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No. 66322-4-I

(King County Superior Court No. 10-2-13916-8 KNT)

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION ONE

WENDY BIRNBAUM,

Appellant,

v.

PIERCE COUNTY,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Legislature enacted chapter 64.40 RCW to protect property owners against two distinct types of harm. First, the Legislature sought to protect property owners against arbitrary, capricious, or otherwise unlawful decisions on land use permit applications. Second, the Legislature also sought to protect property owners against unlawful delays in the processing of land use permit applications.

This case concerns this second type of harm—delay. Appellant Wendy Birnbaum filed a complete land use application with Pierce County for a conditional use permit to construct an RV park and campground **in February 2005**. The County, however, did not issue a final decision **until March 2010**—over five years after the application had originally been submitted and about four years and eight months beyond the legally mandated processing time of 120 days.

Following the precedents of this Court and the Supreme Court, Birnbaum filed this lawsuit only after obtaining a final decision on a permit application, a decision that was not subject to administrative appeal. That final decision by the County Hearing Examiner **approved** the permit application—the substance of which Birnbaum had no reason to challenge and that is not part of this appeal. However, Birnbaum objected to the excessive time period that the County planning department took in

processing the application. Birnbaum also alleged that the County's repeated, arbitrary requests for information caused actionable delays.

This Court must decide whether Birnbaum can proceed with a claim for statutory damages based on delay under chapter 64.40 RCW. In the proceedings below, the County argued, and the trial court agreed, that this Court's decision in *Brower v. Pierce County*¹ precluded relief. The County's contention is that, *because the final decision approved the permit*, Birnbaum's received "adequate relief" and therefore her claim for unlawful delay under chapter 64.40 RCW must be dismissed. The trial court agreed, and accordingly granted the County's motion to dismiss.

This Court should reject this reasoning and reverse the trial court. RCW 64.40's text, legislative history, and the clear precedents of the Supreme Court and this Court all support the conclusion that an applicant whose permit is ultimately granted may nonetheless bring a claim for unlawful delay. *Brower* is clearly distinguishable from this case, but, to the extent it applies, it should be overruled. Accordingly, the Court should reverse the trial court's dismissal of Birnbaum's 64.40 claim.

II. ASSIGNMENT OF ERROR

The trial court erred in entering the Order Granting Defendant's 12(b)(6) Motion to Dismiss. Clerk's Papers (CP) 137-39.

¹ 96 Wn. App. 559 (1999).

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. May a land use permit applicant whose permit application is unlawfully or arbitrarily delayed, but ultimately granted, sue for damages under chapter 64.40 RCW?

2. Is Birnbaum's claim otherwise barred by the statute of limitations, collateral estoppel, or because it is a collateral attack?

3. Whether Birnbaum is entitled to attorney fees and costs on appeal?

IV. STATEMENT OF THE CASE

Because this case comes to this Court on a motion to dismiss under CR 12(b)(6), the Court must presume that Birnbaum's allegations—set forth in her complaint and summarized in the following section—are true. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755 (1994). Moreover, the Court may even consider hypothetical facts not part of the formal record that support Birnbaum's claim. *Id.* The motion was not converted to summary judgment under CR 56—no declarations were submitted by the County.² Thus, this case presents the relatively rare situation where the Court essentially need only review the facts stated in the Complaint, since the County contends that Birnbaum cannot prevail on those facts as

² The County did submit five public records for consideration: two Hearing Examiner decisions and three documents from the writ of mandate lawsuit. CP 18-94.

stated. The Complaint is provided for the Court's convenience as Appendix A, and is also contained in the Clerk's Papers at CP 3-7.

A. Factual background.

On February 23, 2005, Plaintiff Wendy Birnbaum filed a complete application for a conditional use permit to build an RV park and campground on an 89.51 acre site southeast of Orting. CP 4, 50. The County Code requires that a final decision be issued within 120 days of receiving a complete application. Pierce County Code (PCC) 18.100.010.

Despite this requirement, and "despite Birnbaum's prompt provision of all documents and other information demanded by the County," CP 5, the County did not hold a public hearing on the application until August 2, 2006—almost eighteen months after Birnbaum had submitted a complete application. CP 5, 50.

Several weeks later, on September 21, 2006, the Hearing Examiner issued a decision, asserting that Birnbaum did not provide sufficient information for an approval, "despite the fact that Birnbaum had provided all documents and other information demanded by the County." CP 5, 20-35. Of course, the application had already been found to be complete and the County, not Birnbaum, was responsible for setting the matter for hearing.

The Examiner provided Birnbaum with two options as to how to proceed. First, the application could be returned to the planning department for further review. CP 32. Second, and “[i]n the alternative,” the Hearing Examiner provided that Birnbaum “may consider this decision a final denial of the conditional use application for purposes of appeal.” CP 32.

Birnbaum elected to follow the first option and the “Hearing Examiner remanded the matter to the County Department of Planning and Land Services for further review.” CP 5. Accordingly, on December 8, 2006, Birnbaum’s agent submitted a revised site plan and other information regarding the proposed campground, and requested that the project be re-scheduled for public hearing before the Hearing Examiner. CP 5, 52.

The hearing was subsequently scheduled for May 31, 2007, which was then cancelled by the County. CP 6, 52. Over the ensuing two and a half years, “the County repeatedly demanded additional information from Birnbaum that lacked any basis in law or sound engineering, environmental, or other scientific principles.” CP 6, 52. In addition,

Birnbaum filed a petition for a writ of mandate in an attempt to compel the County to hold the required hearing. CP 4, 37-42.³

Eventually, the second hearing was held on December 16, 2009—three years after Birnbaum had submitted her revised site plan. CP 52-53. The Hearing Examiner issued a final written decision approving the conditional use permit on March 15, 2010. CP 53, 84. Again, the Court must presume these facts as true—the County permit processing exceeded the statutory maximum by about four years and eight months.

B. Procedural history.

Birnbaum commenced this action by timely filing a complaint in King County Superior Court on April 14, 2010, within thirty days of the Hearing Examiner’s final decision. CP 3-7; *see also* RCW 64.40.030 (setting forth thirty-day statute of limitations for RCW 64.40 claims). In the complaint, Birnbaum alleged that the County violated both provisions of RCW 64.40.020(1). Specifically, Birnbaum alleged that “the County failed to act within time limits established by law” in responding her permit application. CP 6. Birnbaum also alleged that “the County’s demands for additional information in processing [her] permit application,

³ That lawsuit also pled damages claims including RCW 64.40, but the damages claims were dismissed *without prejudice*. CP 9:16-17, 45-46.

and delay in approving [her] permit application, were arbitrary, capricious, and exceeded its lawful authority.” CP 6.

The County responded by filing a motion to dismiss under CR 12(b)(6). CP 8-94. The County asserted that Birnbaum’s claim was barred on several grounds, including statute of limitations, collateral estoppel, and improper collateral attack. CP 11-17. The County further asserted that the claim was barred under *Brower v. Pierce County* because the ultimate approval of Birnbaum’s permit provided her with adequate relief. CP 14-15. The County filed no declarations, but did submit public records as appendices—namely, the 2006 and 2010 Hearing Examiner decisions, and court documents from Birnbaum’s earlier petition for a writ of mandate. CP 18-94.

After oral argument, the trial court requested supplemental briefing on three issues related to *Brower* because, as the court explained:

It appears to this Court that while *Brower* could be fatal to plaintiff’s case, *Hayes* could be interpreted as supportive of plaintiff’s right to relief under RCW 64.40, even though plaintiff ultimately obtained permission to develop the campground.

CP 115. After briefing, the court granted the County’s motion. CP 137-39. The trial court noted that it was “sympathetic with [Birnbaum’s] argument,” but determined that *Brower* compelled the conclusion that the ultimate approval of Birnbaum’s permit provided her with adequate relief,

and thus barred her claim under chapter 64.40 RCW. CP 139. The court did not address the County's other arguments in support of its motion. This timely appeal followed. CP 140-46.

V. ARGUMENT

A. Standard of review.

This case is before the Court on an order of dismissal under CR 12(b)(6). CP 137-139. A CR 12(b)(6) dismissal presents a question of law that is reviewed *de novo* by an appellate court. *Cutler*, 124 Wn.2d at 755. In reviewing a CR 12(b)(6) motion, the Supreme Court has clearly stated that “a plaintiff’s allegations are presumed to be true, and a court may consider hypothetical facts not part of the formal record.” *Id.* (internal quotations omitted; citing collected cases). “CR 12(b)(6) motions should be granted sparingly and with care and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Id.* (internal quotations omitted).

The County did not dispute the facts stated in the Complaint. Although the County supplemented the facts with public records, the facts stated in the Complaint were not contradicted. For these reasons, all of Birnbaum’s allegations—set forth in her complaint and summarized above—must be accepted as true, and may even be supplemented by

hypothetical allegations that support her claim.

B. Chapter 64.40 RCW provides a land use applicant with a cause of action for unlawful delay, regardless of whether the permit is granted.

Birnbaum contends that statute and case law support her right to seek delay damages based both on the County's failure to comply with time limits set by law ("pure delay"), and the County's repeated, arbitrary requests for additional information ("arbitrary delay"), without regard to the fact that her permit was ultimately approved. The discussion below considers the statutory scheme, the legislative history, and the substantial case law supporting Birnbaum's position. Then, the *Brower* decision is thoroughly considered and distinguished.

1. Statutory scheme.

The Legislature enacted chapter 64.40 RCW in 1982; the statute has remained largely unchanged since. *See* Laws of 1982, ch. 232.⁴ The central provision of the statute provides property owners who apply for a land use permit a cause of action for damages in two distinct instances:

Owners of a property interest who have filed an application for a permit have an action for damages to obtain

⁴ The only change in the statute—the enactment and subsequent lapse of RCW 64.40.050—is discussed *infra* at 14-15.

[1] relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or

[2] relief from a failure to act within time limits established by law...

RCW 64.40.020(1) (line breaks and numbers added).

The statute, however, places several limits or conditions on bringing a claim under this provision. For example, as illustrated by the quote above, a permit applicant may only sue over an “act” (or failure to act). The statute defines “act” to mean:

a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed.

RCW 64.40.010(6). “Act” is also defined to mean “the failure of an agency to act within time limits established by law in response to a property owner’s application for a permit...” *Id.*⁵ Thus, under RCW 64.40, a permit applicant may only challenge a jurisdiction’s final decision on an application, and/or its failure to make a final decision within time limits set by law.

The statute also precisely defines when a permit applicant may

⁵ The definition further contains the provisos that “there is no ‘act’ within the meaning of this section when the owner of a property interest agrees in writing to extensions of time, or to the conditions or limitations imposed upon an application for a permit. ‘Act’ shall not include lawful decisions of an agency which are designed to prevent a condition which would constitute a threat to the health, safety, welfare, or morals of residents in the area.” These are not at issue here.

bring suit under its provisions, specifically that:

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

RCW 64.40.030. Thus, regardless of whether a permit applicant is suing over a jurisdiction's arbitrary act or its failure to make a decision within the time limits established by law, she must wait until "all administrative remedies have been exhausted"—that is, until the jurisdiction has made a final decision on the application (including any required administrative appeal)—to bring suit, and then she must do so within thirty days after the final decision. *See Callfas v. Dep't of Construction & Land Use*, 129 Wn. App. 579 (2005). These statutes are explained and applied in numerous cases discussed below.

2. "Pure delay" is actionable under RCW 64.40.

As the above illustrates, RCW 64.40 provides two distinct types of claims for relief—one for arbitrary, capricious, or unlawful acts, and one for a failure to act within legally established time limits. This conclusion is underscored by the statute's legislative history. In particular, the Legislature's final report, which summarizes all of the bills passed during the session, described RCW 64.40's effect as follows:

The owners of interests in real property who have filed an application for a permit to use or transfer

their property are granted a cause of action to recover damages against a public entity for:

(a) placing added restrictions on a permit that are in excess of the regulations applicable at the date the application for the permit was filed if such act by the public entity was arbitrary, capricious, unlawful or in excess of the lawful authority; or

(b) failing to act within time limits established by law.

1982 Final Legislative Report, Forty-Seventh Legislature of Washington State, pp.101-02 (sub-letters in original, line breaks added).

As both the statutory language and the report make clear, “pure delay” is actionable under the second prong of RCW 64.40.020(1)—that is to say, delay need not be arbitrary or capricious to be actionable. If a jurisdiction fails to make a decision on a permit application “within time limits set by law,” then a property owner has a claim for damages.

In addition, the case law also recognizes an “arbitrary delay” claim under RCW 64.40. For example, *Callfas* states that “delay in processing **or granting a permit** may be actionable under RCW 64.40 as an ‘arbitrary and capricious,’ final decision, or an ‘arbitrary and capricious’ failure to act within the time limits established by law...” 129 Wn. App. at 596 (emphasis added). Similarly, in *Mission Springs, Inc. v. City of Spokane*, the Supreme Court allowed a 64.40 claim to proceed for what it characterized as the “arbitrar[ly] refus[al] to process [a] grading permit

application” and the “unlawful[] with[holding] [of] the permit.” 134 Wn.2d 947, 962 (1998).

Based on this support in case law, Birnbaum has alleged both types of claims. Specifically, she has alleged that

- that “the County failed to act within time limits established by law” in responding her permit application, and
- that “the County’s demands for additional information in processing [her] permit application, and delay in approving [her] permit application, were arbitrary, capricious, and exceeded its lawful authority.”

CP 6. The overriding thrust of Birnbaum’s suit, however, is that the County failed to act within legally established time limits in responding to her permit application. In particular, Birnbaum alleges that the County failed to comply with the “120-day rule” set forth in PCC 18.100.010 as required by RCW 36.70B.080. The statute provides in pertinent part:

Development regulations adopted pursuant to RCW 36.70A.040 must establish and implement time periods for local government actions for each type of project permit application and provide timely and predictable procedures to determine whether a completed project permit application⁶ meets the requirements of those development regulations. **The time periods for local government actions for each type of complete project permit application or project type should not exceed one hundred twenty day.**

⁶ “Project permit application” is defined to include a permit application for “conditional uses”—*i.e.*, a conditional use permit precisely like that at issue here. RCW 36.70B.020(4).

RCW 36.70B.080(1) (emphasis added).⁷ The County Code implements this statutory requirement, providing that “[t]he Director or Examiner **shall issue a notice of final decision on a permit within 120 days**, of County review time, after the Department accepts a complete application.” PCC 18.100.010 (emphasis added).

It should be noted that failure to comply with the 120-day rule has not always been actionable under RCW 64.40. The Legislature originally enacted the 120-day rule in 1995. *See* Laws of 1995, ch. 347, § 413 (codified at former RCW 36.70B.090). In the same law, the Legislature added a provision to RCW 64.40 providing that failure to comply with the 120-day rule did not give rise to a claim for failure to act within time limits set by law (but leaving intact failure to comply with other time limits). *Id.*, § 421 (codified at former RCW 64.40.050). Both the rule and the waiver, however, were set to lapse in 1998. *Id.*, § 433. Eventually, both provisions were extended to 2000, *see* Laws of 1998, ch. 286, § 8, but lapsed at that time.

However, a year later, in 2001, the Legislature re-enacted the 120-day rule in its present form, this time without exempting a failure to

⁷ The statute contains an exception from the 120-day rule that does not apply here. RCW 36.70B.080(1) provides that the 120-day rule will not apply where “the local government makes written findings that a specified amount of additional time is needed to process specific complete project permit applications or project types.” No such findings exist here and the County has asserted none.

comply with the rule from RCW 64.40. *See* Laws of 2001, ch. 322, § 1 (codified as amended at RCW 36.70B.080). Thus, the Legislature’s initial exclusion of the 120-day rule from RCW 64.40, followed by re-enactment of the 120-day rule without the exclusion, demonstrates that the failure to comply with the rule—a “time limit established by law”—is **now actionable** under RCW 64.40. But, importantly, an action based on failure to comply with the 120-day rule **was not actionable** when the *Brower* case was filed in 1997.

In summary, the failure to comply with the maximum processing time is actionable regardless of the reason for the failure—*i.e.*, “pure delay” creates liability without any finding of negligence or other culpability. Arbitrary delay is also actionable under the precedents of *Mission Springs* and *Callfas*.

3. Ultimate approval of the permit at issue does not bar a claim for unlawful delay under RCW 64.40.

Contrary to the County’s position, a permit applicant may bring a claim under RCW 64.40 for failure to comply with legally established time limits or for arbitrary delay, even if the permit is ultimately granted. This conclusion is supported by the statute’s text and underlying logic, and the clear weight of the case law interpreting the statutory scheme.

First, and most basically, while the statute contains various

limitations and restrictions on bringing a claim, it contains no prohibition on bringing a claim for unlawful delay in the event that the permit is granted. Instead, the statute simply requires an aggrieved applicant to wait until the jurisdiction has made a final decision on her application, and then requires the applicant to file her claim within thirty days of that decision. *See* RCW 64.40.010(6), .020(1).

The weight of the case law also supports the conclusion that a permit applicant may bring an unlawful delay claim under RCW 64.40 even if the permit is ultimately granted. The *Mission Springs*, *Callfas*, and *Hayes* cases are particularly instructive on this point.

Mission Springs. In *Mission Springs*, plaintiff was a developer of a planned unit development comprised of 790 apartment units. 134 Wn.2d at 952. The developer applied for a grading permit as part of this development. *Id.* at 953-54. The City refused to issue the permit. *Id.* at 954-57. The developer sued for injunctive relief and delay damages under RCW 64.40. *Id.* at 957. Soon thereafter, the City reversed course and issued the permit. *Id.* Despite the ultimate issuance of the permit, the Supreme Court held that the developer could proceed with a claim for delay damages under RCW 64.40. *Id.* at 961-62.

Callfas. Similarly, in *Callfas*, plaintiffs applied to the City of Seattle for a master use permit to construct a multiuse development. 129

Wn. App. at 580-81. The City failed to make a decision on the application for over three years. Before issuance of a final decision, plaintiffs sued for delay damages under RCW 64.40. The City subsequently issued the master use permit. *Id.* at 581. The trial court dismissed the suit and this Court affirmed. The dismissal, however, was not based upon the ultimate approval of the permit application. Rather, the Court held that the Callfases' suit was fatally premature because the plaintiffs filed suit **before** the City made a final decision on the master use permit. *Id.* Instead, the Court concluded that a permit applicant only has "a claim under RCW 64.40 for delay damages . . . once the tardy permit [is] issued" which effectively exhausted administrative remedies. *Id.* at 597.⁸

Hayes. In an earlier case, *Hayes v. City of Seattle*, the Seattle City Council approved a master use permit, but added a condition restricting the length of the building at issue. 131 Wn.2d 706, 709 (1997). Hayes challenged the imposition of the condition in court and obtained a reversal. *Id.* at 709-10. The City Council then approved the permit without the condition. *Id.* at 710. Within thirty days after the new approval, Hayes commenced a lawsuit for damages pursuant to 64.40 RCW. *Id.* Even though the permit had been approved, Hayes prevailed at the trial court on

⁸ See also *id.* at 598 (relying on *Hayes* for the proposition that issuance of permit constitutes the exhaustion of administrative remedies).

his 64.40 claim, *id.*, and the Supreme Court affirmed on review.

Mission Springs, Hayes, and Callfas apply here. These decisions are consistent with both the text and underlying logic of RCW 64.40. The statute was enacted to provide damages due to delay in processing the permit—the delay is not shortened or remedied by the ultimate approval of a permit. To hold that approval of a permit automatically bars a delay claim under RCW 64.40 would allow a jurisdiction to endlessly delay a project without reason or for impermissible reasons, but then avoid all liability for damages lawsuit by eventually granting the permit. Indeed, this rule would, in effect, read RCW 64.40’s protection against unlawful delay out of the statute entirely, or at least for approved permits. The Court should accordingly reject this unsupportable reading of the statute.

In short, RCW 64.40’s text, underlying logic, and the weight of its interpreting case law all support the conclusion that a land use applicant may sue a local government for unlawfully delaying a decision on a permit application, regardless of whether the permit is ultimately granted.

C. *Brower* does not bar Birnbaum’s claim.

The trial court’s dismissal of Birnbaum’s claim is largely predicated on the notion that this Court’s decision in *Brower v. Pierce County* compelled such a decision. CP 138-39. The trial court erred.

That said, *Brower* is a bit puzzling in certain respects. As is

explained in greater detail below, it is a significant outlier within the corpus of RCW 64.40's case law. Furthermore, the opinion is not at all clear concerning the nature of the challenge brought by the Browers. The opinion implies that the Browers brought an unlawful delay claim. *See, e.g.,* 96 Wn. App. at 561.⁹ However, an examination of the complaint and appellate briefs in the case makes it clear that the Browers did not bring a delay claim *per se*, but instead sought damages for a substantive decision of the County planning department that they alleged to be arbitrary, capricious and unlawful.

Given all of this, *Brower* does not sweep nearly as broadly as the County claims or the trial court concluded. Indeed, *Brower* is readily distinguishable from the present case. Should the Court conclude otherwise, however, *Brower* should be overruled.

1. *Brower* is distinguishable from this case.

Brower involved an application for a short plat. *Brower* Compl., ¶ 3.5 (copy attached hereto as Appendix B). During its review of the application, the county noted that a wetland existed on the site and asserted that wetlands review was required. *Id.*, ¶ 3.6. The Browers asserted that portions of the project were exempt from the county's

⁹ “[The Browers] sought damages under RCW 64.40 and 42 U.S.C. §§ 1983 and 1988 for the expense of delay and other harms they allegedly suffered between the time that PALS [County Planning and Land Services] denied their exemption and the time the hearing examiner reversed that decision.”

wetlands regulations under an express provision of the county code. *Id.* The county planning department disagreed, and imposed various conditions and mitigation measures on the project. *Id.*, ¶ 3.8.

The Browers appealed this decision to the county hearing examiner. *Id.*, ¶ 3.9. The hearing examiner reversed the planning department, finding that the project was exempt from the county's wetlands regulations. *Id.*, ¶ 3.11.

The Browers then sued the County under the first prong of RCW 64.40.020(1), alleging that the planning department's refusal to find the project exempt from the county's wetlands regulations was arbitrary, capricious, and unlawful. Compl., ¶ 4.2. Tellingly, the word "delay" appears nowhere in the claim for relief under 64.40, *id.*, further underscoring that the Browers were suing under the first prong of 64.40, not the second. Instead, the Browers simply claimed delay damages as one of their elements of damages, along with increased costs associated with the wetlands review and appeal to the hearing examiner. *Id.*, ¶ 5.2.

The trial court dismissed the Browers' 64.40 claim and this Court affirmed. Citing *Smoke v. City of Seattle*, 132 Wn.2d 214 (1997), this Court held that the Browers' appeal to the hearing examiner, and the subsequent reversal of the planning department, provided Browers with "adequate relief" from the planning department's imposition of its

wetlands regulations. *Brower*, 96 Wn. App. at 564. As a result, the Court concluded that the Browsers had no cause of action under RCW 64.40.

Taking all of this into consideration, it is plain that *Brower* is distinguishable from the present case in at least four respects. First, and most obviously, the Browsers did not claim that the County failed to comply with time limits established by law under the second prong of RCW 64.40.020(1). Indeed, as noted above, former RCW 64.40.050 expressly barred a 64.40 claim for violation of the 120-day rule at the time that *Brower* was litigated in the late 1990's. Instead, the Browsers claimed that the planning department's decision to apply the county's wetlands regulations to their short plat was substantively arbitrary, capricious, and unlawful under the first prong of RCW 64.40.020(1). Here, conversely, Birnbaum has never sought to **reverse** the imposition of a substantively arbitrary condition or some other unlawful decision. Rather, the overriding thrust of Birnbaum's damages claim is the County's failure to comply with time limits established by law in deciding her permit under the second prong of RCW 64.40.020(1).

Second, unlike Birnbaum, the Browsers had an internal administrative appeal available where they could challenge the planning department's decision to apply the wetlands regulations to their short plat. Here, by contrast, Birnbaum had no administrative appeal or other internal

County process available where she could challenge the County's failure to comply with the 120-day rule or the planning department's unreasonable requests for additional information. Rather, Birnbaum's options were limited to (1) continuing to ask the County to set a hearing and issue a decision, (2) filing a petition for a writ of mandate in superior court, and (3) seeking damages once the County made a final decision. She pursued all of these options.

Third, not only did the Browsers have an internal administrative appeal available, that appeal was capable of providing them with meaningful relief—namely, reversal of the planning department's substantive decision to apply the wetlands regulations to their short plat. While the appeal did not accord the Browsers complete relief insofar as it did not remedy their damages, the hearing examiner's reversal of the planning department nonetheless provided the Browsers with substantial relief. Conversely, and as just noted, Birnbaum had no administrative appeal or other internal process available. Plainly, one cannot obtain any relief from a non-existent process, never mind "adequate relief." The Hearing Examiner in Birnbaum's case was empowered solely to determine whether to issue the permit, and not whether the planning department had failed to comply with legally established time limits, or had made improper, arbitrary requests for information.

Fourth, *Brower* did not involve final approval of the underlying short plat application—indeed, neither this Court’s opinion, nor the Browsers’ complaint indicates whether the short plat was ultimately approved. Instead, the Browsers filed suit immediately following the hearing examiner’s reversal of the planning department. This reversal, however, did not approve the short plat; it only held that the planning department’s application of the County’s wetlands regulations was improper. *See* App’x B, pp. 14-24. In sum, the Browsers filed suit following the resolution of an interlocutory administrative appeal concerning the applicability of the County’s wetlands regulations to their project, rather than after a final decision on the project itself.¹⁰

By contrast, Birnbaum’s suit followed the County’s final decision on her conditional permit application. This decision did nothing to remedy the County’s prior failures to make a decision within the time limits set by law. Indeed, while an administrative decision maker can correct or reverse an arbitrary, capricious, or unlawful condition imposed at a lower level, there is nothing that he can do to “take back” years of unlawful and unjustified delays.

Given all of this, it is incorrect to maintain that *Brower* establishes

¹⁰ Under today’s case law, particularly *Calfas*, the Brower’s claim would almost certainly be deemed fatally premature, given the absence of a final decision on the underlying short plat application.

the rule that the ultimate approval of a permit precludes a delay claim under RCW 64.40, or that it otherwise bars Birnbaum's claim. *Brower* did not involve the final approval of a permit, and it was based upon a claim that a substantive decision was arbitrary, capricious, and unlawful under the first prong of RCW 64.40.020(1). This case, on the other hand, springs from the final decision on Birnbaum's conditional use permit, and is centered upon a claim for failure to act within time limits set by law under the second prong of RCW 64.40.020(1), as well as delays caused by unreasonable requests for information.

2. To the extent *Brower* applies here, it should be overruled.

This Court should distinguish *Brower* as a unique case based on narrow facts, or otherwise clarify its applicability. In the alternative, if the Court finds that *Brower* applies here, the Court should not hesitate to overrule it. This Court will overrule precedents that are shown to be incorrect and harmful. See *State v. Stalker*, 152 Wn. App. 805, 808 (2009) (citing *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264 (2009)). *Brower* satisfies both conditions.

First, much of the analysis above demonstrates that *Brower* is incorrect. As noted above, nothing in RCW 64.40 expressly or impliedly bars an applicant whose permit is approved from bringing a claim under the statute. Instead, the statute simply requires an applicant to wait to file

suit until a jurisdiction makes its final decision upon the permit, and then mandates the applicant to file suit within thirty days of that decision.

In addition, *Brower* is inconsistent with the necessary assumptions of several cases—both from the Supreme Court and this Court—that interpret and apply RCW 64.40. Cases such as *Mission Springs*, *Callfas*, and *Hayes* all necessarily presume that an applicant whose permit is granted may nonetheless bring a claim for damages under RCW 64.40. Indeed, in *Callfas*, this Court expressly stated that a permit applicant has “a claim under RCW 64.40 for delay damages . . . once the tardy permit [is] issued.” 129 Wn. App. at 597.

Brower is also inconsistent with the underlying logic of RCW 64.40, particularly with respect to claims for failure to comply with time limits established by law. As noted earlier, a hard-and-fast rule that the ultimate approval of a permit bars an unlawful delay claim would give a jurisdiction *carte blanche* to attempt to kill a purportedly undesirable, but legally unobjectionable project simply by delaying a final decision. If that tactic proved unsuccessful, the jurisdiction could then avoid a damages lawsuit by ultimately granting the permit. The ultimate effect of this rule would be to read RCW 64.40’s protection against unlawful delay out of the statute entirely. Such a result is not only incorrect, it is also plainly harmful, and compels the conclusion that *Brower* should be overruled.

The preceding three reasons should suffice, but a deeper review of *Brower* demonstrates the inconsistent reasoning therein. Despite the facts and reasoning of *Hayes* and *Callfas*, the County argues, and the trial court agreed, that *Brower* requires dismissal in this case. The key to understanding *Brower* is unpacking its discussion of the exhaustion requirement. 96 Wn. App. at 563-564. The *Brower* court cites to RCW 64.40.030 that the lawsuit must be commenced within 30 days after “all administrative remedies have been exhausted.” Then, the court states: “A corollary to the exhaustion requirement is that the relief granted by the administrative remedy must be inadequate.” For this statement, the court cites *Smoke v. City of Seattle*.¹¹ Then, the court in *Brower* concludes: “Thus, the central question we must decide is whether the appeal to the hearing examiner provided adequate relief. We hold that adequate relief was provided.” 96 Wn. App. at 564. These statements are examined next.

The meaning of the “corollary” sentence is not completely clear on its face but it does cite to *Smoke*. The decision in *Smoke* addressed a typical affirmative defense—the contention that plaintiff failed to exhaust administrative remedies. In that case, plaintiffs were property owners who had applied for master use permits and building permits to build single family residences on two adjoining lots. 132 Wn.2d at 218. The City

¹¹ 132 Wn.2d 214, 223-224 (1997).

initially refused to issue the permits, asserting that an electrical transformer that straddled the two lots merged them into one lot. *Id.* at 218-19. Plaintiffs sued for a writ and for delay damages under RCW 64.40. *Id.* at 219. Before trial on the writ, the City reversed course and issued the permits. *Id.* In defending the damages claim, the City argued that Smoke’s lawsuit was premature and that Smoke should have exhausted an administrative remedy before filing suit—namely Smoke should have applied for an “interpretation.” The court explained the general rule:

Generally, if an administrative proceeding can alleviate the harmful consequences of a governmental activity at issue, a litigant must first pursue that remedy before the courts will intervene. The doctrine applies in cases where a claim is originally cognizable by an agency which has clearly defined mechanisms for resolving complaints by aggrieved parties and the administrative remedies can provide the relief sought.

Smoke, 132 Wn.2d at 223-224 (citations omitted). The Supreme Court ruled that the interpretation process was not an adequate remedy because it would not result in reversal of the denial of the underlying permit application, and therefore upheld an award of delay damages under RCW 64.40. *Id.* at 226

Back to *Brower*, the court said “the corollary to the exhaustion requirement” The use of the word “corollary” is odd because the word is not used in *Smoke*, and is not a term typically used in discussing

exhaustion of administrative remedies.¹⁷ *Smoke* supports the remainder of the “corollary” sentence in *Brower*, “that the relief granted by the administrative remedy must be inadequate.” Correct, if the relief is inadequate (“is not an adequate remedy”), then, as found in *Smoke*, the purported administrative remedy is not one that must be exhausted before seeking damages under RCW 64.40. So, this sentence in *Brower* is supported by *Smoke* as far as it goes: (1) exhaustion is required, and; (2) the corollary to the exhaustion requirement is that if the relief is inadequate, then exhaustion is not required. But, it is the next step in *Brower* that is confusing: “Thus, the central question we must decide is whether the appeal to the hearing examiner provided adequate relief. We hold that adequate relief was provided.” 96 Wn. App. at 564.

Unlike the defendant city in *Smoke*, the county in *Brower* was not asserting an affirmative defense that the plaintiff had failed to exhaust an administrative remedy—it could not make that argument because the plaintiff has in fact filed and pursued the administrative remedy—an appeal to the hearing examiner. The “central question” in *Brower* and the conclusion do not make sense. If the purported administrative remedy provides adequate relief, then *Smoke* and cases cited therein hold that the

¹⁷ Only one other Washington case was found to use “corollary” in the same paragraph as “exhaustion,” *Garton v. N. Pac. Ry. Co.*, 11 Wn. App. 486, 489, 523 P.2d 964, 967 (1974) (“As a corollary to this argument plaintiff urges that the requirement of exhaustion of administrative remedies is waived where such an attempt would be futile.”).

plaintiff/applicant must pursue that remedy or be subject to dismissal for failing to do so. The court in *Brower* finds that the administrative remedy is adequate, but then instead of holding that plaintiff needed to pursue that remedy and did so, the court in *Brower* rules that since the remedy was adequate the claim is foreclosed. This result is not supported by *Smoke* or any other precedent.

Thus, the *Brower* ruling is not consistent with the theory of exhaustion of administrative remedies: “The basic principle is that administrative remedies must be exhausted before review can be sought.” Washington Administrative Law Practice Manual, Ch. 10, § 10.03[F] (Matthew Bender) (“citing and quoting *Harrington v. Spokane County*, 128 Wn. App. 202, 209-210, 114 P.2d 1233 (2005) [“It discourages litigants from ignoring administrative procedures by resort to the courts.”]). As explained in the *Smoke* case and quoted above, “if an administrative proceeding can alleviate the harmful consequences of a governmental activity at issue”—*i.e.*, if the remedy was adequate, then “a litigant must first pursue that remedy before the courts will intervene.” Yet, in *Brower*, the plaintiff pursued the administrative remedy before going to court, **but then was thrown out of court because the remedy was adequate.** But, if the plaintiff in *Brower* went to court **before pursuing the appeal** to the hearing examiner, then the plaintiff would

have been dismissed **because he failed to pursue an adequate remedy.** This discussion in *Brower*, consisting of a scant half page, should not be considered authoritative on this issue given the weight of authority led by *Smoke* and cases discussed therein.

For these reasons, the typical exhaustion defense does not apply here at all since there is no allegation of failure to exhaust—the decision by the Examiner was the original decision on the application, and there is no administrative appeal from that decision. *Smoke* applies here. In *Smoke*, the plaintiff filed a 64.40 claim within 30 days of the letter decision which was determined to be a final decision and there was no administrative remedy to exhaust, therefore the plaintiff complied with RCW 64.40.030. The *Smoke* court read that statute as saying commence within 30 days after a final decision, or if there is an administrative remedy, then within 30 days of that decision. In this case, Birnbaum, like *Smoke*, had no administrative remedy to exhaust and could proceed directly to court after the final decision by the Hearing Examiner.

D. The County's other grounds for dismissal lack merit.

The trial court did not reach the County's other arguments in support of dismissal. However, a cursory review of the arguments demonstrates that they lack merit and provide no basis for sustaining the trial court's decision.

1. Statute of limitations.

First, the County argues that Birnbaum's claim is barred by the statute of limitations set forth in RCW 64.40.030 because Birnbaum failed to file suit within thirty days of either (a) the expiration of the 120-day deadline for a decision on the permit, or (b) the Hearing Examiner's remand decision in September 2006. CP 11-14. Instead, Birnbaum waited until the Hearing Examiner issued his final decision in 2010 to file suit.

The County's argument is refuted by the decisions in *Hayes* and *Callfas* discussed above. The County's argument essentially posits that the Hearing Examiner's 2006 decision to remand Birnbaum's application to the planning department was the final decision in the matter, requiring Birnbaum to file suit within thirty days thereof—*i.e.*, to have filed this lawsuit while the permit process was ongoing and four years before it concluded. The Examiner's approval of the permit in 2010 was the final agency action. This conclusion, and Birnbaum's actions, are wholly consistent the rules and procedures set forth in *Hayes* and *Callfas*.

In *Hayes*, as noted above, the Seattle City Council approved a master use permit, but added a condition restricting the length of the building. Hayes challenged the imposition of the condition in court and obtained a reversal. The City Council then approved the permit without the condition. Within thirty days after the council's final approval, Hayes

commenced a lawsuit for damages pursuant to 64.40 RCW. The City argued that the suit was barred as untimely because Hayes did not file within thirty days of the council's initial, conditional approval. The Supreme Court rejected this argument, holding that the claim was timely and not barred by the statute of limitations. Importantly, the Court said:

Underlying our decision is a recognition of the fact that **the final action that an administrative body can take in this area is the issuance or denial of the sought after permit**. . . . [F]inal action on Hayes's request for a permit **did not occur** until the City Council **ultimately approved his application** for a master use permit. Therefore, Hayes's action for damages, which was commenced within 30 days of that final action, was timely and is not barred by the statute of limitations.

Hayes, 131 Wn.2d at 716 (emphasis added).¹⁸ Here, the County did not take final action on Birnbaum's application—by either definitively approving or denying it—until the Hearing Examiner's 2010 decision. The Hearing Examiner's earlier decision in 2006 did not result in approval or denial; rather, it resulted in remand to the planning department. Accordingly, under RCW 64.40.030, Birnbaum could not file suit until the County took final action on her permit in 2010.

¹⁸ See also *id.* at 716. (“If we adopted the position advanced by Seattle and approved the reasoning set forth in *R/L Associates [v. City of Seattle]*, 73 Wn. App. 390 (1994), persons in Hayes's position would, in order to avoid a potential bar of the statute of limitations, be forced to bring an action for damages before final action on their application had been taken by the administrative agency. That makes no sense because it would force applicants for permits to file an action for damages before their cause of action was ripe.”)

This conclusion is confirmed by this Court's decision in *Callfas*. As noted above, in that case, the Callfases submitted a land use application to the City of Seattle in June 1999. The City eventually granted the application in May 2003. However, prior to that final agency action, the Callfases had commenced a lawsuit in March 2003 seeking delay damages based on arbitrary delay under RCW 64.40. The court rejected the 64.40 claim because, at the time of the filing of the lawsuit, the City had not made a final decision on the application. *Id.* at 596. Contrasting the Callfases claim with that in *Hayes*, this Court reasoned

The crucial difference between our case and *Hayes* is that the Callfases filed their action before the MUP was issued, unlike *Hayes* who filed his damages action within 30 days after he had exhausted his remedies, i.e., **after the permit was issued**. Because RCW 64.40.030 limits actions under that chapter to those “commenced only within thirty days after all administrative remedies have been exhausted,” **an action for damages for arbitrary and capricious action in denying or granting a permit, including the attendant delay, is not ripe until the City has in fact acted**.

Id. at 598 (citation omitted, emphasis added). Or, stated more simply:

A permit applicant . . . [may bring] a claim under RCW 64.40 for delay damages, as we noted above, without a writ **once the tardy permit [is] issued**.

Id. at 597 (emphasis added).

Thus, Birnbaum is in the precise position that the Callfases were

not—she filed her claim “once the tardy permit was issued” in March 2010. Moreover, Birnbaum’s claim precisely follows the *Callfas* court’s explanation of *Hayes*, and the reasoning in *Callfas* directly supports Birnbaum’s position in this case. Birnbaum’s claim is not barred by the statute of limitations.

2. Rule against collateral attacks.

The County also argued that the 64.40 claim is barred because Birnbaum did not challenge the issuance of the permit in a Land Use Petition Act (LUPA) lawsuit. CP 15-16 (citing *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2005) and *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393 (2010)). In doing so, the County relies on inapposite case law and ignores LUPA’s clear provision that it does not apply to “[c]laims provided by any law for monetary damages or compensation.” RCW 36.70C.030(1)(c).

As a preliminary matter, Birnbaum had no basis to file a LUPA claim—her permit was approved. The County’s argument posits that, to have a ripe claim for damages, a property owner must file a frivolous LUPA lawsuit—*i.e.*, she must challenge a decision that she agrees with!

Neither *Habitat Watch* nor *Mercer Island Citizens* address the issues present in this case. *Habitat Watch* essentially stands for the proposition that injunctive relief claims must be brought according to

LUPA. Injunctive relief is not at issue here, however. *Mercer Island Citizens* is inapplicable here because Birnbaum is seeking **only monetary damages** for delay, and is not attacking the propriety of the Hearing Examiner's final decision under LUPA or otherwise. In *Mercer Island Citizens*, on the other hand, plaintiffs were primarily challenging the propriety of the city's final decision, and also sought damages flowing from that decision.

In short, Birnbaum had no basis to file a LUPA claim and LUPA expressly exempts actions for damages from its requirements. Accordingly, Birnbaum was not required to file a LUPA claim in order to proceed with her damages action under RCW 64.40.

3. Collateral estoppel.

Finally, the County also argued that collateral estoppel bars one aspect of Birnbaum's claims—namely, the County contends that Birnbaum cannot obtain damages for having to submit the additional information per the Hearing Examiner's 2006 decision. CP 16-17. However, the only relevant case that the County cited in support of this argument held that a final judgment in federal court barred an identical claim in state court. *Rains v. State*, 100 Wn.2d 660, 665-66 (1983). The 2006 Examiner decision was not the final decision and was clearly not a “final judgment on the merits” by a court—a required element of collateral

estoppel as set forth in *Rains*.¹⁹

E. Birnbaum is entitled to attorney's fees.

Pursuant to RAP 18.1, Birnbaum requests reasonable attorney's fees and costs on review. This Court should reverse the trial court, and based on that Birnbaum should be entitled to an award of reasonable costs and attorney fees in this Court pursuant to RCW 64.40.020(2). The Supreme Court ruled that appellate costs and reasonable attorney fees are appropriate on appeal under RCW 64.40.020 in *Mission Springs*, 134 Wn.2d at 972.

VI. CONCLUSION

Pierce County had a duty imposed by statute and its County Code to process Birnbaum's application within 120 days. Yet, it took the County over five years. The duty is on Pierce County because it is the County that must review and approve the application. The County controls the personnel. The County staff has to schedule the public hearing before the Hearing Examiner in order for the Examiner to be able to make a decision. One of the main purposes of chapter 64.40 RCW was to provide property owners a damage remedy against local government for arbitrary delay and for delays exceeding the time periods required by law.

¹⁹ The County also cited *Chelan County v. Nykreim*, 146 Wn.2d 904, 931 (2002). The court there recited respondents' argument mentioning res judicata, and simply ruled that the claim for injunctive relief was barred by administrative finality because the lawsuit was not brought within the LUPA time limit.

Later, the Legislature responded to calls for checks on permitting delays by imposing the 120-day rule. At first, the Legislature expressly withheld the RCW 64.40 damages remedy for violations of the 120-day rule. Then, in a further reform of the 120-day rule, the Legislature in 2001 imposed the mandate on local government to establish time periods **and afforded the damages remedy to property owners.** But, the Legislature balanced that impact by affording local government discretion in selecting time periods “for each type of project permit application” with the time period not exceed 120 days, but further allowing local government to extend the time period subject to making written findings that more time was needed. Pierce County failed to make any such findings here, which indicates that there was no just cause for delay, and that is precisely what Birnbaum alleges in her Complaint.

The Legislature has clearly set forth the County’s duty. The County “must establish and implement time periods” and must “provide timely and predictable procedures” in determining whether an application should be approved. RCW 36.70B.080(1). The allegations in the Complaint, presumed to be true, and unrebutted by the County, state that Birnbaum timely complied with all requests for information, even the arbitrary requests, and yet the County’s processing took five years, not four months. Clearly, if the County makes an arbitrary demand for more

information, then the County should not be able to use that as an excuse for exceeding the maximum permit time periods. Otherwise, local government can create endless delay by making up completely irrelevant demands.

Callfas holds that to pursue damages for delay under RCW 64.40, the property owner must wait until obtaining the final decision on her application. Substantial reasons support that procedure. It avoids multiple lawsuits for every arbitrary action or every exceeded time period. The government controls the process and with “timely and predictable procedures” can manage the process to conclusion in a timely fashion, thus avoiding damages. Once the permit is approved, many applicants may be satisfied with the result, so waiting avoids lawsuits. Birnbaum did exactly what this Court stated she was supposed to do—file the 64.40 delay damages lawsuit after obtaining a final decision. She also made demands for a hearing and went so far as to file a writ of mandate action to push the process along. The Legislature established a statutory right to a timely application process and afforded a damages remedy. Wendy Birnbaum is entitled to pursue that statutory right and seek damages for illegal and arbitrary delays. Her case is precisely the type of case that the Legislature envisioned should impose damages liability on the County.

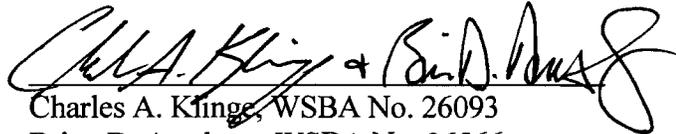
For the foregoing reasons, Birnbaum urges this court to reverse

the trial court's dismissal of her claim, remand this case for further proceedings, and award attorney's fees and costs on appeal.

RESPECTFULLY SUBMITTED this 5th day of May, 2011.

GROEN STEPHENS & KLINGE LLP

By:



Charles A. Klinge, WSBA No. 26093
Brian D. Amsbary, WSBA No. 36566
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

DECLARATION OF SERVICE

I, Brian D. Amsbary, declare:

I am not a party in this action.

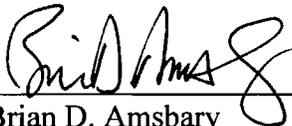
I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On May 5, 2011, I caused a true copy the foregoing document to be served on the following persons via the following means:

Daniel Hamilton	<input type="checkbox"/> Hand Delivery via Legal Messenger
Pierce County Prosecuting Attorney	<input checked="" type="checkbox"/> First Class U.S. Mail
- Civil Division	<input type="checkbox"/> Federal Express Overnight
955 Tacoma Ave. S., Ste. 301	<input type="checkbox"/> Electronic Mail
Tacoma, WA 98402-2160	<input type="checkbox"/> Other _____

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

Executed this 5th day of May, 2011, at Bellevue, Washington.



Brian D. Amsbary

Appendix A

Birnbaum v. Pierce County, No. 66322-4-I
Appellant's Opening Brief

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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

10-2-13916-8 KNT
No. _____

WENDY BIRNBAUM,)
)
 Plaintiff,)
)
 v.)
)
 PIERCE COUNTY, a political subdivision of the)
 State of Washington,)
)
 Defendant.)
 _____)

COMPLAINT FOR DAMAGES

Plaintiff alleges as follows:

1. This is a suit for delay damages under chapter 64.40 RCW. State law and the Pierce County Code (PCC) require the County to issue a final decision on a permit application within 120 days of receiving a complete application. On February 23, 2005, Plaintiff Wendy Birnbaum filed a complete application for a conditional use permit to build a campground southeast of Orting. Despite this, Defendant Pierce County did not issue a final decision on the application until March 15, 2010. In the meantime, the County, acting through its Department of Planning and Land Services, created arbitrary reason after arbitrary reason to delay its decision on the application. Birnbaum promptly submitted all documents and other

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1 information demanded by the County, and requested repeatedly that the application be
2 scheduled for a hearing before the Hearing Examiner. Indeed, Birnbaum eventually had to
3 petition for a writ of mandate to compel the County to move forward on her application. The
4 County's delay in acting upon Birnbaum's application was arbitrary and capricious, and
5 contrary to the time limits set forth by state law and the Pierce County Code. Accordingly,
6 the County is liable for damages under chapter 64.40 RCW.

7 PARTIES, JURISDICTION, AND VENUE

8 2. Plaintiff is Wendy Birnbaum. Birnbaum applied for the permit at issue in this
9 action, and owns the property that is the subject of the permit application.

10 3. Defendant is Pierce County. The County is a political subdivision of the State
11 of Washington and is an "agency" under RCW 64.40.010(1).

12 4. This Court has jurisdiction over this matter under RCW 2.08.010 and
13 64.40.030 because the amount in controversy exceeds \$300 and because Plaintiff commenced
14 suit within thirty days of exhausting her administrative remedies.

15 5. Venue is proper in this Court under RCW 36.01.050 and LCR 82 (e)(4)(vi)
16 because this Court is located in one of the two judicial districts nearest Pierce County
17 according to the Administrative Office of the Courts.

18 FACTS

19 6. On February 23, 2005, Plaintiff Wendy Birnbaum filed a complete application
20 for a conditional use permit to build a campground on an 89.51 acre site southeast of Orting.

21 7. RCW 36.70B.080(1) and chapter 18.100 PCC set forth the deadlines for
22 processing this application. RCW 36.70B.080(1) provides in pertinent part:
23

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

13
14 8. Similarly, PCC 18.100.010 provides that “[t]he Director or Examiner shall
15 issue a notice of final decision on a permit within 120 days, of County review time, after the
16 Department accepts a complete application...”

17 9. Despite these requirements, and despite Birnbaum’s prompt provision of all
18 documents and other information demanded by the County, the County did not hold a public
19 hearing on the application until August 2, 2006.

20 10. Several weeks later, on September 21, 2006, the Hearing Examiner issued a
21 decision, asserting that Birnbaum did not provide sufficient information for an approval,
22 despite the fact that Birnbaum had provided all documents and other information demanded
23 by the County.

11 11. The Hearing Examiner remanded the matter to the County Department of
12 Planning and Land Services for further review.

13 12. On December 8, 2006, Birnbaum’s agent submitted a revised site plan and
14 other information regarding the proposed campground development, and requested that the
15 project be re-scheduled for public hearing before the Hearing Examiner.

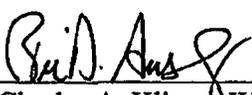
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C. Such other and further relief as the Court deems just and equitable.

RESPECTFULLY SUBMITTED this 14th day of April, 2010.

GROEN STEPHENS & KLINGE LLP

By: 
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Brian D. Amsbary, WSBA #36566
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Appendix B

Birnbaum v. Pierce County, No. 66322-4-I
Appellant's Opening Brief

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ALLEN J. BROWER and PAM BROWER,
husband and wife,

Plaintiffs,

v.

PIERCE COUNTY, a municipal
corporation, acting through its
PLANNING AND LAND SERVICES
DEPARTMENT

Defendant.

97-2-06312-488A
No.

COMPLAINT FOR DAMAGES PURSUANT
TO CHAPTER 64.40 RCW AND 42
U.S.C. § 1981, ET SEQ.

Plaintiffs Allen J. and Pam Brower, by and through their
attorneys, plead and allege as follows:

I. PARTIES

1.1 Plaintiffs.

Plaintiffs Allen J. and Pam Brower (the "Browers") are husband
and wife. Plaintiffs' residence is located in Gig Harbor, Washington.

1.2 Defendant.

Defendant Pierce County (the "County") has been and is now a
municipal corporation organized under the laws of the State of
Washington. The County acts through its various departments and
county employees, including its Planning and Land Services Department
("PALS"). The County's authority to control land use and developments
is limited by its enabling statutes, its own ordinances, the laws of

1 the State of Washington, and the constraints of the constitution of
2 the State of Washington and the United States Constitution.

3 II. JURISDICTION AND VENUE

4 2.1 This court has jurisdiction over this matter pursuant to RCW
5 2.08.010, Chapter 64.40 RCW, and 42 U.S.C. § 1983 and § 1988.

6 2.2 Venue is proper in King County pursuant to RCW 36.01.050.

7 2.3 Because of the nature of the causes of action pled, a tort
8 claim filing or waiting period is not required or applicable.

9 III. STATEMENT OF FACTS

10 3.1 The Browers own a ten acre parcel of property abutting the
11 south side of Artondale Drive N.W., in the vicinity of Gig Harbor,
12 Washington (the "site"). The site is improved with a single family
13 residential dwelling and detached garage located approximately 30 feet
14 south of the Artondale Drive right-of-way. Artondale Creek traverses
15 the site from east to west approximately 175 feet south of the right-
16 of-way. A bridge crosses Artondale Creek, which ties into an existing
17 dirt road that transects the property.

18 3.2 A significant Category II wetland associated with Artondale
19 Creek is located on the east/central portion of the site. The wetland
20 narrows significantly on the west portion of the site, and is adjacent
21 to the creek.

22 3.3 An historic 12 to 13 foot wide road has existed on the site
23 for at least 50 years, portions of which cross the existing wetlands.
24 The road was used for forest practices and agricultural purposes for
25

1 access to the south portion of the site, and was of sufficient width
2 to accommodate tractor-trailers, cars, and pickup trucks.

3 3.4 Recently, the Browers engaged in maintenance work required
4 for the road. This work included placing gravel on the roadbed and
5 cutting vegetation overgrowing the roadbed. No trees were removed
6 during the reconstruction. The Browers also reconstructed the
7 existing bridge, after obtaining a hydraulic permit approval ("HPA")
8 from the State of Washington Department of Fish and Wildlife, and a
9 Forest Practices Act permit from the Department of Natural Resources.

10 3.5 On October 4, 1995, the Browers submitted a short plat
11 application to Pierce County for the purpose of subdividing the site
12 into two five acre lots. Approval of the Browers' short plat
13 application by Pierce County was necessary before the Browers could
14 improve the subject real property as proposed. Proposed lot 1 is
15 adjacent to Artondale Drive and includes the existing house and
16 garage. Proposed lot 2 is to the south of lot 1 and is unimproved but
17 the Browers intend to construct a single-family home on this parcel.
18 Access to lot 2 was proposed via the recently restored historic road
19 near the west property line extending south from Artondale Drive,
20 crossing the existing bridge over Artondale Creek, and continuing
21 south and east to lot 2.

22 3.6 Pierce County informed the Browers that wetland review must
23 be completed before it could take action on the short plat
24 application. On April 26, 1995, the Browers submitted an application
25 for General Wetland Review for the proposed short plat. On several

1 occasions, the Browers sent information to and met with staff of
2 Pierce County's Planning and Land Services Department ("PALS") in an
3 attempt to explain their position that the road and bridge work were
4 exempt from Pierce County Wetland Management Regulations because they
5 constituted maintenance and/or reconstruction of structures or
6 improvements existing at the time of passage of the County's wetlands
7 regulatory standards.

8 3.7 Section 17.12.050 of the Pierce County Code sets forth
9 activities exempted from the requirements of the Wetland Management
10 Regulations, including, "[m]aintenance or reconstruction of roads
11 existing on the effective date of this chapter, provided that
12 reconstruction does not involve expansion of facilities," and
13 "[a]ctivities on improved portions of roads, rights-of-way, or
14 easements, provided there is no expansion of ground coverage"

15 3.8 On October 8, 1996, PALS made an administrative
16 determination that the maintenance and reconstruction work to the
17 existing road needed to serve the new lot proposed as part of the
18 short plat was not exempt from Pierce County Wetland Management
19 Regulations. It also determined that a new road, of a minimum 15-foot
20 width, would need to be constructed. Further, PALS determined that
21 minor impacts to the wetland buffer caused by the road work must be
22 mitigated. By making these determinations, Pierce County rejected
23 the Browers' proposed wetlands mitigation. A true and correct copy of
24 Pierce County's administrative determination is annexed hereto and by
25 reference made a part of this complaint. As a result of this

1 decision, the Browers suffered significant delays in obtaining short
2 plat approval, and expended additional consulting fees to address
3 wetlands issues.

4 3.9 On October 21, 1996, the Browers appealed Pierce County's
5 determination to the Pierce County Hearing Examiner.

6 3.10 PALS staff argued that no road was present prior to the
7 Browers' reconstructing the bridge and constructing a "new" gravel
8 road from Artondale Drive south across the bridge and wetland. PALS
9 staff further asserted that even if the road was present, the Browers
10 expanded both the bridge and the road, thus impacting the wetland
11 buffer and triggering the requirement for a wetland permit. PALS
12 staff argued that the bridge reconstruction was completed without
13 appropriate Pierce County reviews and was thus, not legally
14 established. Finally, PALS staff argued that graveling the road, even
15 if it was existing, was non-exempt work triggering wetlands review.

16 3.11 Following a public hearing, the Pierce County Hearing
17 Examiner granted the Browers' appeal on February 11, 1997, holding
18 that the road and bridge expansion were exempt from Pierce County
19 Wetland Management Regulations pursuant to Section 17.12.050 of the
20 Pierce County Code. A true and accurate copy of this decision is
21 annexed hereto and by reference made part of this complaint. Pierce
22 county has not appealed the Hearing Examiner's decision and it is now
23 deemed final.

24 3.12 Plaintiffs filed the present lawsuit within thirty days
25 after all administrative remedies had been exhausted.

1 IV. CLAIMS FOR RELIEF

2 (1) RCW CHAPTER 64.40

3 4.1 Plaintiffs reallege all allegations referenced in
4 Sections I, II and III of this Complaint, including all subparagraphs
5 specified therein.

6 4.2 Defendant's actions herein constitute the arbitrary,
7 capricious, and/or unlawful administration of the Pierce County Code.
8 Defendant knew or should reasonably have known that its actions herein
9 were unlawful or in excess of lawful authority. Defendant's actions
10 herein constitute a final decision of Pierce County which placed
11 requirements, limitations or conditions upon the use of plaintiffs'
12 real property in excess of those allowed by applicable regulations.
13 Defendant's actions herein were without rational basis as they did not
14 substantially promote any legitimate public interest and deprived
15 plaintiffs of profitable use of the subject property, all contrary to
16 their fundamental rights to develop the subject property pursuant to
17 articulated provisions of the Pierce County Code. Defendant's actions
18 herein were unreasonable, in bad faith, and in derogation of clearly
19 established constitutional rights and protections. Defendant knew its
20 actions were unlawful and in excess of lawful authority or it should
21 reasonably have known unlawful or in excess of lawful authority.

1 (2) CIVIL RIGHTS ACT VIOLATIONS

2 4.3 Defendant, acting under color of law, infringed plaintiffs'
3 rights, privileges and immunities secured by the Washington State
4 Constitution, the United States Constitution, and laws of Washington
5 and the United States, including the right to substantive due process,
6 all in violation of the Washington State Constitution and the United
7 States Constitution, thereby causing plaintiffs' damage in an amount
8 to be demonstrated at the time of trial.

9 4.4 Specifically, plaintiffs' interest in its application for
10 short plat approval is a protectable property interest under the
11 Washington State and United States constitutions. Defendant, acting
12 through policy, ordinance, order, and/or official resolution,
13 administered by employees or officials acting within capacity of their
14 office, deprived plaintiffs of their substantive due process rights
15 secured by the Washington State and United States constitutions by
16 arbitrarily, capriciously and unreasonably failing to exempt
17 plaintiff's road maintenance work and insisting upon full wetland
18 regulatory review. Defendant wrongfully failed to approve plaintiffs'
19 short plat application without wetlands review and/or approval of
20 plaintiffs' wetland mitigation plan even though plaintiffs'
21 maintenance or enhancement of an existing driveway or road and bridge
22 was wholly exempt from the provisions of the Pierce County Wetlands
23 Management Regulations.

24 4.5 Pursuant to Chapter 64.40 RCW and/or 42 U.S.C. § 1983 and
25 § 1988, plaintiff is entitled to recover reasonable expenses and

1 losses including compensatory damages, general damages, attorney's
2 fees, special damages and other relief as the court may deem just and
3 appropriate as fully set forth in Section V herein.

4 V. DAMAGES

5 5.1 Plaintiffs reallege all allegations referenced in paragraphs
6 I, II, III and IV of this Complaint herein, including all
7 subparagraphs specified herein.

8 5.2 The actions of defendant alleged herein proximately caused
9 damages to plaintiffs, both general and special, including but not
10 limited to, damages resulting from undue delays in granting
11 plaintiffs' application for short plat approval and enhanced
12 permitting and other costs associated with responding to Pierce
13 County's asserted wetland regulatory concerns. Additionally,
14 defendants' actions caused the loss of a sale of a portion of the
15 Brower property.

16 VI. PRAYER FOR RELIEF

17 WHEREFORE, plaintiffs pray that this court grant the following
18 relief:

19 6.1 That the court enter judgment for reasonable expenses and
20 losses against the defendant for plaintiffs' damages in an amount to
21 be demonstrated at the time of trial, as found by a jury, to
22 compensate plaintiffs for their losses incurred as a direct, proximate
23 and foreseeable result of the acts set forth above, including general
24 and special damages.



Pierce County

Office of the Pierce County Hearing Examiner

902 South 10th Street
Tacoma, Washington 98405
(206) 272-2206

RECEIVED

FEB 12 1997

STEPHEN K. CAUSSEAU, JR.
Pierce County Hearing Examiner

Williams Kastner & Gibbs

February 11, 1997

Mr. and Mrs. Allen J. Brower
c/o BP Holding
13205 Pt. Richmond Drive NW
Gig Harbor, WA 98332

RE: ADMINISTRATIVE APPEAL: CASE NO. AA21-96, ALLEN J. BROWER, SHORT P1
NO. 213657, WETLAND APPLICATION NO. 222956

Dear Mr. and Mrs. Brower:

Transmitted herewith is the Report and Decision of the Pierce
County Hearing Examiner relating to the above-entitled matter.

Very truly yours,

STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

SKC/ca

- cc: Pierce County Planning
- Pierce County Development Engineering
- Pierce County Building Division
- Pierce County Public Works and Utilities
- Tacoma-Pierce County Health Dept.
- Fire Prevention Bureau
- Pierce County Parks and Recreation
- Pierce County Council
- Pierce County Resource Management



OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: ADMINISTRATIVE APPEAL: Case No. AA21-96, Allen J. Brower, Short Plat No. 213657, Wetland Application No. 222956

APPELLANTS: Mr. and Mrs. Allen J. Brower
c/o B P Holding
13205 Pt. Richmond Drive NW
Gig Harbor, WA 98332

AGENT: Dennis Reynolds, Attorney
Williams, Kastner & Gibbs LLP
P.O. Box 21926
Seattle, WA 98111

SUMMARY OF REQUEST:

Appellant is appealing the decision of an Administrative Official in which a determination was made that the proposed road construction activities are not exempt from the Wetland Management Regulations (WMR). The site is located at 6310 Artondale Drive NW, in the NW 1/4 of Sec. 24, T21N, R1E, W.M., in Council District #7.

The appellant is appealing the Department of Planning and Land Services decision that:

The proposed road construction is not exempt from review under the Wetland Management Regulations and therefore, mitigation for the proposed construction and use of the road is required.

SUMMARY OF DECISION:

Appeal granted.

PUBLIC HEARING:

After reviewing Planning and Land Services Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on December 18, 1996, at 2:00 p.m.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

- EXHIBIT "1" - Planning and Land Services Staff Report and Attachments**
- EXHIBIT "2" - Colored Map submitted by Lenore Marken**
- EXHIBIT "3" - Photos submitted by Lenore Marken dated September 4, 1996**
- EXHIBIT "4" - Photos submitted by Engineering Department dated December 3, 1996**
- EXHIBIT "5" - Memorandum from Dennis Reynolds**
- EXHIBIT "6" - Collage of photos**
- EXHIBIT "7" - Aerial photo dated May 24, 1970**
- EXHIBIT "8" - Aerial photo dated May 19, 1995**
- EXHIBIT "9" - Proposed road section**
- EXHIBIT "10" - Cover letter from Dennis Reynolds dated December 19, 1996 with geotechnical report**
- EXHIBIT "11" - Letter from Lenore Marken dated December 26, 1996**
- EXHIBIT "12" - Letter from Dennis Reynolds to Examiner dated January 10, 1997**

LENORE MARKEN appeared and presented the Planning Division Staff Report. The site contains three wetlands with the green area indicating a Category II wetland. Wetlands B and C which are Category III are not shown. The wetland regulations provide for an exemption for a road if it is not expanded. The photographs on Exhibit "3" are taken from a September 4, 1996, site visit. The road grade does not exist per the inspector's notes. The new road to the second lot must be 15 feet wide and will expand the ground coverage. The photographs on Exhibit "4" were taken on December 3, 1996, and are from the same location as Exhibit "3".

Appearing was DENNIS REYNOLDS, attorney at law on behalf of the appellants, who introduced Exhibit "5" his hearing memorandum. The only issue is whether the exemption applies. The ordinance uses the term "existing road" not legally existing road. The Fire Marshal has approved a minimum width of 12 feet and states that 15 feet is not necessary. A minimum width of 12 feet was required for historic uses such as log trailers and sleds pulled by horses. The site has been used for residential and farming uses. The ordinance allows maintenance and reconstruction of existing facilities. They can take a facility and put it back as before. Even if it

is overgrown, it does not mean that it is not a road; it just needs maintenance. Exhibit "3" shows that there was brush near the bridge. A path might have been four feet wide, but the road itself was 12 to 15 feet wide. The photos do not establish a four foot path. It is a matter of observation. Staff took the photograph on a grassy field and near the end. The applicant was allowed to clear the road and put down ballast for traffic. This is not an expansion, especially considering a 12 foot wide road. They do not debate the law, but present a factually based appeal. The width is established by observation and by historic uses. They have an approved HPA for the bridge, and forest practices permit to allow maintenance of the existing road. They didn't feel other permits were required, as they felt they were exempt from the wetland regulations and had the appropriate permits.

Appearing was ALLEN BROWER who purchased the property in October, 1994, and walked it extensively. It is a ten acre parcel consisting of a front and back five acre tract. He introduced Exhibit "6", photographs of the site. The bridge is 12 feet six inches wide and people used the road for 65 years. The road also went through a 12 foot gate and onto another property, and then through a 13 foot wide gate onto 64th. Old growth fir trees are 15 feet apart. They did have salal and berry bushes along the edge of the road. The ruts in the road are one foot deep. Exhibit "6" are 1996 photographs and show how the road looks today. At the lower portion there is no turn around. They debranched the road and put a gravel layer on the road bed. The only thing removed were salmon berries, firs, and salal. The upper portion of the road was not maintained and was the way it looked before they did the work. He noted the photographs of the bridge and showed that the brush was over the bridge also to a width of four feet. He contacted Russell Henderson, the assistant fire marshal, who stated that a 12 foot wide road was acceptable provided he sprinkle the new residence.

MR. REYNOLDS then appeared to state that the road will be within the 12 foot width and the applicant will sprinkle the house.

Appearing was ELAINE KNAPP, whose parents owned the property in 1930 which was before Artondale Drive was paved. Her grandparents owned 60 acres across the road. They rented out the house on ten acres to a school teacher for the Artondale School. Her father maintained the ten acres and kept equipment across the street. He drove across the road to the rear of the property. They used horses at first, then a tractor and trailer, and then a Chevrolet pickup. The road through the property was used. They cleared it yearly as vegetation would grow over it. She walked the property all year and her husband maintained the property. It was still a road from 1989 to 1991.

MR. REYNOLDS then introduced an aerial photo as Exhibit "7" which is a DNR certified photograph from 1970. He also introduced a May 19, 1995, photograph.

MR. BROWER then reappeared to state that the existing road bed is not gravel. The ruts have been there from 65 years of use and the road was recently not maintained. He established the driveway on September 7, 1996. The width was not increased, but is a gravel road bed.

Appearing was SEAN COMFORT, professional engineer from AHBL, who introduced Exhibit "9", a cross section of the road. It shows the future road upon completion of maintenance activity. It shows what the existing road looks like. The gates which serve the road were 12 to 13 feet wide which is significant to establish historical use. Also the bridge was 12.5 feet wide. The drivable section was 12 to 13 feet. If the bridge was smaller, there would be no reason for a wider gate. The applicant is taking a sensitive approach. What can you do to serve the lot without expanding the road or impacting the wetlands? The Fire Marshal has approved the width and they can create a road without cutting trees or impacting the wetland buffer. He has walked the property and is of the opinion that cutting back vegetation is normal maintenance.

Appearing was STEVE PEACOCK, a realtor, who crossed the old bridge and walked up the road which lead to the end of the Browers' property. He personally measured the bridge and found it approximately 12 feet wide. A worn area was four feet wide, but the road bed itself was ten to 15 feet wide and extended up through the property. He has been on the property several times and lives one-quarter mile away. He was on the south part of property 20 years ago, but not near the bridge. An old road was on the south side at that time.

Reappearing was LENORE MARKEN who questioned whether there was a legal access from the south. There was an historic access, but it is gated. There is a legal access from the south to a wellhouse. The previous bridge was marked as ten feet wide by the inspector. It is now marked as 14 feet, six inches wide. The inspector also marked the gravel surface at 15 feet. Testimony established the old road as 12 feet wide. Such amounts to an expansion of ground coverage.

Reappearing was MR. REYNOLDS who stated that the road consisted of a 12 foot drivable width plus shoulders. The existing road is 12 to 15 feet wide and doesn't have a shoulder. The bridge was 12 feet. It depends on which board was measured. The boards were of different lengths. The pilings stayed the same. The boards now are 15 feet wide, but the footprint remained exactly the same. He agrees with staff that the road with shoulders is 15 feet, but the drivable area is 12 feet. They do not intend to damage the environment. A single family residential project is not in a wetland. If it were in the wetland, it would be exempt. The road has been historically there and a portion of it was covered with brush. It is a reasonable interpretation of the previous width. He encouraged the Examiner to make a site visit.

Reappearing was MR. BROWER who agreed with Mr. Drentlaw that the bridge was 12 feet wide. He agreed that the footprint was not widened, but was winged out and that that met the law. It was a means of construction.

No one spoke further in this matter and the Examiner then left the record open for ten days to receive a staff response and for a geotechnical report. The hearing was concluded at 2:55 p.m.

NOTE: A complete record of this hearing is available in the office of Pierce County Planning and Land Services.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, viewed the property, heard testimony, and taken this matter under advisement.
2. This project is exempt from review under SEPA.
3. Notice of this request was advertised in accordance with Chapter 1.22 of the Pierce County Code. Notice of the date and time of hearing was published two (2) weeks prior to the hearing in the official County newspaper. Parties of Record were sent written notice of this appeal.
4. The appellant has a possessory ownership interest in a ten acre parcel of property abutting the south side of Artondale Drive NW approximately one quarter mile west of its intersection with Wollochet Drive. The site is improved with a single family residential dwelling and detached garage located approximately 30 feet south of the Artondale Drive right-of-way. Artondale Creek traverses the site from east to west approximately 175 feet south of the right-of-way. The site slopes gently from Artondale Drive down to Artondale Creek and then more steeply up a hill south of the creek.
5. A significant Category II wetland associated with Artondale Creek is located on the east/central portion of the site. The wetland narrows significantly on the west portion of the site, and is adjacent to the creek.
6. The appellant has submitted a short plat application to Pierce County for the purpose of subdividing the ten acre parcel into two five acre lots. Proposed lot one is adjacent to Artondale Drive and includes the existing house and garage. Lot two is to the south of lot one and is unimproved. Access to lot two is proposed via a private driveway near the west property line extending south from Artondale Drive, crossing a bridge over Artondale Creek, and continuing south and east the hill to lot two.
7. Pierce County has made an administrative determination that the appellant must obtain a wetland reasonable use exception or other appropriate wetlands permit to improve and use the bridge across Artondale Creek and the driveway which traverses the Category II wetlands as an access to lot 2. The appellant has appealed the determination, asserting that the driveway is located on an historic road which was used for agricultural and logging purposes over at least the past 50 years. Because the road is existing, the appellant asserts that it is exempt from the Pierce County Wetland Management Regulations (Chapter 17.12 of the Pierce County Code). Staff asserts that no road was present prior to the applicant reconstructing the bridge and constructing a gravel road from Artondale Drive south across the bridge and wetland. Staff further asserts that even if the road were present, the appellant expanded both the bridge and the road, thus impacting the wetland buffer and

triggering the requirement for a wetland permit.

8. Section 17.12.050 of the Pierce County Code (PCC) sets forth activities exempted from the requirements of the Wetland Management Regulations (WMR). Said section provides in relevant part as follows:

The following activities are exempt from the provisions of this chapter:

...

- F. Maintenance or reconstruction of roads existing on the effective date of this chapter, provided that reconstruction does not involve expansion of facilities.

...

- H. Activities on improved portions of roads, rights-of-way, or easements, provided there is no expansion of ground coverage;....

The appellant asserts that reconstructing the bridge over Artondale Creek, placing gravel on the roadbed, and cutting vegetation overgrowing the roadbed are consistent with the exemptions set forth above, and that no wetland permit is necessary. The WMR contains no definition of the terms "maintenance", "reconstruction", or "road", but does define "activity" in Section 17.12.020(A) as follows:

"Activity" means any use conducted on a site.

Any use would include maintenance, reconstruction, filling, and grading so long as no expansion of ground coverage occurs.

9. The appellant has established that an historic 12 to 13 foot wide road has existed on the site for at least the past 50 years in the location of the recently improved road. Said road was used for forest practices and agricultural purposes, and was of sufficient width to accommodate tractors pulling trailers, cars, and pick up trucks. The width of the road is established by the width of the bridge and the width of the gates located at the property lines, which are 12 to 13 feet in width. Additional bases for this finding are as follows:

- A. Testimony of Allen Brower regarding the width of the gates and the width of the old bridge, as well as the 15 foot width between old growth fir trees located on the south portion of the property.
- B. Photographs in Exhibit "3" and Exhibit "6" showing the bridge and road prior to cutting vegetation and subsequent to cutting vegetation. The photographs establish

that no trees were removed, and that following vegetation removal, the road bed and bridge were 12 to 13 feet wide.

- C. Testimony of Elaine Knapp regarding horses, tractors and trailers, and Chevrolet pick up trucks using the road from 1934 to 1991.
 - D. Testimony of Sean Comfort regarding the condition of the road, the width of the old bridge, and the width of the gates.
 - E. Testimony of Steve Peacock regarding the width of the road bed and the width of the bridge.
 - F. Wetland analysis report from B-12 Associates referring to the continued use of "the existing road and bridge across the wetland stream and buffer. Since this road is already used, no further impacts to the sensitive areas are anticipated".
 - G. Letter from Dave Ray to Larry Pierce dated December 4, 1996, referring to following an old, existing road across an old bridge and continuing on the road to the location of the soil logs.
 - H. Letter from C.W. Gloger, Washington Department of Natural Resources, who inspected the site prior to issuing a forest practices permit, stating that he noted an existing bridge and old road bed on the south side of the creek.
 - I. Letter from Dan Miller, employee of Murray Pacific Corporation, stating that he walked the entire property using the road which crossed Artondale Creek over an old bridge, and that the road bed was clearly distinct and approximately 15 feet in width.
10. The Examiner is aware that the width measurements by Development Engineering of the road and bridge are less than those made by the appellant. However, the appellant measured the bridge and road subsequent to clearing vegetation. When it was much easier to ascertain the exact edge of the road and bridge. It also appears from the photograph (Exhibit "6") that some boards on the bridge were longer than others, and the width of the bridge would depend on which board was measured. Prior to clearing vegetation it would have been difficult to ascertain that the boards were of different length. The Examiner will accept the appellant's measurements as the most accurate.
11. Apparently no discernable road bed ever existed between Wollochet Drive and the bridge, and said area now consists of manicured lawn. The 1970 aerial photograph (Exhibit "7") establishes that vehicles crossed the grass lawn in a wide area leading to the bridge. Such is consistent with the wetland analysis report which states in paragraph 3.3 as follows:

Run-off on the north side of the creek appears to flow over the

relatively impermeable lawn into the creek and abutting dug pond. Water on the south side of the creek appears to flow primarily through subsurface flow in the relatively permeable overburden to the creek.

Such is consistent with farm vehicles driving freely across a hard, impermeable surface between Artondale Drive and the creek, but driving on a distinct road bed through the more permeable soils on the south side of the creek.

12. The appellant placed gravel over an area which had been used historically by vehicles for access to the south portion of the property. If this area had not been an established road bed, the applicant could not have placed gravel in a relatively straight line through a thick growth of trees without having to cut trees. The road bed was an obvious exception to the permeable soils which characterize the south side of the creek according to the wetland analysis.
13. The Fire Marshal has agreed to a reduction in the required width of the road from 15 feet to 12 feet based upon the appellant's agreement to sprinkle the proposed residence. The appellant has further agreed to limit the road maintenance and reconstruction work to a width of 12 feet with associated shoulder, and to maintain the gravel surface as opposed to paving. The appellant is further agreeable to a condition prohibiting commercial use of the road and limiting it to servicing one single family residence. These are conditions which are appropriate for notes on the short plat, but not as part of the administrative appeal.
14. Due to the addition of shoulders which are described as "transition to adjacent ground" (Exhibit "9"), the total width of the road may slightly exceed the width of the historic road. However, such additional width would be de minimus and would not trigger the necessity of a wetland permit.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The appellant has established that the road construction activities are exempt from the Pierce County Wetland Management Regulations pursuant to the exemptions set forth in Section 17.12.050(F) and (H) PCC.

DECISION:

The appeal of Mr. and Mrs. Allen J. Brower is hereby granted subject to the appellant placing notes on the short plat as proposed in the letter from Dennis Reynolds to the Examiner dated January 10, 1997 (Exhibit "12").

ORDERED this 11th day of February, 1997.


STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 11th day of February, 1997, to the following:

APPELANTS: Mr. and Mrs. Allen J. Brower
c/o B P Holding
13205 Pt. Richmond Drive NW
Gig Harbor, WA 98332

AGENT: Dennis Reynolds, Attorney
Williams, Kastner & Gibbs LLP
P.O. Box 21926
Seattle, WA 98111

Steve Peacock
P.O. Box 147
Gig Harbor, WA 98335

Jill Guernsey
955 Tacoma Ave. S. #301
Tacoma, WA 98401

Sean Comfort
AHBL, Inc.
2215 N. 30th St. Ste 300
Tacoma, WA 98403

Sue Burgemeister
B-Twelve Associates
1103 W. Meeker Suite C
Kent, WA 98032

Elaine Knapp
6417 Artondale Drive
Gig Harbor, WA 98332

PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY BUILDING DIVISION
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

CASE NO. AA21-96, ALLEN J. BROWER, SHORT PLAT NO.
213657, WETLAND APPLICATION NO. 222956

NOTICE

1. RECONSIDERATION: Any aggrieved person feeling that the decision of the Examiner is based on errors of procedure or errors of misinterpretation of fact may make a written request for review by the Examiner. The request must be filed on forms provided by the Planning Department with a reconsideration fee as required by the Department of Planning and Land Services, and filed not later than 4:30 p.m. on February 21, 1997, with the Planning Department. This request shall set forth the alleged errors or misinterpretations, and the Examiner may, after review of the record, take such further action as he deems proper and may render a revised decision.

2. APPEAL OF EXAMINER'S DECISION: The final decision by the Examiner may be appealed in accordance with the Land Use Petition Act, Chapter 347, Laws of 1995, Sections 701-719, and Pierce County Ordinance No. 95-112.

NOTE: In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.

**Pierce County**

Department of Planning and Land Services

2401 South 35th Street
Tacoma, Washington 98409-7480
(206) 591-7200 - FAX (206) 591-3131**DEBORA A. HYDE**
Director

October 8, 1996

Mr. Sean Comfort
AHBL Engineers
2215 North 30th Street, Suite 300
Tacoma, WA 98403-3320

Dear Mr. Comfort:

RE: Wetland Review for BP Holding Application No. 222956

The staff has reviewed your concerns regarding the BP Holding Short Plat. The driveway, needed to serve the new lot proposed as part of the short plat, is not exempt from Section 17.12.050.H. of the Pierce County Wetland Management Regulations (WMR). This provision allows for an exemption for activities on "...improved portions of roads, rights-of-way or easements, provided there is no expansion of ground coverage." The staff finds that the existing path would involve expansion of ground coverage, and is therefore not exempt.

As mentioned in our meeting, buffer impacts from the road must be mitigated. In order to simplify the mitigation plan, the County will allow for buffer planting in only the outer 25 feet of this buffer between the pond and bridge, rather than the complete buffer area. This will allow natural growth to fill in between the existing vegetation and the outside of the newly established buffer. The mitigation plan should be submitted to Lenore Marken.

A Reasonable Use Exception for impacts to the wetland will not be required due to the minimal impact proposed, and the crossing is to one single-family lot, where the driveway location has been minimized in terms of wetland impacts.

Any question regarding specifics of the mitigation plan should be directed to Lenore Marken at 596-2758.

Sincerely,

A handwritten signature in black ink, appearing to read "D Drentlaw".

DAN DRENTLAW
Resource Management Supervisor

DD:jm

c: Lenore Marken, Environmental Biologist
Sue Burgemeister, B-twelve Associates, Inc., 1103 West Meeker Street, Ste C, Kent,
WA 98032-5751
Allen Brower, 13205 Pt. Richmond, Gig Harbor, WA 98332
Ray Hoffmann, Associate Planner

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