

67737-3

67737-3

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 JAN 30 PM 2:42

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

NO. 67737-3-I

NEAL COY,

Appellant,

v.

CITY OF DUVALL,

Respondent.

APPELLANT'S REPLY

David S. Mann
WSBA No. 21068
GENDLER & MANN, LLP
1424 Fourth Avenue, Suite 715
Seattle, WA 98101
(206) 621-8868
Attorneys for Appellant

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	REPLY TO RESPONDENT’S STATEMENT OF FACT	2
	A. The City’s Peer Review Did Not Evaluate or Conclude Whether City Code Could Be Met.....	2
	B. The City’s June 29, 2006, and December 11, 2006, Letters Concluded That Coy Could Not Fill The Wetland On His Property	3
	C. The City’s Wetland Consultant Agreed With Use of a Mitigation Bank.....	4
	D. The City’s Evidence Discussed at Pages 14-15 Was Not Before The Court on Summary Judgment.....	5
	E. Coy Did Not Dismiss His Claim for Delay Damages Due to The City’s Arbitrary Conduct.....	6
III.	ARGUMENT IN REPLY	6
	A. Coy’s Suit Was Timely.....	6
	B. Ultimate Approval Does Not Bar Recovery.....	9
	C. Coy Diligently Exhausted His Remedies	14
	1. Coy did not play “hardball” with the City	14
	2. The Code did not provide for an appeal of an interim decision	15
	D. The City’s Extraordinary Delay in Processing Coy’s Application Was Arbitrary Under RCW 64.40.020	18

1.	Duvall Municipal Code authorizes wetland fill with mitigation	19
2.	City Code provided for review by the DRC	21
E.	Coy Neither Stated Nor Implied That He Intended to Settle His Claims Against the City	22
F.	Coy is Entitled to Non-speculative Damages Under Chapter 64.40 RCW.....	24
G.	The Trial Court Erred in Awarding of Attorneys' Fees Under RCW 64.40.020 to the City	25
IV.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Brower v. Pierce County</i> , 96 Wn. App. 559, 984 P.2d 1036 (1999),	10, 11, 12
<i>Colonial Imports, Inc. v. Carlton Northwest, Inc.</i> , 121 Wn.2d 726, 734, 853 P.2d 913 (1993).....	25
<i>Cox v. City of Lynnwood</i> , 72 Wn. App. 1, 863 P.2d 578 (1993)	28
<i>Dept. of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).....	7
<i>Development Services v. City of Seattle</i> , 138 Wn.2d 107, 117, 979 P.2d 387 (1999).....	19
<i>Kibler v. Frank L. Garrett & Sons, Inc.</i> , 73 Wn.2d 523, 525, 439 P.2d 416 (1968).....	26
<i>MIR Enterprises v. City of Brier</i>	15
<i>Mission Springs v. City of Spokane</i> , 134 Wn.2d 947, 954 P.2d 250 (1998).....	13, 14
<i>Papao v. State, Dep't of Social and Health Services</i> , 145 Wn. App. 40, 46, 185 P.3d 640 (2008).....	26
<i>PUD No. 1 of Douglas County v. Cooper</i> , 69 Wn.2d 909, 918, 421 P.2d 1002 (1966).....	25
<i>Smoke v. City of Seattle</i> , 132 Wn.2d 214, 223-224, 983 P.2d 186 (1997).....	12

Statutes

Ch. 64.40 RCW	7, 9, 12, 22
RCW 64.40.010	10

RCW 64.40.010(4).....	24
RCW 64.40.020.	7, 10, 13
RCW 64.40.020(2).....	25

Municipal Code

DMC 14.02.080(A).....	17
DMC 14.02.080(B)	17
DMC 14.06.0128	19
DMC 14.42.070	15
DMC 14.42.070(C).....	16
DMC 14.42.090(A)(2)	3
DMC 14.42.130	19
DMC 14.42.300	20
DMC 14.42.300(A).....	4
DMC 14.42.310	17
DMC 14.42.320(A).....	19, 20, 21
DMC 14.42.320(A)-(F).....	19

I. INTRODUCTION

Apparently upset that Neal Coy had “vested” his subdivision application under the City of Duvall’s “old” 1996-2005 wetland regulations, the City responded by “re-interpreting” the plain language of those regulations and denying Coy the opportunity to develop his property precisely as immediately adjacent properties had been developed. Coy was not seeking preferential treatment. Coy was seeking to be treated fairly under the Code and subdivide his property at a density allowed under the City’s Comprehensive Plan and zoning. He wanted the City to review his proposal to fill the low-quality and unsustainable wetland on his property just as it had similarly on multiple projects including the property immediately south of Coy’s where it had allowed the filling of a large portion of the very same wetland that extended onto Coy’s property. But instead the City ignored the Code’s permitted exceptions allowing mitigated wetland fills. The City then denied Coy’s request that his proposal be reviewed by City’s Development Review Committee (“DRC”) – the entity authorized by Code to review and approve wetland alterations.

Coy responded by spending the next 18 months working with the City, including its lawyers, in an ultimately successful effort to persuade the City to apply its Municipal Code as written. Unfortunately, the City’s

arbitrary conduct and resulting delay caused significant financial damage. Once the City's administrative process was complete and the City's Hearing Examiner issued a final decision on Coy's application, he timely filed suit under Chapter 64.40 RCW.

II. REPLY TO RESPONDENT'S STATEMENT OF FACTS

A. The City's Peer Review Did Not Evaluate or Conclude Whether City Code Could Be Met

The City mischaracterizes the initial 2006 wetland review conducted by City consultant Hugh Mortenson. Resp. Br. at 3-4; CP 68-71. Contrary to the City's assertion, the wetland was not "much larger" than determined by Coy's consultant. Mortenson's suggested change increased the size of the wetland by only 20 percent. CP 627. Further, Mortenson, who did not complete a basic Wetland Rating process, only surmised that the wetland might have the "potential" to improve water quality. CP 69. In stark contrast, Coy's consultant, who had completed the Wetland Rating process, found that the wetland had "no opportunity" to improve water quality, and "no opportunity" to reduce flooding or erosion. CP 629-639.¹

¹ Two years later, in July, 2008, the City's wetland consultant ultimately agreed with Coy that the wetland did not support hydrology and at best was a "minimally functioning wetland that would not be sustainable over time." CP 267-268.

Finally, while Mortenson speculated upon the value of the wetland and whether it could be filled, he did not reach any conclusions. This is not surprising because other than two site visits, he did not conduct any analysis of his own. Instead he recommended that the City conduct additional analysis. CP 71.² But the City never did so. Instead, the day after receiving Mortenson's review, Lara Thomas concluded, ostensibly based on Mortenson's review, that the wetland could not be filled. CP 216, ¶ 8; CP 240.

B. The City's June 29, 2006, And December 11, 2006, Letters Concluded that Coy Could Not Fill the Wetland on His Property

Ignoring that Thomas's June 29, 2006, letter concluded that the wetlands on Coy's property could not be filled, the City attempts to shift blame to Coy by arguing that it took Coy two years to submit a "mitigation sequencing analysis." Resp. Br. at 5. But lack of a mitigation sequencing analysis did not cause the City's extraordinary delay in reviewing Coy's application. The delay resulted from the City's interim

² The paragraph quoted in the Response at page 4 demonstrates the speculative nature of Mortenson's comments. While he asserted that it is "common" that agencies allow fill only as a last resort, he obviously had not reviewed previous actions by the City of Duvall, including the City's decision to allow the exact same wetland to be filled on the adjacent Chapman property. He also asserted that Coy could achieve the same density by clustering on other portions of his property. But clustering on property with wetlands was expressly prohibited under City Code. *See* DMC 14.42.090(A)(2) (2005)

decision that Coy's proposal "does not meet the criteria in DMC 14.42.300(A)," and that Coy's options were either to "revise your plans" or "wait and resubmit" under the newer City Code. CP 240.³ Doreen Booth's December 11, 2006, letter reinforced the City's position even more pointedly: "[s]taff cannot approve or recommend approving, the filling of the wetland under the Sensitive Areas Regulations your project is vested in." CP 245.⁴ Until the City corrected its fundamental misapplication of the Code, additional analysis by Coy was fruitless. It was not until November, 2007, that Coy could move forward, *after* the City Attorney finally concluded that fill and offsite mitigation would be possible with the submission of additional information. CP 260.

C. The City's Wetland Consultant Agreed With Use of a Mitigation Bank

The City does not dispute that its wetland consultant, Margaret Clancy, ultimately agreed with Coy's initial assessment that the wetland was low value, "would not be sustainable over time," and could be filled under the Code. Resp. Br. at 13; CP 157-158. But the City continues to try and shift blame, claiming, without citation, that the project still could

³ Indeed, Thomas's June 29, 2006, letter did not request wetland mitigation sequencing, or even imply that if it were performed that the City might allow the wetlands on Coy's property to be filled. CP 240.

⁴ It is clear from both Thomas's and Booth's letter that the City preferred Coy re-apply under the new sensitive areas code. CP 240, 244-246.

not move forward because “Coy was unable to locate any appropriate site in the sub-basin.” Resp. Br. at 13. The City ignores that Coy *did* identify locations with the same sub-basin, but that it was the City that rejected Coy’s sites as “problematic.” CP 160. The City ignores also that it was City consultant Clancy that first suggested that if a site could not be found within the sub-basin that the City might instead simply collect a fee “in lieu of” mitigation. CP 158. Finally, despite its repeated assertions that use of the offsite mitigation bank was a special “concession,” Resp. Br. at 2, 13, 17, the City ignores that *its* consultant Clancy recommended use of the off-site mitigation bank because, in part, there was “verifiable evidence that the mitigation bank will provide greater biological values than the areas of the wetland being impacted, as required by previous DMC 14.42.” CP 160-161.

D. The City’s Evidence Discussed at Pages 14-15 Was Not Before the Court on Summary Judgment

In yet another attempt to shift blame the City spends two pages discussing the alleged deficiencies in Coy’s application and reconstructing the history of the time the City took to review Coy’s application. Resp. Br. at 14-15. The City’s analysis is irrelevant: it ignores that the City that held Coy’s application hostage from June, 2006,

until November, 2007. *Infra* at 18-23. Even more, none of the information presented in this portion of the City's brief was before the superior court on Summary Judgment. It should be stricken. *See* CP 791-792 (Order).

E. Coy Did Not Dismiss His Claim for Delay Damages Due to the City's Arbitrary Conduct

The City incorrectly asserts that Coy's voluntary dismissal of his second claim – that the City violated time limits established by law – was a dismissal of Coy's "delay damage" claim. Resp. Br. at 20. Coy's "delay damages" arose from the City's arbitrary conduct holding up his application for over 18 months under the theory that he could not fill wetlands under the Code. Coy's dismissal of his separate "time limits established by law" claim is irrelevant.⁵ Coy seeks damages caused by the City's arbitrary actions and its resulting delay in reviewing his application.

III. ARGUMENT IN REPLY

A. Coy's Suit was Timely

⁵ The City makes much of its alleged "victory" on Coy's claim that the City exceeded time limits established by law, but ignores entirely that Coy voluntarily withdrew this claim *after* the superior court had already ruled that Coy's claim failed the jurisdictional requirement to exhaust remedies.

Contrary to the City's assertion, Coy's argument does not "ignore" the plain language of RCW 64.40.010, or the definition of the term "act." Resp. Br. at 16-17. Coy explained that it is the City that seeks to read the term "act" in isolation and ignore completely the overall purpose of Ch. 64.40 RCW. App. Br. at 18-19. The plain meaning of a statute is not derived from reading a single word in isolation, but instead by reading the entire enactment in context. *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). Thus, while a "final decision" under Chapter 64.40 "is the issuance or denial of the sought after permit," *Hayes v. City of Seattle*, 131 Wn.2d 706, 716, 934 P.2d 1179 (1997), it does not follow that a positive "final decision" eliminates a cause of action for arbitrary interim conduct leading to the final decision. The City confuses the precondition to bringing an action (a "final decision") with the conduct the statute protects against (arbitrary conduct). Where, as here, the interim actions *leading to* the final decision were arbitrary and resulted in significant delay in reaching the final decision, the "act" may be challenged. *See* App. Br. at 17-24.

Hayes v. City of Seattle conflicts sharply with the City's claim and supports Coy's cause of action. In *Hayes*, it was the City's initial 1989 decision conditioning approval of the building that Hayes claimed

constituted arbitrary and capricious conduct entitling him to damages under RCW 64.40.020. 141 Wn.2d at 709-710. While Hayes successfully challenged the City's decision in superior court, his challenge was not based on RCW 64.40.020. Instead, he sought only to reverse the City's decision. After remand, the City approved Hayes's application in November, 1990. Despite the City approving his application, Hayes initiated an action under RCW 64.40.020 within 30 days of the City's November, 1990, decision. Hayes's damage claim was premised on the City's arbitrary action initially conditioning his application in 1989. *Id.* at 710-711. The Supreme Court agreed that the action was timely. Indeed, the Court expressly confirmed that the "final action" triggering Hayes's rights under Chapter 64.40 was the favorable approval of his application. *Id.* at 716; App. Br. at 21-23.

The City tries to distinguish *Hayes* by emphasizing that the initial 1989 decision *could* have been a final decision *if* Hayes had elected to take no further action. Resp. Br. at 19. But Hayes *did* take further action by seeking reversal of the 1989 decision and, as the Court confirmed, it was only the November, 1990 final decision (albeit a favorable one) that triggered the deadline for Hayes to bring his action under RCW 64.40.020 to challenge the earlier 1989 interim and arbitrary decision. This case is

no different. Coy opted to take further action and continue to press the City to reverse itself and approve his initial request. It was the City's final action – favorable as in *Hayes* -- that triggered Coy's right under RCW 64.40.020 to seek damages caused by the City's earlier interim decision.

The City attempts to distinguish *Callfas v. Dept of Const. and Land Use*, 129 Wn.App 579, 120 P.3d 110 (2005), by seeking to limit its holding to actions involving a failure to act within time limits. Resp. Br. at 19-20. The City ignores that this Court addressed the timeliness of challenges for claims *both* for arbitrary and capricious conduct *and* failure to act within time limits. *Id.* at 597; App. Br. at 23-24. The City also ignores this Court's express conclusion that "a permit applicant like the Callfases would have a claim under RCW 64.40 for delay damages ... without a writ once the tardy permit was issued." *Id.* at 597. Like *Callfas* and *Hayes*, Coy correctly waited until the City issued a final decision on his requested preliminary plat before bringing his action for damages.

B. Ultimate Approval Does Not Bar Recovery

The City asserts alternatively that no cause of action exists under Ch. 64.40 RCW when the administrative process provides relief – that in effect, the City gets a "free pass" to act arbitrarily and delay an application for years without liability if it ultimately concedes its errors and approves

the application. Resp. Br. at 41-43. The City's reliance on *Brower v. Pierce County*, 96 Wn. App. 559, 984 P.2d 1036 (1999), is misplaced.

Under RCW 64.40.010, "damages" are defined as:

[R]easonable expenses and losses, other than speculative losses or profits, incurred between the time *a cause of action arises and the time a holder of an interest in property is granted relief as provided in RCW 64.40.020.*

RCW 64.40.010(4) (emphasis added). In this case, Coy's "cause of action" arose in June, 2006, when Lara Thomas notified Coy that the City would not allow the filling of the wetland on the Coy's property and on December 11, 2006, when Planning Director Doreen Booth reiterated Thomas's position and announced that the City no longer allowed for DRC review of proposed wetland alternations. Coy was not granted relief, however, until the December 16, 2008 Hearing Examiner decision approving the plat.

In *Brower*, a landowner seeking to divide a parcel into two lots was required by Pierce County staff to undergo wetland review. On appeal, the Pierce County Hearing Examiner reversed and eliminated the requirement. The landowner then sought damages for the period between the original imposition of the requirement and the Examiner's reversal. 96

Wn. App. at 560-61. This Court denied damages under RCW 64.40.020 after finding that the Examiner's reversal provided relief. The court explained:

A precondition of bringing a claim is provided for by RCW 64.40.030, which states, "Any action to assert claims under the provisions of this chapter shall be commenced only within 30 days after all administrative remedies have been exhausted." *A corollary to the exhaustion requirement is that the relief granted by the administrative remedy must be inadequate.*

96 Wn. App. at 563-64 (emphasis added), *citing, Smoke v. City of Seattle*, 132 Wn.2d 214, 223-224, 983 P.2d 186 (1997).

Read together, RCW 64.40.020 and .030 establish that a cause of action arises when an injury occurs, but remains pending until an applicant has exhausted his administrative remedies and obtained relief. As established by *Brower*, if the administrative remedy is insufficient, damages under RCW 64.40.020 may be appropriate. In this case, while the City did approve the filling and off-site mitigation originally applied for, the administrative remedy was inadequate to address Coy's significant damages. The delay increased Coy's costs, interest payments, and taxes, and resulted in a significant lost profit.

Mission Springs v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998), illustrates an applicant's rights under Chapter 64.40 RCW even where the subject permit is ultimately approved. In that case, the City of Spokane received a permit application from developer Mission Springs and, following several studies, approved the application by ordinance. Mission Springs applied for a grading permit in October, 1994. 134 Wn.2d at 953. In February, 1995, Mission Springs submitted additional information requested by the City related to the permit, and in June, 1995, the City's building officer told the City Council that staff was ready to issue the permit. *Id.* at 953, n.4, 954.

Despite completion of the grading permit application, submittal of additional information, and the recommendation of City staff, the Spokane City Council refused to issue the permit and proceeded to tie up the permit process, citing new concerns with traffic capacity (despite Mission Springs's submittal of the earlier traffic study). *Id.* at 954-55. Following a hearing, the City Council directed staff not to issue the grading permit. Shortly thereafter Mission Springs filed suit. A little more than a month after Mission Springs sued, the City issued the grading permit. *Id.* at 957.

The *Mission Springs* Court rejected the "free pass" argument, holding instead, that the Spokane City Council acted arbitrarily and

capriciously in delaying the issuance of the grading permit, and Mission Springs could recover damages under RCW 64.40. The court found that the harm occurred when the City Council and City Manager “arbitrarily refused to process Mission Springs’s grading permit application” 134 Wn.2d at 962.

Similarly, the harm arose here when the City acted arbitrarily and concluded that City code would not allow Coy’s proposed wetland fill. Because the City acted arbitrarily, Coy can seek damages from the time the cause of action arose until trial under RCW 64.40.020.

A recent decision by U.S. District Court Judge Robert Lasnik reinforced the application of Chapter 64.40 RCW. *MIR Enterprises v. City of Brier* also concerned damages arising from delay in the subdivision process. See CP 200-213. MIR Enterprises sued for damages resulting from the delay, even though it eventually received the permits. The City of Brier cited *Brower* to support its assertion that the administrative process provided an adequate remedy. Judge Lasnik rejected a “free pass” argument:

The rule posited by defendants would absolve municipalities of any and all liabilities arising from clear statutory violations as long as the municipality granted the requested permit at the end of

the process. Neither common sense nor Washington law supports such a result.

CP 212.

RCW 64.40.020 on its face provides a cause of action for damages for arbitrary and capricious conduct. The City cannot escape liability for its arbitrary conduct simply because it eventually issued the approval. To do so would eviscerate the intent of the statute.

C. Coy Diligently Exhausted His Remedies

1. Coy did not play “hardball” with the City

Contrary to the City’s assertion that Coy chose to skip appeals and instead adopt a “hardball approach,” Coy was diligent in his pursuit of remedies. Because the City’s June, 2006, or December, 2006, interim decisions were not final or appealable,⁶ he continued to work with the City to find common ground based on his firm belief that the City was mistaken in its misapplication of the Code. CP 217-218, ¶¶ 10-13.⁷ While, in hindsight, a truly “hardball” litigious course of action “might” have resulted in a faster decision, Coy’s decision to stay the course and

⁶ Contrary to the City’s statement in its Response at 24, the email that the City relies on to claim Mr. Molver advised Coy to reject an appeal questions both whether they City’s letters were appealable and whether the decision not to allow review by the City’s DRC was appealable. CP 81.

⁷ Coy, for example, knew well that the City allowed filling 6000 square feet of the same wetland that extended onto his property in the Chapman subdivision approval. CP 215, ¶ 5.

ultimately convince the City that it had been wrong, that City Code did indeed allow filling of wetlands of little value, and that offsite mitigation using the mitigation bank would actually be beneficial, was not “hardball.” Instead, it represented a diligent pursuit of his available remedies.

2. The Code did not provide for an appeal of an interim decision

The City does not dispute that the Hearing Examiner’s jurisdiction is controlled by the Code and therefore, if Code did not authorize an appeal of Ms. Booth’s December, 2006, opinion, an appeal was not available. Resp. Br. at 23-25. The City also agrees that appeals were governed by DMC 14.42.070. *Id.* at 23-24. Contrary to the City’s claimed “tortured reading” of the Code, Coy identified each of the three subparagraphs in DMC 14.42.070 and explained why each provision did not allow for an appeal of an interim decision by an assistant planner or the planning director. App. Br. at 29-30.

In sharp contrast, the City offers only vague assertions that an appeal was authorized. Citing generally to DMC 14.42.070, the City argues that the “code specifically provides for appeals to the hearing examiner of interim decisions concerning sensitive area regulations and

studies.” Resp. Br. at 23-24. But nowhere in DMC 14.42.070(A)-(C) does the Code mention, much less “specifically provide” for, an appeal of an “interim decision concerning sensitive area regulations.”⁸

The City then attempts to re-write DMC 14.42.070(C) into a “catch-all” provision for review of all “sensitive area questions.” Resp. Br. at 25. But DMC 14.42.070(C) applies only to “decisions authorized by the sensitive area regulations where no review process exists for the permit of approval involved beyond the [DRC].” This provision was not applicable for at least two reasons. First, the interim decisions were not “decision[s] authorized by the sensitive areas regulation.” Second, the “permit or approval involved” was Coy’s application for preliminary plat approval, which *was* subject to review by the hearing examiner once the entire review process was complete. Because DMC 14.42.070 does not authorize an appeal of an interim decision or opinion, an appeal was not available. Ms. Booth did not have the authority to create a mandatory appeal through email.⁹

⁸ The only “interim decision” open to appeal under DMC 14.42.070 is a decision to require a “special sensitive area study.” DMC 14.42.070(A). Booth’s opinion that Coy could not fill the wetland was not a “decision to require a special sensitive area study.”

⁹ The City posits also that Coy could have applied for a variance or reasonable use exception. Resp. Br. at 25. This ignores that both Code and the City’s longstanding application of its Code authorized the wetland fill proposed by Coy making a variance or reasonable use exception unnecessary. It ignores also that neither interim decision invited use of the variance or reasonable use exception. CP 240, CP 245-46.

The City disputes that the appropriate administrative remedy was review by the DRC, asserting instead that the DRC was an advisory body only. Resp. Br. at 26, *citing* DMC 14.02.080(B). The City urges the court to defer to its interpretation of its own ordinance. *Id.* While deference to the City might be appropriate if the City's ordinance was ambiguous, where it is *unambiguous* the ordinance must be "construed to effectuate its plain purpose and intent." *Development Services v. City of Seattle*, 138 Wn.2d 107, 117, 979 P.2d 387 (1999).

The City's interpretation ignores first that DMC 14.02.080(A) expressly charges the DRC with the responsibility to "review land use applications and construction drawings for consistency with city code." Thus, the DRC was directly charged with determining whether Coy's application was consistent with Code. The City ignores also that the DRC was expressly authorized to "grant exceptions from the wetland requirements" in the City's sensitive areas regulations. DMC 14.42.310. Ms. Booth usurped that authority by determining, contrary to Code, that the DRC "no longer acts in the capacity to review the project." CP 81. By unilaterally blocking review of Coy's proposal by the DRC, Booth foreclosed the administrative remedy available to Coy. Coy's remaining option was precisely the course he took – continue to work with the City,

including its lawyers, until the City reversed course and acknowledge that its Code allowed Coy's proposal.¹⁰

D. The City's Extraordinary Delay in Processing Coy's Application was Arbitrary Under RCW 64.40.020

While the trial court refused to enter the City's proposed finding that its actions were not arbitrary and capricious, the City asks this court to step in and make this finding. The court should decline.

Contrary to the City's repeated assertion, Coy did not want to fill wetlands "simply for the purpose of creating more lots in the subdivision." Coy sought to develop his property in a manner consistent with the City's Comprehensive Plan and zoning, and consistent with the properties around him including the immediately adjacent Chapman property. *See* CP 215-216, ¶¶ 5-7; CP 225. Coy sought to fill a low-value wetland that even the City ultimately agreed was not sustainable. Coy's request was entirely consistent with Code and the City's longstanding interpretation of that Code. But the City did an abrupt reversal, and despite no change to the Code, decided to: (1) ignore City

¹⁰ In the course of its summary judgment pleadings the City produced several one-page agendas for the DRC listing Coy's project on the agenda. CP 774, 781-788. The City has not produced any evidence, however that the DRC was afforded the opportunity to review Coy's proposal for filling wetlands. To the contrary, as Ms. Booth's December 11, 2006 email made clear – "the DRC no longer acts in the capacity to review the project." CP 81. This was confirmed over a year later by the City's attorneys: "the DRC does not review requests for wetland alterations." CP 112.

Code and treat Coy's application differently than his neighbors'; and (2) deny his right to have the request reviewed by the City's authorized DRC. "[C]onclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious[.]" *Mission Springs*, 134 Wn.2d at 962 *quoting Hayes*, 131 Wn.2d at 717-718.

1. Duvall Municipal Code authorizes wetland fill with mitigation

Assuming that the City is correct and the analysis of wetland alterations "begins" with DMC 14.42.320 and its list of six "permitted alteration[s]," Coy's interpretation is buttressed by the plain language. The first "permitted alteration" is where the DRC "grants exceptions from the wetland requirements of these regulations in accordance with the allowances in this chapter." DMC 14.42.320(A).¹¹ Thus, on its face, DMC 14.42.320(A) allows the DRC to grant an exception and allow a permitted alteration. The only limitation on the DRC's discretion is that the permitted alteration be in accord with the remainder of the chapter.

Turning next to the definition of "mitigation" in DMC 14.06.0128 and DMC 14.42.130, the Code identifies the five types of actions that

¹¹ The City mentions seven possible "permitted alteration" in its discussion of DMC 14.42.320. Resp. Br. at 31. The Code, however, appears to allow only six: (A) the DRC Exemption; (B) Utilities; (C) Surface Water Management; (D) Trails; (E) Docks; and (F) isolated class three wetlands under 2500 square feet. DMC 14.42.320(A)-(F).

constitute “mitigation.” The City’s definitions of mitigation do not preclude, but instead expressly authorize “replacing,” or “providing substitute sensitive areas.” DMC 14.06.0128(E); DMC 14.42.130(A)(5). While the Code may “prefer” wetland impacts be avoided, it expressly allows for mitigation by replacement.

The City then focuses on DMC 14.42.300. While the City agrees that DMC 14.42.300 allows alterations where the wetland either does not serve a valuable function or where the project will protect or replace other equivalent wetlands, the City accuses Coy of ignoring the initial language stating that alterations must be “expressly authorized” by Code. Resp. Br. at 33. But Coy has not ignored the initial language in DMC 14.42.300. To the contrary, as discussed above, DMC 14.42.320(A) expressly authorizes the DRC to approve alterations so long as other requirements of the code are satisfied. The City reads the DRC’s express authority in DMC 14.42.320(A) out of existence leading to an unreasonable and absurd result.

Rather than conflate one section over another, when they are read together, DMC 14.42.320(A) expressly authorized the DRC to approve wetland alternations if consistent with Code, and DMC 14.42.300 allowed alterations where the DRC determines that the wetland either

does not serve a valuable function or the project will protect or replace other equivalent wetlands.¹² There is no room for two opinions --read together these two code provisions provided the authority for the DRC to review and approve Coy's proposal.¹³

2. City Code provided for review by the DRC

The City was also arbitrary and capricious in refusing Coy's request for review by the DRC. As discussed above, DMC 14.42.320(A) provided express authority for the DRC to "grant exemptions from the wetland requirements." Similarly, DMC 14.42.300 granted authority to the DRC to review and approve wetland alterations where the project would protect or replace other equivalent wetlands. Coy requested review by the DRC on October 13, 2006. CP 242. Doreen Booth responded two month later and, despite the plain language of the Code, proclaimed that the "DRC no longer acts in the capacity to review the project." CP 81. There was no room for two opinions: City Code

¹² In an effort to bolster its illogical re-interpretation of its code, the City relies heavily on the "opinion" of Coy's original wetland consultant Alison Warner. Resp. Br. at 34-35. The City ignores, however, that Ms. Warner's, also prepared the January 8, 2007 sensitive areas report that expressly provided for fill and compensation. The City ignores also that Ms. Warner's email did not address the express authority for wetland alterations where authorized by the DRC in DMC 14.42.320(A) – instead she focused only on permitted alterations for roads and utilities. CP 91.

¹³ These two code provisions provide the authority for the other wetland fills approved and signed by Doreen Booth under the City's 1996-2005 code, including the adjacent Chapman subdivision and Riverview Plaza. App. Br. at 33-34.

provided express authority for the DRC to review and consider proposed wetland alterations and mitigation.

E. Coy Neither Stated nor Implied that He Intended to Settle His Claims Against the City

The City's argument (Resp. Br. at 39-42) that the doctrines of equitable estoppel and accord and satisfaction bar Coy's claims under Chapter 64.40 RCW both fail.¹⁴

Equitable estoppel is not favored, and the party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence. *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 734, 853 P.2d 913 (1993). The doctrine is to be applied "strictly" and "should not be enforced unless substantiated in every particular." *PUD No. 1 of Douglas County v. Cooper*, 69 Wn.2d 909, 918, 421 P.2d 1002 (1966).

Coy never admitted, stated, or acted in a manner to demonstrate that he was willing to settle any legal claim he had against the City in exchange for utilizing more time to document mitigation sequencing analysis. Coy simply wanted his plat application to be processed promptly. Without an admission, statement or act that is inconsistent with a later claim that is asserted, equitable estoppel does not apply.

¹⁴ The City does not even allege that the subject of *settlement* was expressed by either Coy or the City. Resp. Br. at 39-41.

An accord and satisfaction requires a bona fide dispute, an agreement to settle that dispute, and performance of the agreement. *Papao v. State, Dep't of Social and Health Services*, 145 Wn. App. 40, 46, 185 P.3d 640 (2008). The doctrine is founded on contract law and requires “a new contract – a contract complete in itself.” *Id.* Thus, to create an accord and satisfaction in law, “there must be a meeting of minds of the parties upon the subject and an intention on the part of both to make such an agreement.” *Kibler v. Frank L. Garrett & Sons, Inc.*, 73 Wn.2d 523, 525, 439 P.2d 416 (1968).

There is no evidence that Coy considered the grant of time to complete a mitigation sequencing analysis as resolution of any pending claims he might later be entitled to bring against the City. Nor is there evidence of a “meeting of the minds” between the City and Coy. Even if the City intended or hoped to reach an agreement with Coy to settle all potential claims, no agreement was ever made. Coy never agreed with the City’s position that the Code did not allow him to fill a disturbed and isolated wetland. He never consented to the City’s arbitrary delay of his project and never manifested an understanding that he was willing to give up his right to sue when a claim ripened.

F. Coy is Entitled to Non-speculative Damages Under Chapter 64.40 RCW

Coy suffered two types of damages as a result of the City's arbitrary conduct. Coy had over \$520,000.00 in actual losses including additional interest and maintenance costs, as well as approximately \$2,000,000 in lost profit. CP 221, ¶22. The City's response focuses solely on lost profit and ignores Coy's actual losses. Because RCW 64.40.010(4) specifically defines "damages" to include "reasonable expenses and losses" that are "necessarily incurred, and actually suffered, realized or expended," Coy's actual losses are recoverable.

Focusing on one sentence in Coy's Declaration, the City suggests that Coy's significant loss profits are speculative. But the City ignores that this matter was before the court on summary judgment and that all facts were to be construed in favor of the non-moving party – Coy. As explained by *Cox v. City of Lynnwood*, 72 Wn. App. 1, 9-10, 863 P.2d 578 (1993), the determinative factor is whether the lost profits are speculative. Coy's \$2,000,000 loss in profit was based on his own personal experience, knowledge of the market and conversations with local home builders. CP 220-221, ¶¶ 20-21. Coy's lost profit claim was

also supported by an expert real estate appraiser. CP 300-348. Because Coy's lost profits were not speculative, they are recoverable.

G. The Trial Court Erred in Awarding of Attorneys' Fees Under RCW 64.40.020 to the City

Because the trial court erred in its dismissal, its award of \$126,224.50 in attorneys' fees under RCW 64.40.020(2) should also be reversed. In the event this Court agrees that dismissal was appropriate, Coy incorporates the arguments in his Opening Brief in opposition to the award of attorneys' fees. Because the City prevailed on jurisdictional grounds rather than the merits, attorneys' fees are not appropriate.

IV. CONCLUSION

For the foregoing reasons and the reasons expressed in Coy's Opening Brief, the Court should reverse the trial court's dismissal on summary judgment and award of attorneys' fees.

Dated this 30th day of January, 2012.

Respectfully submitted,

GENDLER & MANN, LLP

By:



David S. Mann, WSBA No. 21068
Attorneys for Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

NEAL COY,

Appellant,

v.

CITY OF DUVALL,

Respondent.

NO. 67737-3-I

DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, MARY BARBER, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Gendler & Mann, LLP, attorneys for appellant herein.
On the date and in the manner indicated below, I caused Appellant's Reply to be served on:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Michael B. Tierney
Law Offices of Michael B. Tierney, PC
2955 80th Avenue S.E., Suite 102
Mercer Island, WA 98040
(Attorneys for Defendant/Respondent)

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Federal Express/Express Mail
- By Electronic Mail

DATED this 30th day of January, 2012, at Seattle, Washington.

Mary Barber
MARY BARBER

\\Client Folder\Coy\Pleadings\COA 67737-3-1\Dec serv