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No. 62993-0-I

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

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

Petitioners/Respondents/Cross-Appellants,

v.

King County,

Respondent/Appellant.

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

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I. INTRODUCTION

This is a LUPA appeal. Cross Appellants John Hancock Life Insurance Company and White River Forests, LLC (collectively “White River”) seek relief from King County’s Department of Development and Environmental Services’s (“DDES”) calculated and improper effort to deny White River’s applications for determination of legal lot status. Based on its past practices, King County ordinarily decides within six to eight weeks applications for legal lot status submitted under KCC 19A.08.070. In this case, DDES delayed acting on the applications while it concocted a new “interpretation” of the ordinance that would result in denial of the majority of the applications. DDES’s new interpretation was a radical departure from its past practices and fundamentally changed the meaning of the King County Code for legal lot recognitions. Once it put this “interpretation” in place, DDES immediately denied the majority of the applications based upon its new “interpretation.”

DDES readily admits these facts. It admits that when faced with the applications for legal lot determination of White River and Co-Cross Appellant Palmer Coking Coal Company (hereafter “Palmer”), it changed its review process simply because of the number of legal lots that would result. *See Appellant’s Opening Brief*, pp. 3-4. In so doing, it treated these applicants differently than any other prior applicant and read unintended meaning into the relevant code provision. This is contrary to law. White River seeks relief from DDES’s arbitrary and capricious conduct.

This Court reviews *de novo* DDES's February 22, 2008 Final Code Interpretation (Code Interpretation). It should invalidate it as an erroneous interpretation of the law. The Code Interpretation is erroneous because the ordinance is unambiguous and requires no interpretation. The Code Interpretation is also erroneous because it contradicts the ordinance by importing a definition of "approved roads" that is overly technical, modern and discordant with the purpose of the ordinance to recognize lots that were historically created in compliance with the rules in effect *at the time of the lots' creation*. The Code Interpretation does not reflect Council intent; it is much more restrictive. The Code Interpretation misapplies or selectively applies the 1993 Road Standards, requiring its invalidation. The Code Interpretation fails to favor the landowner as legally required. Where the Code Interpretation outright rejects forest roads as "approved roads," the interpretation is erroneous, as admitted by the Director who conceded it was "overly broad." CP 588. The Code Interpretation is also vague. For any of these reasons, this Court should invalidate the Code Interpretation and remand the lot applications.

Petitioners' are also entitled to legal lot status through another section of the ordinance, Section 4(d), which DDES failed to apply. *See* KCC 19A.08.070.A.4.d. This Court should remand the lot applications for consideration under Section 4(d).

The trial court correctly recognized that DDES had erred in many ways. The trial court correctly refused to give deference to the new "interpretation." CP 626-27, ¶¶ D.3-4; CP 636, line 15 to CP 638, line 11.

This Court should uphold that legal conclusion under *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992) and *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007). The trial court found that prior to issuing the Code Interpretation, DDES had not required proof of compliance with 1993 Road Standards, and that the new rules contradicted its past practice. CP 626-27, ¶¶ D.3-4; CP 636, line 25 to 637, lines 4-17. This finding is supported by substantial evidence and should be affirmed. Finally, the trial court held that the Director exceeded her authority when she applied the Final Code Interpretation to White River's application. CP 626, ¶ D.3. This Court should affirm that conclusion because the Code Interpretation legislates new requirements beyond mere gap filling.

II. ASSIGNMENTS OF ERROR

Regarding DDES's actions:

1. DDES's Final Code Interpretation is an erroneous interpretation of law.
2. DDES's Final Code Interpretation contains erroneous application of law to the facts.
3. DDES erroneously applied its Final Code Interpretation to White River's applications for legal lot status under KCC 19A.08.070(A).
4. The Director of DDES of King County exceeded her authority in issuing the Final Code Interpretation.
5. DDES erroneously denied White River's applications for legal lot status based on an erroneous interpretation of KCC 19A.08.070(A)(1).
6. DDES erroneously denied White River's applications for legal lot status by failing to consider or approve the applications under §4.d. of KCC 19A.08.070(A).

Regarding the trial court's actions:

7. The trial court erred in failing to facially invalidate DDES's Final Code Interpretation.
8. The trial court erred in failing to reverse DDES's denial of legal lot status to 115 of White River's lots.
9. The trial court erred in holding that DDES was not obligated to analyze and approve White River's applications pursuant to KCC 19A.08.070(A)(4)(d). (Conclusion of law D.7.) (CP 627).
10. The trial court erred when it approved King County's use of gated roads and lack of dedicated rights-of-way as bases to deny legal lot status (Conclusion of Law D.9) (CP 627).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should this Court invalidate DDES's Final Code Interpretation as an erroneous interpretation of the law because: 1) the Ordinance is not ambiguous and needs no interpretation; 2) if the Ordinance is ambiguous, any interpretation should favor the landowner and should conform to past practice; 3) the interpretation arbitrarily and retroactively requires compliance with King County's prospective 1993 Road Standards in contrast with the intent of the King County Council; 4) the interpretation erroneously interprets the 1993 Road Standards and specifically the definition of "road;" 5) the outright rejection of forest roads as an "approved road" is erroneous, as admitted by the Director, and/or 6) the Final Code Interpretation is impermissively vague? (Assignments of Error 1, 2 and 7).
2. Should this Court invalidate DDES's Final Code Interpretation as a clearly erroneous application of the law to the facts because it: 1) indiscriminately excludes forest roads; 2) disregards standards for state roads within natural resource lands; 3) holds that a forest or forest road "is not devoted to transportation purposes"; 4) holds that a forest or forest road is "not intended to promote or protect public health, safety and general welfare," and 5) holds that forest roads "will generally not meet this test." (Assignments of Error 2, 3 and 7).
3. Were DDES's denials of the lot determination applications erroneous because KCC 19A.08.070 does not apply 1993 Road Standards, requires only establishment of access by road, states no prohibition on gates, and does not require a dedicated right-of-way? (Assignments of Error 3, 5, 8, 10)

4. Should this Court invalidate DDES's Final Code Interpretation because the Director exceeded her authority when she 1) fundamentally changed recognition of historically created lots in King County through issuing the Final Code Interpretation in contradiction of the plain language of the ordinance, past practice, and legislative intent, and 2) issued an application-specific interpretation? (Assignments of Error 4 and 7).
5. Should this Court reverse and remand with direction for approval White River's previously denied lot applications pursuant to §1 of the ordinance? (Assignments of Error 5 and 8).
6. Should this Court reverse and remand with direction for approval White River's previously denied lot applications pursuant to §4.d. of the ordinance? (Assignments of Error 6 and 9).
7. Should this Court affirm the trial court's decision that the Director exceeded her authority when she applied the Final Code Interpretation to White River's pending applications because the Final Code Interpretation was not consistent with past practice or legislative intent and was an attempt to legislate and/or to bootstrap legal argument? (Assignment of Error 4; King County's Assignments of Error 3 and 4 (misnumbered 3)).
8. Should this Court affirm the trial court's decision that the Final Code Interpretation is not entitled to a deferential standard of review because it was not consistent with past practices or legislative intent and was an attempt to legislate and/or to bootstrap legal argument? (Assignment of Error 1; King County's Assignments of Error 4 (misnumbered 3) and 5 (misnumbered 4)).

IV. STATEMENT OF THE CASE

A. White River Owns Property in King County

White River owns 145,000 acres of land in the Forest zoning district of King County. CP 237, ¶ 3. These properties have existed as 40-acre lots, created by large lot tax segregations under Washington law prior to 1937. *Id.*; CP 227, ¶ 3 to 228, ¶ 5; AR 207-457 (applications). The 40-acre lots have historically been recognized by the King County tax

auditor and taxed by the auditor. CP 228, ¶¶ 4-5; CP 370, ¶ 13; CP 229-30, ¶ 6. *See also* AR 210, 286-433 (historical tax records submitted with applications, Exhibits E-O).

White River Forests LLC's statutory manager is Hancock Natural Resource Group, Inc. ("HNRGI"), which is a wholly owned subsidiary of and investment manager for John Hancock Life Insurance Company, Inc. CP 236-37, ¶ 2. HNRGI is the world's largest timber investment management organization, aiding institutional investors (mainly pension funds) in managing their timberland investments. *Id.* White River's original applications for determining the legal status of 153 of its historically created lots was motivated by its commitment to maximizing the value of its properties. CP 327, ¶ 6.

B. King County's Ordinance and Past Practice for Determining Legal Lot Status

The King County Code contains procedures to receive legal lot status for historically created lots, KCC 19A.80.070A ("the Ordinance"). The Ordinance does not address development of lots, merely their recognition as legal parcels. *See* CP 501; KCC 19A.08.070.D.

A lot with legal status need not be developed. The development rights of a recognized lot may be transferred, creating a transferable development right ("TDR"). *See* CP 237, ¶¶ 4-5. A TDR may then be sold to a developer elsewhere in the County, allowing greater density or other development benefits. Conservation easements are then recorded against the property of the TDR seller, preventing any future development

on that property. In 2004, John Hancock sold development rights from the Snoqualmie Forest to King County, setting aside 90,000 acres in the Forest Zone. *Id. See also* CP 242-244. The conservation easements placed on this land ensures it will remain a working forest in perpetuity. To be eligible for a TDR, a lot must have legal lot status.

In 2000, King County adopted its present legal lot review provisions, codified at KCC 19A.08.070. In relevant part, the code provides as follows:

Determining and maintaining legal status of a lot.

A. A property owner may request that the department determine whether a lot was legally segregated. The property owner shall demonstrate to the satisfaction of the department that, a lot was created, in compliance with applicable state and local land segregation statutes or codes in effect at the time the lot was created, including, but not limited to, demonstrating that the lot was created:

1. Prior to June 9, 1937 and the lot has been:
 - a. Provided with approved sewage disposal or water systems or roads, **or**
 - b. conveyed as an individually described parcel to separate, noncontiguous ownerships through a fee simple transfer or purchase prior to October 1, 1972
 - c. recognized prior to October 1, 1972 as a separate tax lot by the County Assessor;

* * * *

4. Through the following alternative means allowed by the state statute or county code:

* * * *

- d. At a size twenty acres or greater, recognized prior to January 1, 2000, provided, however, for remnant lots not less than seventeen acres and no more than one per quarter section;

KCC 19A.08.070 (2000) (AR 1050; 1130). It is noteworthy that, in 2004, the King County Council changed the disjunctive “or” between subparagraphs 1.a. through 1.c. to the conjunctive “and.” AR 1621 (Ord. 15031, §2). Section 1 now reads:

1. Prior to June 9, 1937 and the lot has been:
 - a. Provided with approved sewage disposal or water systems or roads, **and**
 - b. (1) conveyed as an individually described parcel to separate, noncontiguous ownerships through a fee simple transfer or purchase prior October 1, 1972: **or**

(2) recognized prior to October 1, 1972 as a separate tax lot by the County Assessor;

KCC 19A.08.070 (2004) (App. A to *Opening Brief*). While the amendment was dramatically substantive by changing a disjunctive to a conjunctive, it was characterized as a “clarifying” amendment and not given any attention by the Council or the public. CP 1630. The Council made no changes in 2004 to the provision addressing approved roads.

To obtain legal lot status, a property owner can hire a title research consultant to develop a history of the lots and submit the historical information to DDES. CP 227 at ¶¶2-3. DDES’s *Determination of Legal Lot Stats Instructions & Form* (a version dated June 29, 2007) requires no

information addressing sewers, water or road infrastructure on the lot. CP 501-02. As recently as August 28, 2006, DDES approved lot applications without requiring evidence regarding roads or other infrastructure. CP 322-26; CP 231, ¶ 9. Usually, DDES acts on applications for legal lot status within six to eight weeks. CP 58; CP 504; CP 228 at ¶ 5. *See also* CP 326 (application received 6/23/06), and CP 322 (approved 8/28/06).

C. White River's November 13, 2007 Applications for Lot Determination

White River submitted applications for determination of 153 lots in the Forest Zone of King County on November 13, 2007. AR 207-457 (applications); CP 237, ¶ 6; CP 228, ¶ 5. Palmer submitted applications on October 10, 2007. AR 458-1027 (applications); CP 282. DDES's processing of these applications was slower than usual. CP 58; CP 504; CP 228 at ¶ 5.

These lots are predominately accessed by forest roads. AR 210 ("Section P: Roadway Photos" at AR 434-445 and "Section Q: Roadway Maps" at AR 446-457); CP 238, ¶ 7. The forest roads meet the standards required by Department of Natural Resources in accordance with Washington's Forest Practice Act. CP 238, ¶ 7. "These roads are constructed to meet the demands of their intended use, typically log hauling." *Id.* "As a consequence, they are durable roads that are constructed to exacting standards and maintained in strict accordance with DNR requirements." *Id.* The DNR standards are set forth in WAC 222-24-010, -020, and -030.

When the applications were not approved in the usual time-frame, DDES told White River's consultant he would get an update on February 6, 2008. CP 504. No update was provided, but the Chief Land Surveyor for DDES Raymond Florent told the consultant at that time in an email that DDES would contact the consultant if it needed additional information. ("If we need additional information to prove legal lot status for some of the lots within a submittal, we will send out a letter requesting that additional information be submitted within 30 days to prove the legal lot status.") CP 498, ¶ 6; CP 504 (emphasis added). DDES never requested additional information. CP 498, ¶ 7. DDES subsequently denied some lots in part because of supposed lack of information regarding easements or similar instruments; DDES's decision was final without opportunity to submit additional information. CP 409, ¶ 9; AR 702-708.

D. DDES's February 22, 2008 Final Code Interpretation in Response to White River's Applications Creates a New Meaning for "Approved Roads."

As it turned out, DDES was not processing White River's applications during this time. Its staff instead was busy developing a new rule with which to deny the applications *en masse*. See *Opening Brief*, pp. 3-5. By February, 2008, prior to taking any action on White River's lot applications, the Director of DDES issued a Final Code Interpretation ("the Code Interpretation"). AR 2046-2050 (App. B to Opening Brief). In this Code Interpretation, DDES for the first time required that a road satisfy the 1993 King County Road Standards ("1993 Road Standards") to

qualify a lot for recognition under KCC 19A.08.070(A)(1)(a). These standards ordinarily apply prospectively to new development. *See* KCC CP 184 (“These standards shall apply prospectively to all newly constructed road and right-of-way facilities, both public and private, within King County.”) DDES did not simply apply the definition of “road” set forth in those standards. DDES picked and chose different parts of the 1993 Road Standards to create its unique definition of “road.” This definition conveniently and specifically excludes the forest roads that serve the proposed lots. AR 2049 (App. B to Opening Brief, p. 4 at “Decision”) (“A forest service or logging road that has been constructed under state forest practice regulations or similar regulations does not meet the definition of ‘road’ for purposes of lot recognition under KCC 19A.08.070A.1.a.”).

The Director did not issue the Code Interpretation to generally interpret the meaning or requirements of KCC 19A.08.070, or because of a code change. She issued it in specific response to White River’s applications. This is stated plainly in the Code Interpretation: “[DDES] has recently received several applications for lot recognitions that rely upon ‘forest roads’ or ‘logging roads’ to satisfy the criteria set forth in KCC 19A.08.070.A.1.a.” AR 2046 (Ex. B to Opening Brief, p. 1 at “Background”). This is confirmed by Deputy Director of DDES Joe Miles who testified:

Q: So there wasn't any change to the code that prompted it? Was there any change to King County's policies that prompted the code interpretation?

A: No.

Q: Any changes to the King County rules or development regulations that prompted it?

A: No.

CP 491 (Miles Deposition, 51: 1-9). This is also confirmed by Chief Land Surveyor Ray Florent who similarly testified:

A. There was concern with impact and that's why we went to Mr. Miles to discuss whether or not our procedures is what the department was expecting that we were actually implementing.

Q. So am I understanding you correctly when you say that the code interpretation was discussed as a result of the applications that were submitted and the potential impact you saw to the forest zone?

A. The questions were initially raised to Mr. Miles because of the numbers of applications that were submitted within certain areas of the forestry zone.

CP 461 (Florent Deposition, 56:25 through 57: 10).

E. DDES's April 4, 2008, Denial of White River's Applications for Lack of "Approved Roads."

After issuing this Code Interpretation in response to the Petitioners' lot applications, DDES denied recognition of 115 lots of White River on April 4, 2008. CP 349; AR 702, 707 ("the additional lots requested to be recognized have been denied per referenced items 1, 2, 3 and 4.. ."). DDES based its denials on its conclusion that the roads

serving the properties did not meet its new road standards. AR 702 (“Site is not served by an approved road pursuant to the final code interpretation.”). *See also* CP 228-29, ¶ 5. DDES also denied recognition of some lots because it found the forest roads gated and/or because the forest roads are not built in dedicated roadways. *Id.* (“A private gate prevents access to on-site logging/forest access roads”); (“No right-of-way (e.g. an easement) has been devoted to transportation purposes.”). In issuing the denials with no opportunity for appeal or submission of further information, DDES neither requested access to the gated roads nor requested any additional information from White River, contrary to its prior representation. AR 702-707; CP 498, ¶ 7. This was also contrary to DDES’s past practice of giving an applicant time to supplement the application. CP 498, ¶ 4.

With no additional administrative recourse, White River timely appealed both the Code Interpretation and the denial of their 115 lot applications under the LUPA. CP 46-54 (consolidation order); CP ____ (three LUPA petitions by White River and/or John Hancock) (9/9/09 Supp. Desig.).

F. The Trial Judge Correctly Refused to Give Deference to the Code Interpretation or to Apply the Code Interpretation to Petitioners’ Applications, Recognizing DDES’s Deliberate Manipulation of Its Interpretive Authority That Singled Out Petitioners.

The trial court recognized DDES’s capricious conduct when it resolved the cross summary judgment motions. The trial court correctly

held that the Director exceeded her authority when she applied the Code Interpretation to White River's applications. CP 626, ¶ D.3. The trial court correctly refused to give deference to the Code Interpretation. CP 626-27, ¶¶ D.3-4; CP 636, line 15 to CP 638, line 11. The trial court found that the Code Interpretation contradicted past practice, stating that while deference is accorded to "established past practice," "that is not the case we have here." CP 637, lines 5-12. *See also* CP 626, ¶ C.6 (incorporating oral ruling into written order). The trial court observed that the 1993 King County Road Standards came from nowhere in the Ordinance or past practice, stating,

So, this is in effect a new interpretation sort of reaching in – in the Court's view – to the 1993 King County Road Standards. Sort of just inserts that into this ordinance, when it is not really in there. I cannot see that it was the legislative intent by the counsel [sic] in adopting either the original ordinance or the amendments that this would be the way that it should do. I think, and I reached this reluctantly because I think that it is appropriate to give deference[,] I cannot give deference in this case. . . .

CP 637, lines 13-24.

Despite these conclusions, the trial court declined to facially invalidate the Code Interpretation, *id.*, ¶¶ D.5-6, a step which this Court should take. The trial court also declined to require DDES to evaluate the applications under §4.d of the Ordinance, which Petitioners urged as an additional and/or alternative basis for approval that DDES should have considered. *Id.*, ¶ D.7. Palmer urged this basis of approval to DDES prior to DDES's denial of the applications. CP 2044.

The resolution of the parties' cross summary judgment motions is on appeal pursuant to certification under CR 54(b) and RAP 2.2(d). CP 690-709 (White River's Notice of Appeal); CP 653-670 (King County Notice of Appeal); CP 671-689 (Palmer Notice of Appeal). Trial on the merits is stayed pending this review. CP 696-99 (certification order).

V. STANDARD OF REVIEW

The standard of review is *de novo* in this appeal. In a LUPA appeal, an appellate court "stand[s] in the shoes of the superior court and review[s] the hearing examiner's action *de novo* on the basis of the administrative record." *Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 150, 19 P.3d 453 (2001). "The proper focus of our inquiry is therefore the [decision by the local jurisdiction], rather than the trial court's decision." *Id.* LUPA requires reversal of DDES's land use decisions if the party seeking relief shows that:

- (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;
....
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside of the authority or jurisdiction of the body or officer making the decision;

RCW 36.70C.130(1).

The Court reviews *de novo* questions of law such as those presented by LUPA standards RCW 36.70C.130(1)(b)(land use decision is erroneous interpretation of law) and (e) (outside of authority). *See* 7

WASH. STATE BAR ASS'N, WASHINGTON REAL PROPERTY DESKBOOK § 111.4(9), at 111-25 (3d ed. 1996). *See also Griffin v. Board of Health*, 137 Wn. App. 609, 616-617, 154 P.3d 296 (2007). Standard (d) (clearly erroneous application of the law to the facts) concerns a question of mixed fact and law reviewable *de novo*. *Id.*, citing *Leschi Improv. Council v. Washington State Highway Com.*, 84 Wn.2d 271, 284, 804 P.2d 1 (1974).

The parties appeal the trial court's resolution of cross motions for summary judgment addressing legal issues. This Court reviews *de novo* disposition of a motion for summary judgment. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003), citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).¹

This Court should invalidate the Final Code Interpretation, and reverse or remand DDES's denial of legal lot status to 115 lots of White River.

VI. LEGAL ARGUMENT REGARDING ISSUES PRESENTED BY WHITE RIVER'S CROSS-APPEAL: THIS COURT SHOULD GRANT RELIEF FROM DDES'S ARBITRARY, RESULT-ORIENTED ACTIONS

DDES's Code Interpretation is fundamentally flawed. White River's lot applications satisfied KCC 19A.08.070 and should have been approved. This Court should invalidate the Code Interpretation. It is an

¹ The parties' cross motions for summary judgment were the inverse of each other's motions regarding the validity of the Code Interpretation. As the moving party in its own motion, DDES sought deference to its interpretation. CP 125-128. This Court should reject, therefore, DDES's argument that it should receive favorable inferences relevant to the deference inquiry because it was the non-moving party. *See Opening Brief*, p. 9. It was a cross-movant on the issue. The requested inferences would be unwarranted.

erroneous interpretation of the law. The Director exceeded her authority in issuing it, implementing through the Code Interpretation changes to past practice and to the plain language of the applicable ordinance that constituted a legislative amendment. Only the Council is empowered to make such changes. Within the Code Interpretation, the Director erroneously applied the law to the facts in her attempt to disregard forest roads that would otherwise qualify the lots for recognition.

This Court should reverse or remand the denial of White River's 115 lot determination applications. The requirements of King County Code 19A.08.070(A) have been met, either under § 1 or under § 4.d, a section which King County erroneously failed to apply.

A. This Court Should Invalidate the Code Interpretation As An Erroneous Interpretation of the Law.

The errors in the Code Interpretation are many. The Code Interpretation represents a substantially new approach to determining legal lot status that the legislative body never approved. This Court should invalidate it. It is inconsistent with the plain language of the Ordinance, disfavors land owners, inserts the 1993 Road Standards without basis, mangles the 1993 Road Standards to produce an arbitrary definition of road, and, as the Director has admitted, goes too far in its blanket rejection of forest roads.

1. **“Approved roads” is not ambiguous and needs no interpretation.**²

King County justifies DDES’s Code Interpretation by claiming that the Ordinance is ambiguous. *Opening Brief*, pp. 9-16. This justification fails. King County assumes that “approved roads” is ambiguous, failing to discuss or establish ambiguity. *Id.* “Approved roads” is not ambiguous.

The Ordinance is susceptible to a plain meaning. When the language of a code provision is clear on its face, courts must give effect to the plain meaning and should assume the legislators meant exactly what it said. *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002) (citations omitted); *McTavish v. City of Bellevue*, 89 Wn. App. 561, 565, 949 P.2d 837 (1998) (“Absent ambiguity, there is no need for an agency’s expertise in construing a statute.”); *Cowiche*, 118 Wn.2d at 813. “Simply because the words of a statute are not defined in the statute does not make the statute ambiguous.” *Cowiche*, 118 Wn.2d at 814.

The fact that “approved” or “roads” is not defined does not make these terms ambiguous. A statute is not ambiguous “simply because different interpretations are conceivable.” *Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004) (citation omitted). Courts are not “to search for an ambiguity by imagining a variety of alternative interpretations.” *Id.* (citation omitted) (quotation marks omitted).

² Local ordinances are interpreted the same as statutes. *Sleasman*, 159 Wn.2d at 643. Case law cited herein that relates to statutes applies equally to the Ordinance.

Here, the Ordinance provides a general and straightforward, but not overly technical, requirement that the property in question be served by “approved . . . roads.” “Road” is defined in a dictionary of general usage as, “An open way or public passage for vehicles, persons, and animals; a track or transportation to and fro serving as means of communication between two places usually having distinguishing names.” *Webster’s Third New International Dictionary, Unabridged* (Merriam-Webster 2002). “Approve” is defined in a dictionary of general usage as “to judge and find commendable or acceptable” or “to express often formally agreement with and support of or commendation of as meeting a standard.” *Id.* Synonyms include sanction, endorse, accredit or certify. *Id.* Forest roads are an open way for vehicles, persons and animals. They are also a track for travel to and fro. Forest roads must meet the Department of Natural Resources standards codified in Washington’s Forest Practice Act. CR 238, ¶ 7. The DNR requirements relate to subgrade preparation, surface treatments and wearing course, width and curve dimensions, drainage, and maintenance. *See* WAC 222-24-020 and 030; WAC 222-24-050 through -052. The forest roads are approved because they are roads that meet these standards.

The King County Council could not have meant a special definition of “approved roads” because the word “approved” is also applied to infrastructure other than roads (e.g., sewer and water). To adopt DDES’s interpretation would require a similarly tortured analysis for sewer and water systems. The King County Council gave no indication

that it meant to apply technical, modern standards. If it had wanted to expand upon the interpreted words “approved” and “road” (or “sewer” or “water”) it would have done so.

“To ascertain a provision’s plain meaning, we examine the ordinance as well as other provisions in the same code.” *Griffin v. Board of Health, supra*, 137 Wn. App. at 618. The Ordinance states that an applicant must demonstrate that the lot was “in compliance with applicable state and local land segregation statutes or code in effect at the time the lot was created.” KCC 19A.80.070A(1)(a). *Cf.* KCC 21A.06.800 (defining “non-conforming use” which recognizes uses that conformed to rules and regulations “in effect at the time of establishment.”). The Ordinance embraces application of historical standards, not modern standards.

DDES’s interpretation conflicts with this language. It is at odds with the Ordinance in its entirety. The Ordinance requires evaluation in light of historical standards, but the Code Interpretation applies *contemporary* road construction standards intended to apply prospectively. This is absurd within the context of the Ordinance.

DDES’s interpretation is not merely gap filling. It imposes new, specific, technical and inappropriately modern requirements that are not present in the Ordinance and contradict its purpose and plain meaning. This is contrary to law. As this Court has observed, “[An agency] must interpret and enforce the code as it is written, without adding new criteria on a case-by-case basis.” *Peter Schroeder Architects v. City of Bellevue*,

83 Wn. App. 188, 193 (1996). “It is unreasonable to expect architects and other professionals to comply with unarticulated standards.” *Id.* In *Peter Schroeder Architects*, this Court rejected the new criteria the City of Bellevue invented for “bay window,” remarking,

The ordinary definition of bay window does not limit a window to any specific proportions or sizes. Nor does the BLUC restrict a minor structural element's size other than to limit the distance it may extend into the setback.

Id. In the case at hand, DDES added previously unarticulated standards just like the City of Bellevue attempted to do in *Peter Schroeder Architects*. The Court should reject the attempt as it did in *Peter Schroeder Architects*.

The unambiguous Ordinance in force for eight years needed no new input from DDES in 2008. As did the courts in *Cowiche, Sleasmen*, and *Peter Schroeder Architects*, this Court should hold that the provision is unambiguous.

2. **If “approved roads” is ambiguous, any interpretation should favor the landowner.**

Even if this Court were to find “approved roads” to be ambiguous, it should still reject the Code Interpretation. The Code Interpretation fails to favor the landowner. DDES ignored the principle that land use codes that hinder or prevent owners from using their property are strictly construed. *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 684-85, 649 P.2d 103 (1982); *Sleasman v. City of Lacey*, 159 Wn.2d at 643 n.4, 151 P.3d 990 (2007) (“land-use ordinances must be strictly construed in

favor of the landowner.”). “The basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit.” *Id.* The Ordinance, therefore, should not be expansively interpreted to impose 1993 King County Road Standards. A strict construction would make the requirement of approved roads general and not technical.

A strict construction also would not require that *King County* approve the roads. The Code Interpretation states that the road must be approved by the time of enactment of the Ordinance by King County “or other public agency.” App. B to *Opening Brief*, p. 4 (AR 2049). During her deposition, however, the Director of DDES Stephanie Warden, the author of the Code Interpretation, insisted that only King County could approve the road, testifying,

Q: So explain to us what it is about the forest service roads that is problematic in terms of why would you not recognize an approved—a forest service road that was approved by another agency, Department of Natural Resources?

A: This code provision talks about an approved road approved by King County. So an approval by a DNR or whomever wouldn’t be relevant.

Q: So only King County can approve roads for purposes of this ordinance?

A: For purposes of the subdivision ordinance, yes.

CP 577 (Deposition of Warden, 34:23 to 35:9). Notwithstanding the Director’s testimony, according to the Code Interpretation any public agency can be the source of approval. This is confirmed by Chief Land

Surveyor Ray Florent's testimony.³ Forest roads should qualify in an interpretation that favors the landowner.

3. **The Code Interpretation arbitrarily and retroactively requires compliance with King County's prospective 1993 Road Standards in contrast with the intent of the King County Council.**

The Code Interpretation goes much farther than the Council went. It represents the Director's invention, not Council intent. No evidence indicates the Council meant to impose modern, prospective road standards from an entirely separate division of King County to an ordinance designed to recognize historically created lots.

Administrative agencies have no power "to promulgate rules that would amend or change legislative enactment." *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). Agency rules may be used to "fill in the gaps" in legislation if necessary to effect a general statutory scheme. *Id.* But "[i]t is well established . . . that an administrative agency may not, by means of an interpretative or clarifying regulation, actually modify or amend the statute in question." *Fisher Flouring Mills Co. v. State*, 35 Wn.2d 482, 492, 213 P.2d 938 (1950). "[A] court may declare an agency rule invalid if it . . . exceeds statutory authority of the agency." *Wash. Pub. Ports Ass'n*, 148 Wn.2d at 645 (citation omitted). An agency issuing rules intended to implement a

³ Chief Land Surveyor Florent testified that the roads, water or sewer must be in compliance with "state or local standards", "not exclusively King County standards." CP 463, lines 11-23.

statute must issue rules that are “reasonably consistent” with the statute. *Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Board*, 89 Wn.2d 688, 696, 575 P.2d 221 (1978).

The Code Interpretation is not consistent with the Ordinance, contrary to DDES’s argument. *See Opening Brief*, p. 30-32. The underpinning of King County’s land segregation code, Title 19A KCC, is that a lot is legal so long as it complied with applicable state laws or local codes “in effect at the time of its creation.” *See* KCC 19A.08.070(A). The Ordinance goes on to explain how a lot owner can demonstrate this. The purpose of KCC 19A.08.070 is to recognize whether a lot was legally created according to historical norms. The Code Interpretation, with its importation of modern road standards, is contrary to this overarching principle expressly articulated by the Council.

DDES cites to documents surrounding the Council’s 2000 adoption of the Ordinance to examine legislative intent. *See Opening Brief*, pp. 30-31, Appendix H, F, J, K. If these documents are considered as legislative history, they do not support DDES’s position. The documents demonstrate that the Council viewed the approved roads requirement as synonymous with “access” before *and* after the adoption of the Ordinance in 2000. As an April 1999 staff report states, “The motion would reaffirm the Council intent that pre-1937 lots should be recognized only if they already have been conveyed in non-contiguous ownership, are already developed with a structure, or have water, sewage disposal systems, and

access.” AR 1779. At enactment, the Council pointedly required only one improvement for legal lot status. AR 1131.

As DDES quotes in their brief, the Notice of Public Hearing prior to adoption stated that lots created prior to June 9, 1937, would be entitled to lot status if they were improved with access:

only if the lot has been sold to individual, non-contiguous ownership, **or is currently developed with a residence or is improved with access**, water service or sewage disposal improvements.

Opening Brief, p. 30, citing Appendix I (AR 1293) (press release *before* adoption of Ordinance) (emphasis added). DDES concedes that enactment brought no substantial changes to this proposal. *Id.*, p. 31. In fact, after the Ordinance was enacted requiring “approved sewage disposal, or water systems or roads,” the Council’s office described the requirements to the public exactly the same way, again equating approved roads with access. AR 1031 (press release *after* adoption of Ordinance). The Council only sought some indicia of improvement, including access, for recognition. This is consistent with the staff report received by the Council stating that denying lot status to lots that had some development would be “problematic”:

[A] blanket prohibition against recognition of such lots is problematic, as noted in the Attorney General opinions. Some of these lots may already contain residences, or are otherwise developed. The lots may already be sold to separate, non-contiguous ownerships. The striking amendment addresses this situation by extending recognition to those lots that are already developed to some degree and to those lots that have been sold to separate, non-contiguous ownerships.

AR 1771. The Council sought to acknowledge legal lot status of lots with some improvement including access, such as White River's lots.

When the Council added the requirement that DDES give "great weight to the existence of historic tax record or tax parcels," it did so to "allow" "the department to protect property owners with historic tax parcels who might otherwise be denied separate lot approval." AR 1136. *See also* CP 279, ¶ 8. White River is one of these owners that the Council intended to protect.

DDES describes Executive Simms' proposal to disallow lot status to *any* unrecorded short plats or subdivisions not previously recorded or sold. *See Opening Brief*, p. 30. The Council flat-out rejected this approach. The Council was significantly more inclusive as to what lots would be acknowledged. The 2000 enactment earned significant attention in King County, generating a lot of interest, comments and participation from lot owners throughout King County. *See* CP 277-279; AR 1178-1215. During the 2000 adoption of the Ordinance, the Council unanimously *added* §1(c) to the original proposal, permitting approval of a lot application based *solely* on recognition of the lot as a separate tax lot by the county assessor prior to October 1, 1972. AR 1130. The addition of §1(c) as an independent basis for legal lot status further demonstrated the Council's intent to create significantly more opportunities for acknowledgement of historical lots.

As a whole, the documents contemporaneous to adoption of the Ordinance demonstrate that the Council wanted to confer legal lot status to

lots that had some improvement. *See* AR 1029-1616, 1685-1989 (County records on 2000 Ordinance adoption). The Council employed roads, sewer or water as indicators that the owner had invested some amount in development of the lot. White River's lots have the indicia of development that the Council required. DDES failed to issue an interpretation "reasonably consistent" with the Ordinance.

In 2004, this provision was amended in what was characterized as a "clarifying" amendment with no notice to the public or attention in King County that a fundamental change to the Ordinance was proposed. AR 1630. *See also* AR 1617-1682; 1990-2003 (County records on 2004 amendment). With amendment of the Ordinance in 2004, the Council eliminated the disjunctive nature of the three bases for approval, and required provision of approved sewage disposal or water systems or roads, together with either conveyance prior to October 1, 1972, or recognition prior to October 1, 1972 of the lot as a separate tax lot by the county assessor. AR 1621. The contemporaneous documents demonstrate that the 2004 Council was unaware of the gravitas of the change, and so was the public. White River's lots satisfy the current two-pronged requirements of Section 1. The recognition of the lots at issue prior to October 1, 1972, by the county assessor is undisputed. CP 370, ¶ 13; CP 229-30, ¶ 6.

Past practice also supports invalidation of the Code Interpretation. Since adoption of the Ordinance in 2000, DDES has never required roads that conform to the prospectively applicable 1993 Road Standards. CP

230-231, ¶¶7-9; CP 134, ¶ 6 citing AR 3263-3267 (DDES approved 16 lots in 2006 that were served either by forest roads or inaccessible). This cannot be disputed. By the staff's own admissions, DDES formulated the new requirements between receiving these applications and issuing the Code Interpretation in February 2008. DDES's own application form for lot determination does not require any lot access information. CP 501-02.

This Court should reject DDES's argument that this evidence is insubstantial. *See Opening Brief*, pp. 20-21, 26. Evidence is substantial when there is sufficient quantity of evidence in the record to persuade a reasonable person that the declared premise is true. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002). The evidence is more than sufficient to support the trial court's finding in White River's favor that DDES's past practice was inconsistent with the Code Interpretation.

DDES did not dispute its past practice before the trial court but argued that its past practice was mistaken and the Code Interpretation offered a correction of past practice. CP 389, lines 15-18 (the Director "recognized that DDES staff had not been giving proper meaning to the term 'approved road'"). In its Opening Brief DDES drops this argument and instead argues that it developed the Code Interpretation in response to the 2004 amendment. *See Opening Brief*, p. 2, Statement of Issue #1. This ignores that DDES maintained its practices long after the 2004 amendment, from 2004 to February 22, 2008. It is only in response to

Petitioners' applications—not the 2004 amendment—that DDES sought to change its practices.

The Code Interpretation fabricates new requirements not apparent on the face of the Ordinance, that have never been presented to the public and have never been applied by DDES prior to their invention in February 2008. Such a change in the law requires legislative action. This Court should invalidate the DDES's attempt to change by administrative fiat King County's enacted requirements for lot determination.

4. **The Code Interpretation erroneously interprets the 1993 Road Standards and specifically the definition of “road.”**

DDES does not apply the 1993 Road Standards fairly. Instead, DDES picked and chose various parts of the Road Standards to achieve the result it desired. If the 1993 Road Standards were fairly applied, the forest roads would be recognized.

The 1993 Road Standards define “Road” as “[a] facility providing public or private access including the roadway and all other improvements inside the right of way.” CR 190. The forest roads meet this definition. They are a facility providing public or private access. They include a roadway and other improvements such as bridges, culverts, and drainage.

The Director ignored this simple definition. Instead, the Director rambled in her Code Interpretation for paragraphs about what “can be gleaned” for the definition of road. AR 2048-49 (App. B to Opening Brief, pp. 3-4). She went beyond this definition to require that a road “consist of a smooth, durable surface.” She pronounced that “[o]ne

important characteristic is that the road must be located within a right-of-way, easement or similar instrument that was dedicated to transportation purposes.” AR 2048 (*id.* at p. 3). She stated that the road “must have a defined form and must be surfaced.” AR 2049 (*id.* at p. 4). This Court should invalidate the Code Interpretation based on its unfair application of 1993 Road Standards. The Director picked and chose arbitrarily. The definition of “Road” stated plainly in the 1993 Road Standards contradicts the Code Interpretation.

The Director erred in applying her arbitrary definition of “road” to forest roads. She incorrectly characterized forest roads as “not devoted to transportation purposes” and as “rudimentary access roads.” *Id.* at p. 4 (AR 2049). Neither is true. She incorrectly characterized Washington State’s Forest Practice Rules as “not intended to promote or protect the public health, safety and general welfare,” *id.* and then used these ill-founded assumptions to support her assertion that “logging roads will generally not meet this test.” *Id.*

The Code Interpretation is an erroneous application of law to the facts because it refuses to acknowledge that the forest roads meet the definition of “road” from the 1993 Road Standards. Even if the 1993 Road Standards apply to the lot determination process, the forest roads at issue qualify when those standards are fairly applied.

5. **The outright rejection of forest roads as an “approved road” is erroneous, as admitted by the Director.**

The Director has admitted that certain portions of the Interpretation are overbroad. CP 588. These should be stricken.

The Code Interpretation contains this blanket rejection of forest service or logging roads:

A forest service or logging road that has been constructed under state forest practice regulations or similar regulations does not meet the definition of “road” for purposes of lot recognition under KCC 19A.08.070A.1.a.

AR 2049 (App. B to Opening Brief, p. 4 at “Decision”). The Director admitted that this statement is overbroad, testifying:

Q: Okay, so then the sentence that you had read in the Decision that excludes all forest roads would be incorrect?

A: It may be overly broad.

CP 588 (Deposition of Stephanie Warden, 79:11-14) (see entire line of questioning, Appendix I). Every forest road would not necessarily fail to measure up to DDES’s unique application of the 1993 Road Standards. This Court should invalidate the outright rejection of forest service and logging roads that the Director admitted is in error.

6. **The Code Interpretation is impermissively vague.**

DDES’s code interpretation fails as impermissively vague.

Applicants cannot discern all of the nuances and requirements of the Code Interpretation. Even DDES employees cannot consistently interpret the Code Interpretation. As the Supreme Court has stated, “We have

recognized that the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application." *City of Seattle v. Crispin*, 149 Wn.2d 896, 905, 71 P.3d 208 (2003). See *Anderson v. City of Issaquah*, 70 Wn. App. 64, 77, 851 P.2d 744 (1993) (finding building design provisions of municipal code unconstitutionally vague). The Code Interpretation cannot be applied uniformly and consistently. This Court should invalidate it.

The Code Interpretation states that a road "must be located within a right of way, easement or similar instrument that was dedicated to transportation purposes." AR 2048 (App. B to Opening Brief, p. 3). This does not make sense where a private road is concerned, because the doctrine of merger would not recognize any instrument created by the fee owner of the property. See *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 659, 145 P.3d 411 (2006) ("a person cannot have an easement in his or her own property"), citing *Radovich v. Nuzhat*, 104 Wn. App. 800, 805, 16 P.3d 687 (2001). This creates ambiguity.

To what extent the Code Interpretation incorporates the 1993 Road Standards is unclear on its face. Staff testimony only muddies the waters. Deputy Director Joe Miles testified that not all of the 1993 Road Standards apply. CP 369 ("Ultimately, after consultation with my staff, I decided that petitioners would not be required to comply with every specific requirement of the 1993 Road Standards. . . . Rather, I directed my staff to focus on several general factors found in the 1993 Standards; as

emphasized in the Director's Final Code Interpretation. These included the concept that a road must serve as an access point to the property, be devoted to public transportation, be in an easement or right-of-way, and have some sort of improved surface."'). This testimony confirms that DDES picks and chooses at whim, with ad hoc application. This creates intolerable ambiguity.

The Code Interpretation states that to be an approved road, a road must have "a smooth, durable surface" and "be surfaced." AR 2049 (App. B to Opening Brief, p. 4). DDES employees have testified that it need not be paved, CP 369, ¶ 9 (Decl. of Joe Miles), though this is far from clear. The ambiguity of this section is underscored by Chief Land Surveyor Ray Florent's refusal in February 2008 to explain to White River's consultant what it meant. AR 2036-2034 (the email chronology reads backwards). The email colloquy contained Mr. Florent's admission that the meaning of this term will be decided on an ad hoc basis. AR 2035 (email 2/27/08 10:58 AM: ". . . there is no way for anyone in the public or private sector to come up with a list of all the different types of smooth, durable surfaces. Based on the above references, this determination will be made during each individual review.") When this did not satisfy White River's consultant, Mr. Florent ultimately suggested "you may want to consult with a Licensed Civil Engineer regarding whether or not your application meets the codes and interpretation criteria." AR 2034 (email 2/27/08 12:03 PM). These statements demonstrate that DDES's Code Interpretation contravenes the admonition of *City of Seattle v. Crispin* that

a person of common intelligence should not be made to guess at a law's meaning and application.

Ironically, it is the Director's Code Interpretation, not the Ordinance itself, that results in ambiguity and *ad hoc* determination. This Court should invalidate the confusing and vague Code Interpretation.

B. This Court Should Invalidate the Code Interpretation Because It Exceeds the Director's Authority.

The Director exceeded her authority in issuing the Code Interpretation. She *amended* the Ordinance through the Code Interpretation, she assessed White River's applications based on criteria developed *subsequent* to submission of the applications. She had no authority to issue an *application-specific* interpretation.

The Director had no authority to amend the Ordinance. Only the Council could do that. The Ordinance does not contain any reference to the 1993 Road Standards, or any technical or modern standards. Such standards are not essential to the County's scheme for lot recognition. When the Director issued the Code Interpretation, she did not merely fill in the gaps; she created new requirements. While gap filling is permissible "where necessary to the effectuation of a general statutory scheme," an agency may not purport to amend the statute. *Hama Hama Co. v. Shorelines Hearings Board*, 85 Wn.2d 441, 536 P.2d 157 (1975). The new and exacting requirements based on a selective application of portions of the 1993 Road Standards is legislating, not gap filling. As such, it exceeds the Director's authority.

The Code Interpretation violated the County's own code. KCC 2.100.020.A., which confers authority for code interpretations, states:

A. "Code interpretation" means a formal statement regarding the meaning or requirements of a particular provision in King County's development regulations;

....

C. "Development regulation" means the controls placed on development or land use activities by the county . . . [and] does not include a decision to approve a project permit application as defined in RCW 36.70B.020, even though the decision may be expressed in an ordinance by the county.

KCC 2.100.020A and B. Assuming that these provisions even apply to KCC 19A.08.070, which does not concern development, any "code interpretation" must concern a provision's general meaning or requirements, and cannot be application-specific. The Director did not issue the Code Interpretation to generally interpret the meaning or requirements of KCC 19A.08.070. She issued it in specific response to White River's applications. This was not within her authority. This Court should invalidate the Code Interpretation.

C. This Court Should Invalidate the Code Interpretation For Its Clearly Erroneous Application of Law to the Facts.

The Code Interpretation misapplies law to the facts. The errors include: 1) indiscriminately excluding forest roads, 2) disregarding State standards for roads within natural resource lands, 3) holding that a logging or forest road "is not devoted to transportation purposes," 4) holding that a logging or forest road is "not intended to promote or protect public health,

safety and general welfare,” and 5) holding that forest roads “will generally not meet this test.” This Court should invalidate the Code Interpretation for these errors.

A public official’s decision must be supported by “substantial evidence.” Evidence is substantial when there is sufficient quantity of evidence in the record to persuade a reasonable person that the declared premise is true. *Isla Verde Int’l Holdings, Inc. v. City of Camas, supra*. The Director had no evidence that forest roads would not meet the 1993 Road Standards. She had no evidence that forest roads are not intended to promote or protect public health, safety and general welfare. WAC 222-24-010 demonstrates that the forest roads constructed and maintained according to the standards of the Forest Practices Board do promote the public health and general welfare with their protection of the public resources of this State including water resources, the environment and ecosystems. No evidence supports the Director’s conclusion that forest roads are “not for transportation purposes.” *See* AR 2049 (App. B to Opening Brief, p. 4). The Director’s testimony on this point, *see* testimony at Appendix II (CP 578), is illogical. It is self-evident to anyone but DDES that forest roads are for transportation purposes, being built and used for transportation.

None of the Director’s conclusions were supported by substantial evidence. Each of them constitutes erroneous applications of law to the facts.

D. This Court Should Reverse or Remand the Denial of White River's Legal Lot Determination Applications Pursuant to Either § 1 or § 4(d) of KCC 19A.08.070A.

This Court should reverse the denial of legal lot status of White River's lots, or at the least remand for a redetermination based on appropriate standards. DDES erroneously applied portions of the 1993 Road Standards, and also raised issues of gated roads and dedicated rights-of-way that are found nowhere in KCC 19.08.070A(1). In addition, DDES should have approved the applications based on KCC 19.08.070(A)(4)(d), a section that DDES failed to apply.

1. Denial on the basis of lack of approved roads was legal error.

DDES's application of a unique selection of portions of the 1993 Road Standards to White River's applications was error. For all of the reasons that the Court should invalidate the Code Interpretation, it should reverse the denial of White River's applications. These include that the lots are served by roads that are approved roads and/or that meet the 1993 Road Standards if those standards are fairly applied. Pursuant to KCC 19.08.070(A)(1), DDES should have approved the applications.

White River also joins in Palmer's argument that approval under KCC 19.08.070(A)(1) is unnecessary where the evidence established that these lots were historically created. Where evidence demonstrates a lot's historical creation, resort to any subheading is unnecessary because of the language "including, but not limited to." KCC 19.08.070(A). Here,

White River has established the historical creation of their lots and that should be sufficient for legal lot status.

This Court should remand the applications for approval.

2. **Denial on the basis of gated roads or lack of dedicated rights of way was legal error.**

DDES asserted as a basis of denial of White River's applications that the roads to White River's properties were gated or lacked dedicated rights of way. AR 702; CP 229. No provision authorizes this as grounds to deny legal lot status. This is irrelevant under the Ordinance. DDES never requested access to the properties or additional evidence. It had never denied applications for that reason before in the lengthy experience of White River's consultant. CP 230, ¶ 7.

DDES's additional, ad hoc excuses to deny legal lot status to White River's lots support the conclusion that DDES acted capriciously to achieve denial of the applications. These grounds of denial should be ruled invalid.

3. **DDES should have approved the applications based on Section 4(d).**

It was legal error for DDES to deny legal lot status to White River's lots under section 4.d. of the Ordinance. This section provides special acknowledgement of large, historically created lots "at a size twenty acres or greater, recognized prior to January 1, 2000." KCC 19A.08.070(A)(4)(d) (emphasis added). White River's lots are 40 acres. CP 227-28, ¶¶ 3-4; AR 207-457. DDES has never disputed that White River satisfied Section 1.b.2., that the lots had been "recognized prior to

October 1, 1972 as a separate tax lot by the County Assessor.” CP 370, ¶ 13; CP 229-30, ¶ 6. These lots fall within Section 4.d. because they are twenty acres or greater and were recognized prior to January 1, 2000, based upon the voluminous evidence from the County Assessor’s office that White River presented to King County. White River presented evidence that DDES recognized sixteen 40-acre parcels presumably on this basis in 2006. AR 3263-3267. White River’s lots should have been similarly recognized because they satisfy Section 4.d. Reversal and remand is necessary.

VII. LEGAL ARGUMENT REGARDING ISSUES PRESENTED BY APPELLANT KING COUNTY’S APPEAL: THIS COURT SHOULD NOT APPROVE DDES’S MANEUVERING.

White River opposes the relief DDES seeks in its Opening Brief. White River disputes DDES’s assignments of error. This brief has already responded to DDES’s arguments with the exception of DDES’s vesting discussion and DDES’s attempt to co-opt case law regarding agency deference. White River will respond further on these two issues. Vesting is a red herring and not an appropriate analysis to this case. The cases *Cowiche* and *Sleasman* support the trial court’s decision not to give deference to DDES’s interpretation.

A. This Court Should Affirm the Trial Court's Correct Ruling Not to Give Deference to DDES's Flawed Code Interpretation Targeted Specifically at White River's Applications.

The Court easily should decide not to give deference to DDES's new interpretation of the Ordinance. The Code Interpretation is anything but contemporaneous. It was not adopted in 2000 when "approved roads" was included in the Ordinance, nor following the 2004 amendment to the Ordinance. It was crafted in direct response to White River's applications and used as a means to defeat the applications. *Cowiche* and *Sleasman* directly address deference. The Supreme Court's discussions demonstrate that deference does not arise in these circumstances.

1. This Court Should Reject DDES's Attempted End-Run Around *Cowiche* and *Sleasman*; Under This Case Law, DDES Is Not Entitled to Deference.

DDES fails to apprehend the rules of agency deference. It argues unconvincingly that its conduct justifies giving deferential weight to its Code Interpretation. *See Opening Brief*, pp. 9-27. DDES's argument defies *Cowiche*'s and *Sleasman*'s prohibition on an agency bootstrapping its legal argument into an "interpretation" when the agency in fact had no previous interpretation or policy. DDES essentially argues that an agency can perform an end-run around these cases by merely promulgating a general rule *before* acting on pending applications. DDES ignores the substance of its conduct and urges a superficial analysis of its procedure. DDES is bootstrapping its legal argument into the Code Interpretation. DDES deliberately issued the Code Interpretation as its prefatory act to

denial of pending applications. The Code Interpretation cannot escape the *Cowiche* and *Sleasman* dictates that deference is not due.

In *Cowiche*, the Supreme Court addressed when agency interpretations of ambiguous laws are entitled to weight. 118 Wn.2d at 813-15. The parties in *Cowiche* disputed the meaning of the term “exterior alteration of structures” in the Shoreline Management Act’s definition of “development.” 118 Wn.2d at 812. Because “alter” and “alteration” have “well-accepted, ordinary meanings,” the *Cowiche* court held that the statute was not ambiguous. *Id.* at 813–14. The Supreme Court soundly rejected the Department of Ecology’s argument that its interpretation would be entitled to deference if the statute were ambiguous. The Court stated that, “[I]f an agency is asserting that its interpretation of an ambiguous statute is entitled to great weight it is incumbent on that agency to show that it *has adopted and applied* such interpretation as a matter of agency policy.” *Id.* at 815 (emphasis added). The Court used the past tense. The adoption and application must *have occurred* in the past. The agency cannot *at the time of the dispute* adopt a new general policy and gain deference. DDES ignores or fails to appreciate the temporal meaning of the *Cowiche* court’s discussion of an *existing* agency policy. The policy must have existed *before* the facts underlying the particular case at issue arose. *See also Sleasman*, 159 Wn.2d at 645. (“Lacey’s interpretation would not be entitled to deference. Lacey’s claimed definition was not part of a pattern of past enforcement,

but a by-product of current litigation.”) Here, DDES’s Code Interpretation was an admitted by-product of acting on the pending applications.

The *Cowiche* court disapproved isolated agency action, stating, “The evidence establishes that the application and ‘interpretation’ here was nothing more than an isolated action by the Department.” *Id.*

Similarly, the Code Interpretation was an isolated action by DDES in direct response to these applications.

Sleasman’s discussion of deference to an agency interpretation similarly shows that DDES’s interpretation is not entitled to deference. *Sleasman* concerned the City of Lacey’s construction of an ordinance related to tree removal. *Sleasman*, 159 Wn.2d at 640-41. *Sleasman* followed *Cowiche* and held that if the statute were ambiguous, the City’s interpretation would not be entitled to deference because the City could establish no preexisting policy that included the interpretation. To support its conclusion that no preexisting policy existed, the *Sleasman* court noted, “Here Lacey applied this interpretation to only one or two instances in 30 years, and the Sleasmans were the first.” *Id.* at 647. The fact that the City applied it also to the Sleasmans neighbors *after* it applied the interpretation to the Sleasmans did not demonstrate that it was an agency policy. *Id.* at 647 (“But this [application of the policy] was *after* the Sleasmans cut down their trees. . .”).

Similarly, White River and Palmer are the first to suffer the application of DDES’s new, not preexisting, policy. In nine years, it had never been applied (because it did not exist). The record also

demonstrates that even *after* issuance of the Code Interpretation, DDES did not apply it to all applications. CP 231, ¶ 9. A policy created in direct response to these applications and issued ten days before the applications are denied on the basis of that policy is not “preexisting” as *Cowiche* and *Sleasman* meant it.

White River addressed at note 1 why DDES is not entitled to favorable inferences.

Here, no DDES interpretation of “approved roads” existed. As in *Cowiche* and *Sleasman*, no deference is due.

2. **DDES Did Not Change Its Practice In Response to "a 2004 Code Change," But Invented New Requirements In Direct Response to White River's 2007 Applications.**

DDES falsely argues that its Code Interpretation responds to the 2004 amendment to the Ordinance. *See Opening Brief*, p. 12. This is revisionist history. DDES attempts to fit the present situation into case law holding that courts “should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement.” *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 127, 186 P.3d 357 (2008). This Court should reject this attempt.

The briefing of White River and DDES and the testimony from DDES employees show that the Code Interpretation was drafted in 2008 in response to White River’s applications. Deputy Director Joe Miles specifically testified that the Code Interpretation was not drafted in

response to a code change. CP 491 (Miles Deposition, 51: 1-9). No evidence shows it was adopted in relation to the 2004 code changes. The code changes in 2004 did not concern “approved roads.” That language remained the same since its first adoption in 2000. Sweeping changes to an ordinance’s meaning nine years after it was adopted and in direct response to a party’s application does not permit an agency to claim it was merely pursuing gap filling in the ordinary course. Even if the Ordinance were ambiguous, this Court should reject DDES’s attempt to secure deference. The trial court was absolutely correct to reject deference.

B. Vesting Is Not a Doctrine Relevant to this Case Where the Meaning of "Approved Roads" Has Remained Consistent; It Is DDES That Has Attempted to Create a *New Meaning Through Its Invalid Code Interpretation.*

The Council has not changed the provision regarding “approved roads” in the Ordinance since its adoption in 2000. Either the Code Interpretation appropriately fills gaps in the Ordinance and is therefore a correct interpretation of what that 2000 language has always meant, or it goes beyond gap filling to create new requirements not embodied in the original Ordinance. White River agrees that the vesting doctrine does not apply. No valid changes have occurred. The law has remained the same. It is DDES who is trying to work a change upon the law through its invalid Code Interpretation. This Court should reject that approach.

VIII. ADOPTION OF PALMER’S BRIEF

White River adopts by reference the Brief of Petitioner/Respondent/Cross-Appellant Palmer Coking Coal Company. RAP 10.1(g).

IX. REQUEST FOR FEES AND COSTS

RCW 4.84.370(1) awards fees on appeal of a LUPA petition to a party who prevails and was the substantially prevailing party before the local jurisdiction and in all prior judicial proceedings. Here, there was no substantially prevailing party before the local jurisdiction, because no right of administrative appeal existed. Before the superior court, White River substantially prevailed when the trial court refused to apply the Code Interpretation to the applications. Should White River prevail here, White River is entitled to an award of fees and costs pursuant to RCW 4.84.370(1).

X. CONCLUSION

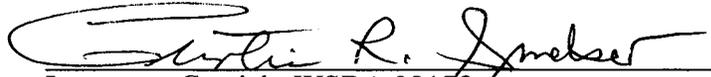
DDES usurped legislative authority to deny legal lot status for a small class of applicants for legal lot determination. Legal lot determination is not intended to monitor development. It is instead a simple process to acknowledge historically created lots. It is undisputed that the lots at issue were historically created prior to 1937 and are accessed by forest roads built and maintained in accordance with Department of Natural Resource standards. DDES should have approved the applications. This Court should reverse the denials of legal lot status.

This Court should invalidate the flawed Code Interpretation and leave to the Council the decision whether to institute new requirements for lot determination through legislative enactment.

The trial court correctly recognized DDES's arbitrary and capricious conduct. The trial court's refusals to give deference to DDES's

Code Interpretation and to apply the Code Interpretation to the applications were correct. This Court should affirm those decisions.

Respectfully submitted this 16th day of September, 2009.



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APPENDICES

APPENDIX I

Excerpt of Testimony by Director Warden

CP 588 (Dep. of Warden, 77:21 to 79:14)

- Q: Could a forest road meet the definition of the 1993 King County road construction standards?
- A: Well, we're getting into semantics here. And I think that a forest service or forest road that's been constructed under state forest practice regulations or similar regulations could not meet the definition.
- Q: And why is that?
- A: You have to read all of the interpretation, but basically it doesn't—it doesn't meet the standards of the 1993 road standards.
- Q: What standards does it not meet? And I say that as a broad pronouncement because that's what this sentence says. It's a broad pronouncement, that all forest roads don't meet the 1993 standards. What standards specifically does not any particular road that's a forest road not meet, 1993 standards?
- A: Well, that's a one-sentence conclusion based on three pages of analysis.
- Q: So what standard would it not meet then?
- A: It doesn't – it's not “a facility providing public or private access including the roadway and all other improvements inside the right-of-way.”

Q: Why is that the case?

A: Do you want me to read the whole interpretation?

Q: No, no. That sentence you just read, why would a forest service road not meet that standard?

A: It's not inside the right of way.

Q: Sorry. If I may, what is the definition of right-of-way again?

A: "Land, property, or property interest; for example, an easement, usually in a strip, acquired for or devoted to transportation purposes."

Q: So if I had a forest road providing ingress and egress for, let's say forest roads or members of the public for recreational purposes, why would that not meet the definition of a right-of-way?

A: I guess it could.

Q: Okay. So then the sentence that you had read in the decision itself that excludes all forest roads would be incorrect?

A: It may be overly broad.

CP 588 (Dep. of Warden, 77:21 to 79:14).

APPENDIX II

Excerpt of Testimony by Director Warden
CP 578 (Dep. of Warden, 38:24 to 39: 22)

Q: So how do you define “transportation purpose?”

A: For ingress/egress of transportation.

Q: Why would a forest service road not be considered for transportation purposes?

A: The primary purpose is for hauling the timber out, not for transportation purposes.

Q: Are you – so that’s not ingress and egress?

A: Not in the sense used in the road standards, no.

Q: If search and rescue teams used the forest service roads to look for lost hikers, are they using them for transportation purposes, or not?

A: Not per the meaning of the road standards.

Q: And if the forest production properties allow recreational use of their properties and openly allow access, is that not transportation purpose for someone to go up in the forest production district to go hiking?

A: Again, not per the ’93 road standards.

Q: So if they take a public road to a park, then that road is there for transportation purpose; but if they take a private forest service road to a park or open space location, it's not?

A: That would be my reading of the road standards, yes.

CERTIFICATE OF SERVICE

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

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