

No. 40277-7-II

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

ALEXANDER MACKENZIE, LLC,

Appellant

v.

TOWN OF STEILACOOM,

Respondent

TOWN OF STEILACOOM'S OPENING BRIEF

Respondent

FILED
COURT OF APPEALS
10 MAY 26 PM 3:49
STATE OF WASHINGTON
BY *WV*
CLERK

Adam L. Rosenberg, WSBA #39256
Keating, Bucklin & McCormack,
Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
Telephone: (206) 623-8861
Facsimile: (206) 23-9423

Lawrence E. Hoffman, WSBA
#16556
Hoffman Law Firm
204 Quince Street N. E., Suite 202
Olympia, WA 98506-4096
Telephone: (360) 709-9499
Facsimile: (360) 709-9521

ORIGINAL

1. TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....2

 A. Factual Background.....2

 1. The Inn’s 2006 Permit Application.....2

 2. The Inn’s 2008 Permit Application.....3

 3. Appellants Seek Reconsideration.....6

 B. Procedural Posture.....8

III. AUTHORITY AND ARGUMENT.....9

 A. Standard of Review.....9

 B. Summary of Argument.....11

 C. The Proper Scope of This Appeal Is Limited to
 The Inn’s 2008 Permit Application – the Earlier
 2006 Application Is a Verity Under the Doctrine
 of Finality.....12

 D. The Inn Continues to Miss the Point: It Was Not
 Allowed to Operate a Commercial Conference
 Room in a Residential Zone Because the Town’s
 Code Simply Does Not Allow It.....13

 1. The Manner in Which the Town Interprets
 Its Code Is Entitled to Significant
 Deference.....13

 2. SMC 18.12.030 Is Unambiguous in Both
 Its Language and Intent.....14

3.	Because a Conference Room is Not a Permitted Use in an R-7.2 Zone, There Was No Further “Evidence” to Consider.....	16
4.	A Commercial Conference Room Is Not A “Secondary Use” or “Home Occupation”.....	18
E.	The Appearance of Fairness Doctrine Is Not Implicated in This Case; and Even If It Were, By Statute, It Was Waived At the Administrative Level.....	21
F.	The Court Should Not Reach Appellants’ Newly-Minted Argument About the Transcript of the Administrative Record, Though, Even If It Did, the Claim is Wholly Without Merit.....	23
1.	The Rules of Appellate Procedure Do Not Permit Appellants to Raise Fact-Sensitive Arguments as the First Time On Appeal.....	23
2.	Even if the Court Were to Reach This Argument, it Fails on Multiple Grounds.....	25
G.	The Only Lawful Basis for Fee Shifting in This Case – RCW 4.84.370 – Favors the Town, Not Appellants.....	27
1.	There Is No Basis In Law or Fact to Award Appellants Attorneys’ Fees Or Costs.....	27
2.	Consistent With RCW 4.84.370, the Town Respectfully Requests Attorneys’ Fees and Costs Associated With This Appeal.....	29
IV.	CONCLUSION.....	30

TABLE OF CASES

<i>Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.</i> , 151 Wn.2d 279, 288, 87 P.3d 1176 (2004).....	10
<i>Isla Verde International Holdings, Inc. v. City of Camas</i> , 146 Wn.2d 740, 751, 49 P.3d 867 (2002) (citing RCW 36.70C.130).....	10
<i>Cingular Wireless, L.L.C. v. Thurston County</i> , 131 Wn. App. 756, 768, 129 P.3d 300 (2006).....	10
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 176, 176, 4 P.3d 123 (2000).....	11
<i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 929, 52 P.3d 1 (2002).....	12
<i>Mall, Inc. v. Seattle</i> , 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987).....	13
<i>Neighbors of Black Nugget Road v. King County</i> , 88 Wn. App. 773, 778, 946 P.2d 1188 (1997).....	13
<i>State v. Watson</i> , 146 Wn.2d 947, 955, 51 P.3d 66 (2002).....	14
<i>Morin v. Johnson</i> , 49 Wn.2d 275, 279, 300 P.2d 569 (1956).....	14
<i>Sleasman v. City of Lacey</i> , 159 Wn.2d 639, 640-41, 151 P.3d 990 (2007).....	14
<i>Millay v. Cam</i> , 135 Wn.2d 193, 202, 955 P.2d 791 (1998).....	15
<i>State v. Delgado</i> , 148 Wn.2d 723, 729, 63 P.3d 792 (2003).....	15
<i>State v. McCraw</i> , 127 Wn.2d 281, 288, 898 P.2d 838 (1995).....	16
<i>Davis v. Dept. of Licensing</i> , 137 Wn.2d 957, 963, 977 P.2d 554 (1999).....	16
<i>Anich v. Turner</i> , 35 Wn. App. 487, 667 P.2d 1112 (1983).....	19

<i>Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment</i> , 749 A.2d 1258 (D.C. 2000).....	19, 20
<i>Tahoma Audubon Society v. Park Junction Partners</i> , 128 Wn. App. 671, 116 P.3d 1046 (2005).....	20, 21
<i>Chrobuck v. Snohomish County</i> , 78 Wn.2d 858, 480 P.2d 489 (1971).....	21
<i>Faghih v. Dep't of Health, Dental Quality Assurance Comm'n</i> , 148 Wn. App. 836, 843, 202 P.3d 962 (2009).....	22
<i>Martin v. Johnson</i> , 141 Wn. App. 611, 617, 170 P.3d 1198 (2007).....	23
<i>Re v. Tenney</i> , 56 Wn. App. 394, 400, 783 P.2d 632 (1989).....	24
<i>McPhail v. Municipality of Culebra</i> , 598 F.2d 603, 607 (1st Cir. 1979).....	24
<i>Capitol Neighborhood Ass'n v. City of Olympia</i> , 23 Wn. App. 260, 595 P.2d 58 (1979).....	25
<i>Schofield v. Spokane County</i> , 96 Wn. App. 581, 590, 980 P.2d 277 (1999).....	27
<i>Henderson v. Kittitas County</i> , 124 Wn. App. 747, 758, 100 P.3d 842 (2004).....	27
<i>Zink v. City of Mesa</i> , 137 Wn. App. 271, 152 P.3d 1044 (2007).....	28
<i>In re Recall of Feetham</i> , 149 Wn.2d 860, 872, 72 P.3d 741 (2003).....	29
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 413, 120 P.3d 56 (2005).....	30
<i>Nickum v. City of Bainbridge Island</i> , 153 Wn. App. 366, 223 P.3d 1172 (2009).....	30

I. INTRODUCTION

Respondent, the Town of Steilacoom (“the Town”), by law, limits commercial uses in areas zoned R-7.2. This is a dense residential zone, and the Town’s limitation on property uses is calculated to ensure peace and privacy in the area. The few “conditional uses” that are permitted are specifically enumerated in SMC 18.12.030—commercial uses *not* listed are precluded.

Appellant, Alexander MacKenzie, LLC (“the Inn”), sought and received a permit to operate a Bed & Breakfast in the R-7.2 zone. B&B’s are an enumerated—and therefore permissible—conditional use. *But commercial conference rooms are not.* They are not listed in the Town’s Code as a potential conditional use in R-7.2, nor do they comport with the residential purpose of the zone. On this straightforward basis, the Inn’s request was denied.

The Inn sought review under Washington’s Land Use Petition Act (“LUPA”), and raised every conceivable argument it could. It literally argued *all six* grounds for reversal under the statute, “appearance of fairness,” and even claimed that the Town’s actions amounted to an unconstitutional “taking.” The Honorable Stephanie Arend rejected every single argument. In doing so, she specifically acknowledged that

deference was statutorily due to the Town's decision, but did not feel it necessary to afford it—that is, the Town was objectively correct.

On appeal, nothing has changed. The Inn's statutory arguments remain contorted and unreasonable. And this says nothing of the statutory deference due to *the Town's* reading of the Code, not the Inn's. The Inn falls back on naked accusations. If relevant at all, these personal attacks—based upon nothing in the record—serve only to underscore the weakness of the Inn's legal position.

For the reasons discussed below, Judge Arend's Order should stand. The Town respectfully requests an award of reasonable attorneys' fees associated with defending this appeal pursuant to RCW 4.84.370.

II. STATEMENT OF THE CASE

A. Factual Background

1. THE INN'S 2006 PERMIT APPLICATION

Mr. and Mrs. Brake, doing business as the “Alexander MacKenzie, LLC,” are property owners in the Town of Steilacoom. CP 140.¹ Their property is zoned R-7.2, *id.*, a classification expressly crafted for higher-density residential use of property:

¹ Of note, the record is not as large as it seems. The Inn, misleadingly, attempted to designate only its own briefing and self-serving pieces of the record. *See* CP 1-115. The Town supplemented the clerk's papers to include its own brief—as well as the *full* record and cited portions of the Code. For reference, the Court can review the administrative record, beginning to end, in **CP 139-275**; and cited portions of the Code in **CP 276-288**.

[It] is intended to create a desirable living environment for a wide variety of family and housing types. *The smaller lot size of this district reflects the higher density residential pattern* of the early plats of Balch, Chapman and others.

CP 279 (citing SMC 18.12.020(A) (“Intent of residential zoning districts”).

In this zone, the Town’s Code and Comprehensive Plan actually *encourages* “Bed and Breakfasts” (“B&B’s”). *See* CP 158 (citing SMC 18.12.030 and Land Use Policy 1.3). So when the Inn sought a conditional use permit to operate its B&B in 2006—“The Inn at Saltar’s Point”—the Town unceremoniously granted it. CP 157-58 (planning commission recommendation); CP 181-84 (council decision).

However, in that same application, the Inn requested a conditional use permit to operate *a conference room*. CP 183-84. Conference rooms—unlike B&B’s—are neither encouraged, nor contemplated in the Code or comprehensive plan. *Id.* Consequently, the Town considered the requests independently, disallowing the conference room. *Id.*

Notice of the denial was provided in 2007, and the matter was never appealed.

2. THE INN’S 2008 PERMIT APPLICATION

Approximately a year later, in early 2008, the Inn sought to reopen discussions on the conference room issue. CP 235. It inquired with the

Town about “amending” its existing permit. *Id.* In its letter, the Inn explained that the conference room would be operated as “a separate business.” *Id.*

The Town provided it with a copy of its zoning code for that area. CP 236. It also reminded the Inn that it would not be permitted to stack multiple businesses at a single residential address. *Id.*

The Inn was nevertheless furnished with an application, as well as a reminder that there would be no guarantee that they would receive a permit. CP 236-37. Mr. Fortner, the Town’s Planner, explained:

Running a conference room in conjunction with the B & B was rejected by the Town Council previously, and there was substantial opposition by the public. If you are willing to take the chance that the Council will approve the concept now, I will need a couple of items....

CP 237. The Inn was not dissuaded and filed its application. CP 140.

Significantly, conditional use permits are not available as a matter of right under the Town’s Code. Though the Inn—incorrectly—contends that “a request for a conditional use permit may be denied *only* if the expected impacts cannot be mitigated by assigned conditions,” Appellant’s Br. at 13 (emphasis in original), this is inaccurate.² The term “conditional use,” itself, is a defined term in the Town’s Code and limited:

² This misrepresentation of the Code was summarily rejected by the Superior Court. *See* Tr. 76-77 (... there isn’t a substantial evidence test before the Court... [the Town] simply interpreted their code.”).

Use, Conditional. “Conditional use” means *a use allowed in one or more zones as defined by this title* but which, because of characteristics peculiar to such use, or because of size, technological processes or equipment, or because of the exact location with reference to surroundings, streets and existing improvements or demands upon public facilities, requires a special permit in order to provide a particular degree of control to make such uses consistent with and compatible to other existing or permissible uses in the same zone or zones.

CP 278 (citing SMC 18.8.920(B)) (emphasis added). In other words, the universe of “conditional uses” is limited to the “defined uses” within each zoning classification.

In property zoned R-7.2—where the Inn is located—the Code provides for the following “defined uses”:

Principle Uses	Secondary Uses	Conditional Uses
Single-family homes	Accessory structures	Assisted living facilities
Townhouses in PAD’s	Accessory dwelling units	Bed and breakfasts
Foster homes	Home occupations	Day care centers
Duplexes on lots of 14,000 square feet or greater	Radio transmitting and satellite antennas	Class 2 boarding houses
Family day care facilities	Class 1 boarding houses	Halfway houses
Secondary public facilities		Group care facilities, more than one per residential block
Group care facilities, less than one per residential block		

CP 280 (citing SMC 18.12.030).³

As is evident, B&B's *are* listed, while conference centers *are not*. Reading SMC 18.8.920(B) and SMC 18.12.030 together (CP 278; 280), it follows that a property owner in R-7.2 may seek a conditional use permit to operate a day care or B&B, but not a conference room. A conference room—*i.e.*, a use not “defined” in SMC 18.12.030—is not a candidate for a conditional use permit.

Because the Code's plain language did not permit the Inn—or any applicant—to operate a conference room in the residential R-7.2 zone, its application was denied. CP 157-160 (“The [Inn] does not directly address the Council's earlier findings that conference rooms are not mentioned in either the Comprehensive Plan nor the zoning ordinance...”); CP 181-84 (“The Council cannot approve a use that is not listed in the applicable regulations”). 43-46.

A notice of decision to this effect was sent. CP 274.

3. APPELLANTS SEEK RECONSIDERATION

Shortly thereafter, the Inn sought reconsideration of the denial of their permit application. CP 226-230. According to the Code,

³ Many of the uses listed in the ordinance are very straightforward. And to the extent that a few are not, they are defined in the Code. For example, “accessory structures” are “decks less than thirty (30) inches in height, satellite dishes and antennae serving the principal use, patios, swimming pools.” CP 281 (citing SMC 18.16.010(C)). Accessory dwelling units are second residential units added to the property. CP 282 (citing SMC 18.16.020(b)(1)).

“[r]econsideration should be granted only when an obvious legal error has occurred or a material factual issue has been overlooked that would change the previous decision.” CP 277 (citing SMC 14.20.090); *see also* CP 220-21.

In reviewing this request, the Town Planner, Mr. Fortner, dutifully went through each of the Inn’s concerns. First, he reviewed SMC 18.12.030, which listed the uses that *are* permitted. CP 221. Conference rooms remained unlisted. *Id.* Mr. Fortner explained in his report that “no matter how many conditions are placed on a non-permitted use, it is still not permitted within the zone.” CP 221-22. Because the list in SMC 18.12.030 was exhaustive—both by virtue of its plain language and authoritative interpretation—the Town was not free to add more. *Id.*

Mr. Fortner further rejected the Inn’s attempt to dress the conference room up as a “home occupation,” especially given that it was not part of a residence (or “home,” as it were), but already a commercial B&B. CP 222.

And finally, Mr. Fortner considered the Inn’s argument that it was “unfair” for the Town to operate conference rooms while the Inn could not. *Id.* Mr. Fortner, however, determined that a public community center in a *public zone* and a private conference center in a *residential zone* were “very different things.” *Id.*

He concluded that the Town Code, as written, did not permit the proposed conference room. CP 222-23. Such a use in R-7.2 would require positive legislative action. *Id.* Upon his recommendation that there was neither an “obvious legal error,” nor “material factual error,” the Council denied reconsideration. *Id.*; *see also* CP 219 (adopting findings); CP 275 (notice).

The Inn petitioned for review under Washington Land Use Petition Act in Pierce County Superior Court. CP 2.

B. Procedural Posture

On December 17, 2009, the LUPA hearing was held in Pierce County Superior Court before the Honorable Stephanie Arend. Tr. at 1. More than once, the Inn has insinuated that Judge Arend did not read or understand their materials. *See, e.g.*, Appellant’s Br. at 5 (“Judge Arend had very little time to review the entire record prior to the review hearing...”).

These concerns are unfounded. From the bench, Judge Arend represented that she had indeed read the materials. Tr. at 7. And in response, the Inn expressed appreciation—certainly not objection:

First, I want to thank the Court in accepting this case on short notice. I’m glad to see that the Court has had an opportunity to review the briefing. There was substantial materials provided, but I’m glad to see that the Court has had an opportunity to review that.

Tr. at 8.

Also significant, though the Inn raised every conceivable ground for reversal in its briefing, only two or three were actually pursued. Tr. at 15 (“... so all of that is in the record... but what I would like to do in oral argument is provide my best arguments and let the Court sift out what it tends to do with the case...”).

After the parties were provided a full and fair opportunity to express their arguments, Judge Arend ruled in favor of the Town in all respects. Not surprisingly, she found commercial conference rooms “inconsistent” with the intent of the residential zone where the Inn sought to open it. Tr. at 77-79. The Inn’s strained interpretations of the Town’s Code were rejected without “any deference whatsoever to the Town Council.” Tr. 80.

An order was entered, CP. 109-11, which the Inn timely appealed to this Court.

III. AUTHORITY AND ARGUMENT

A. Standard of Review

In an appeal of a superior court LUPA order, the appellate court reviews the factual record before the local jurisdiction’s body with the highest level of authority to make a land use determination. *See* RCW

36.70C.020(2) (1995); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004).

The court may grant relief only if the party seeking relief—here, the Inn—carries its burden of establishing error under one of LUPA standards. *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002) (citing RCW 36.70C.130).

Here, the Inn challenges the first three standards, namely:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court...

RCW 36.70C.130(1)(a)-(c).

The lawfulness of the procedure or process is reviewed *de novo*. *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). And while statutory interpretation, under (b), is also reviewed *de novo*, *Isla Verde*, 146 Wn.2d at 751, that review involves “deference” to *the agency’s* construction pursuant to RCW 36.70C.130(b). Subsection (c) is reviewed for “substantial evidence.” *Wenatchee*

Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 176, 4 P.3d 123 (2000).

B. Summary of Argument

In this appeal, the Inn continues to ignore the actual basis for the Town's decision. Stated simply, the Inn was not granted a permit to operate a commercial conference room in a residentially-zoned area because conference rooms are not a permitted use in residentially-zoned areas. SMC 18.12.030 provides an exhaustive list of potential uses of property in R-7.2, and conference rooms are not included. The Inn, in making its arguments, disregards the plain language of the Code, as well as the Town's authoritative interpretation of its Code. Thus, for our purposes, the question is merely whether the Town's interpretation is rational—the Town would submit that precluding conference rooms in residential neighborhoods is indeed supported by the rule of reason.

The Inn's remaining fall-back arguments, on their face, lack merit. For example, the Inn misunderstands the "appearance of fairness doctrine." Not only did it statutorily waive the issue by failing to object at the administrative level, but more fundamentally, it is required to come forward with something more than a naked accusation of unfairness. Similarly, the lack of a verbatim transcript issue has not been a reversible issue since 1995, when LUPA was codified. Ironically, the statute now

puts the onus on the petitioner (*i.e.*, the Inn) to provide a transcript. To the extent the Inn was prejudiced, it has itself to blame.

The Inn's fee request is specious as well. The notion that a *respondent* can be sanctioned for advancing a "frivolous defense"—by defending the decision of a superior court judge—is itself frivolous. The only party entitled to attorneys' fees is the Town, under RCW 4.84.370, as it has prevailed at every level thus far.

For the reasons explained below, the Town respectfully requests that Judge Arend's order be affirmed, as well as an award of reasonable attorneys' fees and costs under RCW 4.84.370.

C. The Proper Scope Of This Appeal Is Limited To The Inn's 2008 Permit Application—The Earlier 2006 Application Is A Verity Under The Doctrine of Finality

Before reaching the merits, some housekeeping is in order. The Inn, incorrectly, attempts to make an issue out its 2006 permit denial. It is not disputed that the Inn did not timely appeal this denial under LUPA.

In Washington, it is well-settled that challenges to land use decisions—even ministerial or illegal ones—must be brought within 21 days or they are barred. *See* RCW 36.70C.040; *see also Chelan County v. Nykreim*, 146 Wn.2d 904, 929, 52 P.3d 1 (2002) (doctrine of finality requires appeal of land use decision within 21 days). Whether the Inn's discussion of unappealed issues was imprecise drafting or an improper

attempt to avoid statutory deadlines, this Court need not expend resources on the issue. As a matter of law, the 2006 CUP denial is legally and factually irrelevant.

The 2006 decision is a verity, and safely set aside for purposes of this appeal.

D. The Inn Continues To Miss The Point: It Was Not Allowed To Operate A Commercial Conference Room In A Residential Zone Because The Town's Code Simply Does Not Allow It

1. THE MANNER IN WHICH THE TOWN INTERPRETS ITS CODE IS ENTITLED TO SIGNIFICANT DEFERENCE

The primary question on appeal is whether the Town evenhandedly applied its Code to the Inn's request for a conditional use permit. In evaluating this question, under LUPA, courts generally defer to the judgment on the agency. Not only is this manifest in the case law, *Mall, Inc. v. Seattle*, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987); *Neighbors of Black Nugget Road v. King County*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997), but the maxim has since been codified. See RCW 36.70C.130(1)(b) (affording deference due to the agency with expertise). A government agency's code interpretations are generally upheld, so long as they are reasonable under the circumstances.

The Inn incorrectly claims that zoning ordinances must be construed "in favor of the landowner." *All* of the authorities cited in the

Inn’s brief for this proposition are either *pre-LUPA* cases⁴ and *non-LUPA* cases.⁵ No LUPA case has ever held this, nor would the plain language of RCW 36.70C.130(1)(b) permit it. In requesting deference, the Inn is just plain wrong.

To be sure, there is nothing “ambiguous” in the Town’s Code in the first place. So there is nothing that this Court will need to “construe.” *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002) (courts do not interpret unambiguous statutes). But if there were, it would be the Town’s interpretation that would control—not the Inn’s.

2. SMC 18.12.030 IS UNAMBIGUOUS IN BOTH ITS LANGUAGE AND INTENT

The Town, reasonably, does not permit all conceivable uses of property in its dense residential areas. Accordingly, the Code provides that “[p]ermitted uses within residential districts shall be as described in the following table[::]”

Principle Uses	Secondary Uses	Conditional Uses
Single-family homes	Accessory structures	Assisted living facilities
Townhouses in PAD’s	Accessory dwelling units	Bed and breakfasts
Foster homes	Home occupations	Day care centers

⁴ *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956) is quoted at length for the proposition that ordinances must be construed in favor of the landowner’s proposed use. LUPA became the law in 1995.

⁵ *Sleasman v. City of Lacey*, 159 Wn.2d 639, 640-41, 151 P.3d 990 (2007), was a criminal case involving “illegal tree cutting.” LUPA was not mentioned at all.

Duplexes on lots of 14,000 square feet of greater	Radio transmitting and satellite antennas	Class 2 boarding houses
Family day care facilities	Class 1 boarding houses	Halfway houses
Secondary public facilities		Group care facilities, more than one per residential block
Group care facilities, less than one per residential block		

CP 280 (citing SMC 18.12.030).

Relevantly, no language is used that would suggest that these are “examples” or “for-instances.” Legislative bodies know how to use the term, “including but not limited to.” *See, e.g.*, RCW 74.34.020(2)(a) (defining “sexual abuse” with non-exhaustive examples); RCW 26.09.187(3)(c) (parenting plans). But here, by design, SMC 18.12.030 includes no such language. When certain language is used in one instance but different, dissimilar language is used in another, different intent is presumed. *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998).

This is consistent with basic notions of statutory interpretation as well. For example, it is a textbook example of *express inclusion* of some, implying *intentional omission* of others. *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (“*expressio unis*”). The Town’s ordinance includes *specific uses* of property—*e.g.*, day care centers, B&B’s—impliedly excluding other nonlisted uses. This was intentional, and should

not be treated as a mistake. *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (courts should “assume that the legislature means exactly what it said”).

Indeed, any other reading would render all of the enumerated uses and specific definitions superfluous. If the Inn were correct, and landowners could pursue any commercial end in R-7.2, it is difficult to know what purpose the list of specific uses would serve. That is not how courts interpret statutes. See *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (statutes should be construed so that all language is given effect with no portion rendered meaningless).

In short, if the Town wanted to open the floodgates and permit a plethora of uses in its residential zone, it would have done so explicitly. It did not. The Inn’s attempt to rewrite the Code ostensibly as “interpretation” should be rejected.

3. BECAUSE A CONFERENCE ROOM IS NOT A PERMITTED USE
IN AN R-7.2 ZONE, THERE WAS NO FURTHER “EVIDENCE”
TO CONSIDER

The Inn misconstrues the Town’s Code and proceedings below in advancing this argument. It claims that a conditional use permit can “only” be denied if impacts cannot be mitigated, by reference to “nine factors.” *Appellant’s Br.* at 13-14. And from there, the Inn leaps to the

conclusion that the Town's not going through this exercise necessitates reversal. *Id.*

This line of reasoning overlooks the very definition of “conditional use.” It is as follows:

Use, Conditional. “Conditional use” means *a use allowed in one or more zones as defined by this title* but which, because of characteristics peculiar to such use, or because of size, technological processes or equipment, or because of the exact location with reference to surroundings, streets and existing improvements or demands upon public facilities, requires a special permit in order to provide a particular degree of control to make such uses consistent with and compatible to other existing or permissible uses in the same zone or zones.

CP 278 (citing SMC 18.8.920(B)) (emphasis added). This interplays with SMC 18.12.030, which provides the universe of what is “defined by this title.”

The language cited by the Inn—in SMC 18.28.020—assumes that the conditional use contemplated by the applicant is a permissible, defined use. If it is not, there is no evidence to consider; the Code simply does not allow it. Because the Inn attempted to obtain a conditional use permit for a use not allowed in the first place—against advice from the Town (CP 237)—the decision turned on a legal, not evidentiary, determination.

The Town would have to violate its own Code, and disregard the very nature of the permit sought, to accommodate the Inn. It could not, and consistent with the Code, neither should this Court.

4. A COMMERCIAL CONFERENCE ROOM IS NOT A
“SECONDARY USE” OR “HOME OCCUPATION”

The Inn then falls back on a dual argument that its commercial conference room is a “home occupation” and/or a “secondary use” to the B&B. This ignores the plain language of the Code—and, as a practical matter, makes no sense.

A conference room is not a “home occupation.” By the Inn’s own acknowledgment, the B&B is not a “home,” it is a for-profit business subject to completely different regulations. *See* Appellant’s Br. at 1. Residents do not live there, nor does anybody else. Rather, the B&B is a for-profit conditional use, subject to differing regulation. *See* SMC 18.16.050 (citing SMC 18.16.060). There is nothing in the Code that permits residents to “stack” conditional uses on top of already nonconforming uses. Indeed, it says the opposite. *See* SMC 18.16.050(D)(11) (“There shall be no more than one (1) home occupation in any dwelling unit.”). This issue was carefully considered and properly rejected by the Planner and Council in the administrative process. CP 222.

Also, as Judge Arend pointed out, having a “home occupation” of entirely different character than the surrounding residential zone is not supported by the Code. Tr. at 78-80 (citing SMC 18.16.050(A)).

The Inn then half-heartedly argues that conference rooms are actually a “secondary use.” Again, it overlooks the plain language of the ordinance. SMC 18.16.030 provides a limited number of “secondary uses.” As noted above, secondary uses are not open-ended, and therefore, should not be treated as such.

And the cases cited by the Inn, when read in context, actually support the Town. They do not stand for the sweeping proposition that conference rooms are secondary uses “as a matter of law.”⁶ *Anich v. Turner*, 35 Wn. App. 487, 667 P.2d 1112 (1983), for example, concerned the question of whether land devoted “primarily” to harvesting timber could include a cottage. The court logically found that it could, but implied that the result would have been different if the Legislature had used the word “exclusively.” *Id.* at 489. Because here, the Town’s Code *is* exclusive, *Anich* favors the Town.

The Inn’s out-of-state authority, *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, 749 A.2d 1258 (D.C. 2000), lends even stronger support to the Town. It is true that

⁶ Such a categorical holding would necessarily overlook the varying wording of codes in innumerable cities and counties across the country.

in *Dupont*, the court approved of an interpretation allowing a B&B to include a conference room as an accessory use. But it was the interpreting agency that was arguing *in favor* of this interpretation of its own code. *Id.*

¶ 11. This was a case about deference to the interpreting agency:

The crux of the matter is thus whether the [local agency] reasonably interpreted the Zoning Regulations as permitting accessory uses to other accessory uses. “*When the [agency’s] decision turns on its interpretation of a regulation that agency is charged with implementing, that interpretation must be upheld unless it is “plainly erroneous or inconsistent with the regulation.”*”

Id. ¶ 18 (emphasis added). Finding the agency’s interpretation to be “reasonable,” its decision was upheld. The Town agrees that *Dupont* is instructive insofar as it demonstrates the proper standard. A local agency’s interpretation of its own ordinances should be upheld so long as rational.

Tahoma Audubon Society v. Park Junction Partners, 128 Wn. App. 671, 116 P.3d 1046 (2005), is similar. It, like *Dupont*, was a case in which the interpreting agency *wanted* a conference center, and the third-party objector did not. *Id.* at 674. Like *Dupont*, the *Tahoma* court acknowledged that “[w]hen an agency is charged with the administration and interpretation of a statute, its interpretation of an ambiguous statute is accorded *great weight*.” *Id.* at 682 (emphasis added). The court went on to interpret “primary” and “secondary” use—terms wholly undefined in

that code—by resort to dictionary definitions. *Id.* at 683-86. In contrast to *Tahoma*, the relevant terms in the Town’s code are unequivocally defined. Like the previous cases, to the extent *Tahoma* is relevant, it supports the Town.

The Inn is asking the Court to read “home occupation” and “secondary use” in a manner contrary to the Code’s plain language, reasonableness, and the Town’s own deferential interpretation. Indeed, such a reading renders the bulk of the Town’s scheme meaningless: the specific enumerated uses in SMC 18.12.030 have little import if people can do *anything* with their property under the auspices of a “home occupation” or “secondary use.” This argument, too, should be rejected.

E. The Appearance of Fairness Doctrine Is Not Implicated In This Case; And Even If It Were, By Statute, It Was Waived At The Administrative Level

The Court need not expend much time on this “argument,” or more accurately, blithe accusation. The Town’s “appearance of fairness” contention is little more than a bald assertion that the Town’s decision was not “open minded, objective, and impartial.” *Appellant’s Br.* at 28 (citing *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 480 P.2d 489 (1971)). Because such mud could be slung at any unfavorable land use decision, it is not surprising that the law requires something more.

The Inn misunderstands the appearance of fairness doctrine. It is codified under RCW 42.36, and its focus is not on the Town as an entity, but on the underlying decision-makers. *See generally* RCW 42.36.060. Appearance of fairness might be implicated if individual council members had a personal or financial stake in the Inn’s conference room. *See id.* But allegations against “the entire government” do not invalidate a decision.⁷

Here, there is no allegation that any specific council member carried a particular bias or financial stake. Nor would the record support it. It is presumed that administrative decision-makers perform their duties properly and the party claiming a violation *must present specific evidence to the contrary*, not speculation. *Faghih v. Dep’t of Health, Dental Quality Assurance Comm’n*, 148 Wn. App. 836, 843, 202 P.3d 962 (2009) (emphasis added).

The Inn offers nothing. It points to nothing in the record which would even permit an inference of malfeasance on the part of any individual. The presence of a public conference room, in a public zone, is not “specific evidence” of anything—at best, it amounts to conjecture.

Moreover, even if there were a valid objection to make, it has long since passed. The statute provides:

⁷ If biased governments render unsupported decisions, the remedy would lie within the six grounds for reversal under the LUPA statute.

Anyone seeking to rely on the appearance of fairness doctrine to disqualify a member of a decision-making body from participating in a decision must raise the challenge as soon as the basis for disqualification is made known to the individual. *Where the basis is known or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be relied on to invalidate the decision.*

RCW 42.36.080 (emphasis added). The appearance of fairness doctrine was never raised until the Inn submitted its reply brief to the superior court. No bias or personal interest was discussed at the administrative level. No council member was asked to recuse himself, but refused. No hearing examiner was sought. If the Inn truly felt that the Town's decision-making process was tainted, the statute placed the burden on them to act. They did not act, and therefore waived objection.

The Inn's reliance on the appearance of fairness doctrine is untimely, misplaced, and properly rejected.

F. The Court Should Not Reach Appellants' Newly-Minted Argument About the Transcript of the Administrative Record, Though, Even If It Did, The Claim Is Wholly Without Merit

1. THE RULES OF APPELLATE PROCEDURE DO NOT PERMIT APPELLANTS TO RAISE FACT-SENSITIVE ARGUMENTS FOR THE FIRST TIME ON APPEAL

RAP 2.5(a) provides that the Court of Appeals may refuse to review any claim of error which was not raised in the trial court first. *Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007)

(refusing to review issue that trial court did not have opportunity to rule on first); *Re v. Tenney*, 56 Wn. App. 394, 400, 783 P.2d 632 (1989) (same).

The Inn's superior court briefing is part of the record. *See* CP 27-53. The Court, in reviewing it, will find no argument or objection related to the absence of a verbatim record at the administrative proceeding. This is an argument being unabashedly raised for the first time on appeal.

The Town acknowledges that RAP 2.5 is a discretionary rule, and the appellate court may in some cases reach new arguments. Here, it should not. Assuming for the sake of argument that the lack of a verbatim record did actually amount to "*per se* reversible error" in a LUPA appeal—which it does not—the matter could have easily been remedied by a timely objection. That is, if the Inn had raised the issue at the administrative level—or even at the Superior Court level when the record was being compiled—any problem could have been solved. The same cannot be done now in a closed-record appeal.

The Inn's attempt to raise the issue for the first time at this late hour, without any justification whatsoever, is both unfair and prejudicial. *McPhail v. Municipality of Culebra*, 598 F.2d 603, 607 (1st Cir. 1979) ("party may not 'sandbag' his case by presenting one theory to the trial court and then arguing for another on appeal.").

The time to raise arguments about the contours of the record passed, without objection. If the Inn had a meritorious complaint, it should have been raised when the Town could factually respond, and Judge Arend could properly rule. The Inn's failure to raise the issue precluded both considerations. Consistent with RAP 2.5, the Court should prudently decline to reach this newly generated appellate argument.

2. EVEN IF THE COURT WERE TO REACH THIS ARGUMENT, IT FAILS ON MULTIPLE GROUNDS

Assuming for the sake of argument that the state of the administrative record *were* properly before the Court, the ultimate result would be the same. The cases relied upon pre-date LUPA, and the controlling statute is actually to the contrary.

The Inn asserts that the absence of a verbatim transcript in a LUPA case is *per se* reversible error. *Appellant's Br.* at 30-32. It is wrong. The most recent case offered for this proposition is *Capitol Neighborhood Ass'n v. City of Olympia*, 23 Wn. App. 260, 595 P.2d 58 (1979), a writ action. *Id.* at 31. Significantly, that decision was rendered over 15 years before land use appeals became codified under the LUPA statute.

Current law—which the Inn neglected to offer—provides for the following:

- (1) ...the local jurisdiction shall submit to the court a certified copy of the record for judicial review of the land

use decision, *except that the petitioner shall prepare at the petitioner's expense and submit a verbatim transcript of any hearings held on the matter.*

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

RCW 36.70C.110 (emphasis added). As is plain in the statute, the onus is on the petitioner—*i.e.*, the Inn—to provide a verbatim transcript.

To the extent that the Inn believes it was prejudiced by the lack of a transcript—a claim conspicuously absent from its brief—it only has itself to blame. It would be anomalous to award the Inn relief by virtue of its own failure.

Moreover, RCW 36.70C.110(2) specifically relieves agencies (and superior courts) of the archaic requirement that an entire verbatim transcript be made part of the administrative record. Parties, as here, may agree to the scope of the record.⁸ This is consistent with the policies and purpose of the statute. *See* RCW 36.70C.010 (“uniform, expedited appeal procedures”).

The Inn’s attempt to superimpose common law writ practice onto this statutory procedure is misguided. Contemporary law leaves no room

⁸ When the Town provided the record, the Inn raised no issues related to the transcript of proceedings. The Town, accordingly, assumed that there was no dispute as to the scope of the administrative record.

for the Inn’s attempt to “lie in the weeds” and sandbag the Town with un-raised procedural complaints on appeal. If the transcript was missing, fault lies with Inn, and the error is not fatal in any event. *See* RCW 36.70C.110. Even if this new argument were properly raised, it fails on the merits.

G. The Only Lawful Basis For Fee Shifting In This Case—RCW 4.84.370—Favors The Town, Not Appellants

1. THERE IS NO BASIS IN LAW OR FACT TO AWARD APPELLANTS ATTORNEYS’ FEES OR COSTS

The Inn also asks for an award of attorneys’ fees, arguing that the Town’s not-yet-received brief constitutes a “frivolous defense.” It is difficult to know where to begin addressing the fallacies in this argument.

To start, the Inn simply should not prevail. For the reasons stated above, any special relief associated with “prevailing party” status should be a moot point.

But even if reversal were ordered, there would still be no basis for fee shifting in favor of the Inn. As a general rule, LUPA does not allow fee shifting. Over a decade ago, in *Schofield v. Spokane County*, 96 Wn. App. 581, 590, 980 P.2d 277 (1999), the Supreme Court analyzed the statute and concluded that it did not, in and of itself, give rise to fee shifting. That remains the law today. *See, e.g., Henderson v. Kittitas*

County, 124 Wn. App. 747, 758, 100 P.3d 842 (2004) (“LUPA appeal does not give rise to attorney fees”).

The Inn seems to acknowledge this, but goes on to argue that the Town’s defense is “frivolous,” despite having not yet received the Town’s brief. *Appellant’s Br.* at 29-30. It relies upon *Zink v. City of Mesa*, 137 Wn. App. 271, 152 P.3d 1044 (2007), a case in which the city terminated a building permit for no apparent reason. The superior court likened it to “Pearl Harbor,” insofar as it was a “totally unprovoked act of aggression.” *Id.* at 1045-46. The city defended its actions, which generated expensive briefing, *id.*, but right before the hearing, *stipulated* that its actions were in error. *Id.* at 1046. The city further stipulated that fees may be due. *Id.* Reasoning that “parties must abide by their stipulations,” Division III deemed the defense frivolous. *Id.* at 1047.

Here, of course the Town has not stipulated, nor “admitted,” that it is anything but correct. There was no “unprovoked act of aggression,” just an accurate application of the Town’s Code. Suffice to say, *Zink* is inapposite.

And as a more general matter, diligent research fails to uncover any appellate holding in which *a respondent* was sanctioned for advancing a frivolous defense—and for good reason. A superior court judge has already concurred to the Town’s view. Thus, at a bare minimum, the

Town has presented some “debatable issues” to the Court. The frivolous appeal standard under RCW 4.84.185 is, by definition, not met.⁹

For a whole host of reasons, the Inn is not entitled to fees or non-statutory costs, win or lose.

2. CONSISTENT WITH RCW 4.84.370, THE TOWN
RESPECTFULLY REQUESTS ATTORNEYS’ FEES AND COSTS
ASSOCIATED WITH THIS APPEAL

If the superior court’s ruling is affirmed—as the Town believes it should be—it respectfully requests an award of reasonable attorneys’ fees and costs under RCW 4.84.370. The statute provides, in pertinent part:

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys’ fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a... *conditional use*.... The court shall award and determine the amount of reasonable attorneys’ fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town . . .; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, *the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.*

⁹ An appeal is frivolous if it presents “no debatable issues” and “no reasonable possibility of success.” See *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

RCW 4.84.370 (emphasis added); *see also Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005) (if a land use decision is affirmed by two courts, the prevailing party is entitled to fees under this statute). As contemplated in the statute, the Town has prevailed at every level of the litigation to date.¹⁰

If this Court affirms, the Town—as the prevailing party—asks that it be granted an award of reasonable attorneys’ fees and costs associated with defending this appeal. The Town will promptly submit an affidavit for calculation by the Court Commissioner. *See Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009).

IV. CONCLUSION

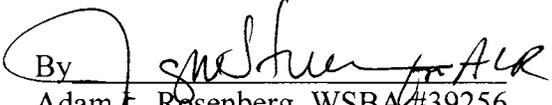
For the foregoing reasons, the Town respectfully requests that the Court of Appeals affirm Judge Arend’s Order dismissing Appellants’ LUPA petition. Under RCW 4.84.370, the Town further requests an

¹⁰ After the Inn appealed Judge Arend’s ruling, the Town specifically placed it on notice of this statute. *See Rosenberg Decl. Ex. A-B*. The Inn disregarded the notice and moved forward with this appeal, with full knowledge of the attendant risk.

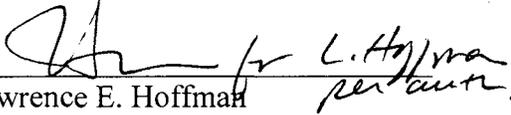
award of reasonable attorneys' fees and costs associated with defending
this appeal.

DATED this 26th day of May 2010.

KEATING, BUCKLIN &
McCORMACK, INC., P.S.

By  #24318
Adam E. Rosenberg, WSBA #39256
Attorneys for Respondent

HOFFMAN LAW FIRM

By  per *per curiam*
Lawrence E. Hoffman
WSBA #16556
Attorneys for Respondent

