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NO. 663224

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

WENDY BIRNBAUM, Appellant

v.

PIERCE COUNTY, Respondent

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RESPONDENT'S BRIEF

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Table of Contents

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE ISSUES.....	1
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT.....	5
A. COMPLAINT IS TIME BARRED UNDER 64.40.030.....	9
1. "Failure to Act" Claim Was Filed Years After It Accrued.....	9
a. Statutory Language Bars Any "Failure to Act" Claim	10
b. <i>Callfas</i> Supports Dismissal of "Failure to Act" Claim	13
c. Policy Requires Dismissal of "Failure to Act" Claim	14
2. "Final Act" Claim Also Was Filed Years After It Accrued.....	17
B. NO RCW 64.40 CLAIM SINCE PERMIT WAS GRANTED ADMINISTRATIVELY	21
1. Plaintiff's "Final Act" Claim Is Subject to <i>Brower</i>	22
2. Plaintiff's "Failure to Act" Claim Also Cannot Avoid <i>Brower</i>	23
3. <i>Brower</i> Should Not Be Overruled Since This Court Did Not Err	26

C.	COLLATERAL ATTACK RULE BARS CLAIM 2006 DECISION WAS UNLAWFUL.....	31
D.	COLLATERAL ESTOPPEL BARS ANY "FINAL ACT" CLAIM.....	35
E.	COUNTY IS ENTITLED TO COSTS AND ATTORNEY'S FEES.....	39
V.	CONCLUSION.....	40

Table of Authorities

	<u>Page</u>
Cases	
<i>Beach v. Board of Adjustment</i> , 73 Wn.2d 343, 345, 438 P.2d 617 (1968).....	35
<i>Bennett v. Dalton</i> , 120 Wn.App. 74, 84 P.3d 265 (2004).....	6, 35
<i>Berge v. Gorton</i> , 88 Wn.2d 756, 759, 567 P.2d 187 (1977).....	6, 7
<i>Bowman v. Two</i> , 104 Wn.2d 181, 186, 704 P.2d 140 (1985).....	25
<i>Brower v. Pierce County</i> , 96 Wn.App. 559, 984 P.2d 1036 (1999).....	passim
<i>Callfas v. Dept. Of Const. & Land Use</i> , 129 Wn.App. 579, 596, 120 P.3d 110 (2005).....	passim
<i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 931-933, 52 P.3d 1 (2002).....	35, 38
<i>Crisman v. Crisman</i> , 85 Wn.App. 15, 931 P.2d 163, <i>rev. denied</i> , 132 Wn.2d 1008 (1997).....	15
<i>Davis v. Rogers</i> , 128 Wash. 231, 235, 222 P. 499 (1924).....	16
<i>Densley v. Department of Retirement Systems</i> , 162 Wn.2d 210, 219, 173 P.3d 885 (2007).....	11
<i>Deschenes v. King County</i> , 83 Wn.2d 714, 716-17, 521 P.2d 1181 (1974).....	39
<i>Golden Eagle Mining Co. v. Imperator-Quilp Co.</i> , 93 Wash. 692, 696, 161 P. 848 (1916).....	16
<i>Haberman v. Wash. Pub. Power Supply Sys.</i> , 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).....	6, 8
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 408, 120 P.3d 56 (2005).....	21, 32, 34

<i>Harbor Lands, L.P. v. City of Blaine</i> , 2008 WL 5130049 (W.D. Wash. 2008).....	4, 22, 26
<i>Hayes v. Seattle</i> , 131 Wn.2d 706, 934 P.2d 1179 (1997)	passim
<i>In re Estate of Toth</i> , 138 Wn.2d 650, 981 P.2d 439 (1999).....	6
<i>In re Preston's Estate</i> , 59 Wn.2d 11, 19, 365 P.2d 595 (1961)	32
<i>Long v. Dugan</i> , 57 Wn.App. 309, 310-11, 788 P.2d 1 (1990).....	6
<i>Lund v. Tumwater</i> , 2 Wn.App. 750, 755, 472 P.2d 550 (1970).....	35
<i>McCurry v. Chevy Chase Bank, FSB</i> , 169 Wn.2d 96, 101, 233 P.3d 861 (2010).....	5
<i>Mercer Island Citizens for Fair Process v. Tent City 4</i> , 156 Wn.App. 393, 399, 232 P.3d 1163 (2010).....	passim
<i>Messer v. Board of Adjustment</i> , 19 Wn.App. 780, 788-89, 578 P.2d 50 (1978).....	35
<i>Milligan v. Thompson</i> , 90 Wn.App. 586, 592, 953 P.2d 112 (1998).....	13, 20
<i>Mission Springs, Inc. v. City of Spokane</i> , 134 Wn.2d 947, 971, 954 P.2d 250 (1998).....	28
<i>Mueller v. Staples & Son Fruit Co., Inc.</i> , 26 Wn.App. 166, 170, 611 P.2d 801 (1980).....	25
<i>O'Neil v. Estate of Murtha</i> , 89 Wn.App. 67, 73, 947 P.2d 1252 (1997).....	16
<i>Phoenix Dev., Inc. v. City Of Woodinville</i> , __ Wn.2d __, 2011 WL 2409635 (2011).....	32
<i>Purse Seine Vessel Owners v. State</i> , 92 Wn.App. 381, 387, 966 P.2d 928 (1998).....	37
<i>R/L Assocs. v. City of Seattle</i> , 73 Wn.App. 390, 392, 869 P.2d 1091 (1994).....	19

<i>Rains v. State</i> , 100 Wn.2d 660, 665 (1983)	36
<i>Rodriguez v. Loudeye Corp.</i> , 144 Wn.App. 709, 717-18, 189 P.3d 168 (2008).....	6, 7, 8, 24
<i>Ruth v. Dight</i> , 75 Wn.2d 660, 664, 453 P.2d 631 (1969)	15
<i>Samuel's Furniture, Inc. v. Dep't of Ecology</i> , 147 Wn.2d 440, 54 P.3d 1194 (2002).....	37
<i>Seattle v. Blume</i> , 134 Wn.2d 243, 249-50, 947 P.2d 223 (1997).....	18
<i>Skamania County v. Columbia River Gorge Comm'n</i> , 144 Wn.2d 30, 57 n. 16, 26 P.3d 241 (2001).....	38, 39
<i>Smoke v. City of Seattle</i> , 132 Wn.2d 214, 225-26, 937 P.2d 186 (1997).....	11, 20, 29, 30
<i>Stangland v. Brock</i> , 109 Wn.2d 675, 676 (1987).....	6
<i>State v. Beaver</i> , 148 Wn.2d 338, 343, 60 P.3d 586 (2002).....	11
<i>State v. Eaton</i> , 168 Wn.2d 476, 489, 229 P.3d 704 (2010)	10
<i>Steckman v. Hart Brewing</i> , 143 F.3d 1293, 1295-96 (9th Cir. 1998).....	7
<i>Stenberg v. Pacific Power & Light Co., Inc.</i> , 104 Wn.2d 710, 714, 709 P. 2d 793 (1985).....	15
<i>Summerrise v. Stephens</i> , 75 Wn.2d 808, 811, 454 P.2d 224 (1969).....	15
<i>Thomas v. Richter</i> , 88 Wash. 451, 456, 153 P. 333 (1915)	16
<i>Valley Wood Preserving, Inc. v. Paul</i> , 785 F.2d 751, 753 (9th Cir. 1986)	35
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 178, 4 P.3d 123 (2000).....	37
<i>West v. Stahley</i> , 155 Wn.App. 691, 696, 229 P. 3d 943 (2010).....	6, 9
<i>Westway Const., Inc. v. Benton County</i> , 136 Wn.App. 859, 866, 151 P.3d 1005 (2006).....	19

<i>White v. Johns-Manville Corp.</i> , 103 Wn.2d 344, 348, 693 P.2d 687 (1985).....	13, 20
<i>Woods v. Kittitas County</i> , 162 Wn.2d 597, 610, 174 P.3d 25 (2007).....	32
<i>Yeakey v. Hearst Communications, Inc.</i> , 156 Wn.App. 787, 791, 234 P.3d 332 (2010).....	6
<i>Yurtis v. Phipps</i> , 143 Wn.App. 680, 689, 181 P.3d 849 (2008)	7

Statutes

RCW 36.70.C.....	17, 37
RCW 36.70A.040.....	2
RCW 36.70B.080.....	23
RCW 36.70C.030(1)(a)(ii).....	32
RCW 36.70C.030(1)(c).....	33
RCW 36.70C.040(3).....	21
RCW 64.40	passim
RCW 64.40 <i>et seq.</i>	3, 9, 10
RCW 64.40.010(4).....	25
RCW 64.40.010(6).....	10, 36, 37
RCW 64.40.020	passim
RCW 64.40.020(1).....	9, 23
RCW 64.40.020(2).....	39
RCW 64.40.030	passim

Pierce County Code

PCC 1.22.080(B)..... 18
PCC 18.25.030 35
PCC 18.60.030 3, 20, 35
PCC 18.100.010 2, 18
PCC 18.100.020 23
PCC 18.100.030 3, 20

Other Authorities

K. Tegland, *3A Wash. Prac.*, 264 (5th Ed. 2006)..... 6
R. Settle, *Washington Land Use and Environmental Law and Practice*,
§ 2.10(a) at 53 (1983)..... 35

Rules

CR 12(b)(6)..... passim
ER 201(f) 7
RAP 2.5(a) 24
RAP 18.1 39

Appendix

Full Text of Cited RCWsAPP 1-14
Full Text of Cited Pierce County CodesAPP 15-20

I. INTRODUCTION

Because Superior Court Judge Bruce Heller held *Brower v. Pierce County*, 96 Wn.App. 559, 984 P.2d 1036 (1999), "requires the dismissal of this case," CP 138, it was unnecessary for his order dismissing Plaintiff Wendy Birnbaum's "suit for delay damages under chapter 64.40 RCW" to address Pierce County's other grounds for dismissal. *See* CP 3, 8. Hence, the order of dismissal did not discuss the statute of limitations (*i.e.*, RCW 64.40.030), the prohibition against collateral attack, or collateral estoppel that also were raised in the County's CR 12(b)(6) motion. CP 8. Nevertheless, as demonstrated below, each of these four separate and independent grounds warranted dismissal and supports its affirmation on appeal.

II. STATEMENT OF THE ISSUES

1. Where a permit applicant brings suit in 2010 concerning an alleged 2005 failure to timely process her application and a 2006 Hearing Examiner's land use decision, does the statute of limitations RCW 64.40.030, precedent, and public policy bar Plaintiff's RCW 64.40 claims?
2. Where a County hearing examiner issues a "final denial of the conditional use application for purposes of appeal" and the applicant chooses not to appeal but to revise her application and later administratively obtains the permit without court intervention, can she later still sue the County under RCW 64.40.020?

3. Where Plaintiff did not seek a LUPA appeal of a 2006 land use decision to which she objects and instead waited until 2010 to bring a RCW 64.40 suit, is her damages action an impermissible collateral attack?

4. Where an unappealed hearing examiner's decision held that a permit would be denied due to its failure "to meet the burden of showing compliance with the decision criteria," is she collaterally estopped from later claiming in a separate RCW 64.40 suit that the denial was unlawful?

III. STATEMENT OF THE CASE

On July 6, 2010, Plaintiff Wendy Birnbaum served Pierce County with a complaint "for delay damages under chapter 64.40 RCW." CP 3. Specifically, her complaint claimed that in February 2005 she "filed a complete application for a conditional use permit to build a campground on an 89.51 acre site" but it was not until September 21, 2006, that "the Hearing Examiner issued a decision, asserting that Birnbaum did not provide sufficient information for an approval, despite the fact that Birnbaum had provided all documents and other information demanded by the County." CP 4-5. The complaint claims such delay was contrary to RCW 36.70A.040 and PCC 18.100.010 which it alleges set a time period for permit decisions of "120 days." CP 5. In so claiming, the complaint expressly refers to the 2006 Hearing Examiner decision which found Plaintiff's proposal "does not provide sufficient specificity to meet the burden

of showing compliance with the decision criteria" and -- among other things -- "needs study from both a safety perspective and dust perspective" but could be rescheduled for hearing "[u]pon completion of review and preparation of a more detailed site plan" as expressly authorized by the Pierce County Code. *See* CP 23, 31-32; PCC 18.60.030; PCC 18.100.030. Though the examiner's decision expressly stated it was "a final denial of the conditional use application for purposes of appeal," CP 32, and gave separate notice that the "final decision by the Examiner may be appealed," CP 35, the complaint admits Plaintiff instead "submitted a revised site plan and other information regarding the proposed campground development, and requested that the project be rescheduled for public hearing." CP 5.

Pursuant to the 2006 decision, the complaint alleges the "County repeatedly demanded additional information from Birnbaum that lacked any basis in law or sound engineering, environmental, or other scientific principles" and that the conditional use permit was not ultimately approved by the Hearing Examiner until March 15, 2010. CP 6. Though the complaint states Plaintiff "eventually had to petition for a writ of mandate to compel the County to move forward on her application," CP 4, the court record instead shows Plaintiff's writ petition -- and its accompanying first RCW 64.40 *et seq.* suit over these same issues -- actually was filed in

2008 (two years before the ultimate March 2010 approval) and was dismissed voluntarily without any action to prosecute it. CP 37, 45, 89. Further, the 2010 decision granting the permit -- also cited in the complaint, CP 6 -- expressly states it was based on, among other things, Plaintiff's "plan revisions" that she had not filed until just two days prior to the second hearing in December 2009 as well a month afterwards in January 2010. CP 52, 55. Plaintiff did not appeal this 2010 decision granting the permit, but on April 14, 2010, instead filed the instant "suit for delay damages under chapter 64.40 RCW" claiming liability under two theories -- *i.e.*, that: 1) "the County's demands for additional information in processing Birnbaum's permit application, and delay in approving Birnbaum's permit application, were arbitrary, capricious, unlawful, and exceeded its lawful authority;" and 2) "the County failed to act within time limits established by law in response to Birnbaum's permit application." CP 3, 6.

Because the complaint, documents cited therein, and official court record confirmed the suit failed to state a claim upon which relief can be granted, Pierce County moved to dismiss under CR 12(b)(6) on four separate and independent grounds: 1) RCW 64.40.030 statute of limitations; 2) the absence of a cause of action under *Brower v. Pierce County, supra.*, and *Harbor Lands, L.P. v. City of Blaine*, 2008 WL 5130049 (W.D. Wash. 2008) because the requested permit was administratively granted without

court intervention; 3) the rule against collateral attacks; and 4) collateral estoppel. CP 8, 108, 116. On August 27, 2010, the Honorable Bruce Heller heard oral argument at which time Plaintiff conceded the court was required to consider more than just her complaint "because [the County was] only citing to publicly-available documents and including the -- like the Hearing Examiner decision, which we did cite." CP 165. On September 15, 2010, the trial court requested additional briefing concerning *Brower* because it "could be fatal to plaintiff's case" but the earlier "*Hayes* [v. *Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997)] could be interpreted as supportive of plaintiff's right to relief under RCW 64.40, even though plaintiff ultimately obtained permission to develop the campground." See CP 115. After supplemental briefing was provided, the trial court granted the County's motion because -- even without addressing the motion's three other grounds -- it held *Brower* and its progeny alone "requires the dismissal of this case." CP 138.

IV. ARGUMENT

Though under CR 12(b)(6) "a plaintiff states a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint," *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010), those "possible ... facts" must still be "consistent with the complaint." *Stangland v. Brock*, 109

Wn.2d 675, 676 (1987). Hence, when "allegations set forth do not support a claim, dismissal is proper." *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). In deciding such motions, "the court is not required to accept the complaint's legal conclusions as true." *Rodriguez v. Loudeye Corp.*, 144 Wn.App. 709, 717-18, 189 P.3d 168 (2008). *See also Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987) (on CR 12(b)(6) motion the "court need not accept legal conclusions as correct"). Rather, dismissal is granted if "plaintiff's allegations show on the face of the complaint an insuperable bar to relief," *Yeakey v. Hearst Communications, Inc.*, 156 Wn.App. 787, 791, 234 P.3d 332 (2010); *West v. Stahley*, 155 Wn.App. 691, 696, 229 P. 3d 943 (2010), and "[t]ypical examples are cases in which the plaintiff's claim is clearly barred by the statute of limitations or the plaintiff is asserting a cause of action that is not recognized in this state" K. Tegland, 3A *Wash. Prac.*, 264 (5th Ed. 2006). *See also e.g. In re Estate of Toth*, 138 Wn.2d 650, 981 P.2d 439 (1999) (dismissal under CR 12(b)(6) for violating statute of limitations); *Bennett v. Dalton*, 120 Wn.App. 74, 84 P.3d 265 (2004) (reversing denial of CR 12(b)(6) motion because barred by statute of limitations); *Long v. Dugan*, 57 Wn.App. 309, 310-11, 788 P.2d 1 (1990) (CR 12(b)(6) dismissal because no statutory claim existed). Other examples are motions based on res judicata and collateral estoppel. *See Yurtis v.*

Phipps, 143 Wn.App. 680, 689, 181 P.3d 849 (2008) (granting CR 12(b)(6) dismissal on "grounds of res judicata and collateral estoppel").

Though Plaintiff now claims "this case presents the relatively rare situation where the Court essentially need only review the facts stated in the Complaint," AB 3, she ignores not only that under CR 12(b)(6) a court "may take judicial notice of matters of public record," *Berge, supra.* at 763; *Rodriguez, supra.* at 725-26; ER 201(f) ("Judicial notice may be taken at any stage of the proceeding"), but that "[d]ocuments whose contents are alleged in a complaint but are not physically attached to the pleading may also be considered in a ruling on a ... motion to dismiss." *Rodriguez, supra.* at 726. Indeed, the law requires a Court to disregard a complaint's "conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) ("we are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint"). Here the record not only included such properly submitted additional materials, but Plaintiff expressly agreed they were properly considered by the trial court under CR 12(b)(6). *See* AB 3; CP 18-94, 122-27, 165. Finally, though plaintiff abstractly notes that under CR 12(b)(6) a court also can consider "hypothetical facts," AB 3, she neither alleged to

the trial court nor does she allege here any such "hypothetical." *See* CP 164-65, 180.

An application of these CR 12(b)(6) principles required dismissal of Plaintiff's RCW 64.40.020 complaint that admitted the requested permit was granted without judicial intervention and which untimely and improperly objected to the process of that approval. *See* CP 6. Specifically, the complaint alleged -- as did plaintiff's previously dismissed complaint to which it refers, *see* CP 41, 45 -- that the County supposedly: 1) failed to make a "final decision ... within 120 days" of application; and 2) pursuant to a hearing examiner's decision, thereafter made "demands for additional information in processing Birnbaum's permit application" which caused "delay in approving Birnbaum's permit application" in unidentified ways that supposedly were "arbitrary and capricious, unlawful, and exceeded its lawful authority." CP 6. However, such conclusory allegations are impermissibly contrary to the contents of the document referred to in the complaint, CP 5, which instead confirms the 2006 Examiner's decision expressly noted it was a "final denial for purposes of appeal" and hence a "final decision." CP 32, 35 (emphasis added). Indeed, as noted above, "the court is not required to accept the complaint's legal conclusions as true." *Rodriguez, supra.* at 717-18. *See also Haberman supra.* (under CR 12(b)(6) "court need not accept legal conclusions as correct").

As demonstrated below, the complaint, its cited documents, court record, the language of RCW 64.40 *et seq.*, established precedent, and public policy all confirm Plaintiff's "allegations show on the face of the complaint an insuperable bar to relief." *See West*, 155 Wn.App. at 696.

A. COMPLAINT IS TIME BARRED UNDER 64.40.030

RCW 64.40.020(1) provides in pertinent part:

Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law

(Emphasis added.) Though Plaintiff here alleges both types of statutory claims, the statute of limitations RCW 64.40.030 is an insuperable bar to both because her complaint was filed several years too late.

1. "Failure To Act" Claim Was Filed Years After It Accrued

Ignoring she did file and later dismiss a RCW 64.40 "failure to act" suit on this same application while the permit process was ongoing and two years before it concluded, CP 37, 45, Plaintiff now inconsistently argues she could not file such a suit "while the permit process was ongoing and four years before it concluded." AB 31. However, Plaintiff's discussion of the statute of limitations nowhere confronts the actual language of the underlying statute, its rationale, or other applicable precedent, but only

asserts the application of the limitations period here "is refuted by the decisions in *Hayes* [*supra.*] and *Callfas* [*v. Dept. Of Const. & Land Use*, 129 Wn.App. 579, 596, 120 P.3d 110 (2005)]." AB 31. A review of RCW 64.40, *et seq.*, its precedent -- including *Callfas* and *Hayes* upon which plaintiff exclusively relies -- and its underlying policy shows otherwise.

a. **Statutory Language Bars Any "Failure to Act" Claim**

"Statutory interpretation begins and usually ends with the statute's plain meaning." *State v. Eaton*, 168 Wn.2d 476, 489, 229 P.3d 704 (2010). Here the plain meaning of the statute's language confirms Plaintiff's 2010 suit for a 2005 "failure to act" was untimely as a matter of law.

As noted above, RCW 64.40.020 authorizes suit both for certain "acts of an agency" as well as certain "failure[s] to act within time limits established by law." (Emphasis added). Hence, RCW 64.40.010(6) expressly states an "Act" under the statute can be a "final decision by an agency" or a "failure of an agency to act within time limits established by law in response to a property owner's application for a permit." Because the statutory scheme recognizes that "final acts" and "failures to act within time limits" are different claims and different types of "acts," a "failure to act" does not require a "final decision." Plaintiff's attempt to impose the definition of the former cause of action onto the latter so as to require both

be a "final act," is contrary to the plain meaning of the statute. *See e.g. Densley v. Department of Retirement Systems*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) ("different language" in statute cannot "be read to mean the same thing because if 'the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings'"); *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) ("When the legislature uses different words within the same statute, we recognize that a different meaning is intended").

Further, RCW 64.40.030 states: "Any action to assert claims under the provisions of this chapter shall be commenced only within thirty days after all administrative remedies have been exhausted." (Emphasis added.) Hence, this statute of limitations on its face applies to "failure to act" suits. *See Callfas*, 129 Wn.App. at 596 (RCW 64.40.030 "by its own terms applies to '[a]ny action' under RCW 64.40"). However, it is also settled that no exhaustion is required if there is no adequate administrative remedy. *See Smoke v. City of Seattle*, 132 Wn.2d 214, 225-26, 937 P.2d 186 (1997) (because it "is not an adequate administrative remedy" if a procedure "cannot provide the plaintiffs with adequate relief," plaintiffs were not required to seek available administrative procedure before suing). Here, once the 120 days in question expired, there was -- to paraphrase the Supreme Court -- no "adequate administrative remedy because it cannot

provide the plaintiffs with adequate relief" since the 120-day period had already expired by that time and there was "no [administrative] remedy for the Plaintiffs situation" that could have gone back in time and granted her a permit during the already expired period. *Id.* at 226. Hence nothing further was "required for exhaustion." *Id.* Plaintiff nowhere explains how after the expiration of those 120 days any administrative remedy could have corrected the alleged failure to "act" within 120 days.

Rather, in the context of discussing *Brower*, she instead contradictorily argues that "failure to act" claims should be treated differently than "final decision" claims because she there concedes that after expiration of the "time established by law" she "had no administrative appeal or other internal County process available where she could challenge the County's failure to comply with the 120 day rule" and the County could do "nothing to remedy the County's prior failures to make a decision within the time limits thereafter." AB 22-23. Plaintiff in fact expressly concedes there was a "non existent process, never mind adequate relief" for her "time limits" objection, and "there is nothing [an administrative decision maker] can do to 'take back' ... delay" after expiration of the 120-day time period. AB 21-23. Hence it is uncontested there was no administrative remedy available once there was a "failure ... to act within time limits established by law" because that alleged injury had already occurred.

Because there was no administrative remedy, as a matter of law no exhaustion was required and Plaintiff's claim for any failure to "act within time limits established by law" was required by RCW 64.40.030 to be filed thirty days thereafter. This is consistent with the "rule ... that a cause of action 'accrues' at the time the act or omission occurs." *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687 (1985). *See also Milligan v. Thompson*, 90 Wn.App. 586, 592, 953 P.2d 112 (1998) ("a tort or personal injury action accrues at the time the tortious act or omission occurs"). Because Plaintiff chose to wait until after the passage of an additional five years to bring suit in 2010, the plain meaning of the statute as a matter of law bars her claim concerning any 2005 "failure to act."

b. Callfas Supports Dismissal of "Failure to Act" Claim

Ignoring the statutory language and her own admissions, Plaintiff exclusively relies on *Callfas* as somehow supporting her "failure to act" claim because there the complaint was erroneously filed "before the MUP was issued." AB 33-34. However, *Callfas* was not a "failure to act" suit. *See* 129 Wn.App. at 580 (plaintiff sued over city's affirmative decision "to refuse to act on their ... application" where the only administrative decision was its later granting of the permit). Indeed, that case expressly held any failure "to act within 'applicable time limits established by law'" was a

claim "the Callfases did not make" because the city's "actions were apparently within the time limits set by Seattle ordinance," and therefore any "failure to act" claim for delay was "not properly before us, and we cannot decide it." *Id.* at 597 (emphasis added).

Nevertheless, the discussion in *Callfas* is still directly contrary to Plaintiff's claim. That case expressly states that "while delay in processing or granting a permit may be actionable under RCW 64.40 as an 'arbitrary and capricious,' final decision, or an 'arbitrary and capricious' failure to act within the time limits established by law, claims for damages under RCW 64.40 must still comply with the statutes time requirements for filing" and therefore "must still be filed within 30 days of a final 'act,' or a 'failure to act within time limits established by law.'" 129 Wn. App. at 596 (emphasis added). Hence it is well supported -- and *Callfas* expressly states -- that "failure to act" claims "must" be filed "within 30 days of ... a failure to act within time limits established by law."

c. **Policy Requires Dismissal of "Failure to Act" Claim**

Plaintiff's unique and only stated rationale for why a "failure to act" claim should be treated as if it were a "final decision" -- asserted solely in the context of the statute of limitations -- is that perhaps "[o]nce the permit is approved, many applicants may be satisfied with the result,

so waiting avoids lawsuits." AB 38. However, nothing supports this speculation while the public policy behind the statute of limitations is demonstrably and directly to the contrary.

As the County asserted to the trial court in this case, it is contrary to public policy to allow a plaintiff to "pile up damages" and "wait five years after that to file suit" when plaintiff has the option of "filing a writ, filing a 64.40 action once the period established by law has expired" CP [34]. Further, our state Supreme Court has explained an additional public policy behind such legislative enactments:

In Washington, the goals of our limitation statutes are to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence. *Summerrise v. Stephens*, 75 Wn.2d 808, 811, 454 P.2d 224 (1969). Our policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims. *Ruth v. Dight*, 75 Wn.2d 660, 664, 453 P.2d 631 (1969).

Stenberg v. Pacific Power & Light Co., Inc., 104 Wn.2d 710, 714, 709 P.2d 793 (1985) ("courts apply limitation statutes to compel the exercise of a right of action within a reasonable time so opposing parties have fair opportunity to defend," and "are in their nature arbitrary" because they "rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens"). *See, also, Crisman v. Crisman*, 85 Wn.App. 15, 931 P.2d 163, *rev. denied*, 132 Wn.2d 1008 (1997) ("When

plaintiffs sleep on their rights, evidence may be lost and witnesses' memories may fade"). Hence, though it "is easy to argue, relative to any statute of limitations as applied to a particular case, that it works injustice ... it must be remembered that these are statutes of repose, and, as said in *Thomas v. Richter* [88 Wash. 451, 456, 153 P. 333 (1915)], "It is believed that it is better for the public that some rights be lost than that stale litigation be permitted." *O'Neil v. Estate of Murtha*, 89 Wn.App. 67, 73, 947 P.2d 1252 (1997) (quoting *Golden Eagle Mining Co. v. Emperor-Quilp Co.*, 93 Wash. 692, 696, 161 P. 848 (1916)).

Here the complaint alleges the County failed to make a "final decision ... within 120 days" of plaintiff's February 2005 application, yet admits that no administrative remedy existed thereafter and that she did not file suit until five years later in April of 2010. CP 4-5; AB 21-23. Plaintiff cannot sit on her rights, enlarge her damages, extend for years the fears and burdens of threatened litigation while imposing the risk that pertinent evidence will no longer be available and witnesses no longer retain clear impressions of the occurrence. As a matter of law, the legislature's conclusion that 30 days is the required time for filing such a suit "is not an unconscionable defense, but a declaration of legislative policy to be respected by the courts." *O'Neil, supra.* (quoting *Davis v. Rogers*, 128

Wash. 231, 235, 222 P. 499 (1924)). Respect for this clear legislative policy requires dismissal here of any "failure to act" claim.

2. "Final Act" Claim Also Was Filed Years After It Accrued

As to the second claim under RCW 64.40.020 "for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority," Plaintiff's "adequate administrative remedy" was exhausted in 2006 -- four and a half years before she filed suit in 2010. Specifically, the complaint admits that in 2006 "the Hearing Examiner issued a decision, asserting that Birnbaum did not provide sufficient information for an approval." CP 5. The actual language of that decision -- referenced in Plaintiff's complaint -- confirms it found Plaintiff's proposal did "not provide sufficient specificity to meet the burden of showing compliance with the decision criteria" and, among other things, "needs study from ... a safety perspective" as well as required "completion of review and preparation of a more detailed site plan" CP 31-32. Hence, the 2006 Hearing Examiner's decision expressly informed Plaintiff that if she objected to either the requirement of providing additional safety and other information or additional agency review, his decision was "a final denial of the conditional use application for purposes of appeal," CP 32, and specifically gave notice that the "final decision by the Examiner may be appealed in accordance with CH. 36.70.C RCW." CP 35. Indeed, un-

der the Pierce County Code, the Hearing Examiner's decision is the County's "final decision" on land use matters. *See* PCC 1.22.080(B), 18.100.010. However, Plaintiff chose not to appeal and to comply with the decision by revising her application and its supporting materials -- albeit at her own chosen glacial speed. CP 5, 52, 55.

Therefore the statute of limitations, RCW 64.40.030, also bars her remaining claim that pursuant to the unappealed 2006 decision the County supposedly made "demands for additional information in processing Birnbaum's permit application" and thereby "delay[ed] in approving Birnbaum's permit application" in a way that supposedly was "arbitrary and capricious, unlawful, and exceeded its lawful authority." CP 6. Any claim concerning "delay in approving Birnbaum's permit application" required by the Examiner should have been brought within 30 days of that expressly "final denial" and "final decision" in 2006. *See* RCW 64.40.030. Because such a suit was not brought within 30 days of the September 2006 decision, the complaint is barred by the statute of limitations. *See e.g. Seattle v. Blume*, 134 Wn.2d 243, 249-50, 947 P.2d 223 (1997) (claim "City, by delaying the permitting process, acted in an arbitrary and capricious manner in violation of RCW 64.40" was "barred by the statute of limitations" of RCW 64.40.030); *Hayes*, 131 Wn.2d at 716 (in RCW 64.40 suit land use decision "would have been final if [plaintiff] had done nothing

further"); *Westway Const., Inc. v. Benton County*, 136 Wn.App. 859, 866, 151 P.3d 1005 (2006) (had plaintiffs "done nothing to try to overturn this action, this would be the date their administrative remedies were exhausted") (emphasis added); *R/L Assocs. v. City of Seattle*, 73 Wn.App. 390, 392, 869 P.2d 1091 (1994) ("statute expresses the time to file claims in terms of administrative remedies, and the final administrative remedy, here, was the hearing examiner's denial of the variance" so any action filed more than 30 days after the Hearing Examiner's decision "was barred").

Plaintiff again ignores the statutory language and all the above precedent other than *Hayes*. CP 31-32. As to *Hayes* -- unlike here -- the applicant "promptly commenced an action for judicial review specifically for the purpose of overturning what he claimed was arbitrary and capricious action by the Council" and after judicial reversal the Council changed its decision. 131 Wn.2d at 716 (emphasis added). Because "Hayes continued to pursue his efforts to obtain a master use permit from the Seattle City Council, albeit with aid from the King County Superior Court, it cannot be said that he had exhausted his administrative remedies at the time of the council's initial action." *Id.* (emphasis added). Indeed, in *Hayes* the Supreme Court expressly noted that otherwise the land use decision "would have been final if [plaintiff] had done nothing further." 131 Wn.2d at 716. Plaintiff Birnbaum's purposeful choice not to seek "aid

from the ... Superior Court" but to instead comply with its requirements -- albeit begrudgingly -- is precisely the scenario *Hayes* recognizes as "final." Plaintiff gives no rationale how RCW 64.40.030 can be interpreted contrary to the "rule ... that a cause of action 'accrues' at the time the act or omission occurs." *White, supra. See also Milligan, supra.*

Here the complaint and record establish that any delay for additional information was required only because the 2006 decision enforced Code required safety and other studies and Plaintiff chose not to appeal that enforcement. CP 5, 26, 31-32; PCC 18.60.030; PCC 18.100.030. Plaintiff cannot convert an express "final denial of the conditional use application" and "final decision" into a supposed "remand decision," AB 31, by choosing to comply with its requirements at her leisure and then suing almost five years later claiming the unappealed 2006 decision and its requirements were "arbitrary, capricious, unlawful, or exceed[ed] lawful authority." Under Plaintiff's theory, the statute of limitations would never apply when a permit was denied and an applicant at some point later chose to revise the application and delay compliance with its requirements. This would violate both the letter of the law and its "policy of repose." Because after the unappealed 2006 Examiner decision there was no administrative remedy available to overturn its express "final decision" and avoid

its requirements, *Smoke, supra.*, Plaintiff's failure to appeal that decision bars her second claim under RCW 64.40.030 also.

B. NO RCW 64.40 CLAIM SINCE PERMIT WAS GRANTED ADMINISTRATIVELY

On its face the complaint expressly concedes that without judicial intervention the Hearing Examiner ultimately "issued a written decision approving the conditional use permit on March 15, 2010." CP 6. This of course was the very relief Plaintiff sought in the administrative process and it nowhere is alleged the permit she was granted was in any way inadequate. Indeed, the record confirms its adequacy because thereafter Plaintiff dismissed her writ petition and never sought judicial review within the Land Use Petition Act's (hereinafter "LUPA's") 21-day time period or otherwise. *See* CP 89; RCW 36.70C.040(3); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 408, 120 P.3d 56 (2005) ("LUPA's statute of limitations begins to run on the date a land use decision is issued").

As this Court makes clear in *Brower v. Pierce County, supra.* (rejecting "recovery for the damages allegedly sustained here during the period between" the time the permit allegedly should have been granted and its ultimate grant), where the administrative rather than judicial process ultimately provides the permit applicants seek "they have no cause of action -- and no right to damages -- under RCW 64.40.020." This is so be-

cause a RCW 64.40.020 "cause of action arises only when the administrative process fails to provide adequate relief" and here "the problem is remedied and judicial remedies are not ordinarily warranted." *Brower*, 96 Wn.App. at 565-66. *See also Harbor Lands, L.P.*, 2008 WL 5130049 ("to the extent that Harbor Lands now seeks damages caused by the construction delay, RCW 64.40.020 does not support a claim for damages if an applicant ultimately prevails on administrative appeal").

Plaintiff however attempts to first distinguish the facts of *Brower* and then argue it should be overturned. AB 15-30. As shown below, our state does not recognize a "suit for delay damages under chapter 64.40 RCW" where the permit is granted solely through the administrative process after the original application is revised and resubmitted pursuant to an unappealed "final denial" by the Hearing Examiner.

1. Plaintiff's "Final Act" Claim Is Subject to *Brower*

Plaintiff concedes that in *Brower* plaintiffs also sought damages under RCW 64.40.020 "for the expense of delay and other harms they allegedly suffered between the time" the County denied their permit "and the time the permit was granted." 96 Wn.App. 561; AB 19 n. 9. However, she argues the Browers' claim was based only on the County's allegedly "arbitrary, capricious and unlawful" acts of delay while here Plaintiff Birnbaum additionally sues for delay caused by "failure to act within time

limits established by law in response to Birnbaum's permit application."¹ AB 19-21; CP 6 (emphasis added). Of course, because Plaintiff expressly admits "Birnbaum has alleged both types of claims," AB 13 (emphasis added); *see also* CP 6, her proffered distinction cannot avoid dismissal of her primary claim -- the same as that in *Brower* -- for alleged "arbitrary, capricious, or unlawful" administrative "acts." CP 3, 4, 6; *Brower*, 96 Wn.App. at 560 n. 1.

2. Plaintiff's "Failure to Act" Claim Also Cannot Avoid *Brower*

As to her separate "failure to act within time limits" theory, it first should be noted Plaintiff never briefed to the trial court her argument now on appeal that *Brower* only applied to "final acts" claims. *See* CP 104-105, 128-136. Indeed, even after Judge Heller pointedly requested additional briefing to address if there were "circumstances, if any, under which a plaintiff may pursue a claim under RCW 64.40 even after obtaining adequate administrative relief," CP 115, Plaintiff nowhere responded such a

¹ To the extent Plaintiff claims a "failure to act within time periods" somehow creates strict liability, RCW 64.40.020(1) actually authorizes "relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority." (Emphasis added.) Hence, this Court has explained "delay in processing or granting a permit may be actionable under RCW 64.40 as an 'arbitrary and capricious,' final decision, or an 'arbitrary and capricious' failure to act within the time limits established by law" *Callfas*, 129 Wn.App. at 596 (emphasis added). Further, the 120-day time limit does not apply if -- as here -- additional information is needed. *See* RCW 36.70B.080; PCC 18.100.020.

circumstance was where a "failure to act" claim that instead was made under RCW 64.40.020. CP 130-134. Under RAP 2.5(a), "the appellate court may refuse to review any claim of error which was not raised in the trial court." Accordingly, this argument is not properly before the Court and should be disregarded. *See e.g. Rodriguez*, 144 Wn.App. at 728 (though after CR 12(b)(6) dismissal plaintiffs "assert for the first time on appeal that the certificate of incorporation may not have contained this provision at times relevant to this action, we will not consider arguments not first raised below"); *Brower*, 96 Wn.App. at 567 (under RAP 2.5(a) "[w]e will not consider arguments that are made for the first time on appeal" in an RCW 64.40 action").

Second, Plaintiff's argument -- that at least her separate "failure to act within time limits" claim should not be precluded by the ultimate grant of the permit -- has no application here. Though she restates it four different ways and claims it shows "*Brower* is distinguishable from the present case in at least four respects," Plaintiff essentially disputes *Brower's* application to her "failure to act" claim only because ultimately granting her permit "did nothing to remedy the County's prior failures to make a decision within the time limits set by law." AB 21-24. However, such a distinction is meaningless where, as here, the alleged untimely decision is an unappealed "final denial" -- especially one with which Plaintiff complied.

This is so because, contrary to Plaintiff's statement that "pure delay" automatically provides "a claim for damages," AB 12, RCW 64.40.010(4) expressly states that "damage" under that statute does not include "speculative losses or profits" but "must be caused by an act, necessarily incurred, and actually suffered, realized, or expended" Indeed, it is well settled that without causation of damage, there is no claim. *See Mueller v. Staples & Son Fruit Co., Inc.*, 26 Wn.App. 166, 170, 611 P.2d 801 (1980) ("It is a good defense that the misconduct ... has resulted in no loss or damage to the principal, for then the rule of *injuria absque damno* applies although it is a wrong, yet it is without any damage"). Here, the complaint did not and could not claim a permit somehow would have been granted if only a decision had been made within 120 days because the actual "final decision" that followed was a "final denial." CP 32, 35. For that reason, the face of the complaint precludes Plaintiff from claiming any harm was "actually suffered" during the period between the expiration of the 120-day period and the "final denial" -- much less that such was "caused" and "necessarily incurred" because of some "failure" to deny her application earlier. CP 6. *See also Bowman v. Two*, 104 Wn.2d 181, 186, 704 P.2d 140 (1985) (because "breach of duty must also be a proximate cause of the resulting injury," CR 12(b)(6) dismissal affirmed). Hence, Plaintiff is in the same position as plaintiffs in *Brower*: neither alleged

harm by a delay in the denial of their application but both alleged harm by a delay in an application's ultimately being later administratively granted.

Here Plaintiff's complaint identifies no harm resulting from a "failure to act within time limits," and *Brower* precludes a "final act" claim. *Brower* holds that "[w]hen given its plain meaning, this subsection authorizes damages only for expenses and losses that are incurred after a cause of action under the statute arises" and such "arises only when the administrative process fails to provide adequate relief." 96 Wn.App. at 566 (emphasis added). However, here the "administrative remedy through the hearing examiner provided ... adequate relief" by ultimately granting her permit. *Id.* See also *Harbor Lands, supra*. ("to the extent that Harbor Lands now seeks damages caused by the construction delay, RCW 64.40.020 does not support a claim for damages if an applicant ultimately prevails on administrative appeal, which Harbor Lands did").

3. *Brower* Should Not Be Overruled Since This Court Did Not Err

Though Plaintiff from whole cloth attempts to marginalize *Brower* "as a unique case based on narrow facts" and somehow "a significant outlier within the corpus of RCW 64.40's case law," AB 19, 14, this Court's *Brower* decision continues to be followed by courts a decade later. See e.g. *Harbor Lands, L.P., supra*. (under *Brower*, "RCW 64.40.020 does not

support a claim for damages [caused by the construction delay] if an applicant ultimately prevails on administrative appeal"). As shown below, she is likewise mistaken that *Brower* is somehow "incorrect and harmful."

First, contrary to Plaintiff's mischaracterization, this Court in *Brower* neither held that the "approval of a permit automatically bars a delay claim," AB 18 (emphasis added), nor affirmed simply because of "the ultimate approval of the permit at issue." AB 15. Rather *Brower* upheld dismissal by the trial court because "[w]hen given its plain meaning, this subsection authorizes damages only for expenses and losses that are incurred after a cause of action under the statute arises" and "a cause of action arises only when the administrative process fails to provide adequate relief." 96 Wn.App. at 566. Hence in *Brower* -- as here -- "exhaustion of [plaintiffs'] administrative remedy through the hearing examiner provided them adequate relief" by granting the application they sought. *Id.* at 560 (emphasis added). Though Plaintiff claims the "weight of the case law" she cites supposedly shows a RCW 64.40 action can be successful "even [though] the permit is ultimately granted," AB 16-18, 25, she actually only identifies two successful actions² that instead concern permits granted upon judicial intervention -- not resulting from an exclusively

² The reason is unclear for plaintiff's third citation to *Callfas* on this issue, AB 16-18, because she admits the action in *Callfas* actually was dismissed "because the plaintiffs filed suit before the City made a final decision on the master use permit." AB 17.

"administrative remedy through the hearing examiner" as here and in *Brower*. Compare *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 971, 954 P.2d 250 (1998) (City mistakenly concluded that if plaintiffs "bring suit, we can always turn around and issue the permit"); *Hayes*, 131 Wn.2d at 716 (after a judicial reversal the City changed its decision "with aid from the King County Superior Court"). See also *Brower*, 96 Wn.App. at 566 n. 22 (*Mission Springs* inapplicable since applicant "commenced its action before the Council rescinded its decision" and the cited cases do not "involve a situation where the applicant prevails in an administrative appeal and then is awarded damages under RCW 64.40.020 by the superior court").

Second, Plaintiff is also mistaken that *Brower* should be reversed as "inconsistent with the underlying logic of RCW 64.40" when applied to "claims for failure to comply with time limits established by law" because it supposedly gives agencies "carte blanche to attempt to kill a purportedly undesirable, but legally unobjectionable project simply by delaying a final decision." AB 25. However, as Plaintiff herself notes, "the Browsers did not claim that the County failed to comply with time limits established by law," AB 21, but sued for "delay and other harms they allegedly suffered between the time that PALS denied their exemption and the time the hearing examiner" granted it as being unlawful. 96 Wn.App. at 561 (emphasis

added). Further, as explained at length above, a suit for "failure to act" does not require a "final decision," *see discussion supra.* at 10-14, and therefore can and must be brought within 30 days after expiration of the "time limit established by law." Hence, neither *Brower* nor the statute gives "carte blanche" to an agency "to attempt to kill a ... unobjectionable project simply by delaying a final decision" -- or "carte blanche" to an applicant to delay timely pursuing her remedies until after she has maximized her alleged damage when she could have avoided or minimized it.

Third, Plaintiff erroneously argues that her "deeper review" shows "inconsistent reasoning" by this Court in *Brower*. AB 26-30. Specifically, Plaintiff argues it is "confusing" that *Brower* cited *Smoke v. City of Seattle, supra.*, as support for its statement that "relief granted by the administrative remedy must be adequate." AB 28; 96 Wn.App. at 564. However, as the County has previously noted, *Smoke* held it "is not an adequate administrative remedy" if an administrative procedure "cannot provide the plaintiffs with adequate relief" and therefore found plaintiffs in that case were not required before suing to seek an administrative "interpretation" that would not have provided them any relief. 132 Wn.2d at 225-26. Because the issue in *Brower* was whether plaintiffs can sue despite having already obtained relief through the administrative process, this Court's citation to *Smoke* that any such relief should be "adequate" is far from "con-

fusing." Rather, *Brower's* conclusion thereafter that "a cause of action arises only when the administrative process fails to provide adequate relief" naturally follows from *Smoke*. What does not follow and is confusing is Plaintiff's assertion that because *Smoke* holds an "applicant must pursue [an adequate administrative] remedy or be subject to dismissal," *Brower* somehow could not hold that where "the remedy was adequate the claim is foreclosed" by an unappealed "final decision." AB 29.

Hence, *Brower* and *Smoke* together reasonably hold that an RCW 64.40 suit for an unlawful "final act" requires Plaintiff to first exhaust her adequate administrative remedies and thereby obtain an inadequate remedy. If she brings suit before exhausting her administrative remedies, she is barred as was the case in *Callfas* -- which likewise relied upon *Smoke*. 129 Wn. App. at 595. On the other hand, if she does pursue those remedies and obtains them, *Brower* understandably holds she does not automatically have a cause of action simply because she exhausted her remedies. The exhaustion requirement is not a meaningless procedure but is imposed precisely because a cause of action should exist only if resort to the Courts was needed to obtain adequate relief. The only confusing issue is how Plaintiff concludes her "deeper review" somehow supports overruling this Court's precedent that courts have followed for over a decade.

C. COLLATERAL ATTACK RULE BARS CLAIM 2006 DECISION WAS UNLAWFUL

The complaint's challenge to the Examiner's "demands for additional information in processing Birnbaum's permit application" and "delay in approving Birnbaum's permit application" attempts to relitigate the unappealed 2006 Hearing Examiner decision. However, as noted above, that decision expressly advised Plaintiff that if she wished to challenge its findings and conclusions she should "consider this decision a final denial of the conditional use application for purposes of appeal," CP 32, and gave notice its "final decision by the Examiner may be appealed." CP 35. Nevertheless, Plaintiff did not appeal. As a matter of law the "failure to timely challenge a land use decision by means of a Land Use Petition Act (LUPA) petition bars any further claims challenging that decision, including challenges to the process for approving that decision." *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn.App. 393, 399, 232 P.3d 1163 (2010) (agreeing with City "that the claims should have been asserted in a LUPA petition and that the 21-day limitation period for filing a LUPA claim had passed" and therefore dismissing later damages action) (emphasis added).

The reason dismissal is required is because:

A land use decision becomes unreviewable by the courts if not appealed to the superior court within LUPA's specified

21-day timeline. Once the 21-day period passes, a land use decision becomes final and binding and is deemed valid and lawful. Thus, "even illegal decisions must be challenged in a timely, appropriate manner."

Id. at 1166 (*quoting Habitat Watch*, 155 Wn.2d at 407) (emphasis added).

Rather, "LUPA provides the exclusive means for judicial review of a land use decision (with the exception of those decisions separately subject to review by bodies such as the growth management hearings boards)."

Phoenix Dev., Inc. v. City Of Woodinville, __ Wn.2d __, 2011 WL 2409635 (2011) (citing *Woods v. Kittitas County*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007)). *See also* RCW 36.70C.030(1)(a)(ii). Here this complaint is an impermissible collateral attack on the unappealed 2006 land use decision and subject to dismissal on that ground. *See In re Preston's Estate*, 59 Wn.2d 11, 19, 365 P.2d 595 (1961) (appealable orders "cannot be collaterally attacked in a subsequent proceeding"). *See also Habitat Watch, supra.* at 410-11 ("Because appeal of the special use permit and its extensions are time barred under LUPA, Habitat Watch cannot collaterally attack them through its challenge to the grading permit"); *Mercer Island Citizens, supra.* at 401 (because "the complaint makes clear, each of these claims was based on the alleged illegality of the [decision] and challenged its approval process" the Court rejected plaintiff's argument their damages

suit did not "collaterally attack the [land use decision] and therefore LUPA does apply to them").

In response, Plaintiff first claims RCW 36.70C.030(1)(c) states that LUPA appeals have no effect on "[c]laims provided by any law for monetary damages or compensation." AB 34. However, that statute instead expressly states its requirements do not apply to damages suits "set forth in the same complaint with a land use petition." (Emphasis added). Indeed, this Court in *Mercer Island Citizens* expressly rejected the identical argument that damages claims "are not subject to the LUPA time limitations because RCW 36.70C.030(1)(c) specifically excludes damage actions from the LUPA time limitations" because "claims for damages based on a LUPA claim must be dismissed if the LUPA claim fails." 156 Wn.App. at 404-05. Next, Plaintiff attempts to mischaracterize the County's position as being that "she must challenge a decision that she agrees with" by bringing a LUPA action against the Examiner's 2010 decision. AB 34. Of course, the County's position instead has always been that because Plaintiff's objection is to "the unappealed 2006 decision of the Hearing Examiner" and "plaintiff did not appeal" it, her "failure to timely challenge a land use decision by means of a Land Use Petition Act (LUPA) petition bars any further claims challenging that decision, including challenges to the process for approving that decision." *See e.g.* CP 15

(emphasis added). Finally, Plaintiff makes untenable attempts to distinguish *Habitat Watch* and *Mercer Island Citizens*. Specifically, Plaintiff asserts *Habitat Watch* only "stands for the proposition that injunctive relief claims must be brought according to LUPA." AB 35 (emphasis added). However, Plaintiff nowhere explains why the holding of *Habitat Watch* that "a land use decision becomes final and binding and is deemed valid and lawful" applies only to injunctive relief. Indeed, this Court in *Mercer Island Citizens* repeatedly cites *Habitat Watch* as supporting dismissal of a later non-LUPA suit for damages. 156 Wn.App. 398-99. Further, the Supreme Court itself in *Habitat Watch* states broadly that "once a party has had a chance to challenge a land use decision and exhaust all appropriate administrative remedies, a land use decision becomes unreviewable by the courts if not appealed to superior court within LUPA's specified timeline." 155 Wn.2d at 407 (emphasis added). As to *Mercer Island Citizens*, Plaintiff claims she is "seeking only monetary damages for delay" and that there plaintiffs were "primarily challenging the propriety of the city's final decision," but then admits those plaintiffs "also sought damages flowing from that decision." AB 35. Indeed, this Court in *Mercer Island* expressly held a failure to administratively challenge a decision "within LUPA's time limitations requires dismissal of all the claims, in-

cluding those for damages" brought in a separate damages suit. 155 Wn.App. at 405 (emphasis added). The complaint here is such a claim.

D. COLLATERAL ESTOPPEL BARS ANY "FINAL ACT" CLAIM

It is beyond serious dispute that the Hearing Examiner has lawful authority under the Pierce County Code to require additional studies and further review before granting a conditional use permit. *See e.g.* PCC 18.60.030. Likewise, it is well settled that such decisions concerning conditional use permits are quasi-judicial. *See Beach v. Board of Adjustment*, 73 Wn.2d 343, 345, 438 P.2d 617 (1968); *Bennett v. Board of Adjustment*, 23 Wn.App. 698, 700, 597 P.2d 939 (1979); *Messer v. Board of Adjustment*, 19 Wn.App. 780, 788-89, 578 P.2d 50 (1978); *Lund v. Tumwater*, 2 Wn.App. 750, 755, 472 P.2d 550 (1970). *See also* R. Settle, *Washington Land Use and Environmental Law and Practice*, § 2.10(a) at 53 (1983) ("It is well established that government action on applications for use permits is quasi-judicial"); *Valley Wood Preserving, Inc. v. Paul*, 785 F.2d 751, 753 (9th Cir. 1986) (Conditional use permit process was quasi-judicial); PCC 18.25.030 ("Hearing Examiner review' means a quasi-judicial decision making process"). As such, collateral estoppel prevents a second litigation of land use issues decided by the Hearing Examiner, *see Chelan County v. Nykreim*, 146 Wn.2d 904, 931-933, 52 P.3d 1 (2002) (RCW

64.40 suit applied res judicata to Hearing Examiner's decision); *see also Rains v. State*, 100 Wn.2d 660, 665 (1983), and therefore precludes Plaintiff's claim here that "delay in approving Birnbaum's permit application" was somehow unnecessary -- much less "arbitrary and capricious, unlawful, and exceeded its lawful authority." CP 4-6.

As has been previously noted, the unappealed 2006 Hearing Examiner decision expressly found the application was denied because, among other things, it needed "study from ... a safety perspective," failed "to meet the burden of showing compliance with the decision criteria," and would not be rescheduled for approval unless there had been "completion of review and preparation of a more detailed site plan" as required in the decision. *See* CP 31-32 (emphasis added). Because for purposes of an action under RCW 64.40.020 an "'Act' shall not include lawful decisions of an agency which are designed to prevent a condition which would constitute a threat to the health, safety, welfare, or morals of residents in the area," RCW 64.40.010(6) (emphasis added), the unappealed finding that "study from ... a safety perspective" was needed also collaterally estops any claim now that such constituted an "act" upon which a RCW 64.40.020 claim be based. The Examiner's previously uncontested conclusion that Plaintiff had not met her "burden of showing compliance with the decision criteria" and would not be rescheduled for hearing unless

"completion of review and preparation of a more detailed site plan" occurred, precludes any challenge now that those requirements were "arbitrary and capricious, unlawful, and exceeded its lawful authority."

In response, Plaintiff simply ignores RCW 64.40.010(6) altogether and addresses neither the underlying principles of collateral estoppel nor their application to RCW 64.40 and her cause of action. Rather, she summarily asserts without explanation or analysis that the Examiner's decision must be a "final judgment on the merits." AB 35. However, a "judgment is considered final on appeal if it concludes the action by resolving the plaintiff's entitlement to the requested relief." *See e.g. Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002) (because city's land use decision was "final," it could not later be "collaterally challenge[d]" in a separate action) (*quoting Purse Seine Vessel Owners v. State*, 92 Wn.App. 381, 387, 966 P.2d 928 (1998)). Here, the Examiner's 2006 decision resolved that Plaintiff would not administratively obtain her requested permit because of the inadequacy of her safety and other studies. CP 32. Once she chose not to appeal that 2006 administrative resolution despite being put on express notice that it was "final" and "may be appealed in accordance with Ch. 36.70.C. RCW," CP 25, 32, Plaintiff was collaterally estopped from later litigating that decision as arbitrary, capricious or unlawful. *See e.g. Wenatchee Sportsmen Ass'n v. Chelan County*,

141 Wn.2d 169, 178, 4 P.3d 123 (2000) ("failure to bring timely LUPA challenge to county's approval or application barred challenging validity of that decision); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 57 n. 16, 26 P.3d 241 (2001) (because it had not appealed, respondent could not "collaterally invalidate final county land use decisions"); *Nykreim*, 146 Wn.2d at 933 ("Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner").³

That permit decisions are "final" unless directly and timely appealed is not only well supported by precedent but also by policy. There is "a strong public policy supporting administrative finality in land use decisions" because "[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property To make an exception ... would completely defeat the purpose and policy of the law in making a definite time limit." *Nykreim*, 146

³ Plaintiff baselessly argues *Nykreim* only "recited respondent's argument mentioning res judicata" and then "simply ruled that the claim for injunctive relief was barred by administrative finality because the lawsuit was not brought within the LUPA time limit." AB 36 (emphasis added). In fact, after reciting respondent's argument "that res judicata applies only in the quasi-judicial context and never applies to purely ministerial approvals," the Supreme Court immediately in the very next sentence expressly explained that "language used by this court referring specifically to land use decisions and a plain reading of LUPA leads to a contrary conclusion." 146 Wn.2d at 931-32.

at 931-32 (quoting *Skamania County*, 144 Wn.2d at 49; *Deschenes v. King County*, 83 Wn.2d 714, 716-17, 521 P.2d 1181 (1974)). Hence, collateral estoppel bars Plaintiff from undermining the finality of the 2006 decision.

E. COUNTY IS ENTITLED TO COSTS AND ATTORNEY'S FEES

RCW 64.40.020(2) provides that the "prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees." Though Plaintiff requests such an award, AB 36, this Court holds that where plaintiffs in a RCW 64.40.020 action "have not prevailed, we [will] deny their request for attorney fees." *Brower*, 96 Wn. App. at 567. Because Plaintiff did not "prevail" below and -- as shown above -- certainly should not do so on appeal, Plaintiff would not be the "prevailing party" nor entitled to "reasonable costs and attorney's fees."

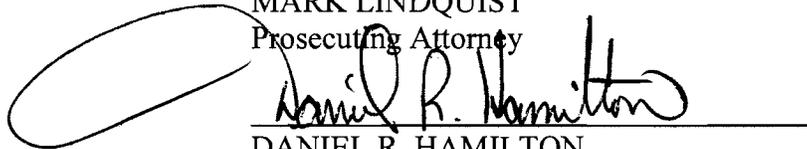
However, Pierce County did prevail below and -- as shown above -- should prevail on appeal. Hence, the County has been and should on appeal be the "prevailing party in an action brought pursuant to" RCW 64.40. Accordingly, in light of the especially baseless nature of Plaintiff's appeal, Pierce County respectfully requests Plaintiff be denied attorney's fees or costs and instead the County be awarded its costs and attorneys fees as the prevailing party under RAP 18.1 and RCW 64.40.020(2).

V. CONCLUSION

Plaintiff had a duty when applying for a permit to comply with the requirements for its approval, as well as a duty to comply with the requirements for challenging its denial. Because Plaintiff failed for years to do either, yet nevertheless ultimately obtained the very permit she sought, her complaint "for delay damages under chapter 64.40 RCW," CP 3, was properly dismissed by the trial court. Accordingly, Defendant Pierce County respectfully requests that dismissal be affirmed on appeal.

DATED: July 13, 2011

MARK LINDQUIST
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Daniel R. Hamilton", is written over a horizontal line. To the left of the signature is a large, loopy scribble.

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CERTIFICATE OF SERVICE

On July 13, 2011, I hereby certify that delivered a true and correct copy of the foregoing RESPONDENT'S BRIEF to ABC Legal Messengers with appropriate instruction to deliver the same to:

Charles Klinge
Brian Donald Amsbary
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Chapter 36.70C RCW
Judicial review of land use decisions

RCW Sections

- 36.70C.005 Short title.
- 36.70C.010 Purpose.
- 36.70C.020 Definitions.
- 36.70C.030 Chapter exclusive means of judicial review of land use decisions -- Exceptions.
- 36.70C.040 Commencement of review -- Land use petition -- Procedure.
- 36.70C.050 Joinder of parties.
- 36.70C.060 Standing.
- 36.70C.070 Land use petition -- Required elements.
- 36.70C.080 Initial hearing.
- 36.70C.090 Expedited review.
- 36.70C.100 Stay of action pending review.
- 36.70C.110 Record for judicial review -- Costs.
- 36.70C.120 Scope of review -- Discovery.
- 36.70C.130 Standards for granting relief -- Renewable resource projects within energy overlay zones.
- 36.70C.140 Decision of the court.
- 36.70C.900 Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347.

36.70C.005
Short title.

This chapter may be known and cited as the land use petition act.

[1995 c 347 § 701.]

36.70C.010
Purpose.

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

[1995 c 347 § 702.]

36.70C.020
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Energy overlay zone" means a formal plan enacted by the county legislative authority that establishes suitable areas for siting renewable resource projects based on currently available resources and existing infrastructure with sensitivity to adverse environmental impact.

(2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

APP 1

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

(3) "Local jurisdiction" means a county, city, or incorporated town.

(4) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

(5) "Renewable resources" has the same meaning provided in RCW

19.280.020.

[2010 c 59 § 1; 2009 c 419 § 1; 1995 c 347 § 703.]

36.70C.030

Chapter exclusive means of judicial review of land use decisions — Exceptions.

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

[2010 1st sp.s. c 7 § 38; 2003 c 393 § 17; 1995 c 347 § 704.]

Notes:

Effective date -- 2010 1st sp.s. c 26; 2010 1st sp.s. c 7: See note following RCW 43.03.027.

36.70C.040

Commencement of review — Land use petition — Procedure.

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW

4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first-class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2) (d) of this section.

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

[1995 c 347 § 705.]

36.70C.050

Joinder of parties.

If the applicant for the land use approval is not the owner of the real property at issue, and if the owner is not accurately identified in the records referred to in RCW

36.70C.040(2) (b) and (c), the applicant shall be responsible for promptly securing the joinder of the owners. In addition, within fourteen days after service each party initially named by the petitioner shall disclose to the other parties the name and address of any person whom such party knows may be needed for just adjudication of the petition, and the petitioner shall promptly

APP 3

7/12/2011

name and serve any such person whom the petitioner agrees may be needed for just adjudication. If such a person is named and served before the initial hearing, leave of court for the joinder is not required, and the petitioner shall provide the newly joined party with copies of the pleadings filed before the party's joinder. Failure by the petitioner to name or serve, within the time required by RCW 36.70C.040(3), persons who are needed for just adjudication but who are not identified in the records referred to in RCW 36.70C.040(2)(b), or in RCW 36.70C.040(2)(c) if applicable, shall not deprive the court of jurisdiction to hear the land use petition.

[1995 c 347 § 706.]

36.70C.060 **Standing.**

Standing to bring a land use petition under this chapter is limited to the following persons:

- (1) The applicant and the owner of property to which the land use decision is directed;
- (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
 - (a) The land use decision has prejudiced or is likely to prejudice that person;
 - (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
 - (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
 - (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

[1995 c 347 § 707.]

36.70C.070 **Land use petition — Required elements.**

A land use petition must set forth:

- (1) The name and mailing address of the petitioner;
- (2) The name and mailing address of the petitioner's attorney, if any;
- (3) The name and mailing address of the local jurisdiction whose land use decision is at issue;
- (4) Identification of the decision-making body or officer, together with a duplicate copy of the decision, or, if not a written decision, a summary or brief description of it;
- (5) Identification of each person to be made a party under RCW 36.70C.040(2) (b) through (d);
- (6) Facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060;
- (7) A separate and concise statement of each error alleged to have been committed;
- (8) A concise statement of facts upon which the petitioner relies to sustain the statement of error; and
- (9) A request for relief, specifying the type and extent of relief requested.

[1995 c 347 § 708.]

APP 4

36.70C.080**Initial hearing.**

(1) Within seven days after the petition is served on the parties identified in RCW

36.70C.040(2), the petitioner shall note, according to the local rules of superior court, an initial hearing on jurisdictional and preliminary matters. This initial hearing shall be set no sooner than thirty-five days and no later than fifty days after the petition is served on the parties identified in RCW 36.70C.040(2).

(2) The parties shall note all motions on jurisdictional and procedural issues for resolution at the initial hearing, except that a motion to allow discovery may be brought sooner. Where confirmation of motions is required, each party shall be responsible for confirming its own motions.

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.

(4) The petitioner shall move the court for an order at the initial hearing that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits.

(5) The parties may waive the initial hearing by scheduling with the court a date for the hearing or trial on the merits and filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in subsections (3) and (4) of this section.

(6) A party need not file an answer to the petition.

[1995 c 347 § 709.]

36.70C.090**Expedited review.**

The court shall provide expedited review of petitions filed under this chapter. The matter must be set for hearing within sixty days of the date set for submitting the local jurisdiction's record, absent a showing of good cause for a different date or a stipulation of the parties.

[1995 c 347 § 710.]

36.70C.100**Stay of action pending review.**

(1) A petitioner or other party may request the court to stay or suspend an action by the local jurisdiction or another party to implement the decision under review. The request must set forth a statement of grounds for the stay and the factual basis for the request.

(2) A court may grant a stay only if the court finds that:

(a) The party requesting the stay is likely to prevail on the merits;

(b) Without the stay the party requesting it will suffer irreparable harm;

(c) The grant of a stay will not substantially harm other parties to the proceedings; and

(d) The request for the stay is timely in light of the circumstances of the case.

(3) The court may grant the request for a stay upon such terms and conditions, including the filing of security, as are necessary to prevent harm to other parties by the stay.

[1995 c 347 § 711.]

App 5

36.70C.110**Record for judicial review — Costs.**

(1) Within forty-five days after entry of an order to submit the record, or within such a further time as the court allows or as the parties agree, the local jurisdiction shall submit to the court a certified copy of the record for judicial review of the land use decision, except that the petitioner shall prepare at the petitioner's expense and submit a verbatim transcript of any hearings held on the matter.

(2) If the parties agree, or upon order of the court, the record shall be shortened or summarized to avoid reproduction and transcription of portions of the record that are duplicative or not relevant to the issues to be reviewed by the court.

(3) The petitioner shall pay the local jurisdiction the cost of preparing the record before the local jurisdiction submits the record to the court. Failure by the petitioner to timely pay the local jurisdiction relieves the local jurisdiction of responsibility to submit the record and is grounds for dismissal of the petition.

(4) If the relief sought by the petitioner is granted in whole or in part the court shall equitably assess the cost of preparing the record among the parties. In assessing costs the court shall take into account the extent to which each party prevailed and the reasonableness of the parties' conduct in agreeing or not agreeing to shorten or summarize the record under subsection (2) of this section.

[1995 c 347 § 712.]

36.70C.120**Scope of review — Discovery.**

(1) When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

(2) For decisions described in subsection (1) of this section, the record may be supplemented by additional evidence only if the additional evidence relates to:

(a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created;

(b) Matters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding; or

(c) Matters that were outside the jurisdiction of the body or officer that made the land use decision.

(3) For land use decisions other than those described in subsection (1) of this section, the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record.

(4) The court may require or permit corrections of ministerial errors or inadvertent omissions in the preparation of the record.

(5) The parties may not conduct pretrial discovery except with the prior permission of the court, which may be sought by motion at any time after service of the petition. The court shall not grant permission unless the party requesting it makes a prima facie showing of need. The court shall strictly limit discovery to what is necessary for equitable and timely review of the issues that are raised under subsections (2) and (3) of this section. If the court allows the record to be supplemented, the court shall require the parties to disclose before the hearing or trial on the merits the specific evidence they intend to offer. If any party, or anyone acting on behalf of any party, requests records under chapter

42.56 RCW relating to the matters at issue, a copy of the request shall simultaneously be given to all other parties and the court shall take such request into account in fashioning an equitable discovery order under this section.

[2005 c 274 § 273; 1995 c 347 § 713.]

Notes:

Part headings not law -- Effective date -- 2005 c 274: See RCW 42.56.901 and 42.56.902.

APP 6

36.70C.130**Standards for granting relief — Renewable resource projects within energy overlay zones.**

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW

36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) 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;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

(3) Land use decisions made by a local jurisdiction concerning renewable resource projects within a county energy overlay zone are presumed to be reasonable if they are in compliance with the requirements and standards established by local ordinance for that zone. However, for land use decisions concerning wind power generation projects, either:

(a) The local ordinance for that zone is consistent with the department of fish and wildlife's wind power guidelines; or

(b) The local jurisdiction prepared an environmental impact statement under chapter 43.21C RCW on the energy overlay zone; and

(i) The local ordinance for that zone requires project mitigation, as addressed in the environmental impact statement and consistent with local, state, and federal law;

(ii) The local ordinance for that zone requires site specific fish and wildlife and cultural resources analysis; and

(iii) The local jurisdiction has adopted an ordinance that addresses critical areas under chapter 36.70A RCW.

(4) If a local jurisdiction has taken action and adopted local ordinances consistent with subsection (3)(b) of this section, then wind power generation projects permitted consistently with the energy overlay zone are deemed to have adequately addressed their environmental impacts as required under chapter 43.21C RCW.

[2009 c 419 § 2; 1995 c 347 § 714.]

36.70C.140**Decision of the court.**

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.

[1995 c 347 § 715.]

APP 7

36.70C.900

Finding — Severability — Part headings and table of contents not law — 1995 c 347.

See notes following RCW

36.70A.470.

App 8

RCW 36.70A.040

Who must plan — Summary of requirements — Development regulations must implement comprehensive plans.

(1) Each county that has both a population of fifty thousand or more and, until May 16, 1995, has had its population increase by more than ten percent in the previous ten years or, on or after May 16, 1995, has had its population increase by more than seventeen percent in the previous ten years, and the cities located within such county, and any other county regardless of its population that has had its population increase by more than twenty percent in the previous ten years, and the cities located within such county, shall conform with all of the requirements of this chapter. However, the county legislative authority of such a county with a population of less than fifty thousand population may adopt a resolution removing the county, and the cities located within the county, from the requirements of adopting comprehensive land use plans and development regulations under this chapter if this resolution is adopted and filed with the department by December 31, 1990, for counties initially meeting this set of criteria, or within sixty days of the date the office of financial management certifies that a county meets this set of criteria under subsection (5) of this section. For the purposes of this subsection, a county not currently planning under this chapter is not required to include in its population count those persons confined in a correctional facility under the jurisdiction of the department of corrections that is located in the county.

Once a county meets either of these sets of criteria, the requirement to conform with all of the requirements of this chapter remains in effect, even if the county no longer meets one of these sets of criteria.

(2) The county legislative authority of any county that does not meet either of the sets of criteria established under subsection (1) of this section may adopt a resolution indicating its intention to have subsection (1) of this section apply to the county. Each city, located in a county that chooses to plan under this subsection, shall conform with all of the requirements of this chapter. Once such a resolution has been adopted, the county and the cities located within the county remain subject to all of the requirements of this chapter.

(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a countywide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; (d) if the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, and if the county has a population of less than fifty thousand, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan by January 1, 1995, but if the governor makes written findings that a county with a population of less than fifty thousand or a city located within such a county is not making reasonable progress toward adopting a comprehensive plan and development regulations the governor may reduce this deadline for such actions to be taken by no more than one hundred eighty days. Any county or city subject to this subsection may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the *department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

(4) Any county or city that is required to conform with all the requirements of this chapter, as a result of the county legislative authority adopting its resolution of intention under subsection (2) of this section, shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city that is located within the county shall adopt development regulations conserving agricultural lands, forest lands, and mineral resource lands it designated under RCW 36.70A.060 within one year of the date the county legislative authority adopts its resolution of intention; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; and (d) the county and each city that is located within the county shall adopt a comprehensive plan and development regulations that are consistent with and implement the comprehensive plan not later than four years from the date the county legislative authority adopts its resolution of intention, but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the *department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

(5) If the office of financial management certifies that the population of a county that previously had not been required to plan under subsection (1) or (2) of this section has changed sufficiently to meet either of the sets of criteria specified under subsection (1) of this section, and where applicable, the county legislative authority has not adopted a resolution removing the county from these requirements as provided in subsection (1) of this section, the county and each city within such county shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a countywide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall adopt development regulations under RCW 36.70A.060 conserving agricultural lands, forest lands, and mineral resource lands it designated within one year of the certification by the office of financial management; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; and (d) the county and each city located within the county shall adopt a comprehensive land use plan and development regulations that are consistent with and implement the comprehensive plan within four years of the certification by the office of financial management, but a county or city may obtain an additional six months before it is

APP 9

required to have adopted its development regulations by submitting a letter notifying the *department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

(6) A copy of each document that is required under this section shall be submitted to the department at the time of its adoption.

(7) Cities and counties planning under this chapter must amend the transportation element of the comprehensive plan to be in compliance with this chapter and chapter 47.80 RCW no later than December 31, 2000.

[2000 c 36 § 1; 1998 c 171 § 1; 1995 c 400 § 1; 1993 sp.s. c 6 § 1; 1990 1st ex.s. c 17 § 4.]

Notes:

***Reviser's note:** The "department of community, trade, and economic development" was renamed the "department of commerce" by 2009 c 565.

Effective date -- 1995 c 400: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 16, 1995]." [1995 c 400 § 6.]

Effective date -- 1993 sp.s. c 6: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect June 1, 1993." [1993 sp.s. c 6 § 7.]

APP 10

RCW 36.70B.080

Development regulations — Requirements — Report on implementation costs.

(1) Development regulations adopted pursuant to RCW 36.70A.040 must establish and implement time periods for local government actions for each type of project permit application and provide timely and predictable procedures to determine whether a completed project permit application meets the requirements of those development regulations. The time periods for local government actions for each type of complete project permit application or project type should not exceed one hundred twenty days, unless the local government makes written findings that a specified amount of additional time is needed to process specific complete project permit applications or project types.

The development regulations must, for each type of permit application, specify the contents of a completed project permit application necessary for the complete compliance with the time periods and procedures.

(2)(a) Counties subject to the requirements of RCW 36.70A.215 and the cities within those counties that have populations of at least twenty thousand must, for each type of permit application, identify the total number of project permit applications for which decisions are issued according to the provisions of this chapter. For each type of project permit application identified, these counties and cities must establish and implement a deadline for issuing a notice of final decision as required by subsection (1) of this section and minimum requirements for applications to be deemed complete under RCW 36.70B.070 as required by subsection (1) of this section.

(b) Counties and cities subject to the requirements of this subsection also must prepare annual performance reports that include, at a minimum, the following information for each type of project permit application identified in accordance with the requirements of (a) of this subsection:

(i) Total number of complete applications received during the year;

(ii) Number of complete applications received during the year for which a notice of final decision was issued before the deadline established under this subsection;

(iii) Number of applications received during the year for which a notice of final decision was issued after the deadline established under this subsection;

(iv) Number of applications received during the year for which an extension of time was mutually agreed upon by the applicant and the county or city;

(v) Variance of actual performance, excluding applications for which mutually agreed time extensions have occurred, to the deadline established under this subsection during the year; and

(vi) The mean processing time and the number standard deviation from the mean.

(c) Counties and cities subject to the requirements of this subsection must:

(i) Provide notice of and access to the annual performance reports through the county's or city's web site; and

(ii) Post electronic facsimiles of the annual performance reports through the county's or city's web site. Postings on a county's or city's web site indicating that the reports are available by contacting the appropriate county or city department or official do not comply with the requirements of this subsection.

If a county or city subject to the requirements of this subsection does not maintain a web site, notice of the reports must be given by reasonable methods, including but not limited to those methods specified in RCW 36.70B.110(4).

(3) Nothing in this section prohibits a county or city from extending a deadline for issuing a decision for a specific project permit application for any reasonable period of time mutually agreed upon by the applicant and the local government.

(4) The *department of community, trade, and economic development shall work with the counties and cities to review the potential implementation costs of the requirements of subsection (2) of this section. The department, in cooperation with the local governments, shall prepare a report summarizing the projected costs, together with recommendations for state funding assistance for implementation costs, and provide the report to the governor and appropriate committees of the senate and house of representatives by January 1, 2005.

[2004 c 191 § 2; 2001 c 322 § 1; 1995 c 347 § 410; (1995 c 347 § 409 expired July 1, 2000); 1994 c 257 § 3. Formerly RCW 36.70A.065.]

Notes:

***Reviser's note:** The "department of community, trade, and economic development" was renamed the "department of commerce" by 2009 c 565.

APP 11

Findings -- Intent -- 2004 c 191: "The legislature finds that the timely issuance of project permit decisions by local governments serves the public interest. When these decisions, that are often responses to land use and building permit applications, are issued according to specific and locally established time periods and without unnecessary or inappropriate delays, the public enjoys greater efficiency, consistency, and predictability in the permitting process.

The legislature also finds that full access to relevant performance data produced annually by local governments for each type of permit application affords elected officials, project proponents, and the general public the opportunity to review and compare the permit application and processing performance of jurisdictions. Furthermore, the legislature finds that the review and comparison of this data, and the requirement to provide convenient and direct internet access to germane and consistent reports, will likely foster improved methods for processing applications, and issuing project permit decisions in a timely manner.

The legislature, therefore, intends to continue and clarify the requirements for certain jurisdictions to produce and provide access to annual permitting performance reports." [2004 c 191 § 1.]

Effective date -- 1995 c 347 § 410: "Section 410, chapter 347, Laws of 1995 shall take effect July 1, 2000." [1998 c 286 § 10; 1995 c 347 § 412.]

Expiration date -- 1995 c 347 § 409: "The amendments to RCW 36.70B.080 contained in section 409, chapter 347, Laws of 1995 shall expire July 1, 2000." [1998 c 286 § 9; 1995 c 347 § 411.]

Severability -- 1994 c 257: See note following RCW 36.70A.270.

Development regulations must provide sufficient land capacity for development: RCW 36.70A.115.

APP 12

Chapter 64.40 RCW
Property rights — damages from governmental actions

RCW Sections

- 64.40.010 Definitions -- Defense in action for damages.
- 64.40.020 Applicant for permit -- Actions for damages from governmental actions.
- 64.40.030 Commencement of action -- Time limitation.
- 64.40.040 Remedies cumulative.
- 64.40.900 Severability -- 1982 c 232.

64.40.010
Definitions — Defense in action for damages.

As used in this chapter, the terms in this section shall have the meanings indicated unless the context clearly requires otherwise.

- (1) "Agency" means the state of Washington, any of its political subdivisions, including any city, town, or county, and any other public body exercising regulatory authority or control over the use of real property in the state.
- (2) "Permit" means any governmental approval required by law before an owner of a property interest may improve, sell, transfer, or otherwise put real property to use.
- (3) "Property interest" means any interest or right in real property in the state.
- (4) "Damages" means reasonable expenses and losses, other than speculative losses or profits, incurred between the time a cause of action arises and the time a holder of an interest in real property is granted relief as provided in RCW 64.40.020. Damages must be caused by an act, necessarily incurred, and actually suffered, realized, or expended, but are not based upon diminution in value of or damage to real property, or litigation expenses.
- (5) "Regulation" means any ordinance, resolution, or other rule or regulation adopted pursuant to the authority provided by state law, which imposes or alters restrictions, limitations, or conditions on the use of real property.
- (6) "Act" means a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed. "Act" also means the failure of an agency to act within time limits established by law in response to a property owner's application for a permit: PROVIDED, That there is no "act" within the meaning of this section when the owner of a property interest agrees in writing to extensions of time, or to the conditions or limitations imposed upon an application for a permit. "Act" shall not include lawful decisions of an agency which are designed to prevent a condition which would constitute a threat to the health, safety, welfare, or morals of residents in the area.

In any action brought pursuant to this chapter, a defense is available to a political subdivision of this state that its act was mandated by a change in statute or state rule or regulation and that such a change became effective subsequent to the filing of an application for a permit.

[1982 c 232 § 1.]

64.40.020
Applicant for permit — Actions for damages from governmental actions.

- (1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.
- (2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.
- (3) No cause of action is created for relief from unintentional procedural or ministerial errors of an agency.

APP 13

(4) Invalidation of any regulation in effect prior to the date an application for a permit is filed with the agency shall not constitute a cause of action under this chapter.

[1982 c 232 § 2.]

Notes:

Findings -- Recommendations -- Reports encouraged -- 2007 c 231: See note following RCW 43.155.070.

64.40.030

Commencement of action — Time limitation.

Any action to assert claims under the provisions of this chapter shall be commenced only within thirty days after all administrative remedies have been exhausted.

[1982 c 232 § 3.]

64.40.040

Remedies cumulative.

The remedies provided by this chapter are in addition to any other remedies provided by law.

[1982 c 232 § 4.]

64.40.900

Severability — 1982 c 232.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1982 c 232 § 5.]

APP 14

~~B. No Councilmember, County official, or any other person shall interfere or attempt to interfere with the Examiner or Deputy Examiners in the performance of their designated duties.~~

~~(Ord. 96-19S § 4 (part), 1996; Ord. 95-112 § 1 (part), 1995; Ord. 95-1 § 1, 1995; Ord. 94-112S § 1 (part), 1994)~~

1.22.080 Examiner – Powers and Duties.

~~A. The Examiner shall have the power to appoint Deputy Hearing Examiners subject to confirmation by the Council. The Deputy Hearing Examiners shall assist the Examiner in the performance of the duties conferred upon the Examiner and shall have all the powers and duties of the Examiner.~~

B. The Examiner shall receive and examine available relevant information, including environmental documents, conduct public hearings, cause preparation of the official record thereof, prepare and enter findings of fact and conclusions of law, and issue final decisions for:

1. Land Use Matters.

- a. Applications for zone changes or amendments to the classification of specific parcels of land; provided that area-wide amendments to the Zoning Atlas, amendments to the text of the Zoning Code, community plans, Countywide Comprehensive Plan initiated in whole or part by the County Council, County Departments or Planning Commission are not within the Examiner's jurisdiction.
- b. Appeals of decisions or orders of a County Administrative Official under the Site Development Regulations.
- c. Applications for preliminary and final plats.
- d. Applications for, and major amendments to, Planned Development Districts – PDDs.
- e. Application for Transfer of Development Rights.
- f. Applications for Shoreline Management Substantial Development Permits, Variances, Conditional Use Permits and Nonconforming Use Permits pursuant to the Shoreline Management Use Regulations.
- g. Appeals from any final administrative order or decision related to the administration, interpretation or enforcement of the Pierce County Code.
- h. Appeals contesting the approval or denial of short plats and large lot divisions.
- i. Applications for, and major amendments to, variances, conditional use permits, public facility permits, permits for the alteration, or expansion or replacement of a nonconforming use.
- j. Amendments to plats.
- k. Appeals from the following environmental determinations: Appeals of final and revised threshold determinations; determinations of adequacy of final and supplemental environmental impact statements; and the exercise of SEPA substantive authority to condition or deny actions; PROVIDED, SEPA appeals of legislative actions taken by the Council pursuant to the requirements of the Growth Management Act or Shoreline Management Act shall be appealed to the Central Puget Sound Growth Management Hearings Board and are not within the Examiner's jurisdiction.
- l. Petitions for Plat Vacations, Alterations, Time Extensions, Revocations, Modifications, Reclassifications.

- m. Appeals of Cease and Desist Orders.
 - n. Applications for Youth Cabaret licenses.
 - o. Wetland variances and appeals of any order or decision of the Planning Department under the Pierce County Wetland Management Regulations.
 - p. Reasonable use exceptions and any order or decision of the Planning Department under the Critical Areas and Natural Resource Lands Regulations.
 - q. Applications for a request for removal of development moratorium pursuant to Title 18H, Development Regulations – Forest Practices.
 - r. Appeals of decisions or orders of the Planning Department under Title 18H, Development Regulations – Forest Practices.
 - s. Any other land use matters assigned by the Council to the Examiner.
2. Non Land Use Matters.
- a. Appeals of issuance, denials, revocations, or suspensions of business licenses. (Title 5)
 - b. Appeals of potentially dangerous dog declarations. (6.07)
 - c. Appeals of Notice of Violation and Abatement (Public Nuisances) (8.08)
 - d. Appeals of Notice of Violation and Abatement (Public Nuisance Vehicles). (8.10)
 - e. Appeals of denials of Solid Waste Handling Facility designations. (8.30)
 - f. Referrals from City of Tacoma's Human Rights and Human Services Department regarding complaints alleging violations of Fair Housing Regulations. (8.68)
 - g. Appeals from decisions of County in the administration or enforcement of the Road and Storm Drainage Design and Construction Standards. (Title 17A)
 - h. Appeals from decisions of Public Works Director regarding underground utility installations. (11.22)
 - i. Sewer Assessment Protests. (13.20)
 - j. Appeals from administrative decisions or orders of the Building Official or Fire Marshal regarding the Uniform Construction Codes. (Title 17C)
 - k. Appeals from decisions of the Building and Fire Codes Board of Appeals regarding water mains, fire hydrants, and fire flow standards. (Title 17C)
 - l. Appeals from any final administrative order or decision of the Planning Department in administration, interpretation or enforcement of the Pierce County Code.
 - m. Any other non land use matter assigned by the Council to the Examiner by ordinance.
 - n. Latecomers Agreement appeals (13.10.080)
 - o. Appeals concerning impact fees for parks, schools and roads. (4A)
 - p. Appeals of denials of permits for parades, motorcades, runs and assemblies. (12.44)

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- C. Subpoena Authority. The Examiner shall have the authority to issue subpoenas compelling the appearance of witnesses and the production of documents.
- 1. A subpoena issued by the Hearing Examiner may be served by any person 18 years of age or over, competent to be a witness, but who is not a party to the matter in which the subpoena is issued.
 - 2. Each witness subpoenaed by the Hearing Examiner as a witness shall be allowed the same fees and mileage as provided by law to be paid witnesses in courts of record in Washington State.
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Chapter 18.25

DEFINITIONS

Sections:

- 18.25.010 Purpose.**
- 18.25.020 Applicability.**
- 18.25.030 Definitions.**
- 18.25.040 Acronyms**

18.25.010 Purpose.

The purpose of this Chapter is to provide definitions for the terms used throughout the Title 18 series of Development Regulations. (Ord. 2004-58s § 1 (part), 2004)

18.25.020 Applicability.

The terms defined in this Chapter apply to each Title of Development Regulations, including but not limited to General Provisions, Zoning, Signs, Environmental, Critical Areas, Forest Practices, Natural Resource Lands, Design Standards and Guidelines, Subdivisions and Platting, and Shoreline Management. In certain circumstances, a term may only apply to an individual Title or Chapter. In these cases, see the individual Title or Chapter for that definition. Any inconsistency in definitions between Titles or Chapters shall be resolved in favor of the later adopted definition.

Any word or phrase not listed in this Chapter which is in question when administering the Development Regulations shall be defined from one of the following sources which are incorporated herein by reference. Said sources shall be utilized by finding the desired definition from source number one, but if it is not available there, then source number two may be used, and so on. The sources are as follows:

1. Any statute or regulation of the State of Washington (i.e., the most applicable RCW or WAC);
2. Any term defined from Washington State case law;
3. Other Titles of Pierce County Code;
4. Any other Pierce County resolution, ordinance, or regulations;
5. Black's Law Dictionary; and
6. Webster's Dictionary.
7. Other applicable scientific, technical, or professional manuals.

(Ord. 2004-58s § 1 (part), 2004)

18.25.030 Definitions.

"A zone" means those areas inundated by the 100-year flood (base flood).

"Abbreviated plan" means a plan for small sites to implement temporary best management practices (BMPs) to control pollution generated during the construction phase, primarily erosion, sediment, and post-construction runoff.

"Abutting" means bordering upon, to touch upon, in physical contact with. Sites are considered abutting even though the area of contact may be only a point.

using physical, chemical, or biological processing of hazardous wastes to make such waste non-dangerous or less dangerous and safer for transport, amenable for energy or material resource recovery. Storage includes the holding of waste for a temporary period, but the accumulation of waste on the site of generation as long as the storage complies with applicable requirements of Chapter 173-303 WAC. Hazardous waste treatment, storage, and recycling facility includes both onsite and offsite treatment, storage and recycling facilities. (1) "Onsite treatment, storage, and recycling facility" means an accessory facility that treats, stores, or recycles hazardous waste generated or handled on the same geographically contiguous property. (2) "Offsite treatment, storage, and recycling facility" means a facility that treats, stores, or recycles hazardous waste generated on property other than those on which the offsite facility is located.

"Hazardous waste" means and includes all dangerous waste and extremely hazardous waste, including substances composed of both radioactive and hazardous components, as designated pursuant to Chapter 70.105 RCW and Chapter 173-303 WAC.

"Head scarp" means the steep, cliff-like, landform defining the upslope termination of a landslide.

"Health Department" means the Tacoma-Pierce County Health Department.

"Hearing Examiner" means the Pierce County Hearing Examiner as established in Chapter 1.22 PCC. The Hearing Examiner may also be referred to as the "Examiner."

"Hearing Examiner review" means a quasi-judicial decision making process involving the judgment and discretion of the Examiner when applying specific decision criteria and other requirements unique to a particular use in the approval of an activity permitted, or permitted conditionally, within a zone.

"High capacity transit" means any transit technology that operates on separate right-of-way and functions to move large numbers of passengers at high speeds, e.g., busway, light rail, commuter rail, etc.

"High Density Residential District" land use designation means concentrations of high density residential uses along major arterials, state highways and major transit routes that connect to Major Urban, Activity, Community or Employment Centers. High Density Residential Districts are composed of multi-family and high density single-family and two-family housing and limited neighborhood retail and service commercial uses.

"High Occupancy Vehicle (HOV)" means a vehicle containing more than a single occupant such as an automobile with several passengers (carpool), a bus, vanpool, or a train. An HOV lane is a road lane dedicated for use by High Occupancy Vehicles and transit vehicles only. It is also known as a "diamond" or carpool lane.

"Highways" refers to any controlled access roadway.

"Hobby farm" means non-commercial agricultural activities, including the raising of farm animals and placement of associated farm structures, established on a lot with or without a principal dwelling unit.

Chapter 18.60

REVIEW PROCESS

Sections:

- 18.60.010** **Initiation of Review Process.**
- 18.60.020** **Initial Review.**
- 18.60.030** **Additional Information.**
- 18.60.040** **Combined Hearings.**
- 18.60.050** **Right of Entry Agreement.**
- 18.60.060** **Appendices.**

18.60.010 **Initiation of Review Process.**

The Department shall not commence the review process of any application until the application is deemed to be complete. (Ord. 96-19S § 1 (part), 1996)

18.60.020 **Initial Review.**

- A. All reviewing departments shall complete an initial review within 30 days from the application filing date for applications which require a public hearing process as set forth in Title 18A and Chapter 1.22, Pierce County Code.
- B. All reviewing departments shall complete an initial review within 60 days from the application filing date for applications which do not involve a public hearing process.
- C. After completion of the initial review, any department request for additional information, plan correction or studies shall be outlined in a written notice and mailed to the applicant. Such notice shall also contain applicable time limits for the applicant to resubmit requested material to the Department.

(Ord. 97-84 § 1 (part), 1997; Ord. 96-19S § 1 (part), 1996)

18.60.030 **Additional Information.**

- A. Acceptance of a complete application shall not preclude the Department or Examiner from requiring additional information or studies at a later date during the review process, if new information is disclosed or substantial changes in the proposed action occur.
- B. In the interest of public health, safety, or welfare or to meet the requirements of the State Environmental Policy Act or other Local or State requirements, a department may request additional application information including, but not limited to: wetland reports, geotechnical studies, hydrologic studies, noise studies, air quality studies, visual analysis, and transportation impact studies.
- C. The application shall be deemed null and void if the applicant fails to submit additional information within 180 days of the Department's or Hearing Examiner's request, unless the applicant has been granted a time period extension. The applicant shall be granted a 180-day extension if:
 - 1. The applicant requests such an extension in writing prior to the expiration of the initial 180-day time period; and
 - 2. The Director or Hearing Examiner finds that unusual circumstances beyond the applicant's control have prevented them from providing the additional information within the initial 180-day time period. Only one extension may be granted.

(Ord. 96-19S § 1 (part), 1996)

Chapter 18.100

TIME PERIOD FOR FINAL DECISION

Sections:

- 18.100.010 Notice of Final Decision.**
- 18.100.020 Exclusion to Time Periods.**
- 18.100.030 Failure to Meet Time Periods.**
- 18.100.040 Time Computations.**

18.100.010 Notice of Final Decision.

The Director or Examiner shall issue a notice of final decision on a permit within 120 days, of County review time, after the Department accepts a complete application as provided in Section 18.40.020 above. (Ord. 96-19S § 1 (part), 1996)

18.100.020 Exclusions to Time Periods.

The 120-day time period established in Section 18.100.010 above shall not apply in the following situations:

- A. Any period during which the applicant has been requested by the Department to correct plans, perform required studies, or provide additional information. This period of time shall be calculated from the date the Department or Examiner notifies the applicant of the need for additional information until the Department or Examiner notifies the applicant that the additional information satisfies the request or 14 days after the last required submittal of the information, whichever is earlier;
- B. Any period during which an EIS is being prepared in accordance with time periods set forth in Title 18D, Development Regulations – Environmental, including any time period for appeal of an Administrative Official's Determination of Significance;
- C. Any period for appeals of administrative decisions, as set forth in Chapter 1.22, Pierce County Code;
- D. Any extension of time mutually agreed upon in writing between the applicant and the Department;
- E. If the permit requires approval of a New Fully Contained Community, Master Planned Resort, or Master Planned Community, (refer to Section 18A.75.050, Planned Development District, for time limitations); or
- F. Any period during which a Landmark designation, street vacation, or other approval relating to the use of public areas or facilities is being considered.

(Ord. 96-19S § 1 (part), 1996)

18.100.030 Failure to Meet Time Period.

If the Director or Examiner is unable to issue a notice of final decision within the 120 days, as prescribed in 18.100.010 above, then a written notice of this fact shall be provided to the applicant together with a statement of reasons why the time limits have not been met and an estimated date for issuance of the notice of final decision. The Department and/or County shall not be liable for damages under this Section if the notice of final decision is not issued within 120 days. (Ord. 96-19S § 1 (part), 1996)