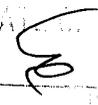


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STATE OF WASHINGTON

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No. 40277-7-II

IN THE COURT OF APPEALS

DIVISION II

STATE OF WASHINGTON

ALEXANDER MACKENZIE LLC, Appellant,

vs.

TOWN OF STEILACOOM, Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS	Page No.
INTROCUCTION	1
STATEMENT OF FACTS	2
I. CORRECTION OF FACTUAL ERRORS STATED IN THE TOWN'S RESPONSE BRIEF	2
A. The Inn's Conference Room is not a "Separate Business."	2
B. There was Substantial Public Support for the Conference Room.	3
C. SMC 18.28.020(1)	3
D. The Inn's "Appearance of Fairness" Argument was Raised in the Inn's Amended Complaint and in the Inn's Opening LUPA Brief Submitted to the Trial Court.	4
II. ADDITIONAL FACTS GERMANE TO THE LEGAL ANALYSIS HEREIN	5
LEGAL ANALYSIS AND ARGUMENT	7
I. THE STEILACOOM MUNICIPAL CODE PRO- VISIONS AT ISSUE IN THIS CASE ARE UN- REASONABLY VAGUE, AMBIGUOUS, AND SUBJECT TO ARBITRARY INTERPRETATION	8
A. SMC 18.08.920(B) v. SMC 18.12.030	10
B. SMC 18.08.920(F) v. SMC 18.12.030	11
C. SMC 18.16.060(d)(9) v. The Town's 2009 Conclusions of Law (CP 232-233)	12

D.	SMC Provisions Germane to this Case are Subject to Arbitrary, <i>Ad Hoc</i> Interpretation and Enforcement	13
II.	THE TOWN'S INTERPRETATION OF THE STEILACOOM MUNICIPAL CODE IS NOT ENTITLED TO DEFERENCE IN THIS CASE	15
III.	IN ANY EVENT, THE TOWN SHOULD NOT RECEIVE AN AWARD OF ATTORNEY FEES PURSUANT TO RCW 4.84.370	19
	CONCLUSION	21
	CERTIFICATE OF SERVICE	24
TABLE OF AUTHORITIES		Page No.
<u>CASE LAW</u>		
	<u>Anderson v. City of Issaquah</u> , 70 Wn. App. 64, 851 P.2d 744 (1993)	9, 14
	<u>Baker v. Tri-Mountain Resources</u> , 94 Wn. App. 849, 973 P.2d 1078 (1999)	20
	<u>City of University Place v. McGuire</u> , 144 Wn.2d 640, 30 P.3d 453 (2001)	8
	<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wn.2d 801, 828 P.2d 549 (1992)	13, 17
	<u>Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment</u> , 749 A.2d 1258 (D.C. 2000)	20
	<u>Grant County v. Bohne</u> , 90 Wn.2d 953, 577 P.2d 138 (1978)	8-9, 16

<u>HJS Dev't., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.</u> , 148 Wn.2d 451, 61 P.3d 1141 (2003)	7-8, 12
<u>Isla Verde Intern'l Holdings, Inc. v. City of Camas</u> , 146 Wn.2d 740, 49 P.3d 867 (2002)	8
<u>Mall, Inc. v. Seattle</u> , 108 Wn.2d 369, 739 P.2d 668 (1987)	9-10
<u>Millay v. Cam</u> , 135 Wn.2d 193, 955 P.2d 791 (1998)	10
<u>Pavlina v. City of Vancouver</u> , 122 Wn. App. 520, 94 P.3d 366 (2004)	7
<u>Sleasman v. City of Lacey</u> , 159 Wn.2d 639, 151 P.3d 990 (2007)	9, 16-18
<u>Spain v. Employment Sec. Dep't</u> , 164 Wn.2d 252, 185 P.3d 1188 (2008)	9
<u>State v. Draxinger</u> , 148 Wn. App. 533, 200 P.3d 251 (2008)	9
<u>State of Washington ex rel. Catholic Family & Children's Services v. City of Bellingham</u> , 25 Wn. App. 33, 605 P.2d 788 (1979)	12
<u>Young v. Pierce County</u> , 120 Wn. App. 175, 84 P.3d 927 (2004)	7-8
 <u>STATUTES AND MUNICIPAL CODES</u>	
RCW 36.70C.130(1)(b)	15
RCW 4.84.320	19-20
Lacey Municipal Code 14.32.040	16
Steilacoom Municipal Code (various provisions- contained in the record)	<i>throughout</i>

INTRODUCTION

Zoning regulations are required by law to be comprehensive enough for a person of ordinary intelligence to read and understand. To avoid arbitrary enforcement actions, municipalities are prohibited from enforcing land-use restrictions, unless the restrictions are codified. If a municipality attempts to enforce unreasonably vague, or ambiguous land-use restrictions, or extend land-use restrictions by implication, such enforcement must be rejected by the Courts. Similarly, if a municipal land-use restriction is subject to arbitrary construction, or interpretation, unsupported by applicable zoning regulations, the land-use restriction must also be rejected.

Despite the definition of a "secondary use" found in the Steilacoom Municipal Code ("SMC"), at SMC 18.08.910(F) (CP 72), the Town of Steilacoom persistently argues that a bed & breakfast cannot operate in conjunction with a conference room, because conference rooms are not specifically itemized as a "conditional" use in the Town's zoning code. SMC 18.12.030 (CP 75). The Town's interpretation of its code is clearly erroneous, because the Town chooses to focus narrowly on one part of the code, and ignore other parts of the code that conflict with its interpretation.

This Reply Brief will primarily focus on two issues: (1) whether a conference room is a valid secondary / ancillary use for a bed & breakfast, under the Steilacoom Municipal Code; and (2) whether the Steilacoom Municipal Code is unreasonably vague and/or ambiguous, such that a

person of ordinary intelligence would not be able to read the Code and understand what it means. Ancillary to the latter issue, this Reply will also discuss whether the Town's land-use decision here is based on an arbitrary interpretation of the Steilacoom Municipal Code and whether deference to the Town's interpretation of Code is appropriate in this case.

STATEMENT OF FACTS

I. CORRECTION OF FACTUAL ERRORS STATED IN THE TOWN'S RESPONSE BRIEF

A. The Inn's Conference Room is not a "Separate Business."

In the Town's Response Brief, at page 4, the Town attempts to mischaracterize the Inn's¹ conference room as a "separate business" from the bed & breakfast lodging facility. However, the Inn's 2008 application for an amendment to its existing conditional use permit ("CUP"), specifically states the purpose of the application as "allowing operation of a seminar room as part of an existing B&B business at 68 Jackson Street." CP 140. Moreover, the "Summary of Operations" submitted to the Town on July 24, 2008, along with the application, describes the conference room as "[o]perating as an accessory to the Bed & Breakfast business." CP 148 ¶ 2.²

¹ Appellant Alexander Mackenzie, LLC, d/b/a, "The Inn at Saltar's Point" is referred to as "the Inn."

² The CUP amendment application is dated June 8, 2008, and was received by the Town on July 24, 2008. CP 140. It should be noted that submission of the 2008 application for operation of a conference room, as an amendment to the existing CUP, was pursuant to the directive of the Steilacoom Town Planner, Doug Fortner. *See*, CP 236 ¶ 1.

The Town's novel attempt to mischaracterize the nature of the Inn's conference room is based on an incomplete reference to correspondence with the Town Planner, Doug Fortner, which was received by Mr. Fortner on March 31, 2008 -- four months prior to the Inn's CUP amendment application. CP 235. On April 2, 2008, Mr. Fortner followed up with an inquiry regarding whether the conference room was intended as a separate business, or as an "integral part of the B&B operation." CP 236 ¶ 3. When the Town received the CUP amendment application, on July 24, 2008, Mr. Fortner also received a response letter from the Inn's counsel, explaining that the conference room "is not intended to be a separate business, but part of the same operation as the Inn." CP 150 ¶ 2.

If there was any confusion between the language of the CUP amendment application itself, and correspondence sent to the Town Planner four months earlier, the application and summary of operations should control. The additional fact that the Town Planner requested clarification and received a corrected statement in response, makes the Town's mischaracterization of the Inn conference room as a "separate business," seem somewhat misleading.

B. There was Substantial Public Support for the Conference Room.

Also on page 4 of the Town's Response Brief, the Town seems to imply that "there was substantial opposition by the public," respecting the Inn's proposed conference room. This is false. According the Town

Council's 2009 Findings of Fact, concerning the Inn's 2008 application for a CUP amendment to include operation of a conference room, "[m]any Town residents testified in favor of the Conditional Use Permit; a much smaller number of Town residents testified in opposition to the application." CP 232 ¶ 7.

In fact, no less than a dozen community members submitted statements in support of the Inn's conference room, including every immediate neighbor of the Inn, save one. CP 191-199; CP 202-203; CP 206; CP 242. Several others testified in support of the conference room. There was a single (1) statement submitted in opposition, which was really a statement in opposition to CUPs altogether. CP 255-256.

The Town's reference regarding "substantial opposition by the public," at page 4 of the Town's Response Brief, is a statement by the Town Planner, discussing the Inn's 2006 application. However, there is no indication in the record of this case, that there was ever any public opposition to the conference room in 2006. In fact, the Town Planning Commission recommended *approval* of the Inn's 2006 CUP application as a whole, including the conference room. CP 157 ¶ 2 ("Current Status").³

C. SMC 18.28.020(1)

Again on page 4 of the Town's Response Brief, the Town insists that the Inn's citation to the exact language of SMC 18.28.020(1) is

³ In 2006, the Town Planning Commission applied the same analysis required by SMC 18.28.020(3), as it did in 2008. *See*, CP 157-160.

"incorrect" and "inaccurate." The section of the SMC entitled "Conditional Use Permit," states verbatim, in the second sentence of SMC 18.28.020(1), that "[a] request for a conditional use permit may be denied only if the expected impacts cannot be mitigated by assigned conditions." CP 81.

D. The Inn's "Appearance of Fairness" Argument was Raised in the Inn's Amended Complaint and in the Inn's Opening LUPA Brief Submitted to the Trial Court.

At page 23 of the Town's Response Brief on appeal, the Town argues that the Inn's argument regarding "appearance of fairness doctrine was never raised until the Inn submitted its reply brief to the superior court." This is totally inaccurate. The Inn's allegation that the Town's land use decision in this case did not have the appearance of fairness, was raised in the Inn's Amended LUPA Complaint, and in the Inn's Opening / Amended LUPA Brief submitted to the trial court. CP 6-7 (¶¶ 21-24); CP 45-49 (*esp.* CP 48:8-10).

II. ADDITIONAL FACTS GERMANE TO THE LEGAL ANALYSIS HEREIN.

In 2006, the Inn submitted its original application for a CUP, to operate a bed & breakfast in conjunction with a conference room, as a secondary use.⁴ The 2006 Town Planning Commission analyzed the

⁴ The purpose of referencing the Inn's 2006 CUP application, which is not subject to review here, is to demonstrate ambiguity in the Steilacoom Municipal Code, such that the Town Planning Commission and the Town Council do not agree on what the Code means.

application as a whole, pursuant to the requirements of SMC 18.28.020(3). CP 81-82. As a result, the Town Planning Commission recommended approval of the application as a whole. CP 157-158 (*see, esp.* ¶ 2 at CP 157, "Current Status"). Upon recommendation for approval from the Town Planning Commission, the Town Council directed that the CUP application be split into two parts. The Town Council denied the application as applied to the conference room and granted the application as applied to the bed & breakfast. CP 157 "Current Status"; CP 163-166.

Pursuant to SMC 14.20.040(b)(1)(iv) (CP 65), the Inn reapplied for inclusion of the conference room as part of its business, in 2008, requesting an amendment to its CUP. CP 140-151; CP 236 ¶ 1. The Town Planning Commission recommended that the Town Council consider the CUP amendment application, on December 8, 2008. CP 156; CP 160. During the Town Planning Commission's December 8, 2008, deliberations, at least one Commissioner disagreed with the Town Council's 2006 code interpretation and opined that "many bed and breakfast inns have meeting rooms, and . . . the zoning code cannot contain every possible use." CP 177.

The Town Planning Commission also noted on December 8, 2008, that the "[conference] room could be compatible with the residential neighborhood with the right conditions." CP 178 ¶ 2. There was a motion by the Town Planning Commission to reverse the Town Council's earlier (2006) decision, and direct that findings and conclusions be made

"determining that conference rooms are allowed uses in bed and breakfast inns." CP 178 ¶ 5.

Again, despite the findings and recommendations of the Town Planning Commission, and without reference to the analysis required by SMC 18.28.020(3) (CP 81-82), the Town Council denied the Inn's 2008 CUP amendment application, on the basis that conference rooms are not specifically mentioned in SMC 18.12.030 (CP 75). CP 233.⁵ However, the Town Council failed to consider whether a conference room fit the definition of a "secondary use" in SMC 18.08.910(F) (CP 72), as applied to the Inn's bed & breakfast business. The Town Council also failed to review other germane Code provisions, discussed below.

LEGAL ANALYSIS AND AGRUMENT

Under LUPA, the Court of Appeals stands in the shoes of the Superior Court and reviews the land use decision at issue on the basis of the administrative record. Pavlina v. City of Vancouver, 122 Wn. App. 520, 525, 94 P.3d 366 (2004); *see also*, Young v. Pierce County, 120 Wn. App. 175, 180-81, 84 P.3d 927 (2004) (*citing*, HJS Dev't., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs., 148 Wn.2d 451, 468, 61

⁵ The Town Council's 2009 denial of the Inn's 2008 CUP amendment application, was not the same as the Town Council's 2006 denial. In 2006, the Town Council denied the Inn's operation of a conference room on the basis that (1) conference rooms are not consistent with the applicable zoning code, and (2) conference rooms are not consistent with the "Comprehensive Plan." CP 158 ("Conclusions" ¶¶ 3-4); CP 166. Presumably, the Town Council abandoned this latter conclusion in 2009, because the "Comprehensive Plan" affects the entire Town of Steilacoom, and the Town itself operates the only for-profit conference rooms in Steilacoom. CP 233; CP 84-85.

P.3d 1141 (2003)). Questions of law are reviewed *de novo*, to determine whether fact and law support the land-use decision at issue. Young, 120 Wn. App. at 181 (*citing* HJS Dev't., 148 Wn.2d at 468, and City of University Place v. McGuire, 144 Wn.2d 640, 647, 30 P.3d 453 (2001)). Interpretation of local ordinances is an issue of law, which the court reviews *de novo*. Isla Verde Intern'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

I. THE STEILACOOM MUNICIPAL CODE PROVISIONS AT ISSUE IN THIS CASE ARE UNREASONABLY VAGUE, AMBIGUOUS, AND SUBJECT TO ARBITRARY INTERPRETATION.

No prohibition can stand where an individual could not reasonably understand that his contemplated conduct is proscribed. Grant County v. Bohne, 90 Wn.2d 953, 955, 577 P.2d 138 (1978) (*citing*, United States v. National Dairy Products Corp., 372 U.S. 29, 83 S. Ct. 594 (1963)). Any ordinance must provide fair warning and nondiscriminatory enforcement. Young v. Pierce County, 120 Wn. App. 175, 182, 84 P.3d 927 (2007).⁶

"A statute is void for vagueness . . . if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." Young, 120 Wn. App. at 182 (*quoting*, Myrick v. Bd. of Pierce County Comm'rs, 102 Wn.2d 698, 707,

⁶ *Quoting*, City of Seattle v. Eze, 45 Wn. App. 744, 748, 727 P.2d 262 (1986) (*in turn quoting*, Karlan v. City of Cincinnati, 416 U.S. 924, 94 S. Ct. 1922 (1974)).

677 P.2d 140 (1984)). Such ordinances violate the most essential aspect of due process-- fair warning. Bohne, 89 Wn.2d at 955.⁷

There can be no prior notice of a prohibition where officials have discretion to make *ad hoc* determinations of prohibited activity. Such *ad hoc* decision making is inconsistent with the requirements of due process. Bohne, 89 Wn.2d at 956-57. While ordinances do not have to meet impossible standards of specificity, at a minimum, uniform guidelines must be set forth so that code interpretation is not left solely to the subjective discretion of administrative bodies, or officials. Anderson v. City of Issaquah, 70 Wn. App. 64, 75-76, 851 P.2d 744 (1993).

A statute that is inconsistent with its own terms is ambiguous. State v. Draxinger, 148 Wn. App. 533, 537, 200 P.3d 251 (2008) (*citing*, State v. Hennings, 129 Wn.2d 512, 522, 919 P.2d 580 (1996)). A statute is ambiguous if it can be reasonably interpreted in more than one way. Spain v. Employment Sec. Dep't, 164 Wn.2d 252, 257, 185 P.3d 1188 (2008).⁸ In the context of land use ordinances, if the code is ambiguous, then it must be construed in favor of the property owner. Sleasman v. City of Lacey, 159 Wn.2d 639, 643 n.4, 151 P.3d 990 (2007) (*citing*, Morin v. Johnson, 49 Wn.2d 275, 279, 300 P.2d 569 (1956)); *See also*, Mall, Inc. v.

⁷ *Citing*, State v. Reader's Digest Ass'n, 81 Wn.2d 259, 501 P.2d 290 (1972); Sonitrol Northwest, Inc. v. Seattle, 84 Wn.2d 588, 528 P.2d 474 (1974); *and*, Bellevue v. Miller, 85 Wn.2d 539, 536 P.2d 603 (1975).

⁸ *Citing*, Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't, 120 Wn.2d 394, 405, 842 P.2d 938 (1992), *and* City of Yakima v. Int'l Ass'n of Fire Fighters, Local 469, 117 Wn.2d 655, 669, 818 P.2d 1076 (1991).

Seattle, 108 Wn.2d 369, 378, 739 P.2d 668 (1987) (*where a land use ordinance is ambiguous, the rule respecting deference to administrative agency charged with interpretation must give way to the rights of property owners*).

A. SMC 18.08.920(B) v. SMC 18.12.030

Steilacoom maintains that its zoning codes are not ambiguous. Resp. Br. at 14. Steilacoom also cites the rule of code interpretation: "[w]hen certain language is used in one instance but different, dissimilar language is used in another, different intent is presumed." Resp. Br. at 15 (*citing, Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998)). Steilacoom cites the definition of "conditional use" found in SMC 18.08.920(B), to demonstrate that conference rooms are not permitted as a "conditional use" under SMC 18.12.030. Resp. Br. at 17.

Under SMC 18.08.920(B) (CP 72), a "'conditional use' means a use in one or more zones as **defined** by this title" (emphasis added). On the basis of this language, the Town argues that the only uses "defined" by SMC Title 18 are those listed in SMC 18.12.030, and the other zoning ordinances. CP 75. However, the language used in SMC 18.12.030 and SMC 18.08.920(B) is inconsistent. SMC 18.12.030 refers to uses "described," rather than uses "defined." Specifically, SMC 18.12.030 states that "[p]ermitted uses . . . shall be **described** in the following table."

Where different words are used in code, different meanings are implied. Millay, 135 Wn.2d at 202. Presumably, SMC 18.08.920(B)

refers to uses "defined" in the Code, which are those uses that are *defined* in SMC 18.08.920, including "secondary" uses. SMC 18.08.920(F) (CP 72). Uses "described" in SMC 18.12.030 are just that -- descriptions of uses. Notwithstanding Steilacoom's arguments to the contrary, the term "described" implies a non-exclusive list of uses.

For instance, one could *describe* this document as containing 24 pages, 22 references to case law, and the signature of an attorney. This document could also be *described* as containing 12-point Times New Roman font, with 2 inch margins on the left and 1.5 inch margins on the right, with a cover page, table of contents, and table of authorities. The former description does not preclude the latter.

B. SMC 18.08.920(F) v. SMC 18.12.030

Regardless, the Inn never applied for a conditional use permit to operate a conference room. The Inn applied for a conditional use permit to operate a bed & breakfast, in conjunction with a conference room as a secondary, incidental use. CP 140; CP 148; CP 150. In response, the Town argues that the "secondary uses" described in SMC 18.12.030 are also exclusive. Resp. Br. at 19. However, the Town's argument here defies reason. If the uses listed in SMC 18.12.030 and the other zoning codes are exclusive, then why does the Code provide a definition for the

term "secondary use" in SMC 18.08.920(F) (CP 72), which could easily include a multitude of uses that are not "described" in SMC 18.12.030?⁹

C. SMC 18.16.060(d)(9) v. The Town's 2009 Conclusions of Law (CP 232-233)

The Town Council's 2009 denial of the Inn's CUP amendment application also failed to reference SMC 18.16.060(d), which is the codification of regulations applicable to bed & breakfasts located in residential areas in Steilacoom. According to SMC 18.16.060(d)(9), bed & breakfasts in residential areas are prohibited from hosting "**outdoor** events, such as weddings, receptions, or parties." CP 168 (emphasis added).

By implication, therefore, *indoor* events are permitted. According to the Town's Response arguments here (Resp. Br. at 15-16), if the Town intended to prohibit "indoor" events, the Code would have specified the prohibition. Nonetheless, it is not possible to host indoor events, unless there is a space to conduct such events. In SMC 18.16.060(d)(9), the Code itself seems to indicate that hosting events is a use ancillary to bed & breakfast lodging facilities.¹⁰

⁹ Definitions contained within the Code control the meaning of the words used in the Code. HJS Dev't., 148 Wn.2d at 472 (*citing*, Burley Lagoon Improvement Ass'n v. Pierce County, 38 Wn. App. 534, 536, 686 P.2d 503 (1984)).

¹⁰ Zoning ordinances are to be construed as a whole, such that each part is given effect with every other part; each provision must be considered in relation to every other provision and, if possible, harmoniously construed. State of Washington ex rel. Catholic Family & Children's Services v. City of Bellingham, 25 Wn. App. 33, 38, 605 P.2d 788 (1979) (*citing*, Publisher's Forrest Products Co. v. State, 81 Wn.2d 814, 505 P.2d 453 (1973)).

D. SMC Provisions Germane to This Case are Subject to Arbitrary, Ad Hoc Interpretation and Enforcement.

Any agency, or municipality charged with interpreting and enforcing a municipal land use ordinance must apply uniform standards of interpretation throughout the code. See, e.g., Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). Nonetheless, in the case at bar, the Town of Steilacoom apparently applies different standards of interpretation, depending on what zoning code is subject to interpretation.

The Town has concluded that the Inn cannot operate a conference room as a secondary, accessory use, because conference rooms are not mentioned as a conditional use, or otherwise, in the R-7.2 zoning district. SMC 18.12.030 (CP 75). However, neither conference rooms, nor anything similar, are mentioned in any zoning code in Steilacoom. CP 75-78. Yet, the Town operates a conference room in a zone where conference rooms are not mentioned as a permissible use. SMC 18.12.070 (CP 78). The Town contends that operating a conference room in this zone is a "very different thing[]" than operating a conference room in the R-7.2 zone. CP 222.

Perhaps the Town is correct; however, there is no language in the Code that allows unlisted, unspecified uses as permissible in one zone, but impermissible in another. Therefore, whether an unlisted use is permissible in a zone in Steilacoom, as a "secondary use," or a

"conditional use," is subject to the *ad hoc* discretion of whoever happens to be sitting on the Town Council.

In Anderson v. City of Issaquah, 70 Wn. App. at 67, the city denied a building permit for lack of compliance with its aesthetic design standards. The design standards required that buildings be "compatible" with adjacent structures and have "appropriate proportions" with "harmonious" colors and fixtures, while avoiding "monotony" of design. At multiple public hearings, members of the development commission repeatedly sent the developer "back to the drawing board" after voicing generalized personal dissatisfaction with the project design. The Anderson court held that the city's aesthetic design standards were unreasonably vague, because they provided so little guidance that officials were left to rely on their own, individual, subjective feelings about whether the proposed design met the city's requirements. Id. at 76.

In this case, as stated above, there is no standard regarding how the Town is supposed to determine what kind of unlisted use is permissible. The Town is emphatic that a use not specifically listed in the R-7.2 zoning code cannot be permitted. CP 233. However, the Town indicates that an unlisted use may be appropriate in other zones, depending on the circumstances, and apparently subject to the *ad hoc* determination of the Town Council. CP 222.

According to SMC 18.12.020, part of the intent of residential zoning districts in Steilacoom, is to allow short-term lodging facilities and

provide for home occupations in residential neighborhoods. CP 74. Part of the specific intent of the R-7.2 zoning district, where the Inn is located, is to provide for "[a]ccessory structures and uses, including home occupations, which are incidental and not detrimental to the residential environment." SMC 18.12.020(A) (CP 74).

The Code defines accessory structures and home occupations. CP 71; CP 79. However, the Code does not define what is "incidental and not detrimental to the residential environment." There is no standard for making this determination, absent the nine criteria required for consideration of any conditional use permit application. SMC 18.28.020(3) (CP 81-82). However, the Town refused to consider the Code's required analysis in this case. Therefore, the Town's interpretation of SMC 18.12.020(A) is an *ad hoc*, subjective determinations of the people who happen to be currently sitting on the Town Council.

II. THE TOWN'S INTERPRETATION OF THE STEILACOOM MUNICIPAL CODE IS NOT ENTITLED TO DEFERENCE IN THIS CASE.

Under LUPA, a land use decision can be overturned by the court, if the land use decision is an erroneous interpretation of law, after allowing for such deference "as is due" the construction of law by a local jurisdiction "with expertise." RCW 36.70C.130(1)(b). In its response to this land use appeal, the Town of Steilacoom argues *ad nauseam* that its interpretation of the Steilacoom Municipal Code is entitled to unqualified, absolute deference. However, the Town fails to explain why deference "is

due" in this case, or demonstrate that the Town Council has any "expertise."¹¹ Nevertheless, the case law simply does not abide with the Town's arguments in regard to deference.

In Sleasman v. City of Lacey, 159 Wn.2d 639, 151 P.3d 990 (2007), a property owner was fined by the City of Lacey for cutting down trees. The City of Lacey derived its authority to impose the fine, from a land use statute, Lacey Municipal Code (LMC) 14.32.040, which required approval prior to timber-harvesting, or land-clearing activities. Sleasman, 159 Wn.2d at 642.¹²

In Sleasman, the Superior Court and the Court of Appeals both granted deference to the City's interpretation of its code. The Court of Appeals granted deference, in part because the ordinance at issue was clear and unambiguous. The Supreme Court agreed that Lacey's ordinance was unambiguous, but disagreed with Lacey's construction of

¹¹ Unlike more prudent municipalities and counties in Washington, the Town's land use decisions are not made by a qualified, objective hearings examiner. The Town Council issues land use decisions, after review and recommendations made by the Town Planning Commission. However, the Town Planning Commission's findings and recommendations do not comport with the Town Council's findings of fact and conclusions of law at issue in this case. RP 52; RP 69-70; CP 156-158; CP 160; CP 177-178; CP 232-233.

¹² The Town's attempt to distinguish Sleasman on the basis that Sleasman was not a "LUPA" case has no merit. First, Sleasman was not a "criminal case," as the Town contends. Resp. Br. at 14 n.5. The petitioners in Sleasman challenged a municipal land-use enforcement action, rather than a denial of a land use permit application. Second, the Town cites no authority for its argument that the law applies differently to a LUPA-styled action, as opposed to any other land use case, because there is no such authority. See, Resp. Br. at 13-14. "Where no authorities are cited, the court may assume that counsel, after diligent search, has found none." Grant County v. Bohne, 89 Wn.2d 953, 958, 577 P.2d 138 (1978) (*citing*, In re. Cassel, 63 Wn.2d 751, 388 P.2d 952 (1964)).

the ordinance as applied. Sleasman, 159 Wn.2d at 642-46. Moreover, the Supreme Court held that "even if the ordinance were ambiguous, Lacey's interpretation would not be entitled to deference." Id. at 646.

Lacey's interpretation of its land use ordinance was not entitled to deference, because its interpretation "was not part of a pattern of past enforcement, but a by-product of current litigation." Id. The Supreme Court further reasoned as follows:

Often when an agency or executive body is charged with an ordinance's administration and enforcement, it will interpret ambiguous language within that ordinance. But the agency must show it adopted its interpretation as a "matter of agency policy." Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). While the construction does not have to be memorialized as a formal rule, it cannot merely "bootstrap a legal argument into the place of agency interpretation" but must prove an established practice of enforcement. Id.

The Supreme Court further clarified in Sleasman, 159 Wn.2d at 647, that the City of Lacey had the burden to show its interpretation was a matter of preexisting policy. The purpose of this rule is simply to provide adequate notice to the public, regarding agency interpretation of land use restrictions, where such restrictions are susceptible to more than one interpretation. In Sleasman, the Supreme Court analogized the facts in that case, to those in the Cowiche case, *supra*, 118 Wn.2d at 815, where the Supreme Court refused to credit an agency interpretation that was

applied in only one or two instances in 14 years. According to the Supreme Court in Sleasman, 159 Wn.2d at 647:

Lacey needs more than two nearly simultaneous examples of its application to single-family residences to demonstrate this was city policy because a nonexistent enforcement policy cannot provide notice to the Sleasmans.

Similarly, in the case at bar, the Town of Steilacoom has never, at any time, identified a policy supporting its interpretation of the Steilacoom Municipal Code, such that a conference room is not a permissible secondary use for a bed & breakfast, or any other use specifically itemized in the Steilacoom zoning codes. When the Town denied the Inn's 2006 application to operate a conference room, the Town concluded that conference rooms were not consistent with the zoning code and the Comprehensive Plan. CP 166. When the Inn requested an amendment to its CUP in 2008, the Town concluded that the Inn conference room was not a permitted use in the applicable zoning code. CP 233.

Here, we have two different interpretations by the Town Council, regarding the same issue, between 2006 and 2009, not to mention the completely divergent interpretations of the Town Planning Commission in 2006 and 2008. CP 156-157; CP 160; CP 177-178. There are no examples of any interpretation policy promulgated by the Town, and therefore, no guidance, or notice available. As a result, the Town

Council's interpretation of the Steilacoom Municipal Code is not entitled to deference in this case.

III. IN ANY EVENT, THE TOWN SHOULD NOT RECEIVE AN AWARD OF ATTORNEY FEES PURSUANT TO RCW 4.84.370.

Normally, a party prevailing at the trial court and at the court of appeals, concerning municipal land use decisions, is entitled to an award of attorney fees, under RCW 4.84.370. However, in this case, even if the Town prevails on appeal, it would be severely unjust to award the Town attorney fees and costs, for two reasons.

First, the Inn did not receive a fair review of the Town's land use decision, in the trial court. This case has been proceeding for four years, yet the trial court judge accepting reassignment afforded herself no more than 24 hours to review the briefing and the entire record of this case. CP 25; CP 102; *see also*, Appellant's Opening Brief at 5. The fact that the trial court judge had not adequately reviewed the record and the briefing, is abundantly evident in the transcript of the December 17, 2009 review hearing.

The trial court judge did not closely review the Inn's LUPA brief, or the record. At pages 1-2, fn. 1, of its LUPA brief, the Inn explained that copies of selected provisions of the Steilacoom Municipal Code were in standard sequential order. CP 28 n.1; *see also*, CP 62-82 (*i.e.*, SMC 18.12.050 is followed by SMC 18.12.060, *etc.*) This kind of referencing was necessary, because the Steilacoom Municipal Code has no

comprehensive page numbering. Yet, the trial court judge repeatedly indicated at the review hearing, that she could not understand the page numbering. RP 5; RP 12; contrast CP 71 re. "home occupations."¹³

More importantly, the trial court judge stated that she had not reviewed the court file. RP 7. She also did not read what was arguably one of the most important cases cited, but certainly the most analogous case to be considered, Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment, 749 A.2d 1258 (D.C. 2000). RP 17-18; RP 81:16 - 82:2; *See also*, RP 7:19-25.

Secondarily, the trial court did not uphold the Town's Code interpretation. The Town's denial of the Inn's CUP amendment application was based on the Town's conclusion that a conference room could not be permitted in association with the Inn's bed & breakfast, because conference rooms are not mentioned in SMC 18.12.030. CP 233. However, the trial court judge specifically disagreed with the Town on this point. RP 80:1-11.

Finally, even if the Inn does not prevail on appeal, and attorney fees are awarded to the Town per RCW 4.84.370, the only fees that can be awarded are fees applicable to the appeal. Baker v. Tri-Mountain Resources, 94 Wn. App. 849, 851, 973 P.2d 1078 (1999).

¹³ Moreover, the Local Jurisdiction Record (LJR) filed in the trial court, and served on the Inn by the Town, did not include page numbers. However, the Clerk's office numbered the pages of the LJR, and the Town numbered their supplemental copy of the LRJ. RP 41; CP 139-275.

CONCLUSION

The evidence that the Steilacoom land use code provisions at issue in this case are vague, ambiguous, and subject to arbitrary interpretation, can be demonstrated in a variety of ways. The code language itself suggests multiple interpretations. This is clearly demonstrated by the differing interpretations given to the code language, between the Town Council and the Town Planning Commission, and between the Town Council's 2006 decision, and the Town Council's 2009 decision, with respect to the same issue.

Originally, in 2006, the Town Planning Commission reviewed the Inn's CUP application, including the conference room, pursuant to the nine criteria required by SMC 18.28.020(3) (CP 81-82). After review, the Town Planning Commission recommended approval of the application as whole, including the conference room as a secondary use. CP 157-158. The Town Council, however, denied the Inn's CUP application with respect to the conference room, on the basis that a conference room is inconsistent with the R-7.2 zoning code, and the Steilacoom Comprehensive Plan. CP 166.

When the Inn resubmitted its application in 2008, as an amendment to include a conference room as a use ancillary to the bed & breakfast, the Town Planning Commission favorably reviewed the application again. However, divergent interpretations of the code were apparent in the Town Planning Commission's December 8, 2008,

deliberations. CP 177-178. Nonetheless, the Town Planning Commission recommended that the Town Council consider the Inn's amendment application. CP 156; CP 160.

When the Town Council finally denied the Inn's CUP amendment application in 2009, the basis for its decision was different than its 2006 decision. Rather than concluding that the conference room was inconsistent with the Comprehensive Plan and the relevant zoning code, the Town simply concluded that the conference room could not be permitted, because it was not listed as a permitted use in SMC 18.28.030. CP 232-233. This wasn't a surprise to the Inn, however, given that the Town's ultimate decision on the issue would impact the Town's own commercial and financial interests.

In any event, a person of reasonable intelligence should be able to look at the Steilacoom Municipal Code and decide whether it is possible to build a bed & breakfast / conference room business in the R-7.2 zone in Steilacoom. That is exactly what the proprietors of the Inn did. They looked at SMC 18.28.030 (CP 75) and SMC 18.08.375 (CP 71), and they saw that a bed & breakfast was permitted as a conditional use, class II home occupation.

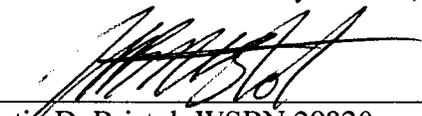
They saw nothing in SMC 18.28.030 that would indicate prohibition of a conference room as a use secondary to the bed & breakfast. Then, they looked at SMC 18.08.920(F) (CP 72) and concluded that a conference room fit neatly within the definition of a "secondary

use," with respect to the bed & breakfast. They also looked at SMC 18.16.060(d)(9) (CP 168) and concluded that only *outdoor* events would be prohibited at the bed & breakfast. This seemed quite clearly to indicate that *indoor* events were permissible.

As a result of their code review, the owners of the Inn sought and received a permit to build an accessory structure on their property, consisting of two bed & breakfast suites atop a large conference room, with a fireplace, a kitchen, restrooms, a storage facility, and 12 off-street parking spaces. CP 144-147. After the accessory building and parking lot were completed, at considerable expense, they submitted their CUP application to the Town Planning Commission, which reviewed the application pursuant to code and recommended approval to the Town Council. CP 157.

Because there could have been no way for the owners of the Inn to know what kind of subjective, *ad hoc* code interpretations would be promulgated by the Town Council, this Court should reverse the Town Council's denial of the Inn's CUP amendment application, so that the owners of the Inn can realize their goal of operating a bed & breakfast business on their property in Steilacoom, along with a conference room, which is a permissible use in the R-7.2 zone in Steilacoom.

RESPECTFULLY SUBMITTED THIS 28th day of June, 2010.


Justin D. Bristol, WSN 29820
Attorney for Appellant

CERTIFICATE OF SERVICE

Above signed attorney hereby declares subject to penalty of perjury under the laws of the State of Washington that counsel for Respondents herein, below named, were served with a copy of this Reply Brief on this 28th day of June, 2010, via electronic mail, pursuant to agreement of counsel of record in this case. A hard-copy was also mailed to attorney Hoffman, at the mailing address indicated below, on June 28, 2010.

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