (15)	72 du/ac (16) 96 du/ac (17)	48 du/ac (3) 72 du/ac (16) 96 du/ac (17)	72 du/ac (16) 96 du/ac (17)	
Minimum Lot Area	10 acres	35 acres	80 acres	10 acres					
Maximum Lot Depth/ Width Ratio	4 to 1	4 to 1							
Minimum Street Setback	30 ft (4)	30 ft (4)	50 ft (4)	(12)	10 ft (5)	10 ft (5)	10 ft (5)	10 ft	25 ft
Minimum Interior Setback	10 ft (4)	10 ft (4)	100 ft (4)	(12)	20 ft (7) (14)	20 ft (7)	20 ft (7)	20 ft (7)	20 ft (7) 50 ft (8)
Base Height (10)	35 ft	35 ft	35 ft	35 ft	35 ft 45 ft (6)	35 ft 60 ft (6) 65 ft (17)	35 ft 65 ft (6)	45 ft 65 ft (6)	45 ft
Maximum Floor/Lot Ratio: Square Feet					1/1 (9)	1.5/1 (9)	2.5/1 (9)	2.5/1 (9)	2.5/1
Maximum Impervious Surface: Percentage (13)	15% 35% (11)	10% 35% (11)	10% 35% (11)		85%	85%	90%	75%	90%