

66325-9

66325-9

Case No. 66325-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SCOTT C. HOPPER,

Appellant/Plaintiff

vs.

SNOHOMISH COUNTY,

Respondent/Defendant

SNOHOMISH COUNTY'S RESPONSE BRIEF

MARK K. ROE

Snohomish County Prosecuting Attorney

Robert Tad Seder, WSBA #14521

Bree Urban, WSBA #33194

Deputy Prosecuting Attorneys

Robert J. Drewel Bldg., 8th Floor, M/S 504

3000 Rockefeller Avenue

Everett, Washington 98201-4046

(425)388-6330 Fax: (425)388-6333

tseder@snoco.org

burban@snoco.org

2011.11.13
11:11:13 AM
3

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	v
I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	2
A. Hopper’s Grading Permit Application.....	3
1. Hopper Submitted Grading Permit Application to PDS	3
2. PDS Requested a Critical Areas Study	4
3. Hopper Submitted Critical Area Study to PDS.....	4
4. PDS Denied Hopper’s Grading Permit Application	4
5. LUPA Appeal Period Expired	5
B. Hopper’s Administrative Appeal of Permit Fees.....	5
1. Hopper Appealed Permit Fees to PDS Director	5
2. Acting PDS Director Larry Adamson Failed to Timely Respond to Permit Fee Appeal	6
3. Barbara Mock Became Acting PDS Director	6
4. Hopper Appealed Permit Fees to Hearing Examiner.....	7
5. Acting PDS Director Mock Granted Hopper’s Administrative Appeal	7
6. Hopper Refused to Accept Permit Fee Refund.....	8
7. Hopper Attempted to Appeal Mock’s SCC 30.86.011 Decision to the Hearing Examiner.....	8
8. Hopper’s Counsel Refused to Accept Permit Fee Refund	9
9. Hearing Examiner Dismissed Hopper’s Permit Fee Appeal	9
10. Clay White Became Director of PDS	10

11.	PDS Director White Refunded Hopper’s Critical Area Study Review Fees.....	10
C.	Hopper’s Judicial Appeal of Permit Fees	11
1.	Hopper Appealed Permit Fees to Superior Court	11
2.	The County Moved to Dismiss Hopper’s Lawsuit	11
3.	Hopper Filed a Second Complaint and the Two Lawsuits Were Consolidated	12
4.	Hopper Sought to Conduct Significant, Substantive Discovery	12
5.	Discovery Regarding the Merits of Hopper’s Claims Was Stayed Pending the Resolution of the County’s Dispositive Motion.....	13
6.	Parties Stipulated to Dismissal of Hopper’s LUPA Claims	13
7.	County Filed Updated Motion to Dismiss	13
8.	Hopper Moved for Class Certification.....	14
9.	Hopper’s Response Correctly Noted that the County’s Motion to Dismiss Should Be Treated as a Motion for Summary Judgment.....	14
10.	County Replied to Hopper’s Response	14
11.	October 22, 2010, Hearing on the County’s Dispositive Motion.....	14
12.	Hopper Conducted Discovery Related to the County’s Dispositive Motion.....	15
13.	Supplemental Pleadings Filed.....	16
14.	Judge Rogers Granted Summary Judgment to the County.....	16
III.	ARGUMENT.....	16
A.	Standard of Review	16

B.	This Court Should Affirm Judge Rogers’s Decision Granting Summary Judgment to the County	17
1.	Judge Rogers Properly Granted the County’s Motion for Summary Judgment Because Hopper Lacked Standing to Bring His Case.....	18
2.	Judge Rogers Properly Granted the County’s Motion for Summary Judgment Because Hopper’s Claims Had Become Moot.	20
3.	No Exception to the Mootness Doctrine Applies to This Case.....	22
a.	Hopper’s Grading Permit Application is Not “Ongoing”	22
b.	Washington’s Exception for “Matters of Continuing and Substantial Public Interest” Does Not Apply	23
c.	The Federal Court Exception for Matters “Capable of Repetition, Yet Evading Review” Does Not Apply	27
C.	It Is Not True That No One Can Ever Challenge the Legality of the County’s Permit Fee System.	32
1.	There Is No Conspiracy to Deprive Citizens of Standing..	32
2.	A Taxpayer Derivative Suit Is Always Available To Challenge the Legality of Governmental Action.....	34
D.	There Is Nothing Improper or Illegal About SCC 30.86.011 or SCC 30.86.015(5)(a).....	36
1.	SCC 30.86.011 Does Not Conflict With RCW 82.02.020	36
2.	SCC 30.86.011 Does Not Violate Due Process	37
3.	SCC 30.86.011 Does Not Violate the Constitutional Prohibition Against Gifting Public Funds.	43

4. SCC 30.86.015(5)(a) is Legal and Reasonable..... 46

E. The Hearing Examiner Acted Properly..... 46

IV. CONCLUSION..... 48

V. STATUTORY COSTS AND ATTORNEYS' FEES 49

DECLARATION OF SERVICE 50

APPENDICES 51

TABLE OF AUTHORITIES

<u>Washington Cases:</u>	<u>Page(s)</u>
<u>Anderson v. O'Brien</u> 84 Wn.2d 64, 524 P.2d 390 (1974).....	44
<u>Brown v. City of Yakima</u> 116 Wn.2d 556, 807 P.2d 353 (1991).....	36
<u>Burnet v. Spokane Ambulance</u> 131 Wn.2d 484, 933 P.2d 1036 (1997).....	17
<u>Calvary Bible Presb. Church of Seattle v. Board of Regents</u> 72 Wn.2d 912, 436 P.2d 189 (1967).....	35
<u>City of Bellevue v. Lee</u> 166 Wn.2d 581, 210 P.3d 1011 (2009).....	38, 40-42
<u>City of Marysville v. State</u> 101 Wn.2d 50, 676 P.2d 989 (1984).....	44
<u>City of Pasco v. Shaw</u> 161 Wn.2d 450, 166 P.3d 1157 (2007).....	38, 43
<u>City of Tacoma v. Taxpayers of Tacoma</u> 108 Wn.2d 697, 743 P.2d 793 (1987).....	44
<u>CLEAN v. State</u> 130 Wn.2d 782, 928 P.2d 1054 (1997).....	43, 44
<u>Drinkwitz v. Alliant Techsystems, Inc.</u> 140 Wn.2d 291, 996 P.2d 582 (2000).....	
<u>Erection Co. v. Department of Labor and Industries of State of Wash.</u> 65 Wn. App. 467, 828 P.2d 657 (1992).....	19
<u>Franzen v. Board of Natural Resources</u> 66 Wn.2d 672, 404 P.2d 432 (1965).....	35

<u>Greater Harbor 2000 v. City of Seattle</u> 132 Wn.2d 267, 937 P.2d 1082 (1997).....	18
<u>Hart v. Department of Social and Health Services</u> 111 Wn.2d 445, 759 P.2d 1206 (1988).....	23, 24, 29
<u>Hudson v. City of Wenatchee</u> 94 Wn. App. 990, 974 P.2d 342 (1999).....	44
<u>In re Marriage of Horner</u> 151 Wn.2d 884, 93 P.3d 124 (2004).....	23, 27
<u>In re Marriage of Irwin</u> 64 Wn. App. 38, 822 P.2d 797 (1992).....	21
<u>King County v. Taxpayers of King County</u> 133 Wn.2d 584, 949 P.2d 1260 (1997).....	44
<u>Nguyen v. State, Department of Health Medical Quality Assurance Commission</u> 144 Wn.2d 516, 29 P.3d 689 (2001).....	37, 39
<u>Orwick v. City of Seattle</u> 103 Wn.2d 249, 692 P.2d 793 (1984).....	21, 23-26
<u>Owen v. Burlington Northern and Santa Fe R.R. Co.</u> 153 Wn.2d 780, 108 P.3d 1220 (2005).....	17
<u>Pentagram Corp. v. City of Seattle</u> 28 Wn. App. 219, 622 P.2d 892 (1981).....	21
<u>Rabon v. City of Seattle</u> 135 Wn.2d 278, 957 P.2d 621 (1998).....	36
<u>City of Redmond v. Moore</u> 151 Wn.2d 664, 91 P.3d 875 (2004).....	41
<u>Robinson v. City of Seattle</u> 102 Wn. App. 795, 10 P.3d 452 (2000).....	35

<u>Rosling v. Seattle Bldg. and Const. Trades Council</u> 62 Wn.2d 905, 385 P.2d 29 (1963).....	20
<u>State ex rel. Boyles v. Whatcom County Superior Court</u> 103 Wn.2d 610, 694 P.2d 27 (1985).....	35
<u>State ex rel. Chapman v. Superior Court for Benton County</u> 15 Wn.2d 637, 131 P.2d 958 (1942).....	20
<u>State v. Link</u> 136 Wn. App. 685, 150 P.3d 610 (2007).....	18
<u>State v. Valencia</u> 169 Wn.2d 782, 791-93, 239 P.3d 1059 (2010).....	38, 43
<u>Stevens v. Brink’s Home Security, Inc.</u> 162 Wn.2d 42, 169 P.3d 473 (2007).....	17
<u>Tacoma v. O’Brien</u> 85 Wn.2d 266, 534 P.2d 114 (1975).....	35
<u>United States v. Town of North Bonneville</u> 94 Wn.2d 827, 621 P.2d 127 (1980).....	44
<u>Vallandigham v. Clover Park School Dist. No. 400</u> 154 Wn.2d 16, 109 P.3d 805 (2005).....	17
<u>Walker v. Monro</u> 124 Wn.2d 402, 879 P.2d 920 (1994).....	18
<u>Washington Education Ass’n v. Shelton School Dist. No. 309</u> 93 Wn.2d 783, 613 P.2d 769 (1980).....	19
<u>Washington Public Trust Advocates v. City of Spokane</u> 117 Wn. App. 178, 69 P.2d 351 (2003).....	35
<u>Westerman v. Cary</u> 125 Wn.2d 277, 892 P.2d 1067 (1994).....	23

Federal Cases:

Carver v. Lehman
558 F.3d 869 (9th Cir. 2009) 39, 40

Knudson v. City of Ellensburg
832 F.2d 1142 (9th Cir. 1987) 39

Mathews v. Eldridge
424 U.S. 319, 96 S.Ct. 893 (1975)..... 39

Morrissey v. Brewer
408 U.S. 471, 92 S.Ct. 2593 (1972)..... 39

Murphy v. Hunt
455 U.S. 478, 102 S.Ct. 1181 (1982)..... 29

O’Shea v. Littleton
414 U.S. 488, 94 S.Ct. 669 (1974)..... 29

Super Tire Engineering Co. v. McCorkle
416 U.S. 115, 94 S.Ct. 347 (1974)..... 31, 32

Weinstein v. Bradford
423 U.S. 147, 96 S.Ct. 347 (1975)..... 27, 29, 30

Statutes:

RCW 4.84.010 49

RCW 4.84.080 49

RCW 36.32.120(7)..... 36

Chapter 36.70C RCW 5

RCW 36.70C.040..... 5

RCW 82.02.020 6, 7, 11, 36, 37, 43

Court Rules

CR 12(b)..... 14, 25

CR 30(b)(6)..... 12

CR 56	14
RAP 18.1.....	49

Snohomish County Code (SCC):

SCC 2.02.122.....	47
SCC 2.02.125(7)	47, 48
SCC 30.41A.300.....	28
SCC 30.52F.178(1)	28
Chapter 30.62A SCC	4
SCC 30.62A.310(3)	5
SCC 30.62A.320(2)	5
SCC 30.63B.280	28
SCC 30.71.060.....	9, 47, 48
SCC 30.86.011	5-10, 17, 19, 21, 33, 36-41, 43, 45, 48
SCC 30.86.015(5)(a).....	10, 36, 46

Other Citations:

20 Am. Jur. 2d Courts § 43 (2010)	19, 21
59 Am. Jur. 2d Parties § 34 (2010).....	18, 19
Black’s Law Dictionary (8 th ed. 2004).....	18
1A C.J.S. Actions § 74 (2010)	21
27 C.J.S. Dismissal and Nonsuit § 62 (2010)	19
67A C.J.S. Parties § 12 (2010).....	18
Wash. Const. art. VIII, § 5	44
Wash. Const. art. VIII, § 7	43
Wash. Const. art. XI, § 11.....	36
U.S. Const. amend. V.....	37
U.S. Const. amend. XIV § 1	37, 39

I. INTRODUCTION

In this case, Plaintiff Scott Hopper (“Hopper”) seeks to represent a class of persons who have allegedly been harmed by Defendant Snohomish County’s (the “County”) development permit fee schedule. The County moved to dismiss Hopper’s lawsuit on two interrelated jurisdictional grounds: (i) lack of standing, and (ii) mootness.

Judge Jim Rogers of the King County Superior Court (“Judge Rogers”) granted summary judgment to the County. Judge Rogers found that Hopper lacked standing to bring his moot claims. Judge Rogers ruled that even when viewing all the facts in the light most favorable to Hopper, no reasonable person could conclude that Hopper had been injured by the County’s development permit fee system. Because Hopper had suffered no injury, Judge Rogers reasoned that Hopper had no standing to sue the County. Hopper appeals Judge Rogers’s decision to this Court.

Hopper’s opening brief deals only tangentially with the propriety of Judge Rogers’s ruling. Instead, Hopper spends the majority of his opening brief on ancillary arguments. For instance, Hopper (i) attacks the legality of the County’s administrative permit fee appeal provision, (ii) accuses the County of nefariously conspiring to prevent both him and anyone else from ever having standing to challenge the legality of the

County's permit fees, and (iii) argues that because his development activity is ongoing, his case cannot be moot. Hopper's ancillary arguments are both fallacious and irrelevant, as will be discussed in greater detail in Section III of this response brief. Notwithstanding Hopper's extraneous allegations, this case is actually extremely simple. The determinative fact in this case is that Hopper has not been injured. The determinative legal principle in this case is that one who has suffered no injury lacks standing to sue. Judge Rogers's decision was correct and should be affirmed by this Court.

II. STATEMENT OF THE CASE

This lawsuit involves a somewhat confusing array of procedural facts, which are set forth in detail below. Nevertheless, both the facts and the legal issues in this case can be succinctly summarized as follows: Hopper seeks to represent a class of persons who have paid development permit fees to the County. He desires to challenge the County's development permit fee schedule as being illegal and unconstitutional. However, Hopper does not have standing to raise these issues because he has not been injured by the County's permit fee schedule. Hopper's claims are moot because the County's Department of Planning and Development Services ("PDS") granted his administrative fee appeal. Because Hopper has not been injured, Hopper has no standing to sue.

Accordingly, Judge Rogers properly granted summary judgment to the County.

A. Hopper's Grading Permit Application.

1. Hopper Submitted Grading Permit Application to PDS.

On May 26, 2010, Hopper submitted to PDS an application for a grading permit (the "Grading Permit Application"). CP 0428 & 0432-33.¹ Hopper's Grading Permit Application requested authorization to perform grading on an undeveloped parcel of land owned by a California company. CP 0428, 0432-33, 0400-01 & 0403-13.

At the time Hopper submitted the Grading Permit Application, PDS staff informed Hopper that the documents Hopper was submitting did not constitute a complete Grading Permit Application because a "Critical Area Study" of the property was needed as well. CP 0433, 1214-15 & 1218-19. Hopper insisted that PDS accept the Grading Permit Application notwithstanding the lack of a Critical Area Study. CP 0433 & 1218-19.

Hopper was assessed and paid \$459.24 in permit application fees when he submitted the Grading Permit Application. CP 0428, 0434-35. Hopper paid the \$459.24 in permit fees by check, on which he wrote "paid under protest." CP 0085-86.

¹ Throughout this response brief, the abbreviation "CP" refers to "Clerk's Papers." The abbreviation "SCP" refers to "Supplemental Clerk's Papers." The abbreviation "RP" refers to "Report of Proceedings."

2. PDS Requested a Critical Areas Study.

On June 9, 2010, PDS staff sent Hopper a letter formally notifying him that because the property at issue in the Grading Permit Application contained a stream, Hopper needed to submit a Critical Area Study of the property in order for PDS to continue processing the Grading Permit Application. CP 0960-64. The June 9, 2010, letter notified Hopper that he would need to pay approximately \$720 in additional permit application review fees in connection with the Critical Area Study. CP 0963.

3. Hopper Submitted Critical Area Study to PDS.

On October 8, 2010, nearly four months after receiving PDS's notification letter, Hopper submitted the Critical Area Study that was a necessary component of his Grading Permit Application. CP 0745. In connection with the submission of that Critical Area Study, Hopper was assessed and paid additional permit application review fees in the amount of \$741.60. He paid \$720.00 of those fees by check on which he wrote "paid under protest." CP 0770-71. He paid the remaining \$21.60 of the fees in cash. CP 0770-71.

4. PDS Denied Hopper's Grading Permit Application.

On January 13, 2010, PDS issued a final decision denying Hopper's Grading Permit Application for failure to meet the requirements of the County's critical areas regulations, contained in chapter 30.62A of

the Snohomish County Code (the “SCC” or the “County Code”). SCP 1650-52. As explained in the January 13, 2010, denial letter, Hopper’s Grading Permit Application requested authorization to perform grading within a stream buffer. SCP 1651. SCC 30.62A.320(2) and SCC 30.62A.310(3) prohibit grading within a stream buffer. SCP 1651. The January 13, 2010, denial letter notified Hopper that he could appeal the denial of his Grading Permit Application to Superior Court under the Land Use Petition Act, chapter 36.70C RCW (“LUPA”). SCP 1652.

5. LUPA Appeal Period Expired.

LUPA imposes a mandatory 21-day filing deadline on appeals of land use decisions. RCW 36.70C.040(3). Accordingly, the filing deadline for any appeal of PDS’s January 13, 2011, decision denying Hopper’s Grading Permit Application was February 3, 2011. Hopper did not appeal the decision.

B. Hopper’s Administrative Appeal of Permit Fees.

1. Hopper Appealed Permit Fees to PDS Director.

On June 1, 2010, less than a week after Hopper submitted the Grading Permit Application to the County, Hopper sent a letter to the Acting Director of PDS pursuant to SCC 30.86.011 disputing the amount of permit application fees charged in connection with the Grading Permit Application. CP 0428-29 & 0436-38. Hopper’s dispute letter contended,

among other thing, that the fees he had been assessed for the Grading Permit Application were excessive and violated RCW 82.02.020. CP 0088-89. Hopper's letter asked PDS to refund to him an unspecified amount of money constituting the allegedly excessive and illegal portion of the permit application fees he paid with respect to the Grading Permit Application. CP 0089.

The section of the County Code authorizing Hopper's administrative appeal, SCC 30.86.011, took effect on January 1, 2009. CP 0579-80. Hopper's June 1, 2010, appeal under SCC 30.86.011 was the first time anyone had invoked that permit fee dispute provision. CP 0431.

2. Acting PDS Director Larry Adamson Failed to Timely Respond to Permit Fee Appeal.

At the time PDS received Hopper's permit fee appeal letter, the Acting Director of PDS was Larry Adamson ("Adamson"). CP 0429, 1173 & 1182-83. SCC 30.86.011 requires the PDS Director to respond to a permit fee appeal within 30 days. CP 0579-80. Adamson retired at the end of June 2010, without addressing Hopper's permit fee appeal. CP 0429.

3. Barbara Mock Became Acting PDS Director.

On July 1, 2010, a new Acting Director, Barbara Mock ("Mock"), assumed temporary leadership of PDS. CP 0429 & 1183.

4. Hopper Appealed Permit Fees to Hearing Examiner.

On July 7, 2010, alleging that the failure of PDS to timely respond to his June 1, 2010, letter constituted a denial of his administrative permit fee appeal, Hopper filed pleadings with the Office of the Snohomish County Hearing Examiner (the “Hearing Examiner”) captioned “Appeal of PDS Director’s Final Decision – SCC 30.86.011.”² CP 0090-91. Hopper paid a \$500 filing fee to the County in connection with this appeal. CP 0401-02, 0414-19 & 1199.

Hopper’s appeal documents alleged, among other things, that the permit fees he had been assessed for the Grading Permit Application were excessive, unconstitutional, and violated RCW 82.02.020. CP 0090-0106. Hopper’s appeal documents also stated that he did not believe the Hearing Examiner had jurisdiction to hear his appeal, and that he was filing the appeal in an abundance of caution to make sure he properly exhausted his administrative remedies. CP 0090-92. Hopper’s pleadings asked the Hearing Examiner to dismiss his appeal. CP 0104 & 0673.

5. Acting PDS Director Mock Granted Hopper’s Administrative Appeal.

Soon after assuming temporary leadership of PDS, Mock became aware that Hopper’s administrative fee appeal had not been addressed by

² Note, on this same day, July 7, 2010, Hopper filed his first complaint with the King County Superior Court. See Section III.C.1 of this response brief.

Adamson within the 30 day time period specified by SCC 30.86.011. CP 1191. Although the County Code requires PDS to respond to an administrative fee appeal within 30 days, the County Code does not specify what the consequence of failing to meet that deadline should be. Mock decided that because the County had not met the deadline imposed by the County Code, she would grant Hopper's appeal and refund the \$459.24 in permit application fees that Hopper had paid. CP 1190-91, 1203 & 1228-30. On July 13, 2010, Mock sent Hopper a letter to that effect, together with a refund check. CP 0429-30 & 0440-47.

6. Hopper Refused to Accept Permit Fee Refund.

By letter dated July 16, 2010, Hopper refused to accept the refund check Mock sent him, stating "I am returning the check and will pursue my court action to obtain the relief to which the putative class and I are entitled." CP 0430 & 0448-51.

7. Hopper Attempted to Appeal Mock's SCC 30.86.011 Decision to the Hearing Examiner.

On July 19, 2010, one of Hopper's attorneys, Bill Williamson ("Williamson"), attempted to file an appeal of Mock's decision with the Hearing Examiner. CP 0430. County staff refused to accept the tendered appeal documents and filing fee on the grounds that the County Code does not provide for an appeal to the Hearing Examiner of a decision issued under SCC 30.86.011. CP 0430 & 0452-54.

8. Hopper's Counsel Refused to Accept Permit Fee Refund.

Also on July, 19, 2010, while Williamson was attempting to file an appeal of Mock's decision with the Hearing Examiner, PDS staff offered Williamson the \$459.24 permit fee refund check Hopper had returned to Mock. CP 0430. Williamson refused to accept the refund check. CP 0430. The County subsequently deposited the \$459.24 into the registry of the King County Superior Court. CP 0402 & 0424-26.

9. Hearing Examiner Dismissed Hopper's Permit Fee Appeal.

By orders dated July 15, 2010, and July 21, 2010,³ the Hearing Examiner dismissed Hopper's "Appeal of PDS Director's Final Decision – SCC 30.86.011" pursuant to SCC 30.71.060. CP 0970-72. The Hearing Examiner's order of dismissal noted that "on July 13, 2010, the Acting Director of PDS granted your appeal pursuant to SCC 30.86.011." CP 0970-72. The Hearing Examiner concluded that "there is no dispute for this office to review," and dismissed the matter. CP 0970-72.

On July 23, 2010, PDS sent Hopper a refund of the \$500 filing fee he had paid in connection with his appeal to the Hearing Examiner. CP 0401, 0417-21 & 1199-1200. That refund check was cashed on July 28, 2010. CP 0402 & 0422-23.

³ The existence of two orders is apparently the result of a clerical error. Although the formatting of the text differs, the two orders are identical in substance. The July 15, 2010, order contains an electronic signature, while the July 21, 2010, order contains the actual, physical signature of the Hearing Examiner. CP 0961 & 0970-72.

10. Clay White Became Director of PDS.

On September 1, 2010, Clay White (“White”) became the new permanent Director of PDS, replacing Acting Director Mock. CP 0431.

11. PDS Director White Refunded Hopper’s Critical Area Study Review Fees.

When PDS Director White became aware that Hopper had been charged additional permit review fees for the Critical Area Study required as a part of Hopper’s Grading Permit Application, White refunded those fees to Hopper pursuant to SCC 30.86.015(5)(a). CP 0961 & 0967-69. SCC 30.86.015(5)(a) authorizes the Director of PDS to refund in full any permit application fees collected in error. CP 0580. White’s October 20, 2010, refund letter to Hopper explained that because Acting PDS Director Mock had granted Hopper’s SCC 30.86.011 appeal of fees related to the Grading Permit Application on July 13, 2010, PDS should not have collected any additional fees related to the Grading Permit Application. CP 0967. Accordingly, White reasoned that the \$741.60 in permit fees PDS collected from Hopper when he submitted the Critical Area Study was collected in error. White’s refund letter apologized for the mistake, and included a refund check in the amount of \$741.60. CP 0967-69.

C. Hopper's Judicial Appeal of Permit Fees.

1. Hopper Appealed Permit Fees to Superior Court.

On July 7, 2010, the same day Hopper filed his permit fee appeal with the Hearing Examiner, he also filed a complaint with the King County Superior Court captioned "LUPA Appeal & Complaint for Declaratory and Writ Relief and Just Compensation Including Disgorgement (Class Action)."⁴ CP 0059-79. Hopper's complaint stated that he was acting "for himself, and in a representative capacity on behalf of all others similarly situated." CP 0059 & 0113. Hopper described the class of persons he purported to represent as "similarly situated owners and applicants for development projects in Snohomish County." CP 0064 & 0119. The complaint alleged, among other things, that the fees collected by the County in connection with Hopper's Grading Permit Application were excessive, unconstitutional and violated RCW 82.02.020. CP 0066-67 & 0122-23.

2. The County Moved to Dismiss Hopper's Lawsuit.

On July 23, 2010, the County filed a motion to dismiss Hopper's lawsuit for lack of standing and mootness. CP 0275-87. Oral argument on the County's dispositive motion was scheduled for October 22, 2010, which was the first date available on Judge Rogers's calendar. CP 0355.

⁴ Hopper filed an amended complaint on July 20, 2010. CP 0113-35. The two documents allege substantially the same facts and causes of action.

3. Hopper Filed a Second Complaint and the Two Lawsuits Were Consolidated.

On July 29, 2010, Hopper filed a second lawsuit with the King County Superior Court. CP 0001-23 & 0679. Hopper's second lawsuit alleged substantially the same causes of action as Hopper's first lawsuit. SCP 1453-59. The two actions were subsequently consolidated. CP 0341-43.

4. Hopper Sought to Conduct Significant, Substantive Discovery.

On August 10, 2010, the County received from Hopper: (i) a Notice of Deposition requesting the County to produce, on September 15, 2010, one or more CR 30(b)(6) witnesses to answer myriad detailed questions regarding the County's development permit fees and accounting practices related thereto; and (ii) a Subpoena Duces Tecum requesting the County to produce, at the CR 30(b)(6) deposition, a broad range of documents and records regarding the County's development permit fees and accounting practices related thereto. CP 0355-56 & 0375-81.

The requested discovery related exclusively to the merits of Hopper's substantive claims rather than to the jurisdictional issues of standing and mootness raised in the County's dispositive motion. CP 0377-81. As the County's jurisdictional motion was already pending with Judge Rogers, the County believed discovery regarding the merits of

Hopper's substantive claims was premature and should be stayed until after Judge Rogers could hear and rule on the County's dispositive motion.

The County moved for a protective order to that effect. CP 0344-53.

5. Discovery Regarding the Merits of Hopper's Claims Was Stayed Pending the Resolution of the County's Dispositive Motion.

By stipulated order dated September 13, 2010, Hopper agreed to withdraw his pending discovery requests until after Judge Rogers's decision regarding the County's dispositive motion. In exchange, the County agreed to withdraw its motion for a protective order. CP 0384-86.

6. Parties Stipulated to Dismissal of Hopper's LUPA Claims.

Also in the September 13, 2010, stipulated order, the parties stipulated to the dismissal of Hopper's LUPA claims, agreeing that Hopper's consolidated lawsuit did not involve any "land use decisions," as that term is defined by LUPA. CP 0384-86.

7. County Filed Updated Motion to Dismiss.

On September 24, 2010, the County filed an updated motion to dismiss. CP 0387-99. The updated motion differed from the County's original, July 23, 2010, motion only in that the County (i) added facts that had occurred during the interim, and (ii) deleted argument regarding Hopper's LUPA claims, since those claims had been dismissed by agreed order. CP 0275-87.

8. Hopper Moved for Class Certification.

On October 13, 2010, Hopper filed a motion for class certification. SCP 1539-90. Hopper attempted to combine the hearing on his motion for class certification with the hearing on the County's dispositive motion. CP 1539. However, Judge Rogers had no additional time available on his calendar for the morning of October 22, 2010, and Hopper's class certification motion was instead scheduled for hearing on a later date.

9. Hopper's Response Correctly Noted that the County's Motion to Dismiss Should Be Treated as a Motion for Summary Judgment.

Hopper filed a response to the County's motion on October 18, 2010. CP 0670-94. In his response, Hopper correctly noted that because both parties had filed declarations and other materials outside the pleadings, the County's CR 12(b) motion to dismiss had been converted into a CR 56 motion for summary judgment. CP 0670-71, 0681-82 & 0955; RP 10.

10. County Replied to Hopper's Response.

On October 20, 2010, the County filed a reply to Hopper's response to the County's dispositive motion. CP 0952-59.

11. October 22, 2010, Hearing on the County's Dispositive Motion.

At the October 22, 2010, hearing on the County's motion for summary judgment, Hopper complained that he had not had an

opportunity to conduct discovery regarding the issues raised in the County's motion. RP 11-17. Judge Rogers agreed to delay ruling on the County's motion until after Hopper conducted limited discovery, including the taking of depositions, regarding the jurisdictional issues of standing and mootness raised by the County's motion. RP 20-22. Judge Rogers established a timeline pursuant to which (i) Hopper would submit a discovery request to the County, (ii) the County could object to the request, and (iii) Judge Rogers would issue a ruling regarding same. RP 33-36; CP 1113-14.

12. Hopper Conducted Discovery Related to the County's Dispositive Motion.

Pursuant to Judge Rogers's order, Hopper submitted a discovery proposal to the County. SCP 1657-63. The County filed objections to Hopper's proposal. CP 1115-37. Hopper filed a response to the County's objections. CP 1138-48. Judge Rogers issued an order resolving the discovery dispute on October 29, 2010. CP 1151-52.

The only individual Hopper asked to depose was Mock. SCP 1657-63. In accordance with Judge Rogers's October 22, 2010, and October 29, 2010, discovery orders, the parties scheduled Mock's deposition for November 3, 2010. CP 1168. The County brought to Mock's deposition the documents and records requested by Hopper and

sustained by Judge Rogers's October 29, 2010, discovery order. CP 1198, 1249-52 & 1255.

13. Supplemental Pleadings Filed.

After conducting his requested discovery, Hopper filed a supplemental pleading, which included the entire transcript of Mock's deposition. CP 1153-64. The County also filed a supplemental pleading. CP 1267-79.

14. Judge Rogers Granted Summary Judgment to the County.

Judge Rogers made an oral ruling in the presence of the parties on November 5, 2010. RP 39-49; CP 1370-79. His written decision was entered on November 12, 2010. CP 1281-86. Hopper moved for reconsideration. CP 1349-60. Judge Rogers denied Hopper's motion for reconsideration without calling for a response. CP 1342-43. This appeal followed.

III. ARGUMENT

A. Standard of Review.

Hopper asks this Court to reverse Judge Rogers's decision granting summary judgment to the County. "When reviewing an order granting summary judgment, an appellate court reviews the matter de novo by engaging in the same inquiry as the trial court."⁵ "Summary judgment is

⁵ Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 295, 996 P.2d 582 (2000).

proper if the record before the trial court establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”⁶ All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party.⁷ “[S]ummary judgment is granted only if, from all of the evidence, reasonable persons could reach but one conclusion.”⁸ An appellate court may sustain a trial court’s decision on any theory established by the pleadings and supported by the record, even if the trial court did not consider it.⁹

B. This Court Should Affirm Judge Rogers’s Decision Granting Summary Judgment to the County.

This Court should affirm Judge Rogers’s decision granting summary judgment to the County. While the procedural facts in this lawsuit may at first appear confusing or complex, once those facts have been digested, reasonable minds can reach but one conclusion: Hopper lacks standing to bring this action because he has suffered no injury related to the County’s permit fee structure. Any claim Hopper might otherwise have had was rendered moot when Mock granted Hopper’s administrative fee appeal pursuant to SCC 30.86.011. Contrary to

⁶ Owen v. Burlington Northern and Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

⁷ Stevens v. Brink’s Home Security, Inc., 162 Wn.2d 42, 46-47, 169 P.3d 473 (2007).

⁸ Vallandigham v. Clover Park School Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

⁹ Burnet v. Spokane Ambulance, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997).

Hopper's assertions, no exception to the mootness doctrine applies in this case. For these reasons, Judge Rogers's decision granting summary judgment to the County was correct and should be sustained by this Court.

1. Judge Rogers Properly Granted the County's Motion for Summary Judgment Because Hopper Lacked Standing to Bring His Case.

Hopper lacks standing to bring this case. "It is a fundamental tenet of our law that persons without a stake in a controversy lack standing to seek a judicial resolution of that controversy."¹⁰ "A person is not entitled to set the machinery of a court into operation unless for the purpose of obtaining redress for an injury which he or she has suffered."¹¹ This legal principle is embodied in the doctrine of standing.

"Standing is a 'party's right to make a legal claim or seek judicial enforcement of a duty or right.'"¹² Under the standing doctrine, "one who is not adversely affected by a statute may not question its validity."¹³ To have standing to sue, a "plaintiff must have suffered an injury in fact arising from the invasion of a judicially cognizable interest which is concrete and particularized and actual or imminent, not conjectural or

¹⁰ 59 Am. Jur. 2d Parties § 34 (2010).

¹¹ 67A C.J.S. Parties § 12 (2010).

¹² State v. Link, 136 Wn. App. 685, 692, 150 P.3d 610 (2007), quoting Black's Law Dictionary, at 1442 (8th ed. 2004).

¹³ Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997) (holding plaintiff taxpayers lacked standing to challenge city's vacation of streets when plaintiffs were not abutting property owners and thus had suffered no special or particularized injury); see also Walker v. Monroe, 124 Wn.2d 402, 419, 879 P.2d 920 (1994).

hypothetical.”¹⁴ Stated more simply, the standing doctrine requires that “[i]n order to bring suit, an individual must have a personal claim against a defendant.”¹⁵

Standing is an aspect of subject matter jurisdiction.¹⁶ “When a party lacks standing, a court has no jurisdiction to grant the relief requested and the case must be dismissed.”¹⁷

In this case, Hopper has suffered no injury related to the County’s permit fees, and therefore lacks standing to challenge them judicially either on his own behalf or on behalf of others. Hopper appealed the development permit fees he paid for his Grading Permit Application administratively under the County’s appeal procedure in SCC 30.86.011. PDS granted Hopper’s administrative appeal and returned to Hopper all of his money. As Hopper requested, the Hearing Examiner dismissed Hopper’s appeal to her office. PDS returned the filing fee Hopper paid with respect to that appeal. Thus, Hopper has suffered no injury in fact with respect to the County’s permit fees.

¹⁴ 20 Am. Jur. 2d Courts § 43 (2010).

¹⁵ Washington Education Ass’n v. Shelton School Dist. No. 309, 93 Wn.2d 783, 790, 613 P.2d 769 (1980); see also Erection Co. v. Department of Labor and Industries of State of Wash., 65 Wn. App. 461, 467, 828 P.2d 657 (1992) (a party has standing to raise an issue if that party has a distinct and personal interest in the outcome of the case).

¹⁶ 59 Am. Jur. 2d Parties § 34 (2010).

¹⁷ 27 C.J.S. Dismissal and Nonsuit § 62 (2010).

Additionally, contrary to Hopper's assertion, Hopper's Grading Permit Application is not an "ongoing" matter. PDS denied Hopper's Grading Permit Application more than a month before Hopper filed his opening brief with this Court.¹⁸ Hopper did not appeal PDS's denial. Accordingly, Hopper's Grading Permit Application is now finished. Hopper will not be paying any additional future fees with respect to his Grading Permit Application because the matter is closed.

Because Hopper has suffered no injury related to the County's permit fees, Judge Rogers properly determined that Hopper lacks standing to bring this lawsuit. This Court should affirm Judge Rogers's ruling.

2. Judge Rogers Properly Granted the County's Motion for Summary Judgment Because Hopper's Claims Had Become Moot.

Hopper's claims became moot within a month of the date on which he filed his first complaint with the Superior Court. Washington courts generally "will not review a proceeding or cause in which the questions presented have become moot."¹⁹ This rule is intended to conserve judicial resources and avoid the danger of erroneous decisions resulting from the failure of parties to zealously advocate their positions because they no

¹⁸ SCP 1650-52.

¹⁹ State ex rel. Chapman v. Superior Court for Benton County, 15 Wn.2d 637, 639, 131 P.2d 958 (1942); see also Rosling v. Seattle Bldg. and Const. Trades Council, 62 Wn.2d 905, 907, 385 P.2d 29 (1963) ("[c]ourts will not knowingly determine moot questions").

longer have an active interest in the outcome of the case.²⁰ “If a case has become moot...there is no necessity for judgment, and the court will dismiss the case without considering the merits of the asserted cause of action.”²¹

“A case becomes moot if it is deprived of its practical significance or becomes purely academic.”²² “A case is considered moot if there is no longer a controversy between the parties; if the question is merely academic; or if a substantial question no longer exists.”²³

In this case, Hopper claimed that the permit fees he paid with respect to his Grading Permit Application were too high. Hopper’s claim became moot when PDS granted Hopper’s administrative appeal under SCC 30.86.011. Because the County has provided Hopper a full refund of the permit fees he paid to the County on May 26, 2010, and October 8, 2010, there is no longer any live, active controversy between the parties, and Hopper no longer has any practical, cognizable interest in the outcome of this lawsuit. Instead, the issues raised by Hopper are now purely

²⁰ Orwick v. City of Seattle, 103 Wn.2d 249, 253-54, 692 P.2d 793 (1984).

²¹ 1A C.J.S. Actions § 74 (2010).

²² In re Marriage of Irwin, 64 Wn. App. 38, 59, 822 P.2d 797 (1992).

²³ Pentagram Corp. v. City of Seattle, 28 Wn. App. 219, 223, 622 P.2d 892 (1981) (citations omitted); see also 1A C.J.S. Actions § 76 (2010) (“issue or case is moot when there is no actual or justiciable controversy between the parties...or where the issues involved have ceased to exist”); 20 Am. Jur. 2d Courts § 46 (2010) (“case is ‘moot’ when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome”).

academic. Accordingly, Judge Rogers correctly ruled that Hopper's lawsuit was moot. This Court should uphold Judge Rogers's decision.

3. No Exception to the Mootness Doctrine Applies to This Case.

a. **Hopper's Grading Permit Application Is Not "Ongoing"**

In his opening brief, Hopper repeatedly states that his case is not moot because his development application is "ongoing" and will have "later stages."²⁴ This is incorrect. Hopper's Grading Permit Application is not "ongoing." Hopper's Grading Permit Application was denied by PDS on January 13, 2011 – more than a month before Hopper filed his opening brief with this Court.²⁵ Hopper did not appeal that denial within the 21-day time period required by LUPA. Accordingly, Hopper's Grading Permit Application is no longer "active."²⁶ It is defunct. Hopper will therefore not be applying for "later development approval,"²⁷ and there will be no "ensuing project fee charges."²⁸ Instead, Hopper's Grading Permit Application is terminated and the matter is closed.

²⁴ See, e.g., Opening Brief at pp. 15, 22, 25, 27-29 & 34.

²⁵ SCP 1650-52.

²⁶ Opening Brief at p. 29.

²⁷ Opening Brief at p. 34.

²⁸ Opening Brief at p. 27.

b. Washington’s Exception for “Matters of Continuing and Substantial Public Interest” Does Not Apply

Hopper argues that this Court should refuse to dismiss his lawsuit despite the mootness of his claims because his complaint raises “matters of continuing and substantial public interest.”²⁹ While Washington’s appellate courts do recognize such an exception to the mootness doctrine, that exception is inapplicable here.

The “public interest” exception to the mootness doctrine allows (but does not require) an appellate court to retain jurisdiction over, and issue a decision regarding, a case that has become moot during the pendency of the appeal.³⁰ An appellate court may invoke this exception if a case presents “issues of continuing and substantial public interest,” as determined by a three-part test.³¹ However, this “public interest” exception is only available when the case at issue was “fully litigated by parties with a stake in the outcome of a live controversy” at the trial level.³² In this case, Hopper’s claims became moot prior to the summary judgment hearing. Judge Rogers never reached the merits of Hopper’s

²⁹ Opening Brief at p. 29.

³⁰ Westerman v. Cary, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994); see also Hart v. Department of Social and Health Services, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988) (discussing the history of the “public interest” exception).

³¹ In re Marriage of Horner, 151 Wn.2d 884, 891-92, 93 P.3d 124 (2004) (discussing the three-part test used to determine whether “issues of continuing and substantial public interest” are present).

³² Orwick v. City of Seattle, 103 Wn.2d 249, 253-54, 692 P.2d 793 (1984).

claims. No issues were “fully litigated” prior to the case becoming moot. Accordingly, the “public interest” exception does not apply to this case.

Hopper cites to Hart v. Department of Social and Health Services, 111 Wn.2d 445, 759 P.2d 1206 (1988), to support his argument that this Court should apply the public interest exception to the mootness doctrine to his case. However, Hart does not support Hopper’s position. In Hart, the Supreme Court refused to invoke the public interest exception to the mootness doctrine.³³ Further, the Hart court cautioned that the public interest exception should be used sparingly, as otherwise the exception would “swallow the basic rule of not issuing decisions in moot cases.”³⁴

The case of Orwick v. City of Seattle, 103 Wn.2d 249, 692 P.2d 793 (1984), is analogous to this case. In Orwick, the plaintiffs filed a class action lawsuit challenging the City of Seattle’s procedures for issuing and adjudicating speeding tickets as being contrary to statute and unconstitutional.³⁵

At the time the complaint in Orwick was filed, each of the three named plaintiffs had received a speeding ticket from the City of Seattle Police Department, and each of the named plaintiffs had also requested a hearing to contest their respective traffic citations before the Seattle

³³ Hart v. Department of Social and Health Services, 111 Wn.2d at 450-51.

³⁴ Hart v. Department of Social and Health Services, 111 Wn.2d at 450.

³⁵ Orwick v. City of Seattle, 103 Wn.2d at 250-52.

Municipal Court.³⁶ Prior to their scheduled traffic citation hearing dates, the speeding tickets of all three named plaintiffs were dismissed, for reasons not disclosed in the record before the Supreme Court.³⁷

The City of Seattle brought a motion to dismiss the lawsuit under CR 12(b), arguing multiple theories for dismissal including lack of subject matter jurisdiction. The trial court granted the City's motion to dismiss.³⁸ Although the plaintiffs requested class certification, the trial court did not reach that issue.³⁹

On appeal, the Supreme Court held that the trial court properly dismissed the plaintiffs' claims for injunctive and declaratory relief because those claims were moot due to the fact that the speeding tickets issued to the named plaintiffs had been dismissed.⁴⁰ While the plaintiffs argued that the "public interest" exception to the mootness doctrine should apply to their lawsuit, the Supreme Court held the doctrine inapplicable, stating as follows:

This court will not generally review a case which has become moot.... We do make an exception for moot cases involving "matters of continuing and substantial public interest." However, the moot cases which this court has reviewed in the past have been cases which became moot only after a hearing on the merits of the claim. In those

³⁶ Orwick v. City of Seattle, 103 Wn.2d at 250.

³⁷ Orwick v. City of Seattle, 103 Wn.2d at 250.

³⁸ Orwick v. City of Seattle, 103 Wn.2d at 251.

³⁹ Orwick v. City of Seattle, 103 Wn.2d at 251.

⁴⁰ Orwick v. City of Seattle, 103 Wn.2d at 252-53.

cases, the facts and legal issues had been fully litigated by parties with a stake in the outcome of a live controversy. After a hearing on the merits, it is a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future.

In this case, however, petitioners' claim for declaratory and injunctive relief became moot before trial. Dismissal of their claim will not involve a waste of judicial resources and will avoid the danger of allowing petitioners to litigate a claim in which they no longer have an existing interest.⁴¹

Thus, in Orwick, the Supreme Court refused to extend the "public interest" exception to the mootness doctrine to cases in which the plaintiffs' claims had become moot before trial. The Supreme Court also upheld the trial court's dismissal of claims that were pled as a "class action" because those claims were moot as to the named plaintiffs.

The same result should occur here. Any grievance Hopper might otherwise have had regarding the permit fees he paid with respect to his Grading Permit Application was resolved by his administrative appeal. Hopper has suffered no injury. He has no standing to contest the County's permit fees either on his own behalf or on behalf of others. Hopper's case is moot and was properly dismissed on summary judgment.

⁴¹ Orwick v. City of Seattle, 103 Wn.2d at 253-54.

**c. The Federal Court Exception for Matters
“Capable of Repetition, Yet Evading Review”
Does Not Apply**

Hopper argues that this Court should refuse to dismiss his lawsuit despite the mootness of his claims because his complaint raises issues that are “capable of repetition, yet evading review.”⁴² While federal courts do recognize such an exception to the mootness doctrine, that exception is inapplicable here.

First, this case is governed by Washington law, not federal law. Next, even if this Court were inclined to apply federal law to this case, the facts of this case do not meet the federal “capable of repetition, yet evading review” standard. The federal “‘capable of repetition, yet evading review’ doctrine [is] limited to the situation where two elements are present: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.”⁴³ Both elements of this test must be met in order for the exception to apply. Hopper’s case does not meet either prong of this two-part test, much less both of them.

⁴² Opening Brief at pp. 31-33.

⁴³ Weinstein v. Bradford, 423 U.S. 147, 148-49, 96 S.Ct. 347 (1975), quoted with approval in In re Marriage of Horner, 151 Wn.2d 884, 893 n. 8, 93 P.3d 124 (2004).

With respect to the first prong of the federal test, that “the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration,” the process of land development is by its nature a long-term undertaking. As Hopper acknowledges in his opening brief, the development permitting process alone often takes years.⁴⁴ Once a development permit is obtained, the permit is valid for a significant period of time as well. For example, an approved preliminary subdivision is valid for up to 6 years.⁴⁵ A residential building permit is valid for up to 3 years.⁴⁶ A grading permit, such as the permit for which Hopper applied, is valid for up to 4 years.⁴⁷ Thus, it is simply not true that either development permit applications or the development permitting process are too short in duration for anyone to challenge them.

Next, with respect to the second prong of the federal test, that there is “a reasonable expectation that the same complaining party would be subjected to the same action again,” there is no evidence that Hopper will be subjected to the same governmental action again. Hopper suggests that in the future he may decide to apply for other development permits. He hypothesizes that if he does apply for other permits in the future, he will

⁴⁴ Opening Brief at p. 35 (“[t]he County itself confirmed in arguments to the trial court that permit applications often take years to process and finalize ‘...thus providing an applicant with ample time to challenge any permit fees charged’”).

⁴⁵ SCC 30.41A.300.

⁴⁶ SCC 30.52F.178(1).

⁴⁷ SCC 30.63B.280.

again have all his permit fees refunded by the Director of PDS, thus frustrating his ability to ever obtain judicial review. Hopper's suppositions are entirely speculative. Federal courts have "never held that a mere physical or theoretical possibility was sufficient to satisfy the test... If this were true, virtually any matter of short duration would be reviewable. Rather, we have stated that there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party."⁴⁸ Additionally, "[t]he injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'"⁴⁹ Hopper does not meet this standard.

Hopper cites to Weinstein v. Bradford, 423 U.S. 147, 96 S.Ct. 347 (1975), to support his argument that the federal exception to the mootness doctrine should apply in this case. However, Weinstein does not support Hopper's position. In Weinstein, the U.S. Supreme Court refused to invoke the "capable of repetition, yet evading review" exception to the federal mootness doctrine and dismissed the plaintiff's case as moot.

⁴⁸ Murphy v. Hunt, 455 U.S. 478, 482, 102 S.Ct. 1181 (1982) (refusing to invoke the 'capable of repetition, yet evading review' doctrine because no likelihood of repetition was shown), quoted with approval in Hart v. Department of Social and Health Services, 111 Wn.2d at 452.

⁴⁹ O'Shea v. Littleton, 414 U.S. 488, 494, S.Ct. 669 (1974) (dismissing for lack of jurisdiction a class action lawsuit because none of the 17 named plaintiffs had suffered "actual injury" and thus none had a "personal stake in the outcome" of the case).

Weinstein involved a North Carolina inmate who alleged that the procedures employed by the North Carolina Board of Parole (the “Parole Board”) to determine parole eligibility violated his procedural due process rights.⁵⁰ The plaintiff filed the lawsuit as a class action, but the trial court refused to certify his putative class and dismissed his complaint.⁵¹ By the time the case reached the U.S. Supreme Court, the plaintiff had not only been granted parole, but had also been released from parole supervision entirely.⁵² The Parole Board argued that because the plaintiff had no further interest in North Carolina’s parole procedures, the case was moot and should be dismissed.⁵³ The plaintiff urged the Court to decide the case notwithstanding its mootness, arguing that the federal “capable of repetition, yet evading review” exception to the mootness doctrine should be invoked.⁵⁴ The Court held the case did not meet the second prong of the federal test because there was “no demonstrated probability” that the plaintiff would again be subject to the procedures and processes of the Parole Board.⁵⁵ Accordingly, the Court dismissed the case as moot.

Like the plaintiff in Weinstein, Hopper has not demonstrated that there is any “reasonable expectation” or “demonstrated probability” that

⁵⁰ Weinstein v. Bradford, 423 U.S. at 147.

⁵¹ Weinstein v. Bradford, 423 U.S. at 147.

⁵² Weinstein v. Bradford, 423 U.S. at 148.

⁵³ Weinstein v. Bradford, 423 U.S. at 147-48.

⁵⁴ Weinstein v. Bradford, 423 U.S. at 148.

⁵⁵ Weinstein v. Bradford, 423 U.S. at 149.

Hopper will in the future be subject to any “real and immediate injury” with respect to the County’s permit fees. Instead, all his arguments on this point are conjectural and speculative.

Hopper also cites to Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 94 S.Ct. 347 (1974), to support his argument that the federal exception to the mootness doctrine should be applied to this case. However, Super Tire Engineering does not support Hopper’s argument because Super Tire Engineering did not involve an exception to the mootness doctrine. Instead, in Super Tire Engineering the U.S. Supreme Court found the case was not moot because the parties were still involved in a live, active controversy.

Super Tire Engineering involved a New Jersey law pursuant to which striking employees were eligible for state welfare assistance.⁵⁶ Employers whose workers were striking sued various officials of the State of New Jersey seeking a declaratory judgment that the New Jersey program of providing welfare assistance to striking workers was void under the supremacy clause because it conflicted with federal statutes regulating labor relations.⁵⁷ While the particular strike that prompted the lawsuit had been resolved long before the case reached the Supreme Court, the Court held the case was not moot because New Jersey’s welfare

⁵⁶ Super Tire Engineering Co. v. McCorkle, 416 U.S. at 116-17.

⁵⁷ Super Tire Engineering Co. v. McCorkle, 416 U.S. at 117-20.

assistance program was still in full force and effect. The Court reasoned that New Jersey's "beneficent policy towards strikers" had an ongoing, continuous and pervasive effect on the carefully constructed balance in the economic collective-bargaining relationship between labor and management that had been crafted by Congress.⁵⁸ Accordingly, the Court held that the employer plaintiffs continued to be harmed by New Jersey's welfare program notwithstanding the cessation of any particular strike.⁵⁹

The facts of Hopper's case are simply not analogous to the facts in Super Tire Engineering. There is no ongoing public policy at issue here. Hopper has no continuing contractual relationship that is adversely affected by an enduring, pervasive governmental policy. Unlike the employers in Super Tire Engineering, Hopper is not suffering a continuing injury. Instead, Hopper's discrete grievance was rendered moot when the Director of PDS granted his administrative fee appeal.

C. It Is Not True That No One Can Ever Challenge the Legality of the County's Permit Fee System.

1. There Is No Conspiracy to Deprive Citizens of Standing.

Throughout his opening brief Hopper repeatedly alleges that the County has intentionally and deliberately conspired to establish a system of administrative procedures pursuant to which no one will ever have

⁵⁸ Super Tire Engineering Co. v. McCorkle, 416 U.S. at 123-24.

⁵⁹ Super Tire Engineering Co. v. McCorkle, 416 U.S. at 122.

standing to challenge the County's permit fee structure in superior court.⁶⁰

It is because of this conspiracy, Hopper argues, that his lawsuit should be allowed to proceed notwithstanding the fact that he lacks standing and his claims are moot.

Hopper's conspiracy theory is flawed. The only evidence Hopper offers to substantiate his claim that the County has an intentional practice of methodically depriving people of standing are the facts of the instant case. The outcome of one specific case does not evidence a systematic conspiracy. If Hopper could show that 10, 15 or 20 people had each attempted to challenge the legality of the County's permit fee system, and in each and every case the Director of PDS had, under some pretextual reason, granted those individuals a full fee refund, such facts might substantiate Hopper's premise. But Hopper cannot make such a factual showing because Hopper is the only person who has ever attempted to challenge the County's permit fee structure. He is the only person who has ever invoked the administrative appeal procedure in SCC 30.86.011. Further, he only invoked that administrative appeal provision on one

⁶⁰ See, e.g., Opening Brief at p. 14 ("ad-hoc policy to avoid judicial scrutiny"); Opening Brief at p. 15 ("an artificial mootness device," "create a mootness fiction"); Opening Brief at p. 16 ("create ad-hoc devices to moot applicants' challenges"); Opening Brief at p. 20 ("the County's ad-hoc 'full refunds' as a device to defeat standing"); Opening Brief at p. 26 ("a self-serving 'penalty' to evade judicial review"); Opening Brief at p. 31 ("a device to evade judicial review"); Opening Brief at p. 37 ("make 'full refunds' to prevent other applicants from ever obtaining judicial review"); Opening Brief at p. 38 ("self-serving contrivances created...in order to evade judicial review"); Opening Brief at p. 50 ("to evade judicial review...by way of a post appeal artifice").

occasion, with respect to one development permit application. One occurrence of an event is not statistically significant. The way this specific case played out is not evidence of a larger pattern or practice, but is simply the result of the particular facts of this case. Thus, even when the facts of this case are viewed in the light most favorable to Hopper, no reasonable person could conclude that the County has established a ruse or sham or any other type of plot or device to systematically deprive people of standing.

2. A Taxpayer Derivative Suit Is Always Available To Challenge the Legality of Governmental Action.

Hopper suggests that if he is not allowed to contest the legality of the County's permit fee system in this class action lawsuit, the County's permit fee system will forever be impervious to challenge. This assertion is incorrect. First, anyone who has actually suffered harm from the County's permit fee system would obviously have standing to sue. Additionally, as the County noted at oral argument, a taxpayer derivative suit is always available to challenge the legality of government action.⁶¹

Washington courts have long recognized that litigants may challenge the legality of governmental acts on the basis of taxpayer

⁶¹ RP 31 & 33.

standing.⁶² “A taxpayers’ derivative suit is an action brought by a taxpayer on behalf of himself or herself and as representative of a class of similarly situated taxpayers to seek relief from illegal or unauthorized acts of public officials.”⁶³ In the case of State ex rel. Boyles v. Whatcom County Superior Court, 103 Wn.2d 610, 614, 694 P.2d 27 (1985), the Supreme Court explained that “taxpayer standing has been given freely in the interest of providing a judicial forum when this state’s citizens contest the legality of official acts of their government.” Accordingly, “[u]nder the doctrine of taxpayer standing, a taxpayer need not allege a personal stake in the matter, but may bring a claim on behalf of all taxpayers.”⁶⁴ This is exactly the type of challenge Hopper states he desires to bring. Thus, even though Hopper’s current class action complaint fails on jurisdictional grounds, Hopper and any other taxpayers in the County remain free to contest the legality of the County’s permit fee system in a taxpayer suit.

⁶² State ex rel. Boyles v. Whatcom County Superior Court, 103 Wn.2d 610, 614, 694 P.2d 27 (1985), citing Tacoma v. O’Brien, 85 Wn.2d 266, 269, 534 P.2d 114 (1975), and citing Calvary Bible Presb. Church of Seattle v. Board of Regents, 72 Wn.2d 912, 917-18, 436 P.2d 189 (1967), and citing Franzen v. Board of Natural Resources, 66 Wn.2d 672, 404 P.2d 432 (1965).

⁶³ Washington Public Trust Advocates v. City of Spokane, 117 Wn. App. 178, 181, 69 P.2d 351 (2003) (citations omitted).

⁶⁴ Robinson v. City of Seattle, 102 Wn. App. 795, 805, 10 P.3d 452 (2000) (citations omitted).

D. There Is Nothing Improper or Illegal About SCC 30.86.011 or SCC 30.86.015(5)(a).

Hopper's opening brief raises numerous arguments that the County believes are irrelevant to the outcome of this case. However, as Hopper devotes significant time to these ancillary issues, the County addresses his principal arguments below.

1. SCC 30.86.011 Does Not Conflict With RCW 82.02.020.

Hopper repeatedly asserts that the appeal procedure in SCC 30.86.011 is illegal because it is not expressly authorized by RCW 82.02.020. Hopper is incorrect. RCW 82.02.020 is silent regarding whether a local jurisdiction may implement an administrative permit fee appeal process. In the absence of a statutory prohibition, the County's general police power authorizes it to adopt regulations for the public benefit.⁶⁵ "[A] municipality may enact an ordinance touching on the same matter as a state law, provided that state law is not intended to be exclusive and the ordinance does not conflict with the general law of the state."⁶⁶ Providing citizens with a quick and easy method for contesting

⁶⁵ Wash. Const. art. XI, § 11; see also Brown v. City of Yakima, 116 Wn.2d 556, 559, 807 P.2d 353 (1991) (holding Wash. Const. art. XI, § 11 "is a direct delegation of police power" that requires "no legislative sanction for its exercise so long as the subject-matter is local, and the regulation is reasonable and consistent with general laws") (citations omitted); see also RCW 36.32.120(7) (authorizing county legislatures to "make and enforce...all such police and sanitary regulations as are not in conflict with state law").

⁶⁶ Rabon v. City of Seattle, 135 Wn.2d 278, 287, 957 P.2d 621 (1998) (citations omitted).

all or any portion of a permit application fee is clearly within the County's authority.

Hopper further misreads RCW 82.02.020 when he contends RCW 82.02.020 requires the County to collect development permit fees.⁶⁷ The plain language of RCW 82.02.020 does not support such a reading of the statute. RCW 82.02.020 does not require a jurisdiction to impose any fees whatsoever on applications for development permits. Instead, what RCW 82.02.020 does is to establish an upper limit on the types and amounts of fees a jurisdiction may impose on development permit applications. Thus, RCW 82.02.020 establishes the maximum amount of permit fees a jurisdiction is allowed to charge. It does not require a jurisdiction to impose any such fees.

2. SCC 30.86.011 Does Not Violate Due Process.

Hopper alleges that SCC 30.86.011 is unconstitutional because it violates procedural due process requirements. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."⁶⁸ "Due process does not require an error-free process, so the mere possibility of error is

⁶⁷ See, e.g., Opening Brief at p. 49.

⁶⁸ Nguyen v. State, Department of Health Medical Quality Assurance Commission, 144 Wn.2d 516, 522-23, 29 P.3d 689 (2001) (citation omitted); see also U.S. Const. amend. XIV § 1; U.S. Const. amend. V.

insufficient to invalidate the process.”⁶⁹ Statutes and ordinances are presumed constitutional.⁷⁰ Thus, Hopper has the burden of demonstrating that SCC 30.86.011 is unconstitutional beyond a reasonable doubt.⁷¹

Hopper’s opening brief failed to describe or argue the legal standard applicable to procedural due process challenges. Accordingly, there is little material in Hopper’s pleadings for the County to refute. However, while Hopper’s due process allegations are confused, it seems clear that Hopper believes SCC 30.86.011 is flawed because it did not provide him with a hearing. Hopper appears to believe that administrative appeal procedures based solely on a paper record are improper. Hopper’s argument is incorrect, as a matter of law. In the recent case of City of Bellevue v. Lee, 166 Wn.2d 581, 210 P.3d 1011 (2009), the Supreme Court expressly upheld the constitutionality of administrative appeal procedures adopted by the Department of Licensing even though those appeal procedures did not include a hearing.⁷² However, because the amount and type of process required under the due process clause differs

⁶⁹ City of Bellevue v. Lee, 166 Wn.2d 581, 585, 210 P.3d 1011 (2009).

⁷⁰ State v. Valencia, 169 Wn.2d 782, 791-93, 239 P.3d 1059 (2010) (discussing the proper standard of review applicable to legislative enactments, administrative regulations, and sentencing conditions) (citations omitted).

⁷¹ City of Pasco v. Shaw, 161 Wn.2d 450, 458, 166 P.3d 1157 (2007).

⁷² City of Bellevue v. Lee, 166 Wn.2d 581, 210 P.3d 1011 (2009).

from case to case,⁷³ the County outlines below the legal standard employed to evaluate procedural due process claims.

“The Due Process Clause of the Fourteenth Amendment to the United States Constitution precludes states from depriving any person of ‘life, liberty, or property, without due process of law.’”⁷⁴ A court’s analysis of procedural due process claims proceeds in two steps. “We first determine whether a liberty or property interest exists entitling the individual to due process. If a protected interest exists we then employ a balancing test to determine what process is due.”⁷⁵ The first step in the test is critical, as “[w]hether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss.”⁷⁶

The County submits that with respect to SCC 30.86.011, Hopper does not meet the first part of the procedural due process test. Namely, Hopper does not have a liberty or property interest at stake that is entitled to protection under the due process clause. Hopper’s “liberty” is clearly not threatened by SCC 30.86.011. Instead, the only interest that could

⁷³ Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893 (1975) (“due process is flexible and calls for such procedural protections as the particular situation demands”).

⁷⁴ Nguyen v. State, Dept. of Health Medical Quality Assurance Commission, 144 Wn.2d 516, 522, 29 P.3d 689 (2001); see also U.S. Const. amend. XIV §1.

⁷⁵ Knudson v. City of Ellensburg, 832 F.2d 1142, 1144 (9th Cir. 1987); see also Carver v. Lehman, 558 F.3d 869, 872 (9th Cir. 2009) (“[t]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient”).

⁷⁶ Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593 (1972) (citations omitted).

potentially qualify for protection under the due process clause here is Hopper's "property" interest in the permit fees he paid for his Grading Permit Application.⁷⁷ Hopper voluntarily paid those permit fees in connection with a Grading Permit Application that he voluntarily chose to submit to PDS. Hopper then received a refund of his permit fees pursuant to SCC 30.86.011. Thus, the County does not understand how Hopper has suffered any "grievous loss" as a result of County action under SCC 30.86.011.

Assuming, *arguendo*, that Hopper does have a property interest that is protected by the due process clause, and it is therefore proper to proceed to the second step of the procedural due process analysis, the second step involves a three part balancing test used to determine the type and amount of process that is required before the government can take away an individual's protected property interest.⁷⁸ That balancing test is comprised of the following factors: (1) "the nature and weight of the private interest affected by the official action challenged;"⁷⁹ (2) "the risk of erroneous deprivation of the interest at stake through the procedures used and the probable value, if any, of additional or substitute

⁷⁷ Note, that because Hopper does not own the real property that was the subject of his Grading Permit Application, this case does not raise any questions regarding a land owner's right to develop or otherwise make reasonable use of his or her real property.

⁷⁸ Carver v. Lehman, 558 F.3d 869, 872 (9th Cir. 2009).

⁷⁹ City of Bellevue v. Lee, 166 Wn.2d 581, 586, 210 P.3d 1011 (2009) (citation omitted).

safeguards;”⁸⁰ and (3) “the State’s interest in the fiscal and administrative burden that additional or substitute procedural requirements would entail.”⁸¹ Applying those three factors to SCC 30.86.011, not one of them suggests that the existing procedures of SCC 30.86.011 are deficient, or that the County needs to provide additional process in order to create a valid, constitutional administrative permit fee appeal mechanism.

The administrative appeal mechanism at issue in this case is somewhat analogous to the administrative appeal system at issue in City of Bellevue v. Lee, 166 Wn.2d 581, 210 P.3d 1011 (2009). In Lee, the plaintiffs were individuals whose drivers’ licenses had been suspended by the Department of Licensing (“DOL”) for nonpayment of traffic citations.⁸² The Court in Lee recognized that an individual’s interest in his or her drivers’ license is an important and substantial interest protected by the due process clause.⁸³ Accordingly, the first part of the two-step due process test was satisfied. With respect to the second part of the test, the plaintiffs in Lee alleged that DOL’s administrative procedures for suspending drivers’ licenses were inadequate under the due process clause

⁸⁰ City of Bellevue v. Lee, 166 Wn.2d at 586 (citation omitted).

⁸¹ City of Bellevue v. Lee, 166 Wn.2d at 589 (citation omitted).

⁸² City of Bellevue v. Lee, 166 Wn.2d at 583.

⁸³ City of Bellevue v. Lee, 166 Wn.2d at 586, citing City of Redmond v. Moore, 151 Wn.2d 664, 670-71, 91 P.3d 875 (2004) (“[i]t is well settled that driver’s licenses may not be suspended or revoked without that procedural process required by the Fourteenth Amendment”).

because DOL did not provide an in-person administrative hearing prior to the suspension of an individual's license.⁸⁴ While DOL's license suspension procedures did allow individuals to file an administrative appeal prior to license suspension, that appeal was based on a paper record only.⁸⁵ The plaintiffs in Lee argued that a paper record appeal process was insufficient under the due process clause.⁸⁶

After applying the three part balancing test described above, the Court in Lee disagreed with the plaintiffs' contentions. Instead, the Court upheld DOL's paper record appeal process as valid under the due process clause. Noting that DOL's administrative appeal procedures allowed individuals to submit documentation supporting their appeals, the Court found the appeal process was "specifically designed to correct...ministerial errors, thereby reducing the risk of erroneous deprivation [of a drivers' license]."⁸⁷

Lee establishes that there is nothing *per se* impermissible about an administrative appeal process that relies on a paper record and does not provide for a hearing. To the extent Hopper has any property interest that is protected by the due process clause in this case, that property interest is

⁸⁴ City of Bellevue v. Lee, 166 Wn.2d at 583.

⁸⁵ City of Bellevue v. Lee, 166 Wn.2d at 584.

⁸⁶ City of Bellevue v. Lee, 166 Wn.2d at 586-87.

⁸⁷ City of Bellevue v. Lee, 166 Wn.2d at 586.

adequately protected by the procedures of SCC 30.86.011. Hopper offers no authority or argument to the contrary.

3. SCC 30.86.011 Does Not Violate the Constitutional Prohibition on Gifting Public Funds.

Hopper contends that SCC 30.86.011 is illegal because any refunds granted pursuant to SCC 30.86.011 constitute an unconstitutional gift of public funds.⁸⁸ This argument appears to be at least partly predicated on Hopper's mistaken belief that RCW 82.02.020 requires a jurisdiction to impose fees on applications for development permits. Since, as discussed in Section III.D.1 above, RCW 82.02.020 contains no such requirement, Hopper's argument is flawed. However, his argument fails for a second, unrelated reason as well: Hopper misunderstands the purpose and scope of the constitutional prohibition on gifting public funds.

Article VIII, § 7 of the Washington Constitution prohibits local governmental entities from using public funds "to benefit private interests when the public interest is not primarily being served."⁸⁹ The full text of the Constitutional provision reads as follows:

⁸⁸ As discussed in Section III.D.2 above, ordinances are presumed to be constitutional, and the challenger has the burden of demonstrating otherwise. See State v. Valencia, 169 Wn.2d 782, 791-93, 239 P.3d 1059 (2010); City of Pasco v. Shaw, 161 Wn.2d 450, 458, 166 P.3d 1157 (2007).

⁸⁹ CLEAN v. State, 130 Wn.2d 782, 797, 928 P.2d 1054 (1997).

Credit not to be loaned. No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.⁹⁰

This constitutional provision was originally adopted to prevent the harmful effects “on the public purse of granting public subsidies to private commercial enterprises, primarily railroads.”⁹¹ Washington courts interpret the prohibition narrowly so as “to remedy more precisely the evils the framers sought to prevent.”⁹² Accordingly, “[a] use of public funds is presumed constitutional, and the burden of overcoming that presumption lies with the individual making the challenge.”⁹³ “The fact that private ends are incidentally advanced is immaterial to determining whether legislation furthers a public purpose.”⁹⁴ “Where it is debatable as to whether or not an expenditure is for a public purpose, [courts] will defer to the judgment of the legislature.”⁹⁵

⁹⁰ An analogous constitutional provision, Wash. Const. art. VIII, § 5, applies to expenditures of state funds. Although these two provisions are worded differently, they have been held equivalent in intent and function. Thus caselaw interpreting one of the provisions is generally applicable to the other provision as well.

⁹¹ City of Marysville v. State, 101 Wn.2d 50, 55, 676 P.2d 989 (1984).

⁹² King County v. Taxpayers of King County, 133 Wn.2d 584, 596, 949 P.2d 1260 (1997).

⁹³ Hudson v. City of Wenatchee, 94 Wn. App. 990, 995, 974 P.2d 342 (1999), citing City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d 697, 702, 743 P.2d 793 (1987).

⁹⁴ CLEAN v. State, 130 Wn.2d 782, 796, 928 P.2d 1054 (1996), citing United States v. Town of North Bonneville, 94 Wn.2d 827, 834, 621 P.2d 127 (1980).

⁹⁵ CLEAN v. State, 130 Wn.2d 782, 793, 928 P.2d 1054 (1996), quoting Anderson v. O'Brien, 84 Wn.2d 64, 70, 524 P.2d 390 (1974).

Hopper complains that by refunding his permit fees, PDS made a gift of public funds to Hopper. However, Hopper does not support this allegation with pertinent authority or reasoned argument. On its face, SCC 30.86.011 neither makes nor purports to make any expenditure of funds. Assuming, *arguendo*, that SCC 30.86.011 does authorize an expenditure of funds, SCC 30.86.011 clearly serves a public purpose. Namely, SCC 30.86.011 allows any person paying fees for a development permit application to challenge the amount of those fees in a quick, easy and cost effective manner. The existence of this administrative appeal procedure allows misunderstandings, mistakes in calculation, or other permit fee-related errors to be addressed and resolved expeditiously, without resort to the judicial process. Efficiency and accurate accounting in government are clearly in the public interest.

In this particular case, Hopper invoked SCC 30.86.011 to demand that an unspecified amount of money be returned to him. PDS had never before received a permit fee appeal under SCC 30.86.011. Because of a staffing transition, PDS did not respond to Hopper's request within the 30 day period mandated in SCC 30.86.011. The County Code does not state what the Director of PDS should do if that 30 day deadline is missed. Accordingly, the new Acting Director of PDS decided it was appropriate to grant Hopper's appeal and refund the total amount of fees he had paid.

to grant Hopper's appeal and refund the total amount of fees he had paid. It is a common business practice to refund a customer's money when the business has made a mistake. The County submits that Mock's decision was reasonable under the circumstances and does not constitute a gift of public funds.

4. SCC 30.86.015(5)(a) is Legal and Reasonable.

The County does not understand why Hopper believes SCC 30.86.015(5)(a) is illegal or improper. SCC 30.86.015(5)(a) authorizes the Director of PDS to refund "100 percent of fees collected by error of the department." This provision is logical, practical and fair. Human error is inevitable. SCC 30.86.015(5)(a) provides a method for correcting human error. Is Hopper suggesting that it would be better for PDS to retain fees collected in error?

The County submits that it is legal and reasonable for the County Code to authorize refunds of fees that are collected in error. Hopper makes no legitimate argument to the contrary.

E. The Hearing Examiner Acted Properly.

The County does not understand why Hopper makes numerous allegations against the Hearing Examiner. The only thing the Hearing Examiner did in this case was to dismiss Hopper's appeal to her office. Hopper stated in his appeal documents that he did not believe the Hearing

Examiner had jurisdiction to hear his appeal.⁹⁶ He expressly asked the Hearing Examiner to dismiss his case.⁹⁷ Since that is exactly what the Hearing Examiner did, it seems illogical for Hopper to claim he was harmed by the Hearing Examiner's action.

To the extent Hopper is disgruntled because he believes the Hearing Examiner failed to follow proper procedures in dismissing his case, Hopper is incorrect. First, the procedural provision to which Hopper repeatedly cites, SCC 2.02.125(7),⁹⁸ does not apply to appeals arising under Title 30 SCC.⁹⁹ Instead, the procedures specified in Title 30 SCC control. In this case, the Hearing Examiner's order of dismissal referenced SCC 30.71.060 as the provision of the County Code pursuant to which she was dismissing Hopper's appeal. SCC 30.71.060, like SCC 2.02.125(7), authorizes the Hearing Examiner to summarily dismiss an appeal if the Hearing Examiner determines the appeal is "without merit on its face, frivolous, [or] beyond the hearing examiner's jurisdiction."¹⁰⁰ Here, the Hearing Examiner's order of dismissal stated she was dismissing Hopper's appeal because "there is no dispute for this office to

⁹⁶ CP 0090-92, 0104 & 0673.

⁹⁷ CP 0090-92, 0104 & 0673.

⁹⁸ Opening Brief at pp. 39, 41-42.

⁹⁹ SCC 2.02.122.

¹⁰⁰ SCC 30.71.060; SCC 2.02.125(7).

review.”¹⁰¹ While this precise language does not appear in SCC 30.71.060, the Hearing Examiner’s determination that an appeal presents “no dispute for this office to review” is substantially the same as a determination that an appeal is “without merit on its face, frivolous, [or] beyond the hearing examiner’s jurisdiction.”¹⁰² Accordingly, the Hearing Examiner acted properly in dismissing Hopper’s appeal.

IV. CONCLUSION

Despite all of Hopper’s tangential arguments, this appeal is about the propriety of Judge Rogers’s decision to grant the County’s motion for summary judgment.¹⁰³ Both the County’s motion and Judge Rogers’s decision were based on jurisdictional grounds. The County argued, and Judge Rogers agreed, that Hopper had no standing to bring his lawsuit because Hopper had suffered no injury. Any claims Hopper might otherwise have had were rendered moot when the Acting Director of PDS granted Hopper’s administrative permit fee appeal under SCC 30.86.011. It is blackletter law that one who has not been harmed cannot invoke the jurisdiction of the courts. It is blackletter law that courts will not decide moot claims. Judge Rogers’s decision was correct and should be affirmed by this Court.

¹⁰¹ CP 0970-72.

¹⁰² SCC 30.71.060; SCC 2.02.125(7).

¹⁰³ CP 1281-86.

V. STATUTORY COSTS AND ATTORNEYS' FEES

Pursuant to Rules of Appellate Procedure 18.1, RCW 4.84.010 and RCW 4.84.080, the County requests its statutory costs and attorneys' fees.

Submitted this 24th day of March, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

Robert Tad Seder, WSBA #14521
Bree Urban, WSBA #33194
Deputy Prosecuting Attorneys
Attorneys for Snohomish County

DECLARATION OF SERVICE

I, Regina McManus, hereby declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on this 24th day of March, 2011, Snohomish County's Response Brief was served upon persons listed and by the method(s) indicated:

Parties Served:

Bill H. Williamson
Columbia Center Tower
701 5th Ave., Suite 5500
P.O. Box 99821
Seattle, WA 98139-0821

- Electronic Service:
williamsonb@msn.com
- Facsimile- (206) 292-0313
- Express Mail
- U.S. Mail
- Hand Delivery
- Messenger Service

Richard B. Price
P.O. Box 1687
Omak, WA 98841-1687

- Electronic Service:
rbpattorney@ncidata.com
- Facsimile - (509) 826-3237
- Express Mail
- U.S. Mail
- Hand Delivery
- Messenger Service

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 24th day of March, 2011.


Regina McManus

APPENDICES

Attached Statute:

RCW 82.02.020

Attached Snohomish County Code (SCC) Sections:

SCC 2.02.122

SCC 2.02.125

SCC 30.41A.300

SCC 30.52F.178

SCC 30.62A.310

SCC 30.62A.320

SCC 30.63B.280

SCC 30.71.060

SCC 30.86.011

SCC 30.86.015

2.02.100

(8) Dispose of procedural requests or similar matters,

(9) Issue summary orders as provided for in SCC 2.02.125 and in supplementary proceedings, and

(10) Take any other action authorized by or necessary to carry out this chapter.

The above authorities may be exercised on all matters for which jurisdiction is assigned either by county ordinance or by other legal action of the county or its elected officials. The examiner's decision shall be final and conclusive and may be reviewable by the council, the shorelines hearings board or court, as applicable. The nature of the examiner's decision shall be as specified in this chapter and in each ordinance which grants jurisdiction. (Ord. 80-115 § 1, adopted December 29, 1980; Amended Ord. 85-105, § 1, December 4, 1985; Amended Ord. 93-077, Sept. 8, 1993; Amended Ord. 96-003, § 3, Feb. 21, 1996, Eff date April 1, 1996).

2.02.122 Procedures for appeal of land use decisions authorized under Title 30 SCC.

The provisions of this chapter relating to procedures for appeals within the hearing examiner's jurisdiction shall not apply to decisions and appeals authorized pursuant to Title 30 SCC. The provisions of Title 30 SCC pertaining to decisions and administrative appeals for permits and approvals authorized by Title 30 SCC shall be the exclusive procedures for such administrative decisions and appeals. (Ord. 02-098 § 6, Dec. 9, 2002, Eff date Feb. 1, 2003).

2.02.125 Procedures for appeals within the examiner's jurisdiction.

Administrative appeals over which the examiner has jurisdiction shall be subject to the following procedural requirements:

(1) Appeals shall be addressed to the hearing examiner but shall be filed in writing with the department whose decision is being appealed within 14 calendar days of the date of action or, in those cases requiring personal or certified mail service, the date of service of the administrative action being appealed. Appeals shall be accompanied by a filing fee in the amount of \$100.00; PROVIDED, That the filing fee shall not be charged to a department of the county or to other than the first appellant; and PROVIDED, FURTHER, That the filing fee shall be refunded in any case where an

appeal is dismissed without hearing because of procedural defect such as but not limited to untimely filing, lack of standing, facial lack of merit, etc.

(2) An appeal must contain the following items in order to be complete. The examiner, if procedural time limitations allow, may allow an appellant not more than 15 days to perfect an otherwise timely filed appeal if such appeal is incomplete in some manner.

(a) Specific identification of the order, permit, decision, determination or other action being appealed (including the county's file number whenever such exists). A complete copy of the document being appealed must be filed with the appeal;

(b) The specific grounds upon which the appellant relies, including a concise statement of the factual reasons for the appeal and, if known, identification of the policies, statutes, codes, or regulations that the appellant claims are violated.

(c) The name, mailing address and daytime telephone number of each appellant together with the signature of at least one of the appellants or of the attorney for the appellant(s), if any;

(d) The name, mailing address, daytime telephone number and signature of the appellant's agent or representative, if any; and

(e) The required filing fee.

(3) Timely filing of an appeal shall stay the effect of the order, permit, decision, determination or other action being appealed until the appeal is finally disposed of by the examiner or withdrawn; PROVIDED, That filing of an appeal from the denial of a permit shall not stay such denial. Failure to file a timely and complete appeal shall constitute waiver of all rights to an administrative appeal under county code.

(4) No new appeal issues may be raised or submitted after the close of the time period for filing of the original appeal.

(5) The department whose decision is being appealed shall forward the appeal to the examiner's office within three working days of its filing.

(6) The examiner's office, within three working days after receipt of the appeal, shall send written notice of the filing of the appeal by first class mail, to the person named in an order or to the person who initially sought the permit, decision, determination or other action being appealed, whenever the appeal is filed by other than such person.

(7) The examiner may summarily dismiss an appeal in whole or in part without hearing if the examiner determines that the appeal is untimely, incomplete, without merit on its face, frivolous, beyond the scope of the examiner's jurisdiction or brought merely to secure a delay. The examiner may also summarily dismiss an appeal if he/she finds, in response to a challenge raised by the respondent and/or by the permit applicant and after allowing the appellant a reasonable period in which to reply to the challenge, that the appellant lacks legal standing to appeal. Except in extraordinary circumstances, summary dismissal orders shall be issued within 15 days following receipt of either a complete appeal or a request for issuance of such an order, whichever is later.

(8) Appeals shall be processed by the examiner as expeditiously as possible, giving proper consid-

be reduced pursuant to chapter 30.42B SCC and chapter 30.41C SCC. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

30.41A.250 Density for sloping land.

All subdivisions shall comply with applicable requirements of SCC 30.28.050 regarding development on steep slopes. For other regulations affecting development activity on slopes see also SCC 30.62B.320 and 30.62B.340. In addition, the following requirements shall apply to all subdivisions:

(1) Determination of Slope. The applicant shall determine land slope and assess the applicability of this section. This information shall be provided to

the department along with the completed application. In determining slope, the applicant shall obtain a topographic survey from a registered professional engineer or land surveyor which defines the slope of the property to a recognized and acceptable mapping standard. In all areas proposed for roads or dwellings, elevations of 90 percent of the area shall be within three feet of the actual ground elevations;

(2) Determination of Potential Maximum Dwelling Unit Density. The applicant shall determine maximum unit yield for the specified zones from Table 30.41A.250(2), except that this requirement shall not apply to a planned residential development combined with a preliminary subdivision; and

**Table 30.41A.250(2)
RESIDENTIAL DENSITY FOR SLOPING LAND**

Zoning	Dwelling units/Gross acre			
	15-20% slope	21-25% slope	26-33% slope	Over 33% slope
Rural Conservation	.5	.5	.5	.25
SA 1-Acre	1.0	1.0	1.0	.25
R-20,000	1.8	1.8	1.8	.25
R-12,500	2.8	2.8	1.8	.25
R-9,600	4.0	2.8	1.8	.25
R-8,400	4.0	2.8	1.8	.25
R-7,200/WEB	4.0	2.8	1.8	.25

Slope means an inclined ground surface, the inclination of which is expressed as a rating of horizontal distance to vertical distance. Slope percentages are calculated by taking the vertical rise over the horizontal run. For land areas greater than 15 percent natural slope, maximum unit yield in the identified zones shall be determined by multiplying the gross site area by the appropriate density factors found in SCC Table 30.41A.250(2). For the purpose of this table, a continuous slope with a horizontal run of less than 50 feet shall be considered level when the slope percentage is less than 33 percent.

(3) The department may require engineering or other technical justification for development in sloped areas where it determines that the public health, safety, welfare, or environment may be jeopardized by the proposed development. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002; Amended Ord. 06-061, § 17, Aug. 1, 2007, Eff date Oct. 1, 2007).

30.41A.300 Preliminary subdivision approval—Term.

(1) The standard term of approval for a preliminary subdivision is five years. An applicant must file for and complete final subdivision approval within the five year period, running from the date of preliminary subdivision approval, or the approval will expire. An appli-

cant or his or her successors may request, in writing, up to a one-year extension of preliminary approval. Such request must be received by the director at least 30 days prior to the expiration of the preliminary subdivision approval. The department may grant an extension if the applicant can demonstrate that a good faith effort was exerted to complete the final subdivision within the initial five-year approval period in accordance with the terms of the preliminary approval. The total time period that any preliminary subdivision approval may be extended by the department shall not exceed one year. The applicant shall pay an extension fee pursuant to SCC 30.86.100. In addition to any extension granted by the department, preliminary subdivision approval may

30.41A.300

be further extended for a period not to exceed four months by the county council concurrent with the council's consideration of final subdivision approval.

(2) The department shall grant an extension in cases where a preliminary approval has been appealed to court, not to exceed the period of time the approval is under judicial review.

(3) The applicant may request final subdivision approval in phases, subject to the time restrictions in 30.41A.300(1) and the terms of the preliminary subdivision approval. Open space, amenities, and other requirements of the preliminary approval shall be completed coincident with each phase of the final subdivision on a prorata basis unless otherwise required in the preliminary approval. A revision to the preliminary approval, pursuant to SCC 30.41A.330, must be applied for with the request to complete the final subdivision improvements in phases. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003). (Amended Ord. No. 09-018, § 3, June 3, 2009, Eff date June 25, 2009)

30.41A.305 Preliminary subdivision approval— Additional extension.

The one-year extension of preliminary subdivision approvals established in SCC 30.41A.300 may be further extended by up to an additional two years for a preliminary subdivision that was approved prior to January 1, 2009. An applicant may request, and the department may approve, a three-year extension of a preliminary subdivision approval or an additional two-year extension of a preliminary subdivision approval provided that all other requirements of SCC 30.41A.300 are met. The total combined time period that any preliminary subdivision approval may be extended by the department under SCC 30.41A.300 and 30.41A.305 shall not exceed three years. A request for such extension must be received by the director at least 30 days prior to the expiration of the preliminary subdivision approval.

(Amended Ord. No. 09-018, § 4, June 3, 2009, Eff date June 25, 2009)

30.41A.307 Repeal.

Snohomish County Code Section 30.41A.305, adopted by Amended Ordinance 09-018 on June 3, 2009, is repealed effective December 31, 2010.

(Amended Ord. No. 09-018, § 5, June 3, 2009, Eff date June 25, 2009)

30.41A.310 Preliminary subdivision withdrawal.

When the owner(s) of property subject to an approved preliminary subdivision wish to withdraw the approved preliminary subdivision prior to its normal expiration pursuant to SCC 30.41A.300, the owner(s) shall file with the hearing examiner's office, a notarized written statement, in a form provided by the county, requesting withdrawal and acknowledging the effects of such withdrawal. The hearing examiner shall issue an administrative order approving the withdrawal within 15 days of receipt of a properly completed request form. A copy of the order shall be transmitted to the owner(s) and to the department for inclusion in the official records of the county. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

30.41A.320 Prohibition against other subdivisions.

No short subdivision (chapter 30.41B SCC) shall be approved which includes any land contained within an approved preliminary subdivision during the period in which the preliminary subdivision is valid. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

30.41A.330 Revisions after preliminary subdivision approval.

Approved preliminary subdivisions may be revised prior to installation of improvements and recording of the final subdivision. Revisions that are generally consistent with the approved preliminary subdivision, which do not alter conditions of preliminary approval and do not adversely affect public health, safety, and welfare may be administratively approved by the department; provided that any increase in trip generation or change in access points shall be reviewed pursuant to SCC 30.66B.075. Any other change shall require processing as a new preliminary subdivision. Relevant county departments and agencies shall be notified of any administrative revision. A revision does not extend the life or term of the preliminary subdivision approval, which shall run from the original date of preliminary approval. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

30.41A.400 Construction drawings—Submittal and review.

The following construction drawings, plans, and evidence shall be prepared and submitted either at the time of consideration of the preliminary subdivision or

(b) A fee that includes a percentage of the original permit application fee equal to the percentage of work to be completed plus a \$400 administration fee is paid;

(c) No permit application nor any rights under this section may be transferred, assigned or sublet, except by operation of law;

(d) The permit application has not been deemed abandoned;

(e) Unless provided an extension of time, the permit would be deemed abandoned within 12 months of (the effective date of this ordinance); and

(f) If extended, the permit application shall be deemed to have been abandoned at the time of expiration of the associated approved preliminary subdivision, short subdivision, site plan or commercial development permit. (Added Amended Ord. 07-084, § 20 (part), Sept. 5, 2007, Eff date Sept. 21, 2007). (Ord. No. 10-014, § 13, April 7, 2010, Eff date April 29, 2010)

30.52F.176 Validity of permit (IRC 105.4).

The issuance or granting of a permit shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of the residential code or of any other applicable law or ordinance of the jurisdiction. Permits presuming to give authority to violate or cancel the provisions of the residential code or other ordinances of the jurisdiction shall not be valid. The issuance of a permit based on construction documents and other data shall not prevent the building official from requiring the correction of errors in the construction documents and other data. The building official is also authorized to prevent occupancy or use of a structure in violation of the residential code or of any other ordinances of this jurisdiction. (Added Amended Ord. 07-084, § 20 (part), Sept. 5, 2007, Eff date Sept. 21, 2007).

30.52F.178 Expiration (IRC 105.5).

(1) Every permit issued shall become invalid 18 months after its issuance. The building official is authorized to grant, in writing, one extension of time, for a period of not more than 18 months, except as provided for in SCC 30.52F.178(2). The extension shall be requested in writing and justifiable cause demonstrated, except as provided for in SCC 30.52F.178(2).

(2) Until April 29, 2011 (twelve months from the effective date of this ordinance), an applicant may

request renewal of a chapter 30.52F SCC permit without requirement to demonstrate justifiable cause or good faith, provided that:

(a) The permit is necessary to complete improvements approved under or necessitated by a preliminary subdivision, short subdivision, site plan or commercial development permit;

(b) A fee that includes a percentage of the original permit fee equal to the percentage of work to be completed plus a \$400 administration fee is paid;

(c) No permit nor any rights under this section may be transferred, assigned or sublet, except by operation of law;

(d) The permit has not expired;

(e) Unless provided an extension of time, the permit would expire within 12 months of (the effective date of this ordinance); and

(f) If extended the permit shall expire simultaneously with the associated approved preliminary subdivision, short subdivision, site plan or commercial development permit. (Added Amended Ord. 07-084, § 20 (part), Sept. 5, 2007, Eff date Sept. 21, 2007).

(Ord. No. 10-014, § 15, April 7, 2010, Eff date April 29, 2010)

30.52F.180 Suspension or revocation (IRC 105.6).

The building official may suspend or revoke a permit issued under the residential code pursuant to SCC 30.71.027 or SCC 30.85.300 or 30.85.310. (Added Amended Ord. 07-084, § 20 (part), Sept. 5, 2007; Amended Ord. 08-062, § 19, Oct. 1, 2008, Eff date Nov. 1, 2008).

30.52F.182 Placement of permit (IRC 105.7).

The building permit or copy of the permit shall be kept on the site of the work until the completion of the project. (Added Amended Ord. 07-084, § 20 (part), Sept. 5, 2007, Eff date Sept. 21, 2007).

30.52F.184 Responsibility (IRC 105.8).

It shall be the duty of every person who performs work for the installation or repair of building, structure, electrical, gas, mechanical or plumbing systems, for which the residential code is applicable, to comply with the residential code. (Added Amended Ord. 07-084, § 20 (part), Sept. 5, 2007, Eff date Sept. 21, 2007).

30.52F.186 Construction submittal documents (IRC 106.1).

Construction documents, special inspection and structural observation programs and other data shall

Classification	Classification Criteria Summary
	High Level Habitat Function (habitat function score is 29-36)
	Moderate Level Habitat Function (habitat function score is 20-28)
	Total score 70 or above but not meeting above criteria
Category II	Estuarine (less than one acre)
	High level of function for habitat (habitat function score is 29-36)
	Moderate level of function for habitat (habitat function score is 20-28)
	High level of function for water quality improvement and low for habitat (water quality function score is 24 — 32 and habitat function score is less than 20)
	Total score 51-69 but not meeting above criteria
Category III	Moderate Level Habitat Function (habitat function score is 20-28)
	Total score of 30-50 but not meeting above criteria
Category IV	Total score for all functions less than 30 points

(Added Amended Ord. 06-061, § 29 (part), Aug. 1, 2007, Eff date Oct. 1, 2007).

Part 300. Standards and Requirements

30.62A.310 General standards and requirements.

(1) This Part establishes specific standards and requirements for protection of wetlands and fish and wildlife habitat conservation areas, and under what circumstances mitigation may be used to address the impacts of development.

(2) Any development activity, action requiring a project permit or clearing occurring within wetlands, fish and wildlife habitat conservation areas, and buffers is prohibited unless conducted in compliance with this chapter.

(3) Except as otherwise provided in Part 500, all development activities, actions requiring a project permit or clearing shall be designed and conducted to achieve no net loss of critical area functions and values and comply with the following general standards and requirements:

(a) The project proponent shall make all reasonable efforts to avoid and minimize impacts to wetlands, fish and wildlife habitat conservation areas, and buffers in the following sequential order of preference:

(i) avoiding impacts altogether by not taking a certain action or parts of an action; or;

(ii) when avoidance is not possible, minimizing impacts by limiting the degree or magnitude of the action and its implementation, using appropriate technology, or by taking affirmative steps, such as project redesign, relocation, or timing, to avoid or reduce impacts; and mitigating for the affected functions and values of the critical area;

(b) When mitigation is required it shall be conducted in accordance with the following requirements:

(i) Mitigation Location. Unless otherwise provided in this chapter, mitigation for impacts to the functions and values of wetlands, fish and wildlife habitat conservation areas and buffers shall be in-kind and on-site. Off-site mitigation may be approved only in those situations where appropriate and adequate on-site mitigation can not replace the function(s) of the wetlands, fish and wildlife habitat conservation area(s) or buffers at an equivalent level to the off-site location. Off-site mitigation must occur in the same sub-drainage basin for streams, lakes and wetlands, or drift cell for marine waters;

(ii) Mitigation Timing. Mitigation shall be completed prior to granting of final building occupancy, or the completion or final approval of any development activity or action requiring a pro-

ject permit for which mitigation measures have been required, except as set forth in chapter 30.84 SCC; and

(iii) Function Replacement. Unless otherwise provided in this chapter, functions and values shall be replaced at a one to one ratio;

(c) A project proponent may demonstrate compliance with SCC 30.62A.310(3) by:

(i) adhering to the standards and requirements in SCC 30.62A.320(1), .330(1), .340(1) and (2) and .450 of this chapter as applicable; or by

(ii) adhering to the performance standards in SCC 30.62A.320(2) and (3), .330(2), .340(3) and (4), or .350 and mitigating for impacted functions and values as follows:

(A) any development activity, action requiring a project permit or clearing allowed pursuant to SCC 30.62A.320(2), .330(2), .340(3) or .350 shall also comply with general mitigation requirements in SCC 30.62A.310(3). Activities not listed or deviations from the standards contained in Part 300 may only be conducted pursuant to SCC 30.62A.350 or Part 500; and

(B) any development activity or action requiring a project permit listed in SCC 30.62A.320(2), .330(2), .340(3) or .350 shall also comply with the critical area study requirements of SCC 30.62A.140, and the mitigation plan requirements of SCC 30.62A.150; and

(d) Permanent identification and protection of wetlands, fish and wildlife habitat conservation areas, and their buffers shall be provided as required by SCC 30.62A.160. (Added Amended Ord. 06-061, § 29 (part), Aug. 1, 2007, Eff date Oct. 1, 2007).

30.62A.320 Standards and requirements for buffers.

Buffers shall be required adjacent to streams, lakes, wetlands and marine waters to protect the functions and values of these aquatic critical areas.

(1) Buffer Standards and Requirements — No Mitigation Required. All development activities, actions requiring project permits and clearing that comply with the buffer requirements of SCC 30.62A.320(1)(a) through (g) satisfy the avoidance criteria of SCC 30.62A.310(3) and are not required to provide mitigation.

(a) Buffer widths shall be as set forth in Table 2a or 2b below.

Table 2a — Stream, Lake and Marine Buffer Width Standards (Feet)		
<i>Streams and Lakes</i>		
Type S		150
Type F with anadromous or resident salmonids		150
Type F without anadromous or resident salmonids		100
Type Np		50
Type Ns		50
<i>Marine Waters</i>		
Type 1	All marine waters	150

Table 2b: Wetland Buffer Width Standards (feet)						
<i>Wetlands</i>						
Wetland Category	Description	Buffer Width Requirements (feet)				
		Standard Buffer Width	High Intensity Land Use ¹ [30.62A.340(4)(b)]			Low Intensity Land Use ²
			Buffer w/out mitigation measure 1 or 2	Buffer w/ mitigation measure 1 (*may use measure 1 OR 2)	Buffer w/ mitigation measures 1 AND 2	
Wetlands containing salmonids (minimum)		150				
Category I	Washington Natural Heritage Program/DNR high quality wetlands	190	250	220*	190	125
	Bogs	190	250	220*	190	125
	Estuarine (at least 1 acre) & Coastal Lagoons	150	200	175*	150	100
	High Level Habitat Function (habitat function score is 29-36)	225	300	262*	225	150
	Moderate Level Habitat Function (habitat function score is 20-28)	110	150	130*	110	75
	Total score 70 or above but not meeting above criteria	75	100	75		50
Category II	Estuarine (less than 1 acre)	110	150	130*	110	75
	High level of function for habitat (habitat function score is 29-36)	225	300	262*	225	150
	Moderate level of function for habitat (habitat function score is 20-28)	110	150	130*	110	75

Table 2b: Wetland Buffer Width Standards (feet)						
Wetlands						
	High level of function for water quality improvement and low for habitat (water quality function score is 24—32 and habitat function score is less than 20)	75	100	75		50
	Total score 51-69 but not meeting above criteria	75	100	75		50
Category III	Moderate Level Habitat Function (habitat function score is 20-28)	110	150	110		75
	Total score of 30-50 but not meeting above criteria	60	80	60		40
Category IV	Total score for all functions less than 30 points	40	50	40		25

¹ High intensity land uses include:

- commercial or industrial uses
- nonresidential use in zones where the primary intent is residential use as per SCC 30.21.025
- Residential use (4 or more units/acre)
- High-intensity recreation (golf courses, ball fields, ORV parks, etc.)

² Low intensity land uses include:

- Forestry (cutting of trees only)
- Low-intensity open space (hiking, bird-watching, preservation of natural resources, etc.)
- Unpaved trails
- Utility corridor without a maintenance road and little or no vegetation management.

(b) Buffer widths shall be measured as follows:

(i) the buffer for streams, lakes and marine waters shall be measured from the ordinary high-water mark extending horizontally in a landward direction and for wetlands, the buffer shall be measured from the edge of the wetland extending horizontally in a landward direction; and

(ii) provided however, where the landward edge of the standard buffer shown in Table 2a or

2b extends on to a slope of 33 percent or greater, the buffer shall extend to a point 25 feet beyond the top of the slope.

(c) Within buffers, the following restrictions on impervious surfaces apply:

(i) no new effective impervious surfaces are allowed within the buffer of streams, wetlands, lakes or marine waters; and

(ii) total effective impervious surfaces shall be limited to 10 percent within 300 feet of:

(A) any streams or lakes containing salmonids;

(B) wetlands containing salmonids;
or
(C) marine waters containing salmonids.

(d) All development activities, actions requiring project permits or clearing shall be designed to avoid the loss of or damage to trees in buffers due to blow down or other causes.

(e) The following measures for reducing buffer width and area may be used without a critical area study or mitigation plan:

(i) Separate Tract Reductions. Up to a 15 percent reduction of the standard buffer is allowed when the buffer and associated aquatic critical area are located in a separate tract as specified in SCC 30.62A.160(3);

(ii) Fencing Reductions. Up to a 15 percent reduction of the standard buffer is allowed when a fence is installed along the perimeter of the buffer. The fence shall be designed and constructed as set forth below:

(A) the fence shall be designed and constructed to be a permanent structure;

(B) the fence shall be designed and constructed to clearly demarcate the buffer from the developed portion of the site and to limit access of landscaping equipment, vehicles, or other human disturbances; and

(C) the fence shall allow for the passage of wildlife, with a minimum gap of one and one half feet at the bottom of the fence, and a maximum height of three and one half feet at the top; and

(iii) for permanent fencing combined with separate tracts, the maximum reduction shall be limited to 25 percent.

(f) The following buffer reduction methods are only allowed in conjunction with a critical area study, pursuant to SCC 30.62A.140, demonstrating that the methods will provide protection equivalent to the standard requirements contained in Table 2. Proposals offering better protection would also be acceptable:

(i) the width of a buffer may be averaged, by reducing the width of a portion of the buffer and increasing the width of another portion of the same buffer, if all of the following requirements are met:

(A) averaging will not diminish the functions and values of the wetland(s), fish and wildlife habitat conservation area(s) or buffer(s);

(B) the total area of the buffer on the subject property may not be less than the area that would have been required if averaging had not occurred;

(C) the total area of buffer averaging shall be placed between the developed area and the wetland, lake, stream or marine water;

(D) no part of the width of the buffer may be less than 50 percent of the standard required width or 25 feet, whichever is greater;

(E) averaging of a buffer shall not be allowed where the reduction extends into associated sloping areas of 33 percent or greater; and

(F) buffers on isolated - wetlands or lakes located in close proximity to other aquatic critical areas shall be connected by corridors of native vegetation where possible using the buffer averaging provisions of this section and the following criteria:

(1) the width of the corridor connection between the aquatic critical areas shall be no less than the combined average of the standard buffers for each of the critical areas, provided that if there is not sufficient buffer area available when using averaging to establish a connection, a connection is not required;

(2) no more than 25 percent of the buffer of the individual critical areas shall be used to make a corridor connection;

(3) the corridor connection shall be established where feasible using the highest quality habitat existing between the critical areas;

(ii) Enhancement Reductions. Up to a 25 percent reduction of the standard buffer width and area is allowed provided the project proponent demonstrates the enhancement complies with all of the following criteria:

(A) a comparative analysis of buffer functions and values prior to and after enhancement, demonstrates that there is no net loss of buffer functions and values;

(B) a full enhancement reduction shall only be allowed where it can be demonstrated that the existing buffer functions and values are non-existent or significantly degraded. Buffers with partial function may receive a partial or prorated reduction; and

(C) the total buffer area after reduction is not less than 75 percent of the total buffer area before reduction;

(iii) reductions may be combined based on the following criteria:

(A) for enhancement combined with permanent fencing, the maximum reduction in width and area shall be limited to 30 percent; and

(B) for enhancement combined with separate tracts, the maximum reduction in both width and area shall be limited to 30 percent.

(g) When averaging is used in combination with any or all of the reduction methods contained in this section, the buffer shall not be reduced to less than half of the standard buffer widths contained in SCC 30.62A.320(1)(a), Table 2.

(2) Buffer Standards and Requirements—Mitigation Required. All actions, structures or facilities listed in this section are allowed only when they are determined to be unavoidable pursuant to SCC 30.62A.310(3) and are conducted according to the standards and requirements identified in this section. When a permit is required, an applicant must also provide a critical area study meeting the requirements of SCC 30.62A.140 and a mitigation plan meeting the requirements of SCC 30.62A.150.

(a) New utilities and transportation structures are allowed within buffers when:

(i) no other feasible alternative exists or the alternative would result in unreasonable or disproportionate costs; and

(ii) location, design and construction minimizes impacts to the buffers pursuant to SCC 30.62A.310.

(b) Stormwater detention/retention facilities are allowed pursuant to the requirements of SCC 30.63A.570.

(c) Access through buffers is allowed provided it is designed and constructed to be the minimum necessary to accommodate the use or activity.

(d) Construction of pedestrian walkways or trails in buffers is allowed when constructed with natural permeable materials and does not exceed 6 feet in width.

(e) Trimming of vegetation for purposes of providing a view corridor in a buffer is allowed provided that:

(i) trimming shall not include felling, topping, or removal of trees and be limited to hand pruning of branches and vegetation;

(ii) trimming and limbing of vegetation for the creation and maintenance of view corridors shall occur in accordance with the pruning standards of the International Society of Arboriculture (See articles published by the International Society of Arboriculture, Consumer Information Program, updated July, 2005);

(iii) trimming shall be limited to view corridors of 30 feet wide or 50 percent of the lot width, whichever is less;

(iv) no more than 30 percent of the live crown shall be removed; and

(v) the activity will not increase the risk of landslide or erosion.

(f) New shoreline and bank stabilization measures or flood protection are allowed pursuant to SCC 30.62A.330(2).

(g) Reconstruction or replacement of buildings may be allowed provided the new building does not encroach further into a critical area or its buffer than did the original building being reconstructed or replaced.

(3) Buffer Standards and Requirements—Mitigation Ratios. To mitigate impacts to functions and values of buffers, the ratios in Table 3 shall be required unless using the provisions of innovative development in SCC 30.62A.350. The ratios are based upon the existing type of vegetative cover and are expressed in terms of the number of acres needed to recover the lost functions and values of one acre of buffer area. For impacts to buffers that permanently remove existing vegetation, functions and values shall be assumed to be replaced by creating or enhancing new buffers at the following ratios:

Table 3—Buffer Mitigation Ratios

Existing Riparian habitat vegetation type	Creation	Enhancement ¹
Mature forest	6:1	12:1

Existing Riparian habitat vegetation type	Creation	Enhancement ¹
Non-mature forest	3:1	6:1
Shrub	2:1	4:1
Non-woody vegetation	1.5:1	3:1
No vegetated cover	1:1	2:1
¹ enhancement of the existing buffer is allowed in lieu of creation for up to one acre of buffer loss		

(Added Amended Ord. 06-061, § 29 (part), Aug. 1, 2007, Eff date Oct. 1, 2007).
 (Amended Ord. 10-026, § 15, June 9, 2010, Eff date Sept. 30, 2010)

period. The application extension shall be requested in writing and the applicant shall demonstrate a justifiable cause for the extension. A renewal fee shall be paid at the time of the renewal request pursuant to SCC 30.86.510(2)(a) and (b).

(Added Amended Ord. 10-023, § 15, June 9, 2010, Eff date Sept. 30, 2010)

30.63B.280 Permit expiration and renewal.

(1) Land disturbing activity permits shall expire 24 months from the date of issuance, provided that the director may set an earlier expiration date for a permit, or issue a permit that is non-renewable, or both, if the director determines that soil, hydrologic, or geologic conditions on the project site necessitate that land disturbing activity and drainage improvements and site stabilization be completed in less time.

(2) If a permit has expired, the applicant shall obtain a renewed permit before starting work authorized under the expired permit.

(3) A permit may be renewed only once for up to 24 additional months, and a request for renewal shall be made no later than 30 days after the date of expiration of the original permit, except as provided for in this section.

(4) Requirements under this chapter that are not expressly temporary during land disturbing activity operations, including but not limited to, requirements for erosion control, drainage, and slope management, do not terminate with expiration of the land disturbing activity permit.

(5) Until April 29, 2011, an applicant may request an extension of time for all chapter 30.63B SCC permits without requirement to demonstrate justifiable cause or good faith, provided that:

(a) The permit is necessary to complete improvements approved under or necessitated by a preliminary subdivision, short subdivision, site plan or commercial development permit;

(b) A renewal fee as shown in SCC Table 30.86.510(2) is paid;

(c) No permit nor any rights under this section may be transferred, assigned or sublet, except by operation of law;

(d) The permit has not expired;

(e) Unless provided an extension of time, the permit would expire within 12 months of April 29, 2010; and

(f) If extended, the permit shall expire simultaneously with the associated approved preliminary subdivision, short subdivision, site plan or commercial development permit.

(Added Amended Ord. 10-023, § 15, June 9, 2010, Eff date Sept. 30, 2010)

Editor's note—Section 27 of Ord. No 10-023 specifies that this § 30.63B.280, adopted in Section 15 of that ordinance, shall be repealed on April 29, 2011.

30.63B.290 Requests for modification or waiver of requirements.

The county may approve modifications or waivers of the requirements of this chapter pursuant to SCC 30.63A.170.

(Added Amended Ord. 10-023, § 15, June 9, 2010, Eff date Sept. 30, 2010)

30.63B.300 Person responsible.

(1) The county is not responsible for the accuracy of land disturbing activity site plans submitted for approval. The county expressly disclaims any responsibility for the design or implementation of a land disturbing activity site plan. The design and implementation of a suitable land disturbing activity site plan is the responsibility of the applicant and property owner.

(2) The applicant and owner shall ensure that all land disturbing activity work is performed in accordance with an approved land disturbing activity site plan and construction specifications that comply with the provisions of title 30 SCC. Any person performing land disturbing activity subject to a land disturbing activity permit shall ensure that a copy of the approved land disturbing activity permit, approved land disturbing activity site plan, and construction plans are available on the work site at all times. Such person shall be responsible for compliance with all approved plans, specifications and permit conditions.

(Added Amended Ord. 10-023, § 15, June 9, 2010, Eff date Sept. 30, 2010)

30.63B.310 Inspections—General.

Land disturbing activity inspections required by this chapter may be conducted together with any inspections required by chapter 30.63A SCC.

(Added Amended Ord. 10-023, § 15, June 9, 2010, Eff date Sept. 30, 2010)

30.63B.320 Site inspection for clearing limits.

Upon submittal of a complete land disturbing activity permit application, the county must perform a

30.71.055 Effect of appeal of Type 1 decision.

Timely filing of an appeal shall stay the effect of the order, permit, decision, determination or other action being appealed until the appeal is finally disposed of by the hearing examiner or the state shorelines hearings board or withdrawn. Failure to file a timely and complete appeal shall constitute waiver of all rights to an administrative appeal under county code. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

30.71.060 Dismissal of appeal of Type 1 decision.

The hearing examiner may summarily dismiss an appeal in whole or in part without hearing if the hearing examiner determines that the appeal is untimely, incomplete, without merit on its face, frivolous, beyond the scope of the hearing examiner's jurisdiction or brought merely to secure a delay. The hearing examiner may also summarily dismiss an appeal based on lack of standing, in response to a challenge raised by the department whose decision is being appealed or by the permit applicant, and after allowing the appellant a reasonable period in which to reply to the challenge. Except in extraordinary circumstances, summary dismissal orders shall be issued within 15 days following receipt of either an appeal or a request for dismissal, whichever is later. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

30.71.070 Notice of appeal of Type 1 decision.

(1) The department shall forward the appeal to the hearing examiner within three working days of its filing.

(2) The hearing examiner, within two working days of receipt of the appeal, shall send written notice of the appeal to the county department whose decision has been appealed; provided that such notice is not required when the department is the respondent.

(3) The hearing examiner, within three working days after receipt of the appeal, shall send written notice of the filing of the appeal by first class mail to the applicant, unless the applicant is the appellant. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

30.71.080 Notice of Type 1 open record appeal hearing.

(1) Notice of open record appeal hearings conducted pursuant to this chapter shall be provided at least 14 calendar days prior to the hearing and shall

contain a description of the proposal and list of permits requested, the county file number and contact person, the date, time, and place for the hearing, and any other information determined appropriate by the department.

(2) Except where notice has already been given pursuant to the combined notice provisions of SCC 30.70.080(2), and except where notice has been provided by the department pursuant to subsections (3) and (4) below, the hearing examiner's office shall give notice of all open record appeal hearings by first class mail (unless otherwise required herein) to:

- (a) The appellant;
- (b) The appellant's agent/representative, if any;
- (c) The department whose decision is being appealed (by interoffice mail);
- (d) The applicant;
- (e) Applicant's agent/representative, if any; and
- (f) All parties of record.

(3) The department shall give notice of an open record appeal hearing for a decision made pursuant to chapter 30.41B SCC:

- (a) In the same manner as required by SCC 30.72.030; and
- (b) By first class mail to parties of record.

(4) The department shall give notice of an open record appeal hearing for a SEPA determination made pursuant to chapter 30.61 SCC by first class mail to:

- (a) Parties of record;
- (b) Agencies with jurisdiction as disclosed by documents in the appeal file; and
- (c) All taxpayers of record and known site addresses within 500 feet of any boundaries of the property subject to the appeal; provided that the mailing radius shall be increased if necessary to correspond with any larger radius required for the notice of any discretionary permit or action associated with the determination under appeal. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

30.71.090 Report of department on appeal of Type 1 decision.

(1) The applicable department shall coordinate and assemble any available comments of other county departments and governmental agencies having an interest in the appeal, and shall prepare a report summarizing the Type 1 decision and responding to the issues raised in the appeal.

(2) At least seven calendar days prior to the scheduled open record appeal hearing, the applicable department shall transmit all development permit files on the action being appealed and the depart-

Chapter 30.86

FEES

Sections:

30.86.010	Fees established.
30.86.011	Fee payment and dispute resolution.
30.86.015	Fee refunds.
30.86.030	Technology surcharge.
30.86.100	Subdivision fees.
30.86.110	Short subdivision fees.
30.86.115	Administrative site plan fees for single family detached units.
30.86.120	Rural cluster subdivision fees.
30.86.130	Binding site plan fees.
30.86.135	TDR fees.
30.86.140	Boundary line adjustment fees.
30.86.145	Landscape and tree plan review and inspection fee.
30.86.200	Rezone fees.
30.86.205	PRD fees.
30.86.210	Conditional use permit fees.
30.86.220	Administrative conditional use permit fees.
30.86.225	Special use permit fees.
30.86.230	Variance fees.
30.86.300	Special flood hazard areas permit fees.
30.86.310	Shoreline management permit fees.
30.86.400	Construction code fees.
30.86.410	Mechanical permit fees.
30.86.420	Plumbing permit fees.
30.86.430	Fire code fees.
30.86.440	Mobile home/commercial coach permit fees.
30.86.450	Sign fees.
30.86.500	SEPA (environmental review) fees.
30.86.510	Drainage and land disturbing activity fees.
30.86.515	Stormwater modification, waiver and reconsideration request fees.
30.86.520	Reserved.
30.86.525	Critical areas review fees.
30.86.530	Park and recreation impact mitigation fees.
30.86.540	Road impact mitigation fees.
30.86.550	School impact mitigation fees.
30.86.600	Permit decision appeal fees.
30.86.610	Code interpretation fees (Type 1).
30.86.615	Reserved.
30.86.616	Reserved.
30.86.620	City or town's fees.

30.86.700 Docketed comprehensive plan amendments to the Snohomish County Comprehensive Plan Future Land Use Map.

30.86.710 Engineering, Design and Development Standards (EDDS) deviations.

30.86.080 Urban Center development fees.

30.86.010 Fees established.

This chapter establishes fees required to be paid by the applicant to compensate the county for the cost of administering title 30 SCC. Where any such fee is required to be paid, it shall be paid in accordance with the provisions and tables set forth herein. Such fees are in addition to any other fees required by law. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

30.86.011 Fee payment and dispute resolution.

Fees are due and payable at the time services are requested unless otherwise specified in this chapter or state law. Any dispute involving fees shall be resolved by the director. A written request to resolve a fee dispute shall be submitted within 30 days of the fee payment. For the purpose of computing elapsed calendar days, the day after the fee payment date shall be counted as day one. The director shall issue a written determination within 30 days of receipt of the request. The director's decision shall be final. Permit review shall be stayed during the pendency of the dispute resolution. (Added Amended Ord. 08-122, § 4, Nov. 10, 2008, Eff date Jan. 1, 2009).

30.86.015 Fee refunds.

(1) Fee refund requests shall be submitted in writing to the department. A request shall reference the applicable project file number, the specific reason for the request and the amount of refund requested.

(2) The date of the refund request shall be the date the written refund request is received by the department. For the purpose of computing elapsed calendar days, the day after the date of application or deadline date as appropriate shall be counted as day one.

(3) When authorized, refunds shall be made within 60-days of the refund request.

(4) Fee refunds shall not include the following:

(a) Base fees;

(b) Fees expended to satisfy public notice requirements;

30.86.015

(c) State Building Code Council surcharges.

(5) The director may authorize the following refunds:

(a) 100 percent of fees collected by error of the department;

(b) Fee refunds for permit applications or services requested before the commencement of services or 60-days, whichever occurs first;

(c) Fees collected for the DOT and Health Department;

(d) SEPA environmental impact statement (EIS) refunds pursuant to SCC 30.86.500(6)(c); and

(e) Appeal related refunds pursuant to SCC 30.71.050(4), SCC 30.72.070(5) and SCC 30.86.610(1). (Added Ord. 02-064, § 19 (part), Dec. 9, 2002; Amended Ord. 08-122, § 5, Nov. 10, 2008, Eff date Jan. 1, 2009).

30.86.030 Technology surcharge.

(1) A technology surcharge is required for the cost of developing and implementing technology necessary to efficiently administer development and permit review by the department and to provide service improvements in permitting processes. The technology surcharge shall be paid in addition to any other fees required by law.

(2) A technology surcharge of three percent of required fees, is required to be paid by the applicant on all PDS fee transactions required by chapters 13.01 and 30.86 SCC, except impact mitigation fees and fees collected on behalf of cities pursuant to SCC 30.86.530, SCC 30.86.540, SCC 30.86.550 and SCC 30.86.620. (Added Amended Ord. 08-122, § 6, Nov. 10, 2008, Eff date Jan 1, 2009).