

67737-3

67737-3

No. 67737-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CITY OF DUVALL,

Respondents,

v.

NEAL COY,

Appellant.

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RESPONDENT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

This case arises out of a disagreement between the City of Duvall and developer Neal Coy over the interpretation of the City's wetland regulations and their application to a proposal by Mr. Coy to create a 32-lot subdivision. Mr. Coy filed an application to develop his subdivision in May 2006 and became vested under the Duvall Municipal Code ("DMC") provisions that were in effect from 1996 to 2006. Mr. Coy contended the DMC allowed him to fill wetlands as a matter of right solely for the purpose of creating additional lots in the subdivision. The City staff maintained that wetlands could be filled only in limited circumstances that were not applicable to Mr. Coy's plat. The staff also maintained that the proposal to fill wetlands required a detailed analysis of what is known as "mitigation sequencing" in which an impact to wetlands is first attempted to be avoided, then minimized, then mitigated. After extensive negotiations, and because his was the last application under the old code, the staff compromised and agreed to utilize Mr. Coy's code interpretation if he would provide the requested "mitigation sequencing" analysis. Ultimately, Mr. Coy would take more than two years to provide the mitigation sequencing analysis and to complete the required engineering work that had been left out of his initial application. Once these tasks were done, the City granted concessions to Mr. Coy that had never been

given to any other developer, allowing him to compensate for the filled wetland by contributing to a wetland project in Snohomish County.

In January 2009, Mr. Coy sued the City, alleging causes of action under RCW 64.40. Two types of statutory claims exist under RCW 64.40. One prong of the statute provides relief from “acts of an agency which are arbitrary, capricious, unlawful or exceed lawful authority.” RCW 64.40.020 (1). The second type of claim, concerning delays in processing, can be brought under the prong providing “relief from a failure to act within time limits established by law.” *Id.* Mr. Coy advanced both claims. The City brought and won a motion for summary judgment on the arbitrary and capricious claim. The City brought a separate motion for summary judgment on the delay claim, and Mr. Coy responded by voluntarily dismissing that claim. This appeal followed.

II. ISSUES PRESENTED

1. The plain language of RCW 64.40.020 creates a cause of action only if the “final decision” by a city is “arbitrary and capricious.” Should the reach of the statute be judicially extended to include claims arising from interim code interpretations by staff that never become final decisions?
2. RCW 64.40.030 forbids a damage claim under the statute until

all administrative remedies have been exhausted. Do the Duvall Municipal Code provisions allowing for administrative appeals, variances, and reasonable use exceptions create administrative remedies that must be exhausted prior to a claim?

3. Can City staff's interpretation of the City's wetland regulations be called arbitrary and capricious, especially when the developer's own experts agree with the staff interpretation?

4. Is Mr. Coy's claim barred by principles of accord and satisfaction and estoppel?

5. Does a cause of action exist under RCW 64.40 when the administrative process provides complete relief?

6. RCW 64.40.010(4) provides that damages cannot be "based upon diminution in value" of real property. Does this provision bar damages based upon an alleged decline in the appraised value of the property?

7. Did the Superior Court abuse its discretion when it awarded the City its attorney's fees pursuant to RCW 64.40.020?

III. STATEMENT OF FACTS

A. Facts Regarding the Wetland Code Interpretation.

Mr. Coy submitted his preliminary plat application on May 11, 2006, and the City issued a Notice of Complete Application on June 8,

2006. On June 28, 2006, the City received comments regarding the plat application from its outside consultant peer reviewer, Hugh Mortensen (“Mortensen”), an ecologist working for The Watershed Company. Mortensen visited Mr. Coy’s property twice and determined that the wetland on the property was much larger than contended by Mr. Coy’s consultant. In his letter, Mortensen took a dim view of Mr. Coy’s proposal to fill the entire wetland and provide payment as mitigation. He found that the wetland likely served several valuable functions, and that Mr. Coy had not provided the necessary “mitigation sequencing” or avoidance analysis, which requires consideration of steps to avoid or minimize the impact on the wetland.

...Typically, since mitigation has been shown to have a historically low success rate, both in Duvall and in the broader region, it is common that agencies allow it only as a last resort. One of the key steps in preparing or evaluating a wetland modification proposal is to demonstrate that there is no practicable or feasible alternative development proposal that results in less impact to the wetland and its buffer. The proposal should include an analysis of mitigation sequencing and an evaluation of how the project has been designed to avoid impacts to the wetland or buffer and to minimize any impacts that are determined to be unavoidable. In evaluating the proposed design, it would appear that there are many efforts that could be taken to avoid wetland fill, not the least of which would be a redesign of the project to include fewer lots or cluster the allowed density on the non-sensitive area portion [sic.] of the site.

CP 69. Mortensen also noted that the wetland required at least a one-to-one replacement of hydrologic and habitat functions, but Mr. Coy's proposed mitigation offered a less than one-to-one ratio because it did not account for "temporal functional loss," which is the time between destruction of the on-site wetland and establishment of the new off-site wetland. CP 70. Contrary to the allegation in Mr. Coy's brief (Appellant Brief, p. 7), Mr. Mortensen found "that the code would not allow alteration of this wetland." CP 69.

On June 29, 2006, the City wrote to Mr. Coy's consultant, David Evans & Associates Inc. ("Evans"), finding that the proposed wetland fill request "does not meet the criteria" for fill under the then-existing DMC. The City gave Mr. Coy 90 days to respond. CP 73. More than two years would elapse before Mr. Coy would complete the requested mitigation sequencing analysis. CP 157-58.

On October 3, 2006, Evans requested an additional 90 days to respond.

This extension is necessary in order to allow for a decision on the outcome of a pending application to the Army Corps of Engineers to fill the on-site wetland. It is also necessary to assess new information stemming from supplemental field work to delineate the wetland boundary.

CP 77. More than 15 months later Evans still had not obtained the independent approval needed from the Corps. CP 133-34.

On October 13, 2006 Evans sent the City a one-page letter asserting that the “responses received are arbitrary and capricious, and constitute a denial of rights afforded to others in the recent past. Further, the proposed mitigated wetland fill is allowed by code.” The letter cited several sections of the DMC. CP 79. On December 11, 2006, the City Planning Director, Doreen Booth, informed Mr. Coy via letter that “[s]taff cannot approve, or recommend approving, the filling of the wetland under the Sensitive Areas Regulations your project is vested in.” CP 84. The justifications for Ms. Booth’s conclusion were the findings in Mortensen’s peer review letter, the report of Mr. Coy’s consultant, and the staff’s interpretation of DMC 14.42¹. Ms. Booth noted that Mr. Coy had the option of using the newly adopted sensitive areas regulations that became effective September 24, 2006, or remaining vested under the previous code. Ms. Booth suggested that the new code might offer more flexibility for wetland fill. She concluded her letter by noting that the mitigation sequencing analysis was required under either option.

Please note that the issues set out in the peer review letter from Hugh Mortensen, The Watershed Company, are required to be addressed regardless of what direction you choose to go from here.

CP 85.

¹ Chapter 14.42 and all other cited portions of the DMC are attached as an appendix to this brief, along with RCW 64.40.

In early January 2007, the City and Mr. Coy then entered into an agreement to explore the possibility of vesting the plat application under the new code. Under this agreement, Mr. Coy's application would not lapse because of failure to respond to the Mortensen letter. Instead, Mr. Coy would submit a wetland analysis based on the new code and the City would have an outside consultant conduct a peer review so that the parties could investigate how Mr. Coy's application would fare under the new code. Once that investigation was complete, Mr. Coy could decide whether to withdraw his application and reapply under the new code. CP 87-89.

Mr. Coy then submitted a wetland analysis based upon the new city code and the City had it peer reviewed by a new outside consultant, Margaret Clancy of the ESA Adolfson Company. On February 16, 2007, Ms. Clancy reported several deficiencies in the analysis received from Mr. Coy's consultants, such as its failure to explore alternatives to filling the wetland, including the possible use of density credits, wetland buffer reduction, and wetland buffer averaging. Ms. Clancy also noted the absence of a mitigation plan and the absence of an analysis of the functions and values of the wetland, which was needed to determine the adequacy of any mitigation plan. CP 93-95.

The City and Mr. Coy's consultants continued to exchange information regarding the analysis of the application of the new code to the wetland, but in the interim, Mr. Coy's consultants developed a concern about the effect of the new code's drainage regulations on other aspects of the design of the plat. CP 98-99. Ms. Thomas cautioned Mr. Coy's consultants that, while she was willing to support use of the new wetlands regulations combined with the old drainage regulations, the hearing examiner might not agree with this approach. CP 101. Eventually, Mr. Coy ceased his investigation of the effect of the new code. In a letter of May 31, 2007, Mr. Coy's attorney stated:

I am aware that the City has suggested that Mr. Coy could proceed under the 2006 regulations. At this point, we are strongly inclined to protect our vesting to the 2005 Code and to see our application through to approval under that code.

CP 103-04. At the same time, instead of completing the mitigation sequencing analysis as originally requested by the City or alternatively submitting a different layout for the plat, Mr. Coy's attorneys submitted a request for a large volume of documents relating to other plats in the city. *Id.*

Eventually, in October 2007, Mr. Coy's attorney wrote to the City advocating an interpretation of the old wetland code that would allow filling the wetland in order to create more lots. He contended that any

wetland could be filled if there existed a mitigation plan that met the requirements of DMC 14.42.300, and also contended the City had applied his proposed interpretation in the past. CP 106-110. Discussions then ensued between Mr. Coy's attorney and the City's outside counsel, Amy Pearsall. These discussions led to a letter from Ms. Pearsall of November 16, 2007 in which she corrected Mr. Coy's interpretation of the DMC, pointing out that the analysis of a proposed alteration of wetlands did not begin with the adequacy of the mitigation plan under DMC 14.42.300, but instead began with a determination as to whether the purpose of the fill was authorized under DMC 14.42.320, which Mr. Coy's attorneys had not addressed. CP 112-14.

To address Mr. Gendler's original request, the City is not prepared at this time to say that wetland alterations with off-site mitigation for Mr. Coy's preliminary plat application is authorized under the 2005 code. Rather, pursuant to the consistent interpretation of the sensitive areas regulations since 2000, certain conditions precedent outlined in Duvall Municipal Code (DMC) 14.42.320 (2005) would have to be met, which do not exist in this particular case, before off-site mitigation would be allowed...

CP 113. Ms. Pearsall also pointed out that the alleged instances where the City had applied Mr. Gendler's interpretation of the 1996-2006 code all concerned projects that became vested prior to Ms. Booth becoming planning director in 2000, and that the City had consistently applied the

code during her tenure. CP 112. At the same time, given that it was the last application under the old code under the old code (CP 124), Ms. Pearsall proposed to compromise the City's position and accept a proposal for filling the wetland if it met the other requirements of the code.

...However, because the City is in agreement with Mr. Gendler's and Mr. Coy's desire to work cooperatively and expeditiously as possible to resolve this matter, it is willing to take another look at this issue and review a proposal consistent with Mr. Gendler's interpretation of the 2005 code. If Mr. Coy can submit the appropriate documentation demonstrating that his proposal will meet the requirements of the 2005 code as outlined below, the City will be prepared to allow off-site mitigation of the wetland conditioned upon compliance of the requirements of the 2005 code.

CP 113. Mr. Coy's attorney accepted the City's proposal in his letter of November 30, 2007.

We appreciate the City's willingness to work cooperatively and that the City is "willing to take another look" and review a proposal consistent with "Mr. Gendler's interpretation of the 2005 code." Mr. Coy, through his agents, are in the process of preparing documentation to demonstrate that the conditions and requirements on page two of your letter are met. Once that material is prepared, we will schedule a meeting to review the submission to assure the City's satisfaction.

CP 121. Mr. Mann's letter also reiterated Mr. Coy's position that the wetland fill was allowed outright under the old code, and requested a commitment from the City to accept the filling of the wetland. *Id.* In response, the City offered to state in stronger terms that it was willing to

allow an exception in Mr. Coy's case. Mr. Mann ultimately declined the City's offer of further written assurances because he knew the City would also restate its belief that the old code did not outright allow the filling of the wetland.

At this point, while a letter confirming in stronger tones that they will allow off-site mitigation in your case would be nice, I do not like the idea of yet another letter in file also stating that it is the City's position that the Code does not allow it, but they will review and approve anyway. I still think this is dynamite in the hands of the anti development activists if they are out there...

CP 124.

In order to assist Mr. Coy's consultants with preparing the necessary documentation, the City asked its outside consultant, Margaret Clancy, to prepare a letter describing the elements of the required studies. The Clancy letter of January 2, 2008 cited the DMC provisions defining mitigation and specifically listed the elements of mitigation sequencing.

CP 127-28. Responding to the City's guidance, Mr. Coy's chief consultant Jack Molver, endorsed the City's approach:

What I think they are saying is simply that it is necessary for the critical area study to provide an alternatives analysis that discusses both avoidance and minimization of impacts, and justification for the fill.

CP 131. In another email, Mr. Molver also wrote:

...Clancy's response is consistent with what my understanding of the code says. The ultimate call as to

whether our analysis and supporting documents are adequate to prompt an affirmative decision lies with the planning director.

CP 133. On February 5, 2008, the City, Ms. Clancy, Mr. Coy and his consultant met to discuss the City's requirements. CP 137.

On February 6, 2008, Mr. Coy's consultants, asked for a 90-day extension of time for submitting documentation in support of the proposed wetland fill. CP 140. On March 17, 2008, Mr. Coy's consultant submitted additional material regarding the proposed plat. His letter acknowledged the substantial delay that had been caused by Mr. Coy's investigation of possible use of the new wetland code. CP 142. The City's independent consultant, Margaret Clancy, then reviewed the new materials and found the additional documentation to be inadequate. CP 145-53. Eventually, even Mr. Coy's attorney became frustrated with the inadequate responses put forth by Mr. Coy's consultants. In an email dated May 9, 2008, Mr. Mann stated:

In finally reviewing everything, I am a bit troubled by the lack of information in Ed's letter. As a read the Adolfson's April 2 letter, they have three topics that they wanted more information on. (1) Revised wetland function analysis as part of the wetland fill justification under former 14.42.300; (2) additional avoidance analysis under former 14.06.0128 (the bulleted list); and (3) more information on mitigation sites within the city v. bank pursuant to former 14.42.330. Ed's letter only addresses the bullet points in item two (former 14.42.0128). I am in the process of reminding the City that former 14.42.0128 was NOT part of their six

factors they identified to us back in November, [See footnote² below] But the other two: compliance with 14.06.300 and 14.06.330 were in the November letter (and seemed fairly easy to accomplish).
Am I missing something here? Why are we not addressing the first and third items?

CP 155.

Eventually, Mr. Coy's consultants finally provided adequate information and Ms. Clancy, in her letter of July 14, 2008, found Mr. Coy had met the requirements to justify the filling of the wetland. CP 158. However, Mr. Coy's proposal still could not be executed because the code required that any off-site mitigation must take place within the same drainage sub-basin as the plat, and Mr. Coy was unable to locate any appropriate site in the sub-basin. The City then made a further concession to Mr. Coy by allowing him to perform off-site mitigation by means of contributing to a wetlands enhancement project in Snohomish County, even though this solution was not authorized under the old code. CP 160-63.

The Hearing Examiner issued his approval of the project on December 23, 2008. Mr. Coy then filed this lawsuit in January 2009. He

² Mr. Mann is mistaken in his contention because DMC 14.06.0128 is merely a definition that sets out the elements of mitigation sequencing, which had been requested of Mr. Coy numerous times. Additionally, Ms. Clancy's letter of January 2, 2008 specifically listed the elements of mitigation sequencing as being part of the required documentation. CP 128.

still owns the property and has not yet constructed the streets, utilities and other infrastructure described in his plans.

B. Facts Regarding Delays Caused by Inadequacies in Mr. Coy's Application.

An awareness of the statutory framework governing the review of preliminary plat applications is necessary in order to understand the time limits for processing a plat application. The criteria that the City must consider in reviewing an application for preliminary plat approval, and the process for conducting the review of the application, are addressed in both state statutes and local ordinances. Under RCW 58.17.140, preliminary plats must be approved, disapproved or returned within 90 days. The statute also allows for supplementation by local ordinances. Pursuant to RCW 58.17.140, the City has an ordinance governing the review process and creating a 90-day review clock. DMC 14.08.020 (G). Under the ordinance, the 90-day review clock does not run during periods when the City has directed requests for additional information to the applicant and is awaiting responses. DMC 14.08.020 (G). The clock does not start running until 14 days after the applicant submits responsive information to the City. *Id.* In effect, stopping the review clock under DMC 14.08.020(G) by a request for information is the equivalent of returning the application under RCW 58.17.140. Mr. Coy's chief consultant, Mr.

Jack Molver, agrees that it is standard practice for jurisdictions to utilize a review clock. CP 978-79.

Other City code sections define the extensive criteria that must be considered in the review of a preliminary plat application. Those sections include DMC 2.30.210, 14.66.040, .050, and .060. In general, those sections require the applicant to show appropriate provisions for compliance with the City's comprehensive plan, protection of public health, proper design of sewer, water, street, storm water, and utility infrastructure, consistency with landscaping and tree retention policies, and protection of sensitive areas.

The City's motion for partial summary judgment on Mr. Coy's delay claim contained a detailed chronology of the delays in processing caused by the inadequacies in Mr. Coy's application and supporting materials. This chronology was set forth in both narrative (CP 912-16) and graphic (CP 933-49) form, and was documented by exhibits (CP 409-574). The chronology showed that ample time still remained on the 90-day clock when the project received final approval, and that the numerous delays were caused by inadequacies in Mr. Coy's materials. When confronted by this evidence, Mr. Coy voluntarily dismissed his claim for delay damages despite the fact that he had brought his own motion for summary judgment on the delay issue. CP 795-97, 179-95.

IV. ARGUMENT

A. The Superior Court Decision Can Be Affirmed On Multiple Grounds.

The Superior Court granted summary judgment on Mr. Coy's arbitrary and capricious claim based on the absence of a final decision within the meaning of RCW 64.40 and based on Mr. Coy's failure to exhaust all administrative remedies. CP 791-93. The Superior Court did not reach other issues argued by the parties, including whether the City's code interpretation was arbitrary and capricious, whether Mr. Coy's claim was barred by estoppel or accord and satisfaction, and whether no claim existed under the statute because the administrative process had provided complete relief. This Court can affirm the Superior Court decision on any of the grounds presented to lower court. *McGowan v. State*, 148 Wn. 2d 278, 287-88, 60 P. 3d 67 (2002).

B. Mr. Coy's Grievance Is Directed To An Interim Code Interpretation And Not A "Final Decision" Within The Meaning of RCW 64.40.

Mr. Coy's argument heads in the wrong direction from the outset because it ignores the plain language of the statute. The analysis of a claim for relief from an arbitrary and capricious act begins with the definition of "act" as set forth in the statute.

“Act” means a final decision by an agency which places requirement, 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) (emphasis added). The statute creates “...an action for damages for relief from acts of an agency which are arbitrary, capricious or unlawful, or exceed lawful authority...” RCW 64.40.020 (1). Thus, a claim under the statute alleging arbitrary and capricious conduct applies only to final decisions of an agency itself, and not interim positions or code interpretations by staff.³ Under the DMC, final decisions on preliminary plat applications are made by the hearing examiner. DMC 14.08.010.C. Interim interpretations regarding sensitive area studies or regulations are also subject to final decision by the hearing examiner via appeal. DMC 14.42.070.

Mr. Coy’s project involves only one “final decision” -- the hearing examiner decision of December 23, 2008. The final hearing examiner decision placed no requirements, limitations or conditions on Mr. Coy’s property in excess of applicable law. In fact, it provided Mr. Coy with a concession that no other developer received under the old code, allowing him to perform wetland mitigation outside of the drainage sub-basin in

³ Mr. Coy mistakenly refers to this issue as concerning whether his claim was timely filed. Opening Brief, pp.16, 24. In fact, the existence of a final decision is a necessary element of a claim under the arbitrary and capricious prong of the statute, not just a benchmark for filing a lawsuit.

which the plat was located. There is nothing arbitrary and capricious about the hearing examiner decision. Indeed, Mr. Coy makes no such claim. As confirmed by his interrogatory answers, the only arbitrary and capricious event alleged by Mr. Coy consists of the interim interpretation of the wetland code by Doreen Booth in 2006.⁴ CP 169-71. But history shows Ms. Booth's interpretation was not at all "final." It is undisputed that the staff agreed to compromise on the interpretation of the code and utilize the interpretation proposed by Mr. Coy. The final position of the City was, in fact, Mr. Coy's position.

Mr. Coy's argument fails because he does not and cannot explain how an interim code interpretation by staff can constitute a final decision by the City within the meaning of the statute. The staff and Mr. Coy engaged in continuous negotiations, explored multiple options, modified engineering plans and plat layouts, and ultimately reached a compromise. The staff position was not fixed into place until Mr. Coy finally provided all of the required engineering data and consultant studies. No final decision by the City occurred until the hearing examiner approved Mr. Coy's development. The plain language requirements of the statute are not met under these facts; "final decision" means exactly what it says.

⁴ Mr. Coy apparently attempts to create a new concept by referring to "arbitrary delay of application processing" (Appellant's Brief, p. 20), but this seems to be nothing more than mixing and matching terms from the two prongs of RCW 64.40. As described above, he voluntarily dismissed his delay damages claim.

Mr. Coy's reliance on *Hayes v. City of Seattle*, 131 Wn. 2d 706, 934 P. 2d 1174 (1997) is misplaced. Nothing in *Hayes* eliminates the statutory requirement of a final decision as a prerequisite to a claim under RCW 64.40. The final decision in *Hayes* consisted of the Seattle City Council's initial decision approving the developer's permit, but reducing the length of the building. 131 Wn. 2d at 709-10. The Supreme Court specifically pointed out that the decision would have remained final but for the developer's successful lawsuit for a writ for review. 131 Wn. 2d at 716. No such final action exists in Mr. Coy's case. All of the negotiations and changes to the project occurred while the application was at the staff-review stage, well prior to the final decision.

Mr. Coy's attempt to rely on *Callfas v. Dept. of Const. and Land Use*, 129 Wn App. 579, 120 P. 3d 110 (2005), fails to recognize the key facts of that case. The plaintiffs in *Callfas* were attempting to assert a claim for delay damages but were not proceeding properly under the "delay" prong of the statute, which allows an "action for damages to obtain...relief from a failure to act within time limits established by law." RCW 64.40.020 (1). The plaintiffs did "not assert that the City missed any of the statutorily-mandated processing deadlines." 129 Wn App. at 593, fn. 6. Instead, the plaintiffs attempted to proceed under the "arbitrary and capricious" prong of the statute, which allows an "action for damages

to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority.” RCW 64.40.020 (1). Under that prong, the claim rests upon an “act,” which, as explained above, requires a final decision by the City. Since the plaintiffs in *Callfas* filed their case before the final decision, it was premature.

Mr. Coy faced no such difficulty because he originally pursued his claim under each prong of the statute, alleging both arbitrary and capricious conduct in the staff interpretation of the wetland regulations and alleging delay caused by failure to act within time limits established by law. Since the hearing examiner decision preceded this lawsuit, the claim was not premature. However, Mr. Coy voluntarily dismissed his delay damage claim because the City’s motion for summary judgment on that claim conclusively demonstrated that the delay in processing was caused by Mr. Coy’s own failure to provide necessary information. Consequently, Mr. Coy is left with only his arbitrary and capricious claim. As the plain language of the statute states, this claim must be directed at an “act” which constitutes a “final decision” of the City. Without that fundamental element, this claim fails as a matter of law.

C. Mr. Coy Did Not Exhaust All His Administrative Remedies.

1. Exhaustion of All Remedies is a Legislatively-Created Element of a Claim Under RCW 64.40, Not a Judicially-Created Doctrine.

Exhaustion of all administrative remedies is a prerequisite to a claim under RCW 64.40. *Harrington v. Spokane County*, 128 Wn. App. 202, 215, 114 P.3d 1233 (2005). In enacting RCW 64.40, the legislature included a strong exhaustion requirement providing explicitly that no claim can be filed until “after all administrative remedies have been exhausted.” RCW 64.40.030 (emphasis added). Even apart from the explicit statutory requirement, Washington has a strong judicially-created policy in favor of exhaustion in order to:

1) insure against premature interruption of the administrative process, (2) allow the agency to develop the necessary factual background on which to base a decision, (3) allow the exercise of agency expertise, (4) provide a more efficient process and allow the agency to correct its own mistake, and (5) insure that individuals are not encouraged to ignore administrative procedures by resort to the courts.

Estate of Friedman v. Pierce County, 112 Wn. 2d 68, 78, 768 P.2d 462 (1989).

Because exhaustion of all administrative remedies is a legislatively-mandated element of a cause of action under RCW 64.40, cases regarding exceptions to the judicially-created doctrine of exhaustion are inapposite. Since the cases cited by Mr. Coy, *Orion Corp. v. State*,

103 Wn. 2d 441, 693 P.2d 1369 (1995), and *Zylstra v. Piva*, 85 Wn. 2d 743, 539 P.2d 823 (1975), do not concern claims under RCW 64.40, they have no bearing on the exhaustion of remedies question in the case before this Court.

Mr. Coy's argument based on *Pleas v. City of Seattle*, 112 Wn. 2d 794, 774 P.2d 1158 (1989), is particularly inapposite. *Pleas* did not concern RCW 64.40, which contains an explicit statutory exhaustion requirement. Furthermore, *Pleas* did not concern exhaustion of administrative remedies, but a proximate cause argument that Plaintiff's damages resulted from its independent business judgment in deciding not to pursue further judicial remedies in addition to the three lawsuits it had already brought. 112 Wn. 2d at 797-98, 807-08. Moreover, the entire discussion in *Pleas* is moot because Washington discarded the "independent business judgment" rule in *City of Seattle v. Blume*, 134 Wn. 2d 243, 253-60, 947 P.2d 223 (1997).

The demands of the statute are strict — plaintiffs must exhaust not just some, but all administrative remedies. Since Mr. Coy exhausted none of his remedies, he has no cause of action.

2. Mr. Coy Implies Facts Not Supported By the Record.

Mr. Coy did not bypass his administrative remedies because, as he suggests in his brief, he did not think the remedies were available. The

undisputed record clearly establishes that that Mr. Coy was fully aware of the multiple administrative remedies in the code, and rejected them because he wanted to negotiate with the staff using a hardball approach. Mr. Coy's chief consultant, Jack Molver, described this approach succinctly very early on in the process, in an email to Mr. Coy dated October 13, 2006.

I do not believe that we want to go into the appeal, variance or reasonable use provisions discussed in 14.42.060, 14.42.070 and 14.42.080 because we must stand firm in our believe [sic] that what we are proposing to do is permitted outright.

CP 770.

Nonetheless, despite his hardball approach, the staff still specifically invited Mr. Coy to appeal to the hearing examiner if he disagreed with the staff position. The City's Planning Director, Doreen Booth, wrote Mr. Coy on December 11, 2006, pointing out that the Development Review Committee did not hear appeals of code interpretations by the Planning Director and stating:

...It is a planning director decision re: code interpretation. According to our city attorney, projects are not vested in process, and an appeal of my interpretation would be to the hearing examiner in accordance with DMC 14.08.010.C. Please call me...if you have any questions.

CP 81. Again, Mr. Coy rejected this remedy, not because he thought the code did not allow an appeal, but because he wanted a different strategic approach. In fact, Mr. Molver advised Mr. Coy to reject the administrative remedy because he feared losing the appeal.

My view is that if we file an appeal based upon the letter, a hearing examiner would look at the statement that the new regulations would be a compromise, so the appeal would be denied.

Id. Mr. Coy's lawyer later agreed with this approach.

The problem with forcing them into a code interpretation is the obvious risk that they "could" rule against us...

CP 116.

There is absolutely nothing in the record that supports Mr. Coy's characterization of a "diligent pursuit" of administrative remedies. Quite to the contrary, he consciously rejected his available remedies in order to pursue a hardball negotiating strategy.

3. The Duvall Municipal Code Provided Multiple Administrative Remedies.

Contrary to Mr. Coy's tortured reading of the City code, the DMC makes the hearing examiner the final decision maker in all matters concerning preliminary plats. DMC14.08.010(C). The code specifically provides for appeals to the hearing examiner of interim decisions

concerning sensitive area regulations and studies. DMC14.42.070. This provision would cover the additional wetland studies that staff requested and which Mr. Coy now protests. Appellant's Brief, p. 13, 15.

The code also contains a "catch-all" provision authorizing appeals to the hearing examiner for sensitive area questions that have no other review mechanisms. DMC 14.42.070 (C). This provision clearly includes in its scope staff interpretations of the sensitive area regulations.

The code further provides several other administrative remedies that Mr. Coy chose to avoid, including a reasonable use exception under DMC 14.42.060 and a variance under DMC 14.42.080. Indeed, the variance standard almost precisely reflects the argument Mr. Coy makes in this lawsuit concerning alleged inconsistencies in the evaluation of wetlands in other subdivisions. The code allows a variance if

[b]ecause of special circumstances applicable to the subject property, including size, shape, topography, location or surroundings, or the size or nature of the sensitive area, the strict application of the sensitive area regulations would deprive the subject property of rights and privileges enjoyed by other properties in the vicinity and in the same zone.

DMC 14.42.080 (B)(1). If Mr. Coy truly believed other similar projects had received different code interpretations, he could have used that point as a basis for a variance request.

Mr. Coy ignores the undisputed facts and ignores the provisions of the Duvall Municipal Code when he posits that his only administrative remedy was through the Development Review Committee (“DRC”). Appellant’s Brief, p. 31. Under the code, the DRC is an advisory body only, not an appellate one with authority to overrule the Planning Director. DMC 14.02.080 (B), CP 774. The DRC consists of the Planning Director, the Public Works Director and/or City Engineer, the Building Official and Fire Chief. DMC 14.02.070 (A). The DRC is managed by the Planning Director, not vice-versa. DMC 14.02.030 (4). Contrary to Mr. Coy’s contention, the DRC met multiple times to consider his project. CP 774, 781-88. Nothing regarding any action or inaction by the DRC affected Mr. Coy’s ability to make an administrative appeal to the hearing examiner or seek other available administrative remedies.

The false premise underlying Mr. Coy’s argument concerning the DRC is that he is the expert in interpreting the appeal provisions of the Duvall Municipal Code and the City is not. The law holds just the opposite. “Great weight” is given to the construction of city ordinances by the officials who enforce them. *Development Services v. City of Seattle*, 138 Wn. 2d 107, 117, 979 P. 2d 387 (1999). Courts routinely give deference to a city’s interpretation of its own ordinances. *Pinecrest*

Homeowners Ass'n v. Cloninger & Assoc., 151 Wn. 2d 279, 290, 87 P. 3d 1176 (2004).

The uncontestable fact here is that, regardless of the language of the code concerning appeals, the City staff made a written proposal to Mr. Coy, offering an opportunity to appeal the interpretation of the wetland fill requirements to the hearing examiner. CP 81. The City would have been bound by this offer had Mr. Coy acted on it. Mr. Coy never told the City that he believed no remedy was available, never challenged the City's interpretation of its code sections regarding administrative remedies, never asked for clarification as to how to pursue an appeal and, in fact, never responded at all to the City's offer. The offer created an available remedy that Mr. Coy was required to pursue, and his refusal to do so bars his claim under RCW 64.40.

4. Mr. Coy Presents Arguments That Were Not Raised in Superior Court.

A party seeking to reverse a decision of a Superior Court cannot raise arguments on appeal that were not first presented to the court below. *Smith v. Shannon*, 100 Wn. 2d 26, 37, 666 P. 2d 351 (1983). Mr. Coy's arguments based on DMC 14.04 (Appellant's Brief, p. 50) were never raised in Superior Court; the pleadings below contain absolutely no

reference to this chapter of the DMC. Consequently, the argument is barred.

Even if the argument had been preserved, it fails to succeed. Nothing in DMC 14.04 stands for Mr. Coy's bizarre proposition that City staff cannot and do not interpret the City code almost daily in the ordinary course of their work unless they constantly file written interpretations. The chapter relied on by Mr. Coy, at DMC 14.04.060, even lists the standard rules of interpretation that should be followed. Whether an interpretation has been written or filed does not change the fact that anyone working with any code is required to interpret it constantly. Even if the staff interpretation did have to be written and filed eventually, that would simply mean that the first step in Mr. Coy's administrative appeal would have been to request a written interpretation, followed by an appeal to the hearing examiner, and his lawyer specifically considered and rejected that option. CP116. Mr. Coy's conduct here is anything but diligent.

In any event, Mr. Coy mistakenly cites to the city code that went into effect in 2007 (see notations on code sections appended to Appellant's Brief), which does not apply because he chose to have his application processed under the predecessor code. CP 142. His argument is therefore irrelevant.

It is undisputed that Mr. Coy, when faced with staff positions he disagreed with, could have pursued multiple administrative remedies, and the City undisputably invited him to do so. Mr. Coy could have sought a variance or he could have appealed to the hearing examiner about the staff's code interpretation. If Mr. Coy had pursued his administrative remedies, it would have allowed the staff to correct any alleged mistake. Mr. Coy chose not to exhaust any of his administrative remedies, but the statute requires him to exhaust all such remedies. RCW 64.40.030. The City led him to water, but he refused to drink. He is therefore barred from presenting a claim under RCW 64.40.

D. The City's Interpretation Of The Wetland Code Was Not Arbitrary and Capricious.

1. The Plain Language of the Code Supports the City's Position.

Government action is "arbitrary and capricious" if it is "willful, unreasonable, and made without consideration and in disregard of facts or circumstances." *Landmark Development v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Even though a reviewing court might disagree with a decision made by the government, the decision is not arbitrary and capricious if there is "room for two opinions." *Isla Verde Int'l Holding, Inc. v. City of Camas*, 146 Wn.2d 740, 769-70, 49 P.3d 867 (2002). The City's interpretation of its own ordinances is entitled to deference from the

courts. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d. 568, 587, 90 P.3d 659 (1994). The “scope of review under an arbitrary and capricious standard is very narrow, and the one asserting it must carry a heavy burden.” *Alpha Kappa Lambda Fraternity vs. Washington State University*, 152 Wash. App. 401, 423, 216 P.3d 451 (2009).

City codes and ordinances are interpreted the same as statutes. *Kitsap County v. Mattress Outlet*, 153 Wn.2d. 506, 509, 104 P.3d 1280 (2005). An unambiguous ordinance will be applied according to its plain meaning. *State v. Villarreal*, 97 Wn. App. 636, 641-42, 984 P.2d 1064 (1999). Full effect must be given to the language chosen by the legislative body, with no part rendered meaningless or superfluous. *Whatcom County v. City of Bellingham*. 128 Wn.2d. 537, 546, 909 P.2d 1303 (1996).

Mr. Coy wanted to (1) fill wetlands simply for the purpose of creating more lots in the subdivision; (2) mitigate the loss of wetlands by creating new wetlands off-site of his subdivision; and (3) create replacement wetlands without first undertaking a “mitigation sequencing” analysis showing that his development plans had considered alternatives to the filling of the wetlands. Mr. Coy’s position is that the City acted arbitrarily and capriciously by not allowing him to carry out the above steps. Mr. Coy argues that the DMC allows developers to fill wetlands simply to create more lots and to do so as a matter of right, but Mr. Coy is

180 degrees wrong in this contention. The DMC allows alteration of wetlands only under specific limited instances that did not apply to Mr. Coy's subdivision and, even where filling of wetlands is permissible, developers must provide studies showing that all other alternatives have been considered.

The statutory interpretation question is essentially confined to four code sections from the City code in effect from 1996 to 2006. The sections are 14.42.130 (defining mitigation), .300 (listing requirements for mitigation plans), .320 (listing permitting alterations of wetlands), and .330 (listing additional requirements for mitigations plans). The City's position was that wetland alterations could only be allowed for the purposes set forth in 14.42.320, which did not include lot creation. Mr. Coy disagreed and asserted that a wetland could be filled for any purpose, so long as he provided a mitigation plan. Mr. Coy's interpretation is wrong because it makes the list of permitted alterations in DMC 14.42.320 meaningless, which is an absurd result.

The analysis of wetland alteration begins with DMC 14.42.320, which lists the following circumstances in which wetlands may be altered: (1) exceptions consistent with the regulations, (2) utilities, (3) roads, (4) surface water management, (5) trails, (6) docks, and (7) wetlands under 2,500 square feet. DMC 14.42.320. None of these circumstances include

filling simply for the creation of more lots. Mitigation is required for filled wetlands, and two, essentially identical code sections apply and spell out the elements of mitigation sequencing, which is generally summarized as first avoid, then minimize, then mitigate. DMC 14.06.0128, 14.42.130. Additionally, mitigation measures must adequately replace wetland functions, preferably on the same development site, but in the same drainage sub-basin if done off-site. DMC 14.42.330. Finally, mitigation plans must be supported by professional studies that make specific required findings. DMC 14.42.300.

The City's interpretation of the code is that it has a logical and reasonable structure. Under the City's interpretation, a proposed wetland alteration is first considered under 14.42.320 to determine whether it qualifies as one of the expressly authorized purposes. If the purpose is authorized, then the provisions of 14.42.300 and other sections of the code regarding mitigation sequencing come into play. This position was set forth in the letter of November 16, 2007 from the City's outside attorney, Amy Pearsall.

To address Mr. Gendler's original request, the City is not prepared at this time to say that wetland alteration with off-site mitigation for Mr. Coy's preliminary plat application is authorized under the 2005 code. Rather, pursuant to the consistent interpretation of the sensitive areas regulations since 2000, certain conditions precedent outlined in Duvall Municipal Code (DMC) 14.42.320 (2005) would have to be

met, which do not exist in this particular case, before off-site mitigation would be allowed...

CP 113.

Mr. Coy's position was that he could fill any wetland for any purpose so long as he could produce either of the required findings under DMC 14.42.300 – that either the wetland had no function, or that the project would protect or replace other equivalent wetlands. CP 108. However, Mr. Coy's interpretation ignores the initial language of DMC 14.42.300 which states that any alteration must be “expressly authorized” by the code.

Development proposals on sites containing wetlands shall meet the requirements of this chapter. Wetlands and required buffers shall not be altered except as expressly authorized in this chapter and all approved alterations shall have an appropriate mitigation plan where the development review committee (DRC) determines, upon review of special studies completed by qualified professionals, that either:

- A. The wetlands does not serve any of the valuable functions of wetlands identified in this code, including but not limited to wildlife and natural drainage functions; or
- B. The proposed development would protect or enhance the wildlife, habitat, natural drainage, and/or other valuable functions of wetlands and would be consistent with the purposes of this chapter. The required studies may include habitat value, hydrology, erosion, and deposition, and/or water quality studies. Such studies shall include specific recommendation for mitigating measures which should be required as a condition for any approval for such

development. The recommendations may include, but are not limited to construction techniques, or design, drainage or density specifications.

- C. There shall be no introduction of any plant or wildlife which is not indigenous to the Pacific Northwest into any wetland sensitive area.

DMC 14.42.300 (emphasis added). Mr. Coy has obviously conflated the elements of a sufficient mitigation plan with the criteria for determining whether fill is allowed in the first place. However, the plain language of the code proves him wrong. Mr. Coy's interpretation would also render 14.42.320 of the code meaningless because its list of permitted alterations would be superseded by the provisions of 14.42.300. Any interpretation that makes a section of the code meaningless is an unreasonable and absurd result.

Mr. Coy's own consultants agreed with the City's interpretation of the code and tried in vain to persuade Mr. Coy that the City's approach was the logical one, telling Mr. Coy in no uncertain terms that the code did not allow wetland fill simply to create lots. Allison Warner, Mr. Coy's wetland consultant, advocated for the City's position with a concise presentation of the City's interpretation of the code, including an explanation of "mitigation sequencing."

Hi Jack- I just wanted to let you know that in reviewing the old code again after receiving this, the way the code is written is very specific. UDR 14.42.300 starts by saying

wetlands may only be altered as expressly allowed in the chapter. Then under wetlands allowed alterations (UDR 14.42.320), It only lists certain alterations allowed, none of which include lot allowance. Even road corridor alignment must be in the outer 75% of the buffer, and must avoid if possible. No other places in the code discuss exemptions or allowed alteration for wetlands. I am not sure where you and Neal are seeing that there is leeway on allowing wetland fill. Other places list the mitigation sequencing which says you must first avoid, then minimize, then mitigate. Just for your information.

CP 91. In another email she wrote:

...As I have stated before, it is my opinion that under the 2005 code, the language is very restrictive and explicitly states it does not allow alterations other than for roads, and utilities and other such allowed activities (which doesn't include lot allowance)...

CP 119. The opinion of Mr. Coy's wetland consultant transforms this inquiry from a theoretical one to a historical one. This Court need not make an abstract determination as to whether there is room for two opinions on the interpretation of the DMC. As an undisputed fact, two opinions actually existed within Mr. Coy's own team.

The issue of whether the City acted arbitrarily and capriciously in the statutory interpretation advanced by City attorney Amy Pearsall and planning director Doreen Booth boils down to two simple questions:

1. Was the code interpretation advanced by Ms. Pearsall and Ms. Booth, and agreed to by Mr. Coy's own wetland expert, Alison Warner, correct?

2. Even if the City's interpretation was incorrect, was there nonetheless room for two opinions?

If the Court's answer to either of these two questions is yes, then the City did not act arbitrarily and capriciously. Since there is room for two opinions, since two opinions actually existed, since the City's opinion is the more logical and reasonable, and since the City's opinion is supported by the plain language of the code, it is impossible to say the City's interpretation of its own code was arbitrary and capricious. As a matter of law, Mr. Coy fails to carry the "heavy burden" required to show a violation of the arbitrary and capricious standard.

2. Mr. Coy's Arguments Based On Other Plats Are Not Applicable

City employees are required to apply the law the way it is written. If mistakes were made in the past, current employees are required to correct those mistakes.⁵ No authority relieves them of this obligation. To put it simply, an incorrect application of the law in the past is just that -- incorrect.

Courts in Washington have universally rejected Mr. Coy's argument that prior mistakes in code enforcement somehow prevent a city from correctly enforcing its code in the present. *Dykstra v. County of*

⁵ As Ms. Booth and the City's attorney pointed out, the code interpretation applied to Mr. Coy's plat had been the City's consistent practice with numerous projects since Ms. Booth became Planning Director in 2000. CP 112, 772-74.

Skagit, 97 Wn. App. 670, 677, 985 P.2d 424 (1990) (County did not act arbitrarily and capriciously in changing practice of approving sub-standard lots — “governmental entities are not precluded from enforcing ordinances even though they may have been improperly enforced in the past”); *Department of Ecology v. Theodoratus*, 135 Wn. 2d 582, 598, 957 P. 2d 1241 (1998) (Department of Ecology action in correcting its past mistake was not arbitrary and capricious); *Buechel v. Department of Ecology*, 125 Wn. 2d 196, 211, 884 P. 2d 910 (1994) (Government action not arbitrary and capricious because “the proper action on a land use decision cannot be foreclosed because of a possible past error in another case involving different property”); *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 483, 513 P.2d 80 (1973) (“Therefore, a municipality is not precluded from enforcing zoning regulations if its officers have issued building permits allowing construction contrary to such regulations, have given general approval to violations of the regulations, or have remained inactive in the face of such violations”); *State ex rel. Miller v. Cain*, 40 Wash. 2d. 216, 225, 242 P. 2d 505 (1952) (“It has quite uniformly been held that permitting some persons to violate a zoning regulation does not preclude its enforcement against others”).

The principle set forth in these cases controls the issue here. Mr. Coy’s contention that the City improperly applied the wetland ordinances

to some developments in the 1990s is irrelevant. Even if Mr. Coy were to show that the code had been interpreted differently in the past — a task that, other than his conclusory allegation, he does not even undertake, much less accomplish⁶ — the prior mistakes by the City would not control the interpretation of the ordinance today or require the City to continue making the same mistake. Since the interpretation put forward by city attorney Amy Pearsall and city planning director Doreen Booth in 2006 and 2007 is the correct application of the wetland ordinance, Mr. Coy’s allegations about events in the 1990s are meaningless, and the City was entitled to summary judgment on the claim that the interpretation by Ms. Pearsall and Ms. Booth was arbitrary and capricious.

Mr. Coy’s argument based on prior plats also fails to change the plain language of the code. Under DMC 14.42.300, any alteration of wetlands must be “expressly authorized” by the code. The only express authorizations are listed in DMC 14.42.320, and none of them include

⁶ Mr. Coy alleges that the filling of wetlands was allowed in the 1990s and suggests that the circumstances were identical to the wetland fill that he proposed for the Yaklich plat. However, he offers no analysis of those other projects, especially with regard to whether the wetland fill was for purposes of utilities, access roads, or for exceptions under DMC 14.42.320 (A). Mr. Coy also fails to acknowledge that the agreements to fill those wetlands were achieved prior to Ms. Booth becoming planning director and that she merely carried them out. The more complete description of the allegedly inconsistent projects is contained in the Booth Declaration and the 2nd Thomas Declaration. These declarations also show that most of the inconsistencies alleged by Mr. Coy were actually wetlands under 2500 square feet, where filling is specifically allowed under the code. CP 749-54, 772-74.

filling wetlands to create more building lots. Whatever the past practice might have been, it did not include an ordinance amending the code.

Finally, Mr. Coy's argument ignores the provisions of DMC 14.42.320 that authorize the filling of small wetlands under 2,500 square feet, and that authorize the City to make exceptions to the wetlands regulations when consistent with the overall purpose of the code. DMC 14.42.320 (A), (F). Consequently, Mr. Coy's argument does not establish that the City's prior application of the code was inconsistent; it merely establishes that the code explicitly leaves room for special exceptions.

Ultimately, Mr. Coy received a special exception that no other developer received — the permission to fill a wetland simply to create lots and to compensate through off-site mitigation outside of the sub-basin in which the plat was located. Nothing in these circumstances amounts to an arbitrary and capricious act.

E. Mr. Coy's Claim Is Barred By Principles Of Estoppel And Accord and Satisfaction, Which Are Incorporated Into RCW 64.40.

The elements of estoppel consist of (1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *McDaniels v. Carlson*, 108

Wn.2d 299, 308, 738 P.2d 254 (1997). An accord and satisfaction exists when parties have a bona fide dispute, an agreement to settle that dispute, and performance of the agreement. *Paopao v. State Department Social and Health Services*, 145 Wn. App. 40, 46, 185 P.3d 640 (2008). Both principles are incorporated into the statute.

...[T]here is no “act” within the meaning of this section when the owner of the property interest agrees in writing...to the conditions or limitations imposed upon an application for a permit...

RCW 64.40.010 (6).

The City made several concessions to Mr. Coy in order to reach an agreement on his development. After the November 16, 2007 letter from the City attorney, and the earlier communications from the City, Mr. Coy knew the City interpreted the DMC as not authorizing the filling of his wetland for the purpose of creating lots. CP 112-14. Mr. Coy also knew the City was willing to compromise with him and adopt his interpretation of the code if he would document the necessary mitigation sequencing analysis. Mr. Coy agreed to provide the documentation. The City provided him the January 2, 2008 letter from Margaret Clancy spelling out the requirements of the analysis. CP 127-29. In an email to Mr. Coy and his consultants, Mr. Coy’s attorney specifically pointed out the need to obtain additional time from the City and the possibility that the City, if

Mr. Coy did not agree to the compromise, would outright deny the preliminary plat. CP 116. The City also granted two other 90-day extensions requested by Mr. Coy, one in October 2006 and one in February 2008. CP 77, 140.

The City's compromise with Mr. Coy creates an accord and satisfaction, establishes the elements of estoppel, and satisfies the exception under RCW 64.40.010 (6). The City could have brought the issue to a head at multiple points by denying the application outright. Instead, the City reached a compromise, carried out its side of the agreement, allowed Mr. Coy additional time, approved his mitigation plan, and ultimately approved the preliminary plat application. CP 112-14, 124-38, 157-63. Clear principles of accord and satisfaction and estoppel, plus the plain language of the statute, prevent Mr. Coy from accepting the benefits of the City's compromise and then filing a lawsuit alleging arbitrary and capricious action on the part of the City.

F. No Cause Of Action Exists Under RCW 64.40 When The Administrative Process Provides Relief.

Mr. Coy has no claim because his project was approved before a cause of action arose. *Brower v. Pierce County*, 96 Wn. App. 559, 566, 984 P.2d 1036 (1999). In *Brower*, the plaintiffs wished to subdivide their property and submitted their application to Pierce County's Planning and

Land Services Department (“PALS”) which determined that the plaintiffs had to undergo wetlands review for the road they wished to build. The plaintiffs disagreed and appealed the PALS determination to the hearing examiner, who agreed with the plaintiffs and reversed the PALS determination. The plaintiffs then sued alleging delay damages under RCW 64.40. *Brower*, 96 Wn. App. at 56-61. The trial court dismissed the plaintiffs’ claim and the Court of Appeals affirmed that decision on the grounds that the administrative process had provided complete relief.

The *Brower* court explained that exhaustion of remedies is intricately tied to the existence of a cause of action, and “the relief granted by the administrative remedy must be inadequate.” *Brower*, 96 Wn. App. at 563-64. The *Brower* court went on to explain that the concept of damages under the statute was limited to the time period that begins only upon completion of the administration process, and if the administrative process provides adequate relief, there are no damages. *Brower*, 96 Wn. App. at 555-66.

The plain reading of RCW 64.40 by *Brower* is not a harsh result for plaintiffs like Mr. Coy for at least two reasons. First, Mr. Coy obtained the permit he sought and cannot prove any damages within the meaning of the statute. Second, the result stems entirely from Mr. Coy’s decision not to pursue available administrative remedies early in the

process. A different result was entirely within Mr. Coy's control if he had made an appeal to the hearing examiner regarding the City staff's code interpretation, requests for engineering and arborist information, or requests for wetland studies and other additional information. CP 933-49. A request for a variance would also have given Mr. Coy a different result. If Mr. Coy had pursued either remedy, he would either have obtained complete relief, or would have triggered the arising of a cause of action under the statute and would consequently be in a position to seek damages today.

However, determining what facts might have existed if Mr. Coy had exhausted his remedies is not the question before this court. No cause of action arises under the statute until administrative remedies have been exhausted. Mr. Coy chose not to exhaust his administrative remedies and the ultimate result of the administrative process was a grant of the preliminary plat approval that he sought. Consequently, he has no claim for damages under the statute.

G. Mr. Coy Cannot Seek Damages For Fluctuation In The Value Of His Land And Offers Only Speculative Claims Of Damage.

The definition of "damages" in RCW 64.40, in relevant part, provides as follows:

...Damages must be caused by an act, necessarily incurred, and actually suffered, realized or expended, but are not

based upon diminution in value of or damage to real property, or litigation expenses.

RCW 64.40.010 (4). In *Cox v. City of Lynnwood*, 72 Wn. App. 1, 863 P.2d 578 (1993), the court held that damages based upon fluctuations in the value of property were excluded until “ the property in question has been sold and its fair market value at the time the cause of action arose has been determined.” *Cox*, 73 Wn. App. at 10.

In contravention of the statute, Mr. Coy asserts a damage claim with an amount of \$2,000,000 for “lost profits” which he calculates by subtracting the alleged 2010 property value from the alleged higher 2007 property value. Clearly, the “lost profits” element is based upon the assumption that Mr. Coy’s property has declined in value between 2007 and the present. It is precisely this “diminution in value” that RCW 64.40.010 (4) excludes from the calculation of damages. Furthermore, no lost profits have been “actually suffered, realized, or expended” within the meaning of the statute. No profit or loss can be “actually” suffered or realized until something is “actually” sold.

In addition to the fact that Mr. Coy did not ever sell his property at the “loss” which he alleges, he offers no proof that it ever could have been sold in 2007 for the “profit” he theorizes. Mr. Coy presents no purchase and sale agreement for his property, and does not identify any prospective

buyer. In fact, Mr. Coy does not even contend that his intention in 2007 was to sell the property at the preliminary plat stage, rather than to install the streets and other infrastructure himself and then sell retail-ready building lots, the damages scenario he originally advanced. CP 174, 178. The most Mr. Coy offers is to speculate that he might have made a profit “if I had been able to sell the Yaklich plat in the first quarter of 2007.” CP 221. But speculation can never amount to proof that a sale actually would have occurred. The work of an independent appraiser, Lloyd Johnson, hired by Mr. Coy’s bank in 2008, confirms the opinion of defense expert David Hunnicutt that buyers for entire preliminary plats had been absent from the Duvall market since at least mid-2006. CP 982-85, 994, 996, 1001-02.

Mr. Coy’s claim fails as a matter of law because, without proof of a prior pending sale, he cannot prove he would be in a different position today. It is undisputed that Mr. Coy’s property today is unchanged since 2006. The only difference he alleges is that its market value has declined. Since he still owns the land, and since he could not have sold it earlier, this is a loss in theory only. The legislature anticipated this situation and specifically barred this type of claim. The plain language of the statute compels the exclusion of this element of damages. Without proof of damages, Mr. Coy has no claim under RCW 64.40.

H. The Superior Court Did Not Abuse Its Discretion When It Awarded The City Its Attorney's Fees.

The prevailing party is entitled to its fees in a case brought under the statute. RCW 64.40.020 (2). The standard of review applied to a Superior Court award of attorney's fees is abuse of discretion, and an award is reversed only if the court exercised its discretion on untenable grounds of for untenable reasons. *In re Recall of Lindquist*, 172 Wn. 2d 120, 135, 258 P. 3d 9 (2011).

Mr. Coy's argument fails on multiple fronts. Perhaps the most obvious of these is its gross misstatement of the facts. For instance, Mr. Coy refers only to the City's victory on the arbitrary and capricious claim and fails to make any mention of the City's victory on the delay damages claim, on which Mr. Coy and the City brought cross-motions for summary judgment. The City not only brought its own motion, but defended against Mr. Coy's. When the City's motion exposed the weakness of Mr. Coy's claim, he was forced to voluntarily dismiss the claim. The City's victory in the cross-motions for summary judgment on the delay damages claim required substantial amounts of work to organize a large volume of documents and to chronologize and track the correspondence and progress of resolution of multiple engineering and land use issues involved in Mr. Coy's development. CP 409-574, 908-65. The City ultimately proved

that the long processing time for Mr. Coy's application was caused by Mr. Coy's own inability to provide accurate and adequate engineering and development information to the City. Nothing involving this cause of action was simple, and nothing constituted an easy victory on jurisdictional grounds.

The general rule in Washington is that the defendant is the prevailing party for purposes of an attorney fee award when the plaintiff voluntarily dismisses a cause of action. *Anderson v. Goldseal Vineyards, Inc.*, 81 Wn.2d 863, 867-68, 505 P.2d 790 (1973); *Backman v. Wilcox*, 96 Wn. App. 349, 365-66, 979 P.2d 890 (1999); *Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 296, 716 P.2d 959 (1996). The City's victory on the delay damages claim by itself justifies the attorney fees award.

Mr. Coy also has invented from scratch the notion that the City prevailed in the Superior Court based upon the lack of subject matter jurisdiction. Appellant's Brief, p. 40. In fact, none of the pleadings submitted by either party in the summary judgment motion contain even one reference to the term "subject matter jurisdiction." The City's victory on the arbitrary and capricious claim was based upon Mr. Coy's inability to prove statutorily required elements of his claim, including the existence of an "act" constituting a "final decision" of the City, the existence of

statutorily-recognized damages, and evidence proving the exhaustion of administrative remedies. The parties nowhere mentioned the concept of subject matter jurisdiction. Consequently, Mr. Coy's argument here lacks any basis in the record of the summary judgment proceedings.

Mr. Coy also mistakenly contends that no reported case exists awarding a government defendant attorney fees under RCW 64.40.020 (2). Yet Mr. Coy himself cites the *Callfas* case, which awarded attorney fee's to the City of Seattle based on the plaintiff's failure to exhaust administrative remedies. *Callfas*, 129 Wash. App. at 598.

Mr. Coy also makes the curious argument that his case was so weak it should have been dismissed early on in the proceedings.⁷ However, this argument ignores the undisputed record of measures taken by the City to resolve the case without extensive litigation efforts. Trial in this case was continued three times in order to allow Mr. Coy to negotiate a sale of the property and to allow for a mediation, which took place on June 29, 2011. CP 1023, 1028-29. When the mediation was unsuccessful,

⁷ Mr. Coy challenges the trial court's finding that his case was frivolous within the meaning of RCW 4.84.185. While this finding is not necessary to an award of attorney's fees under RCW 64.40, it was raised in the pleadings on the attorney fee motion. CP 1022-23. The finding seemed to be compelled by Mr. Coy's own logic, based on his argument that he knew from the outset that he was not seeking damages for a "final decision" within the meaning of RCW 64.40, and that he also knew that he had deliberately chosen not to exhaust his administrative remedies. He faults the City for not bringing its summary judgment motion sooner, but, since both conditions were fatal to his claim, he never should have filed this lawsuit in the first place.

the City was required to conduct and defend multiple depositions while simultaneously examining and producing numerous documents, while bringing and responding to summary judgment motions and while preparing for trial. *Id.* The Superior Court properly concluded that the City should not be penalized for its extensive efforts to reach a negotiated settlement.

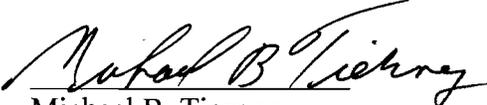
The award of attorney fees was supported by ample pleadings, declarations and documentation. CP 809-907, 1022-30. Nothing in the award constitutes an abuse of discretion, and the Court of Appeals should affirm the Superior Court's award of attorney fees.

I. The City Is Entitled To Its Attorney Fees For This Appeal.

This Court should award the City its attorney fees and costs incurred in this appeal based upon the arguments set forth in Section IV. H, and RCW 4.84.370, RCW 64.40.020 (2), and RAP 14.1 and 18.1. *Callfas*, 129 Wash. App. at 598.

Dated this 20 day of December, 2011.

TIERNEY LAW FIRM, PC

By: 
Michael B. Tierney
WSBA No. 13662
Attorney for Respondent

APPENDIX

REVISED CODE OF WASHINGTON

RCW 58.17.140

Time limitation for approval or disapproval of plats -- Extensions. (Effective until December 31, 2014.)

Preliminary plats of any proposed subdivision and dedication shall be approved, disapproved, or returned to the applicant for modification or correction within ninety days from date of filing thereof unless the applicant consents to an extension of such time period or the ninety day limitation is extended to include up to twenty-one days as specified under RCW 58.17.095(3): PROVIDED, That if an environmental impact statement is required as provided in RCW 43.21C.030, the ninety day period shall not include the time spent preparing and circulating the environmental impact statement by the local government agency. Final plats and short plats shall be approved, disapproved, or returned to the applicant within thirty days from the date of filing thereof, unless the applicant consents to an extension of such time period. A final plat meeting all requirements of this chapter shall be submitted to the legislative body of the city, town, or county for approval within seven years of the date of preliminary plat approval. Nothing contained in this section shall act to prevent any city, town, or county from adopting by ordinance procedures which would allow extensions of time that may or may not contain additional or altered conditions and requirements.

RCW 64.40.010

Definitions -- Defense in action for damages.

As used in this chapter, the terms in this section shall have the meanings indicated unless the context clearly requires otherwise.

(1) "Agency" means the state of Washington, any of its political subdivisions, including any city, town, or county, and any other public body exercising regulatory authority or control over the use of real property in the state.

(2) "Permit" means any governmental approval required by law before an owner of a property interest may improve, sell, transfer, or otherwise put real property to use.

(3) "Property interest" means any interest or right in real property in the state.

(4) "Damages" means reasonable 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 real property is granted relief as provided in RCW 64.40.020. Damages must be caused by an act, necessarily incurred, and actually suffered, realized, or expended, but are not based upon diminution in value of or damage to real property, or litigation expenses.

(5) "Regulation" means any ordinance, resolution, or other rule or regulation adopted pursuant to the authority provided by state law, which imposes or alters restrictions, limitations, or conditions on the use of real property.

(6) "Act" means 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. "Act" also means the failure of an agency to act within time limits established by law in response to a property owner's application for a permit: PROVIDED, 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.

In any action brought pursuant to this chapter, a defense is available to a political subdivision of this state that its act was mandated by a change in statute or state rule or regulation and that such a change became effective subsequent to the filing of an application for a permit.

RCW 64.40.020

Applicant for permit -- Actions for damages from governmental actions.

(1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

(2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.

(3) No cause of action is created for relief from unintentional procedural or ministerial errors of an agency.

(4) Invalidation of any regulation in effect prior to the date an application for a permit is filed with the agency shall not constitute a cause of action under this chapter.

RCW 64.40.030

Commencement of action -- Time limitation.

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.

DUVALL MUNICIPAL CODE

2.30.210 - Additional examiner findings—Preliminary plats.

When the examiner makes a decision regarding an application for a proposed preliminary plat, the decision shall include additional findings as to whether:

A.

Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and

B.

The public use and interest will be served by the platting of such subdivision and dedication.

(Ord. 1019 § 1 Exh. A (part), 2005)

Chapter 14.02

ADMINISTRATIVE MECHANISMS

Sections:

- 14.02.010 Purpose.**
- 14.02.020 Planning director.**
- 14.02.030 Planning director—Duties.**
- 14.02.040 Hearing examiner—Land use.**
- 14.02.050 Building official.**
- 14.02.060 Development review committee—Purpose.**
- 14.02.070 Development review committee—Composition.**
- 14.02.080 Development review committee—Duties.**

14.02.010 Purpose.

A. The purpose of this chapter is to define the general responsibilities of the planning director (director) and the development review committee (DRC).

B. This chapter is not intended to address the responsibilities of the director in areas outside of planning administration. (Ord. 1011 § 2 Exh. A (part), 2005)

14.02.020 Planning director.

A. The director, as the duly authorized representative of the mayor, is charged with the responsibility of drafting updates to city policies and regulations, and carrying out the provisions of the comprehensive plan and the unified development regulations (UDR) for Duvall. For the purposes of this title, all references to the “Director” refer to the planning director.

B. The director shall serve in an advisory capacity to the hearing examiner, planning commission, and city council in comprehensive planning and land use matters as set out in DMC Chapter 14.08.

C. The director shall make land use decisions as set out in DMC Chapter 14.08, Permit Processing, and other sections of this title.

D. The director, while retaining overall responsibility, may delegate specific tasks to other staff members. (Ord. 1011 § 2 Exh. A (part), 2005)

14.02.030 Planning director—Duties.

A. The director shall process land use applications in accordance with this title and shall make recommendations on development proposals. Specific responsibilities of the director include, but are not limited to:

1. Prepare supplemental land use application requirement checklists;
2. Issue, prepare and circulate State Environmental Policy Act (SEPA) determinations as required by law and serving as the responsible official;
3. Prepare and publish all public hearing notices related to land development activity;
4. Manage the DRC;
5. Provide information to the finance department regarding time and costs incurred with regard to development applications. The finance department shall be responsible for monitoring development deposit accounts, collecting development fees, and sending deposit refunds related to land use applications;
6. Process land use applications, including hiring consultants if necessary, preparing staff reports, and making recommendations to the decision maker on land use applications or making decisions as applicable;

7. Prepare and distribute agendas and minutes for planning commission, city council, and hearing examiner meetings. (Ord. 1011 § 2 Exh. A (part), 2005)

14.02.040 Hearing examiner—Land use.

The office of the land use hearing examiner, “Examiner,” is created pursuant to Chapter 35A.63.170 of the Revised Code of Washington (RCW) to hear applications for projects subject to the regulations designated in this title and the Duvall Municipal Code. Specific regulations related to the examiner are set out in Title 2 of this code. (Ord. 1011 § 2 Exh. A (part), 2005)

14.02.050 Building official.

A. The office of the building official is established to administer and enforce the building and construction codes.

B. The rules, regulations, and procedures under which the building official shall operate are established in Title 10 of this code. (Ord. 1011 § 2 Exh. A (part), 2005)

14.02.060 Development review committee—Purpose.

The purpose of a development review committee (DRC) is to create a staff committee to bring multi-disciplinary knowledge and judgment to situations that emerge through the application of these development regulations and other matters related to planning, design, and development. (Ord. 1011 § 2 Exh. A (part), 2005)

14.02.070 Development review committee—Composition.

A. A DRC is created consisting of the planning director, public works director and/or city engineer, building official and fire chief.

B. At their discretion and when the situation warrants, the DRC may also include the city attorney and other department heads. (Ord. 1011 § 2 Exh. A (part), 2005)

14.02.080 Development review committee—Duties.

A. The DRC shall review land use applications and construction drawings for consistency with city codes and regulations.

B. The DRC shall act in an advisory capacity to the director or the public works director/city engineer as applicable. (Ord. 1011 § 2 Exh. A (part), 2005)

14.06.0128 "Mitigation" means the use of any or all of the following actions that are listed in descending order of preference:

- A. Avoiding the impact all together by not taking a certain action or parts of an action;
- B. Minimizing impact by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce impact;
- C. Rectifying the impact by repairing, rehabilitating or restoring the affected sensitive areas;
- D. Reducing or eliminating the impact over time by prevention and maintenance operations during the life of the actions;
- E. Compensating for the impact by replacing, enhancing or providing substitute sensitive areas and environments;
- F. Monitoring the impact and taking appropriate corrective measures.

14.08.010.C. Project permit applications.

The following tables set out the project permit decision making and appeal processes, the division of action types into permit types, the required procedure for each permit type, and the notice requirements for project permits.

Table 14.08.010.C.1 Project Permit Applications – Action Type

Project Permit Applications – Action Type					
TYPE I	TYPE II	TYPE III	TYPE IV	TYPE V	TYPE VI
Boundary Line Adjustments	Building Permits – SEPA required	Conditional Use Permits	Rezones	Final Plats	UDR Text Amendments
Minor exterior remodels, no building permit required		Shoreline Conditional Use Permits			Annexations ⁽²⁾
Building Permits – no SEPA required		Other Construction permits – SEPA required			Shoreline Substantial Development Permits
Other Construction Permits – no SEPA required	Sensitive Areas Permits	Shoreline Variances			Comprehensive Plan Amendments
Wireless Facilities on Existing Structure – Camouflaged					
Final Site Plan Permits	Site Plans, Parks, less than ½ acre in new area	Preliminary Short Subdivisions			Street Vacations
Administrative Interpretations		Site Plans			
		Preliminary Long Subdivisions			
Shoreline Exemptions		Variances			
		Vacations or Alterations – Subdivisions			
	Reasonable Use Exceptions				

Table 14.08.010.C.2 Project Permit Applications – Decision Making and Appeal Process

Project Permit Applications – Decision Making and Appeal Process						
	TYPE I	TYPE II	TYPE III	TYPE IV	TYPE V	TYPE VI
Final Decision made by	Director	Director	Hearing Examiner	City Council	City Council	City Council
Recommendation made by	N/A	N/A	Planning Department Planning Commission ⁽¹⁾	Planning Commission Public Meeting	Engineering Department	Planning Commission
Open Record Public Hearing – Decision	No	No	Yes – Hearing Examiner	Yes – City Council	No	Yes – Planning Commission Yes – City Council
Open Record Public Hearing - Appeal	Yes	Yes	No	No	No	No
Closed Record Appeal	No	No	No	No	No	No
Appeal to:	Hearing Examiner	Hearing Examiner	King County Superior Court	King County Superior Court	King County Superior Court	King County Superior Court
Judicial Appeal	Yes	Yes	Yes	Yes	Yes	Yes

(1) Site plan applications only shall require a recommendation by both the Planning Commission and the Planning Department.

(2) Annexation petition decisions are not appealable.

Table 14.08.010.C.3 Required Procedures for Project Permit Applications

Required Procedures for Project Permit Applications						
	TYPE I	TYPE II	TYPE III	TYPE IV	TYPE V	TYPE VI
Pre-Application Meeting	No	No	Yes	Yes	No	No
Notice of Completeness	No	Yes	Yes	Yes	Yes	No
Notice of Application	No	Yes	Yes	Yes	No	No
SEPA Determination ⁽¹⁾	No	Yes	Yes	Yes	No	Yes
Notice of Hearing	No	No	Yes	Yes	No	Yes
Notice of Decision	No	Yes	Yes	Yes	Yes	No
120 Day Review ⁽²⁾	No	Yes	Yes	Yes	No	No

(1) SEPA not required for projects that are categorically exempt in accordance with DMC 14.60.

(2) 120 Day Review does not apply to preliminary or final plats. Preliminary long or short plats have a 90-day review clock and final short or long plats, a 30-day review clock in accordance with RCW 58.17.140.

DUVALL MUNICIPAL CODE

DMC 14.08.020

G.

Time Limits/Review Clock. Following are the time limits that are set out for project review.

1.

The city shall issue a notice of final decision on a project permit application for a preliminary long or short plat within ninety (90) days after the applicant is notified that the application is complete.

2.

The city shall issue a notice of final decision on a project permit application for a final plat within thirty (30) days after the applicant is notified that the application is complete.

3.

The city shall issue a notice of final decision on all other project permit applications within one hundred twenty (120) days after

the applicant is notified that the application is complete or within fourteen (14) days of approval.

4.

The city shall exclude the following period from the time limits of subsections (G)(1) through (3) of this section:

a.

Any period during which the applicant has been requested by the city to correct plans, perform required studies, or provide additional information. The period shall be calculated from the date the city notifies the applicant by mail, at a meeting, or by email that additional information is required until a date no more than fourteen (14) days after the applicant has submitted the requested information. The city shall determine if the information submitted is sufficient. If the information is not sufficient, this process will begin again;

b.

Any period of time in excess of that allowed by the city for applicant review of city comments and documents;

c.

Any period during which an environmental impact statement (EIS) is being prepared following a determination of significance;

d.

Any period for administrative appeals of project permits, if applicable.

14.66.040 - Preliminary subdivision and short subdivision review and approval criteria.

A.

Each proposed subdivision or short subdivision shall be reviewed to ensure that:

1.

The proposal conforms to the goals, policies and plans set forth in the Duvall comprehensive plan;

2.

The proposal conforms to the site and design requirements set forth in this title. No final subdivision or short subdivision shall be approved unless the requirements are met;

3.

The proposed street system and pedestrian system conform to the Duvall comprehensive plan, DMC Chapter 14.34, Design Guidelines, and the development design standards, and is laid out in such a manner as to provide for the safe, orderly and efficient circulation of vehicular and pedestrian traffic;

4.

The proposed subdivision or short subdivision will be adequately served with city-approved water and sewer, and other utilities appropriate to the nature of the subdivision or short subdivision;

5.

The layout of lots, and their size and dimensions, takes into account topography and vegetation on the site in order that buildings may be reasonably sited, and that the least disruption of the site, topography and vegetation will result from development of the lots;

6.

Identified hazards and limitations to development have been considered in the design of streets and lot layout to assure street and building sites are on geologically stable soil considering the stress and loads to which the soil may be subjected.

B.

Lack of compliance with the criteria set forth in subsection A of this section and DMC Section 14.66.050, Subdivision standards, shall be grounds for denial of a proposed subdivision or short subdivision, or for the issuance of conditions necessary to more fully satisfy the criteria.

(Ord. 1073 § 1 Exh. A (part), 2008)

14.66.050 - Subdivision standards.

A.

Subdivision Names. No subdivision shall be approved which bears a name using a word which is the same as, similar to or pronounced the same as a word in the name of any other subdivision in King County, except for the words "town," "city," "place," "court," "addition," "acres," "heights," "villa," or similar words, unless the land so divided is contiguous to the subdivision bearing the same name. All subdivisions must continue the block numbers of the subdivision of the same name last filed.

B.

Block Standards. Blocks shall have sufficient width to provide for a maximum of two tiers of lots of appropriate depths. Exceptions shall be permitted in blocks adjacent to major streets, railroads, waterways, or involving unique site conditions that make this requirement impractical.

C.

Lot Standards.

1.

Lot lines shall be at right angles to street lines or radial to curvilinear streets unless a variation will result in a better street or lot plan.

2.

No lot shall be established which is in violation of the Duvall Municipal Code.

3.

Lot shapes shall be designed to avoid awkward configuration or appendages.

4.

Each lot shall have sufficient width, area and frontage to comply with the minimum site requirements as set forth in each zoning district.

5.

The building envelope shall be shown on all lots.

D.

Exceptions to Lot Standards.

1.

Eminent Domain. Parcels smaller than otherwise permitted by Duvall Municipal Code may be created through the action of governmental agencies, including the city of Duvall by such actions as eminent domain and the splitting of a parcel by dedicated right-of-way. Wherever possible, such parcels shall be merged in title with adjacent lots to create lots in compliance with the Duvall Municipal Code.

2.

Legal lot of record, see DMC Section 14.76.080

E.

Easements.

1.

Public easements for the construction and maintenance of utilities and public facilities shall be granted to provide and maintain adequate utility service to each lot and adjacent lands. The width of the public easements shall be the minimum necessary as determined by the utility, unless the public works director determines a smaller or larger width is appropriate based on site conditions. Whenever possible, public easements shall be combined with driveways, pedestrian accessways and other utility easements.

2.

Private easements for the construction and maintenance of utilities within the subdivision or short subdivision shall be granted so that individual lots gain access to public facilities. The widths of the private easements shall be the minimum necessary as determined by the utility, unless the public works director determines a larger width is appropriate based on the site conditions.

3.

Native growth protection easements, tracts, or areas (NGPE/NGPT/NGPA) shall be granted as deemed appropriate by the city where the preservation of native vegetation benefits the

public health, safety and welfare, including control of surface water and erosion, maintenance or slope stability, visual buffering, and protection of plant and animal habitat, and in accordance with DMC Chapter 14.42, Sensitive Area Regulations. The NGPE shall impose upon all present and future owners and occupiers of land subject to the easement the obligation, enforceable on behalf of the public by the city of Duvall, to leave undisturbed all trees and other vegetation within the easement, except that area required for future construction of multi-purpose low impact trails and city-approved utilities. The vegetation within the easement may not be cut, pruned, covered by fill, removed, damaged or enhanced without express written permission from the city of Duvall.

4.

The placement of any building on or over an easement for utility mains or lines shall be prohibited. An easement may be used for more than one utility, vehicle, or pedestrian access, provided the city finds the multi-use appropriate. Restoration of the site shall be required following any excavation or other disturbance permitted by the terms of the easement. Appropriate landscaping as determined by the city is permitted, and may be required, in an easement.

5.

Easements required by this section shall be granted by the terms and conditions of such easements being shown on the final subdivision or short subdivision or by separate instrument.

F.

Water Supply. All lots shall be served by a water system approved by the city of Duvall. Any common water system serving more than one lot shall be provided by the applicant and dedicated to the appropriate water purveyor. Such water supply systems shall be designed and constructed according to all applicable provisions of the Duvall Municipal Code and the development design standards, the standards and specifications of the water purveyor, and the applicable rules and regulations of the state.

G.

Sewage Disposal. All lots shall be served by the sanitary sewer system of the city of Duvall. Except for private side sewers, any common sanitary sewer system serving more than one lot shall be provided by the applicant and dedicated to the city. Such sewer systems shall be designed and constructed according to all applicable provisions of the

development design standards and the standards and specifications on file in the office of the director of public works.

H.

Storm Drainage.

1.

All lots shall be provided with adequate storm drainage connected to the storm drainage system of the city or other system approved by the public works director.

2.

Where a public street is to be dedicated or improved by the applicant as a condition of preliminary approval, the applicant shall provide and dedicate any required storm drainage system in the right-of-way.

3.

When appropriate, storm drainage facilities shall include suitable on-site detention and/or retention facilities.

4.

Storm drainage shall be provided in accordance with development design standards as amended and standards and specifications as approved by the public works director.

I.

Watercourses. When required by the city, the developer of a subdivision shall enhance a stream which traverses or abuts the subdivision in accordance with the specifications and standards approved by the city.

J.

Underground Utilities. All permanent utility service to lots shall be provided from underground facilities as set forth in the development design standards regulating underground wiring. The applicant shall be responsible for complying with the requirements of this section, and shall make all necessary arrangements with the utility companies and other persons or corporations affected by installation of such underground facilities in accordance with the rules and regulations of the public utility commissioner of the state of Washington.

K.

Water and Sewer Standards.

1.

Design Standards. All city water and sewer facilities shall be designed in compliance with the development design standards.

2.

Construction Standards. All city water and sewer facilities shall be constructed in compliance with the development design standards.

L

Street Standards. The location, design and construction of all streets shall comply with the following requirements:

1.

Subdivisions shall provide direct access to at least one existing improved and publicly dedicated street. The internal vehicular network of the subdivision can include alleys and private tracts consistent with the Duvall development design standards.

2.

When a subdivision is abutting an existing street(s) with a right-of-way of lesser width than specified by city ordinances or abuts a roadway(s) that is not built to city street standards, or abuts a roadway(s) that is in substandard condition, the applicant may be required as a condition of approval to deed additional right-of-way width, and/or to improve the existing and additional right-of-way to the design specifications of the public works director. The city may require dedication of right-of-way in excess of standards in the following cases:

a.

Where additional width is necessary to maintain continuity with the adjoining rights-of way;

b.

Where additional width is necessary to maintain alignment with adjoining streets and sidewalks improvements; and

c.

Where additional width is necessary to insure that all streets intersect at right angles.

3.

Dead-end streets shall be used on local streets only and shall terminate in a cul-de-sac. Streets which dead-end, and which would normally be continued if the adjacent property were developed, shall be shown as temporary turnarounds. The land beyond the normal right-of-way for such streets shall revert back to the abutting property owners when the street is continued.

4.

The street within and adjacent to a site plan or subdivision shall be classified and designed to comply with the Duvall

comprehensive plan and the Duvall development design standards.

5.

Proposed streets should extend to the boundary lines of the proposed site plan or subdivision in order to provide for the future development of adjacent tracts unless prevented by natural or man-made conditions or unless such extension is determined to be unnecessary by the public works director.

6.

The street pattern for subdivisions should be designed to expedite traffic movement, reduce conflicts between various types of land uses, including pedestrians, and coordinate the location of proposed buildings with loading and parking facilities.

7.

Streets shall be designed in accordance with the development design standards and DMC Chapter 14.34, Design Guidelines.

M.

Street Right-of-Way and Pavement Widths.

1.

The street right-of-way in or along the boundary of a subdivision shall conform to the provisions set forth in the development design standards.

2.

When a subdivision or an area within a subdivision is set aside for commercial or industrial uses, or where probable future conditions warrant, greater widths than those provided in the development design standards, may be required.

3.

Where topographical requirements necessitate either cuts or fills for the proper grading of the streets, additional right-of-way widths or slope easements may be required.

N.

Street Names.

1.

Public street names for streets located on the city grid as determined by the building official shall conform to the city's street numbering system.

2.

Public and private street names for streets not located on the city grid shall be determined by the building department. Such names

shall be taken from a list of historical names prepared by the Duvall historical society and updated from time to time.

3.

Signs shall be installed as designated by the public works director before final subdivision approval.

4.

Street name determination and addressing shall also be consistent with DMC Chapter 8.06

O.

Street Lights.

1.

All subdivisions shall include underground electric service, light standards, wiring and lamps for street lights according to development design standards for underground wiring and the specifications and standard set forth in DMC Chapter 14.46, Exterior Lighting Standards.

2.

The applicant shall submit for approval by the city the design of the light standards.

3.

The subdivider shall install such facilities and make the necessary arrangements with the serving electric utility.

P.

Survey Required. The survey of every proposed subdivision or short subdivision shall be made by or under the supervision of a registered land surveyor. All surveys shall conform to standard practices and principles for land surveying as set forth in the laws of the state of Washington. Subdivision control and staking traverses shall close within an error of one foot in five thousand (5,000) feet. Primary survey control points shall be referenced to section corners and monuments.

Q.

Monuments.

1.

Permanent survey control monuments shall be provided for all final subdivisions and short subdivisions at:

a.

All controlling corners on the boundaries of the subdivision or short subdivision;

b.

The intersection of centerlines of roads within the subdivision or short subdivision; and

c.

The beginning and ends of curves on centerlines or points of intersections on tangents.

2.

Permanent survey control monuments shall be set in two-inch pipe, twenty-four (24) inches long, filled with concrete or shall be constructed of an approved equivalent. Permanent survey control monuments within a street shall be set after the street is paved. Every lot corner shall be marked by a three-fourths inch galvanized iron pipe or approved equivalent, driven into the ground. If any land in a subdivision or short subdivision is contiguous to a meandered body of water, the meander line shall be re-established and shown on the final subdivision or short subdivision.

R.

Public Accessways.

1.

When necessary for public convenience or safety, the developer shall improve and dedicate to the public accessways to connect to cul-de-sac streets, to pass through oddly shaped or unusually long blocks and to provide for networks of public paths creating access to schools, parks, shopping centers, transit stops or other community services.

2.

The accessway shall be of such design, width and location as reasonably may be required to facilitate public use. Where possible, said dedications may also accommodate utility easements and facilities.

S.

Clearing and Grading. All clearing and grading shall be conducted in compliance with the provisions set forth in DMC Chapter 10.12, Clearing and Grading and DMC Chapter 14.34, Design Guidelines.

T.

Other Standards. The proposal conforms to all other standards set forth in this title, other applicable provisions of the Duvall Municipal Code, and the development design standards.

U.

Fire Department. The proposal conforms to all standards of the Duvall-King County Fire District 45.

14.66.060 - Preliminary subdivision and short subdivision.

A.

Decision Criteria. As a basis for approval, approval with conditions or denial of a preliminary subdivision or short subdivision, the decision maker shall determine if appropriate provisions have been made for implementing the purpose, criteria, and standards set forth in this chapter, and all other applicable code provisions.

B.

Effect of Preliminary Subdivision Approval. Approval of the preliminary subdivision or short subdivision shall constitute authorization for the applicant to prepare and implement construction drawings, and, upon approval of those drawings, develop the subdivision facilities and improvements in strict accordance with the plans and specifications as approved by the city subject to any conditions imposed by the decision maker.

C.

Time Limits—Approval Within Ninety (90) Days. A preliminary subdivision shall be approved, approved with conditions, denied or returned to the applicant for modification or correction within ninety (90) days from the date of filing of a complete application unless the applicant agrees to an extension of the time period in writing. Provided, should an environmental impact statement (EIS) be required per RCW 43.21C.030, the ninety (90) day period shall not include the time spent in preparing and circulating the EIS by the city. A preliminary subdivision application shall not be deemed "filed" until all of the application requirements of this section have been met.

1.

Short subdivisions shall be approved, disapproved, or returned to the applicant within thirty (30) days from the date of filing a complete application thereof, unless the applicant consents to an extension of such time period.

D.

Limitation on Preliminary Approval. Final approval must be acquired within five years of preliminary approval, after which time the preliminary subdivision approval is void. The decision maker may grant an extension for one year if the applicant has attempted in good faith to submit the final subdivision within the five-year time period; provided, however, the applicant must file a written request with the original

decision maker requesting the extension at least thirty (30) days before expiration of the five-year period.

Chapter 14.42 Sensitive Area Regulations.

14.42.010 Purpose.

The purpose of this chapter is to identify environmentally sensitive areas and to supplement the development requirements contained in the various use classifications by providing additional controls without violating any citizens constitutional rights. Erosion, flood, landslide, seismic, steep slope and streams, wetlands and protective buffers, as defined in this chapter, constitute environmentally sensitive areas that are of special concern to Duvall. The standards and mechanisms established in this overlay district are intended to protect these environmentally sensitive features in Duvall. By regulating development and alterations to sensitive areas this overlay district seeks to implement the goals and policies of the Washington State to:

- A. Protect members of the public and public resources and facilities from injury, loss of life, property damage or financial losses due to flooding, erosion, landslides, seismic events, soil subsidence or steep slope failures;
- B. Protect unique, fragile and valuable elements of the environment including wildlife and its habitat;
- C. Mitigate unavoidable impacts on environmentally sensitive areas by regulating alterations in and adjacent to sensitive areas;
- D. Prevent cumulative adverse environmental impacts to water availability, water quality, wetland and streams;
- E. Protect the public trust as to navigable waters and aquatic resources;
- F. Meet the requirements of the National Flood Insurance Program and maintaining Duvall as an eligible community for federal flood insurance benefits;
- G. Alert members of the public including, but not limited to appraisers, owners, potential buyers or lessees to the development limitations of sensitive areas;
- H. Provide city officials with sufficient information to protect sensitive areas;
- I. Implement the policies of the State Environmental Policy Act, Revised Code of Washington (RCW) 43.21C, the Washington State Growth Management Act (GMA), and the Duvall comprehensive land use and utility plans which call for protection of the natural environment and the public health and safety. (Ord. 765 § 1 (part), 1996)

14.42.020 Applicability.

A. When any provision of any other chapter of this code conflicts with this chapter, that which provides more protection to the sensitive areas shall apply unless specifically provided otherwise in this section; provided, however, that municipal provisions shall not conflict with preemptive controlling state regulations such as the Shorelines Master Program, Chapter 173-19 WAC.

B. Prior to fulfilling the requirements of the sensitive area regulations, Duvall shall not grant any approval or permission to alter the conditions of any land, water or vegetation, or to construct or alter any structure or improvements including but not limited to the following:

1. Building permit, commercial or residential;
2. Binding site plan;
3. Conditional use permit;
4. Street use permit;
5. Grading and clearing permit;
6. shoreline conditional use permit;
7. Shoreline environmental redesignation;
8. Shoreline substantial development permit;
9. Shoreline variance;
10. Special use permit;
11. Subdivision (short or long);
12. Unclassified use permit;
13. Variance;
14. Zone reclassification; or
15. Any subsequently adopted permit or required approval not expressly exempted by this chapter. (Ord. 765 § 1 (part), 1996)

14.42.030 Sensitive area review.

A. When a development proposal includes or is adjacent to one or more sensitive areas the applicant shall meet with the development review committee (DRC) prior to the submission of any development application to discuss the goals, purposes, objectives and requirements of this overlay district.

B. The development review committee (DRC) shall perform a sensitive area review for any application for a development proposal on a site which includes or is adjacent to one or more sensitive areas unless otherwise provided in this chapter. As part of all development applications, Duvall shall verify the information submitted by the applicant to:

1. Confirm the nature and type of the sensitive areas;
2. Evaluate the need for any special sensitive area studies or the adequacy of any such studies submitted with the application;
3. Determine whether the development proposal is consistent with these sensitive area regulations;
4. Determine whether any proposed alterations to sensitive areas are necessary;
5. Determine if the mitigation and monitoring plans and bonding measures proposed by the applicant are sufficient to protect the public health, safety and welfare consistent with the goals, purposes, objectives and requirements of this overlay district.

C. The development review committee (DRC) shall include in every report recommendation or administrative decision on a development application such findings as may be necessary to address the provisions of this chapter.

D. The city may approve, approve with conditions, or deny any development proposal in order to comply with the requirements of this chapter and to carry out the goals, purposes and objectives of these regulations.

E. Approval of a development proposal pursuant to the provisions of this chapter does not discharge the obligation of the applicant to comply with the other provisions of this code. (Ord. 765 § 1 (part), 1996)

14.42.040 General exemptions.

The following are exempt from the provisions of this chapter and any administrative rules adopted thereunder:

- A. Emergencies that threaten the public health, safety and welfare;
- B. Structures lawfully in existence on the date these regulations become effective and that do not meet the setback or buffer requirements of these regulations for wetlands, streams or steep slope hazard areas may be remodeled, reconstructed or replaced provided that the new construction or related activity does not further intrude into a stream, wetland, steep slope, or associated buffers and is subject to the restrictions of the flood hazard areas for reconstruction; provided further, however, that new construction or related activity shall not be considered further intruding into an associated buffer so long as the footprint of the structure lying within the sensitive area is not increased by more than one thousand (1,000) square feet and no portion of the structure is located closer to the stream, wetland or steep slope than the existing structure;
- C. For the following agricultural activities in existence on the date these regulations become effective:
 1. Grazing of livestock within any animal density limitations established by these regulations,
 2. Mowing of hay, grass or grain crops,
 3. Tilling, discing, planting, seeding, harvesting, and relative activities for pasture, food crops, grass seed or sod, provided that such activities shall not involve the conversion of any Class 1 or 2 wetland or buffer of Class 1 or 2 stream or buffer not currently under agricultural use and shall not take place on steep slopes,
 4. Normal and routine maintenance of existing irrigation and drainage ditches; provided, however, that this exception shall not apply to any ditches used by salmonids,
 5. Normal and routine maintenance of farm ponds, fish ponds and livestock watering ponds; provided that, such activities shall not involve conversion of any wetland not currently being used for such activity;
- D. For the following electric, natural gas, cable communications and telephone utility-related activities:
 1. Normal and routine maintenance or repair of existing utility structures or right-of-way,
 2. Relocation of electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of fifty-five thousand (55,000) volts or less only when required by a local governmental agency which approves the new location of the facilities,

3. Relocation of natural gas, cable communications, telephone facilities, lines, pipes, mains, equipment or appurtenances only when required by a local governmental agency which approved the new locations of the facilities,

4. Installation or construction in improved Duvall road right-of-way, and replacement, operation or alteration of all electric facilities, lines, equipment or appurtenances,

5. Installation or construction in improved city (Duvall) road right-of-way, and replacement, operation, repair or alteration of all natural gas, cable communications, and telephone facilities, lines, pipes, mains, equipment or appurtenances;

E. Public agency development proposals only to the extent of any construction contract awarded before the effective date of these regulations provided that any regulation in effect at the time of such award shall apply to the proposal. (Ord. 765 § 1 (part), 1996)

14.42.050 Sensitive area special studies.

A. Required. An applicant for a development proposal that includes, or is adjacent to, or could have probable significant adverse impacts to sensitive areas shall submit such studies as are required by Duvall to adequately evaluate the proposal and all probable impacts. The study shall be prepared by a qualified sensitive area consultant as may be required by the development review committee (DRC) to adequately evaluate the potential impacts to such areas from the proposal. The applicant shall pay for all costs of such study.

B. Waivers. The development review committee (DRC) may waive the requirement for a special study if there is a substantial showing that:

1. There will be no alteration of the sensitive area or required buffer;

2. The development proposal will not impact sensitive areas in a manner contrary to the goals, purposes, objectives and requirements of this chapter;

3. The minimum standards required by this chapter are met.

C. Exceptions. No special study is required for the following development proposals:

1. A residential building permit for the remodel of a structure when no alteration of the sensitive area will occur as a result of the remodel activity or any associated construction for additional parking;

2. A residential building permit for a lot which was subject to a previous special study of sensitive areas, provided that the previous special study adequately identified the impacts associated with the current development proposal;

3. The development review committee (DRC) shall make such field investigations as are necessary to determine if the criteria for an exception are satisfied.

D. Contents. Sensitive area special studies shall identify and characterize any sensitive area as a part of the larger development proposal site, assess any hazards to the proposed development, and assess the impacts of any alteration proposed for a sensitive area. Studies shall propose adequate mitigation, maintenance, and monitoring plans and bonding measures. Sensitive area special studies shall include a scale map of the development proposal site and a written report. The development review committee (DRC) may, in its discretion, require such supplements or amendments to the study as it may deem necessary to develop a reasonably comprehensive understanding of the site conditions and potential impacts.

E. Independent Review. Based on a review of the information contained in the sensitive area study and the conditions of the development proposal site, the DRC may require independent review of any such study. This independent review shall be performed by qualified sensitive area consultants selected by the city and paid for by the applicant. The purpose of such independent review is to assist the city in evaluating the effects on sensitive areas which may be caused by a development proposal and to facilitate the decision making process. (Ord. 765 § 1 (part), 1996)

14.42.060 Reasonable use exception.

A. If the application of the regulations in this chapter would deny all reasonable use of the property, development may be allowed which is consistent with the general purposes of these regulations and the public interest.

B. An application for a sensitive areas reasonable use exception shall be filed with the city and shall be heard by the hearing examiner, who shall seek legal advice from and consult with the city attorney and

shall issue a final decision. The fee and costs, procedural and appellate provisions established in this code shall apply.

C. The hearing examiner, in recommending approval of the reasonable use exception, must determine that:

1. Application of the sensitive area regulations would deny all reasonable use of the property;
2. There is no other reasonable use with less impact on the sensitive area;
3. The proposed development does not pose an unreasonable threat to the public health, safety or welfare on or off the development proposal site;
4. Any alterations permitted to these sensitive areas shall be the minimum necessary to allow for reasonable use of the property.

D. Any authorized alteration of a sensitive area under this section shall be subject to conditions established by the city and shall require mitigation under an approved mitigation plan.

E. The procedures and fees applying to zoning variances shall also apply to applications for reasonable use exceptions. (Ord. 765 § 1 (part), 1996)

14.42.070 Appeals.

A. Any decision to require a special sensitive area study pursuant to this chapter may be appealed by the applicant to the hearing examiner. The fee and costs, procedural and appellate provisions established in this code for variances shall apply.

B. Any decision to approve, condition or deny a development proposal based on the requirements of the sensitive area regulation may be required in conjunction with and according to the review procedures for the permit or approval involved.

C. Any decision authorized by the sensitive area regulations where no review process exists for the permit or approval involved beyond the development review committee (DRC), may be appealed by an aggrieved party to the hearing examiner pursuant to this title. The fee and costs, procedural and appellate provisions established in this title for variances shall apply. (Ord. 765 § 1 (part), 1996)

14.42.080 Variances.

A. Variances from the standards of this chapter may be authorized in accordance with the procedures set forth in this title. The appeal provisions of this title shall apply to variance applications under the sensitive area regulations of this chapter.

B. In granting a variance from the provisions of the sensitive area regulations the following standards shall apply:

1. Because of special circumstances applicable to the subject property, including size, shape, topography, location or surroundings, or the size or nature of the sensitive area, the strict application of the sensitive area regulations would deprive the subject property of rights and privileges enjoyed by other properties in the vicinity and in the same zone.
2. The granting of the variance is the minimum necessary to accommodate the development proposal and will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated, or contrary to the goals and purposes of the sensitive area regulations. (Ord. 765 § 1 (part), 1996)

14.42.090 Density credits.

A. Sensitive areas and their buffers may be used in the calculation of allowed residential density whenever two or more residential lots or two or more multifamily dwelling units are created subject to the following limitations:

1. Full density credit shall be allowed for erosion and seismic hazard areas. Flood hazard areas outside of streams, wetlands, or associated buffers shall be counted for full density credit.
2. No density credit shall be allowed for streams and wetlands.
3. Partial to full density credit shall be allowed for steep slopes, landslide hazard areas and required buffers for any sensitive area according to the following table:

Percent of Site in Buffers and/or Sensitive Areas	Density Credit
--	----------------

11 - 10 percent	100 percent
11 - 20	90
21 - 30	80
31 - 40	70
41 - 50	60
51 - 60	50
61 - 70	40
71 - 80	30
81 - 90	20
91 - 99	10

B. Allowed density on sites containing sensitive areas shall be calculated as follows:

1. Determine the percentage of site area in sensitive areas and buffers by dividing the total area in steep slopes, landslide hazard areas and required buffers for any sensitive areas by the total site area.

2. Multiply the density credit percentage set forth in subsection A by the site area in sensitive areas and buffers to determine the effective sensitive area.

3. Add the effective sensitive area to the site area not in sensitive areas or buffers. The resulting acres shall be considered the effective site area for purposes of determining the allowable dwelling units pursuant to the zoning regulations.

4. By way of example, the density credit provisions apply as follows for a ten (10) acre site under the R8 zone:

a. The square feet in the site is four hundred thirty-five thousand six hundred (435,600), of which wetlands include forty-five thousand (45,000) square feet, steep slopes include eighty-two thousand (82,000) square feet, and required buffers include sixty thousand (60,000) square feet.

b. Divide the total amount of sensitive areas and buffers (one hundred eighty-seven thousand (187,000) square feet) by the total site (four hundred thirty-five thousand (435,000) square feet) equal to 42.9 percent.

c. Apply the density credit from the chart (equal to a sixty (60) percent density credit where the amount of site in a sensitive area is between forty-one (41) to fifty (50) percent).

d. Multiply the steep slopes and required buffers only (one hundred forty-two thousand (142,000) square feet since no credit is received for wetlands) by the density credit of sixty (60) percent equal to eighty-five thousand two hundred (85,200) square feet.

e. Add the unconstrained site area (two hundred forty-eight thousand six hundred (248,600) square feet) plus the sensitive area density credit (eighty-five thousand two hundred (85,200) square feet) to create the effective site area for density calculations (three hundred thirty-three thousand eight hundred (333,800) square feet).

f. Divide the total effective site area by forty-three thousand five hundred sixty (43,560) square feet to determine acreage (three hundred thirty-three thousand eight hundred (333,800) square feet/ (forty-three thousand five hundred sixty (43,560)) square feet/acre = 7.66 acres) and multiply by the density allowed in the R8 zone (7.66 acres times eight dwelling units/acre) = sixty-one (61) dwelling units maximum (note that the maximum density may be reduced by other provisions of this code).

C. The density transfer can only be utilized within the development proposal site. The applicant may cluster and configure the site's development to accommodate the transfer of density but cannot change the type of uses or housing products allowed within the zone proper. (Ord. 765 § 1 (part), 1996)

14.42.100 Notice on title.

A. The owner of any property on which a development proposal is submitted shall file for record with the records and elections division of King County a notice approved by the city. Such notice shall provide notice in the public record of the presence of a sensitive area or buffer, the application of these regulations to the property, and that limitations on actions in or affecting such areas or buffers may exist.

B. The applicant shall submit proof that the notice has been filed for public record before Duvall shall approve any development proposal for such site. The notice shall run with the land and failure to provide such notice to any purchaser prior to transferring any interest in the property shall be a violation of this section. (Ord. 765 § 1 (part), 1996)

14.42.110 Sensitive area tracts and setback areas.

A. Sensitive area tracts shall be used to protect those sensitive areas and buffers listed below in subdivision or binding site plans to which they apply. The sensitive areas shall be designated on the plat or site plan and recorded with the records and elections division of King County in a form approved by the city.

1. All landslide hazard areas and buffers;
2. All steep slope hazard areas and buffers;
3. All wetlands and buffers;
4. All streams and buffers.

B. Any required sensitive area tract shall either be held in an undivided interest by each owner of a building lot within the development and shall pass with the ownership of the lot or shall be held by an incorporated homeowner's association or other legal entity which assures the ownership and protection of the tract.

C. Sensitive area setback areas shall delineate wetlands, streams, steep slopes hazard areas, landslide hazard areas and required buffers in development proposals for building permits, short subdivisions, and grading and clearing permits. The setback area shall be identified on a site plan which is filed as an attachment to the notice of title. (Ord. 765 § 1 (part), 1996)

14.42.120 Temporary marking, permanent survey marking and signs.

A. Temporary Marking. Prior to commencing construction activities on a development proposal site, the applicant shall mark, as required by the development review committee (DRC), sensitive areas in a highly visible manner, such as yellow caution tape. These areas must remain so marked until all development proposal activities in the vicinity of the sensitive area are completed.

B. Survey Markers. Permanent survey stakes using iron or cement markers as established by current survey standards shall be set delineating the boundary between adjoining property and the sensitive area tracts.

C. Signs. The boundary between a sensitive area tract and adjacent land shall be identified using permanent signs. (Ord. 765 § 1 (part), 1996)

14.42.130 Mitigation.

A. "Mitigation" means the use of the following actions that are listed in descending order of preference:

1. Avoiding the impact all together by not taking a certain action or parts of an action;
2. Minimizing impact by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce impact;
3. Rectifying the impact by repairing, rehabilitating or restoring the sensitive areas;
4. Reducing or eliminating the impact over time by prevention and maintenance operations during the life of the action;
5. Compensating for the impact by replacing, enhancing or providing substitute sensitive areas and environments;
6. Monitoring the impact and taking appropriate corrective measures.

B. It is the goal of Duvall to achieve no overall net losses of wetlands and stream functions and values and to measure the quantity and quality of wetlands and stream resource base.

C. Mitigation measures shall be in place to protect the sensitive areas and its buffer from alterations occurring on all or portions of the site that are being developed.

D. A mitigation plan shall be required for the design, implementation, maintenance and monitoring of mitigation. (Ord. 765 § 1 (part), 1996)

14.42.140 Monitoring.

A. The development review committee (DRC) may require monitoring when mitigation is required for the alteration of a sensitive area.

B. Where monitoring reveals a significant deviation from predicted impacts or a failure of mitigation measures, the applicant shall be responsible for appropriate corrective action which, when approved, shall be subject to monitoring. (Ord. 765 § 1 (part), 1996)

14.42.150 Enforcement.

A. The development review committee (DRC) or its designee shall have a right to enter upon any property at reasonable times and to make such inspections as are necessary to determine compliance with the provisions of this chapter or the conditions imposed pursuant to this chapter. The city shall make a reasonable effort to locate the owner or persons in charge and request entry.

B. The DRC is further authorized to take such actions as may be necessary to enforce the provisions of this chapter. (Ord. 765 § 1 (part), 1996)

14.42.160 Liberal construction.

This chapter shall be liberally construed to give full effect to the objective and purposes for which it was enacted. (Ord. 765 § 1 (part), 1996)

14.42.170 Administrative rules.

The development review committee (DRC) shall have the authority to adopt administrative rules consistent with the provisions of this chapter that are necessary for the implementation of sensitive area regulations. (Ord. 765 § 1 (part), 1996)

14.42.180 Vegetation management plan.

A. For all development proposals where preservation of existing vegetation is required by this chapter, a vegetation management plan shall be submitted and approved prior to issuance of the permit or other request for permission to proceed with an alteration.

B. The vegetation management plan shall identify the proposed clearing limits for the project and any areas where vegetation in a sensitive area or its buffer is proposed to be disturbed.

C. Where clearing includes cutting any merchantable stand of timber, the vegetation management plan shall include a description of proposed logging practices which demonstrate how all sensitive areas will be protected in accordance with the provision of this chapter.

D. Clearing limits as shown on the plan shall be marked in the field in a prominent and durable manner. Proposed methods of field marking shall be reviewed and approved by the DRC prior to any site alteration. Field marking shall remain in place until the certificate of occupancy or final project approval is granted.

E. The vegetation management plan may be incorporated into a temporary erosion and sediment control plan or landscaping plan where either of these plans is required by other laws or regulations.

F. Submittal requirements for vegetation management plans shall be set forth in administrative rules. (Ord. 765 § 1 (part), 1996)

14.42.190 Building setbacks.

A. Unless otherwise provided, buildings and other structures shall be set back a distance of fifteen (15) feet from the edges of all sensitive area buffers or from the edges of all sensitive areas, if no buffers are required.

B. The following may be allowed in the building setback area:

1. Landscaping;

2. Uncovered decks;

3. Building overhangs if such overhangs do not extend more than eighteen (18) inches into the setback area;

4. Impervious ground surfaces, such as driveways and patios, provided that such improvements may be subject to special drainage provisions specified in administrative rules adopted for the various sensitive areas. (Ord. 765 § 1 (part), 1996)

14.42.200 Erosion hazard areas--Definition.

A. "Erosion hazard areas" means those areas of Duvall containing soils which, according to the U.S. Department of Agriculture (USDA) Soil Conservation Service, the Snoqualmie Pass Area Soil Survey dated 1990, the King County Soils Survey dated 1973, and any subsequent revision or additions thereto, may experience severe to very severe erosion hazard.

B. This group of soils includes but is not limited to the following that occur on slopes of fifteen (15) percent or greater:

1. Alderwood gravelly sandy loam (Agd);

2. Alderwood-Kitsap (AkF);
3. Beausite gravelly sandy loam (BeD and BeF);
4. Kitsap silty loam (KpD);
5. Ovall gravelly sandy loam (OvD and OvF);
6. Ragnar fine sandy loam (RaD);
7. Ragnar-Indianola Association (RdE);
8. Any occurrence of River Wash (Rh); or
9. Coast beaches (Cb). (Ord. 765 § 1 (part), 1996)

14.42.210 Erosion hazard areas-- Development standards and permitted alterations.

Alteration of a site containing an erosion hazard area shall meet the following requirements:

A. Clearing on an erosion hazard area is allowed only from April 1st to November 1st, except that up to fifteen thousand (15,000) square feet may be cleared on any lot, subject to any other requirement for vegetation retention.

B. Only that clearing necessary to install temporary sedimentation and erosion control measures shall occur prior to clearing for roadways or utilities.

C. Clearing limits for roads, sewer, water and stormwater utilities, and temporary erosion control facilities shall be marked in the field and approved by the development review committee (DRC) prior to any alteration of existing native vegetation.

D. Clearing for roads and utilities shall remain within construction limits which must be marked in the field prior to commencement of site work.

E. The authorized clearing for roads and utilities shall be the minimum necessary to accomplish project specific engineering designs and shall remain within approved rights-of-way.

F. Clearing of trees permitted pursuant to the requirements of these regulations may occur in conjunction with clearing for roadways and utilities.

G. All trees and understory shall be retained on lots or parcels during clearing for roadways and utilities provided that understory damages during approved clearing operations may be pruned or replaced.

H. Damage to vegetation retained during initial clearing activities shall be minimized by directional felling of trees to avoid sensitive areas and vegetation to be retained, and preparation and approval of a skidding plan aimed at minimizing damage to soil and understory vegetation.

I. Retained trees, understory and stumps may subsequently be cleared only if such clearing is a specific element of residential, multifamily or commercial structure site plan approval.

J. Hydroseeding and/or other erosion control methods as required in temporary erosion control plans shall be required.

K. All development proposals shall submit an erosion control plan consistent with this section and other adopted requirements prior to receiving approval. (Ord. 765 § 1 (part), 1996)

14.42.220 Flood hazard areas-- Components.

A. "Flood hazard areas" means those areas of Duvall subject to inundation by the base flood. These include, but are not limited to streams, lakes, wetlands and closed depressions. A "flood hazard area" consists of the following components:

1. Floodplain. The total area subject to inundation by the base flood;

2. Flood Fringe. That portion of the floodplain outside of the zero-rise floodway which is covered by floodwaters during the base flood. It is generally associated with standing water rather than rapidly flowing water;

3. Federal Emergency Management Agency (FEMA) Floodway. The channel of the stream and that portion of the adjoining floodplain which is necessary to contain and discharge the base flood flow without increasing the base flood elevation more than one foot;

4. Zero-Rise Floodway. The channel of the stream and that portion of the adjoining floodplain which is necessary to contain and discharge the base flood flow without any measurable increase in flood heights. A measurable increase in base flood height means a calculated upward rise in the base flood elevation, equal to or greater than 0.01 foot, resulting from a comparison of existing conditions and changed conditions directly attributable to development in the floodplain. This definition is broader than that of the Federal Emergency Management Agency floodway, but would always include the FEMA floodway. The boundaries of the one hundred (100) year floodplain as shown on the Flood Insurance Study are

considered the boundaries of the zero-rise floodway unless otherwise delineated by a special sensitive areas study.

B. The DRC shall determine the flood hazard area after obtaining, reviewing and utilizing base flood elevations and available floodway data for a flood having a one percent change or being equaled or exceeded in any given year, often referred to as the one hundred (100) year flood. The base flood is determined for existing conditions, unless a basin plan including projected flows under future developed conditions has been completed and adopted, in which case these future flow projections shall be used. In areas where the flood insurance study for King County includes detailed base flood calculations, those calculations may be used until projections of future flows are completed and approved by King County. (Ord. 765 § 1 (part), 1996)

14.42.230 Flood hazard areas--Protection mechanisms and permitted alterations.

A. Development proposals on sites containing a flood hazard area shall meet the requirements of this chapter. In addition to the provisions of this chapter, development proposal sites on or adjacent to a flood hazard area shall also meet the requirements for buffers, sensitive area tracts, building setback lines, permitted alterations, mitigation and monitoring for the streams, wetlands or other areas which form constituent elements of the floodplain.

B. For all new structures or substantial improvements, the applicant shall provide certification by a professional civil engineer or land surveyor licensed in the state of:

1. The actual as-built elevation of the lowest floor, including basement;
2. If applicable, the actual as-built elevation to which the structure is floodproofed.

C. For the purposes of this chapter, the term "substantial improvement" means any repair, reconstruction or improvement of a structure, the cost of which equals or exceeds fifty (50) percent of the market value of the structure either:

1. Before the improvement or repair is started; or
2. If the structure has been damaged, and is being restored, before the damage occurred.

D. The engineer or surveyor shall indicate if the structure has a basement.

E. The development review committee (DRC) shall maintain the certifications required by this section for public inspections.

F. In all flood hazard areas, the development review committee (DRC) shall honor all existing contractual obligations with any federal agency. (Ord. 765 § 1 (part), 1996)

14.42.240 Flood fringe area outside the zero-rise floodway.

A. Development proposals shall not reduce the effective base flood storage volume of the floodplain. Grading or other activity which would reduce the effective storage volume shall be mitigated by creating compensatory storage on the site or off the site if legal arrangements can be made to assure that the effective compensatory storage volume will be preserved over time.

B. No structure shall be allowed which would be at risk due to stream bank destabilization including, but not limited to, that associated with channel relocation or meandering.

C. All elevated construction shall be designed and certified by a professional structural engineer licensed by the state, and shall be approved by the development review committee (DRC) prior to construction.

D. Subdivisions, short subdivisions and binding site plans shall meet the following requirements;

1. New building lots shall contain five thousand (5,000) square feet or more of buildable land outside the zero-rise floodway, and building setback areas shall be shown on the face of the plat to restrict permanent structures to this buildable area.
2. All utilities and facilities, such as sewer, gas, electrical and water systems shall be located and constructed consistent with the following subsection requirements.
3. Base flood data and flood hazard notes shall be shown on the face of the recorded plat, including, but not limited to, the base flood elevation, required flood protection elevations, and the boundaries of the floodplain and the zero-rise floodway, if determined.
4. The following note shall appear on the face of the recorded plat for all affected lots:

Notice: Lots and structures located within flood hazard areas may be inaccessible by emergency vehicles during flood events. Residents and property owners should take appropriate advance precautions.

E. New residential structures and substantial improvements of existing residential structures shall meet the following requirements:

1. The lowest floor shall be elevated to the flood protection elevation.
2. Portions of a structure which are below the lowest floor area shall not be fully enclosed. The areas and rooms below the lowest floor shall be designed to automatically equalize hydrostatic and hydrodynamic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for satisfying this requirement shall meet or exceed the following minimum criteria:
 - a. A minimum of two openings on opposite walls having a total open area of not less than one square inch for every square foot of enclosed area subject to flooding shall be provided.
 - b. The bottom of all openings shall be no higher than one foot above grade.
 - c. Openings may be equipped with screens, louvers or other coverings or devices if they permit the unrestricted entry and exit of floodwaters.

F. New residential construction and substantial improvements of existing commercial, industrial, or other nonresidential structures shall meet the following criteria:

1. Meet the elevation requirements for residential construction;
2. Floodproof the structure to the flood protection elevation and meet the following criteria:
 - a. The floodproofing must be certified by a professional civil or structural engineer registered in the state, stating that the floodproofing methods are adequate to withstand the flood-depths, pressures, velocities, impacts, uplift forces, and other factors associated with the base flood. After construction, the engineer shall certify that the permitted work conforms with the approved plans and specifications.
 - b. Approved building permits for floodproofed nonresidential structures shall contain a statement notifying applicants that flood insurance premiums shall be based on rates for structures which are one foot below the floodproofed level.

G. Construction for new and reconstructed residential and nonresidential structures shall meet the following criteria:

1. Use materials and methods which are resistant to and minimize flood damage;
2. Floodproof to or elevate above the flood protection elevation, all electrical, heating, ventilation, plumbing, air conditioning equipment, and other utility and service facilities.

H. All new construction shall be anchored to prevent flotation, collapse or lateral movement of the structure.

I. For all mobile homes, all standards for flood hazard protection for conventional residential construction shall apply. All manufactured mobile homes must be anchored and shall be installed using methods and practices that minimize flood damage. For new mobile home parks, for expansions to existing mobile home parks, and for existing mobile home parks where the repair/reconstruction of the streets, utilities, and pads equals or exceeds fifty (50) percent of the value of the streets, utilities, pads before repair/reconstruction has commenced, all standards for floodhazard protection applicable for residential reconstruction shall apply to the mobile homes within the park.

J. Utilities shall meet the following requirements:

1. All new and replacement utilities including, but not limited to, sewage treatment facilities shall be floodproofed to or elevated above the flood protection elevation.
2. Sewage facilities shall be floodproofed to the flood protection elevation.
3. Aboveground utility transmission lines, other than electric transmission lines, shall only be allowed for the transport of nonhazardous substances.
4. Buried utility transmission lines transporting hazardous substances (as defined by the Washington State Hazardous Waste Management Act in RCW 70.1-5.005) shall be buried at a minimum depth of four feet below the maximum depth of scour for the base flood, as predicted by a professional civil engineer licensed by the state, and shall achieve sufficient negative buoyancy so that any potential for flotation or upward migration is eliminated.

K. Critical facilities may be allowed within the flood fringe of the floodplain, but only when no feasible alternative site is available. All such proposed uses shall be evaluated through the conditional use permit process of the zoning code. Critical facilities constructed within the flood fringe shall have the lowest floor

elevated to three or more feet above the base flood elevation. Floodproofing and sealing measures shall be taken to ensure that hazardous substances will not be displaced by or released into floodwaters. Access routes elevated to or above the base flood elevation shall be provided to all critical facilities from the nearest maintained public Street or roadway.

L. Duvall shall review all development permits to determine that all necessary permits have been obtained as required by federal or state law including Section 404 of the Federal Water Pollution Control Act Amendments of 1972. (Ord. 765 § 1 (part), 1996)

14.42.250 Zero-rise floodway.

A. Any activities allowed within the zero-rise floodway shall conform to conditions of this section as well as all requirements which apply to the flood fringe outside the zero-rise floodway. The more restrictive conditions shall apply where a conflict exists.

B. No development activity shall reduce the effective storage volume of the floodway.

C. No development proposal, including permitted new construction or reconstruction, shall cause any increase in base flood elevation unless the following conditions are met:

1. Amendments to the Flood Insurance Rate Map are adopted by FEMA, in accordance with 44 CFR 70, to incorporate the increase to the base flood elevation; and

2. Appropriate legal documents are prepared in which all property owners affected by the increased flood elevations consent to the impacts on their property. These documents shall be filed with the title of record for the affected properties.

D. Post or piling construction techniques which permit water flow beneath a structure must be used.

E. All temporary structures or substances hazardous to public health, safety and welfare, except for hazardous household substances or consumer products containing hazardous substances, shall be removed from the zero-rise floodway during the flood season from September 30th to May 1st.

F. New residential or nonresidential structures shall meet the following requirements:

1. The structures must be outside the FEMA floodway.

2. The structures must be on a lot legally in existence at the time the regulations in this chapter become effective.

3. The structure must be on a lot which contains less than five thousand (5,000) square feet of buildable land outside the zero-rise floodway.

4. The structure must meet the construction standards of the flood fringe area outside of the zero-rise floodway.

G. Utilities shall be located in the zero-rise floodway only when no other location is practicable, and shall meet the minimum criteria set forth in the flood fringe area outside of the zero-rise floodway and the following requirements:

1. Construction of sewage treatment facilities shall be prohibited.

2. Utility transmission lines transporting hazardous substances shall be buried at a minimum depth of four feet below the maximum depth of scour for the base flood as predicted by a professional civil engineer licensed by the state and shall achieve sufficient negative buoyancy so that any potential for flotation or upward migration is eliminated.

H. Critical facilities shall not be constructed in the zero-rise floodway.

I. Installations or structures which are floodway dependent may be located in the floodway if the development proposal is approved by all other agencies with jurisdiction and meets all standards in the flood hazard areas including the flood fringe area and zero-rise floodway. Such installations include, but are not limited to:

1. Dams or diversions for water supply, flood control, hydroelectric production, irrigation or fisheries enhancement;

2. Flood damage reduction facilities, such as levees and pumping stations;

3. Stream bank stabilization structures where no feasible alternative exists to protect public or private property;

4. Boat launches and related recreation structures;

5. Bridge piers and abutments;

6. Fisheries enhancement or stream restoration projects. (Ord. 765 § 1 (part), 1996)

14.42.260 FEMA floodway.

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A. Any activities allowed within the FEMA floodway must conform to all requirements which apply to the zero-rise floodway in addition to the conditions of this section. Where any conflict exists the more restrictive conditions shall apply.

B. No development proposal including, but not limited to, permitted new construction or reconstruction, shall cause any increase in the base flood elevation.

C. Construction or placement of new residential or nonresidential structures is prohibited within the FEMA floodway.

D. Substantial improvements of existing residential structures in the FEMA floodway must meet the requirements set out in WAC 173-158-070 as amended. Such substantial improvement is presumed to produce no increase in base flood elevation and shall not require special studies to establish this fact. (Ord. 765 § 1 (part), 1996)

14.42.270 Landslide hazard areas-- Protection mechanisms and permitted alterations.

Development proposals on sites containing landslide hazard areas shall meet the following requirements:

A. Buffers. A minimum buffer of fifty (50) feet shall be established from all edges of landslide hazard areas and from landslide hazard areas with slopes less than forty (40) percent unless these areas are approved for alteration pursuant to subsection D of this section. Existing native vegetation within the buffer area shall be maintained, and the buffer shall be extended beyond these limits as required to mitigate steep slope and erosion hazards, or as otherwise necessary to protect the public health, welfare and safety.

B. Sensitive Area Tracts. Any landslide hazard area and buffer shall be placed in a sensitive area tract in the development proposal.

C. Building Setback Lines. Building setback lines of fifteen (15) feet shall be required from the edge of a landslide hazard area buffer.

D. Alterations to landslide hazard areas and buffers may be allowed only as follows:

1. A landslide hazard area located on a slope forty (40) percent or steeper shall be altered only as allowed under the standards for steep slope hazard areas.

2. A landslide hazard area, located on a slope of less than forty (40) percent, may only be altered in the following circumstances:

a. If the development proposal will not decrease slope stability on adjacent properties; and
b. If the landslide hazard area can be modified or the development proposal can be designed so that the landslide hazard to the property and adjacent property is eliminated or mitigated and the development proposal on that site is certified as safe by a licensed geologist or geotechnical engineer.

3. Where such alterations are approved, buffers and sensitive areas tracts will not be required. (Ord. 765 § 1 (part), 1996)

14.42.280 Seismic hazard areas--Protection mechanisms and permitted alterations.

A. Development proposal on sites containing mapped seismic hazard areas may make alterations to a seismic hazard area only when the applicant demonstrates and Duvall concludes that:

1. Evaluation of site-specific subsurface conditions shows that the proposed development site is not located in a seismic hazard area.

2. Mitigation is implemented which renders the proposed development as safe as if it were not located in a seismic hazard area.

B. Development proposals will be subject to two levels of review standards based on occupancy types: critical facilities and standard structures. The review standards for critical facilities will be based on larger earthquake recurrence intervals than the earthquakes considered for standard occupancy structures. Until such time as the DRC adopts administrative rules in this area, the administrative rules adopted by King County shall be applied. (Ord. 765 § 1 (part), 1996)

14.42.290 Steep slope hazard areas-- Protection mechanisms and permitted alterations.

A. Buffers. A development proposal on a site containing a steep slope hazard area shall meet the following requirements:

1. A minimum buffer shall be established at a horizontal distance of fifty (50) feet from the top, toe and along side of slopes forty (40) percent or steeper. Existing native vegetation within the buffer area shall be

maintained and the buffer shall be extended beyond these limits as required to mitigate landslide and erosion hazards, or as otherwise necessary to protect the public health, safety and welfare.

2. The buffer may be reduced to a minimum of ten (10) feet when an applicant demonstrates to the development review committee (DRC) pursuant to a special study that the reduction will adequately protect the proposed development and the sensitive site.

B. Sensitive Areas Tracts. Any continuous steep slope hazard area and its buffers shall be placed in separate sensitive areas tracts in development proposals.

C. Building Setback Lines. A building setback line will be established at a distance of fifteen (15) feet from the edge of the buffer.

D. Alterations. Alterations to steep slopes shall be allowed only as follows:

1. Steep slopes may be used for approved surface water conveyance as specified in the King County Surface Water Design Manual. Installation techniques shall minimize disturbance to the slope and vegetation.

2. Construction of public and private trails may be allowed on steep slopes provided they receive site specific approval by the DRC as guided by the construction and maintenance standards in the US Forest Service "Trails Management Handbook" (FSH 2309.18, June 1987 as amended) and "Standard Specifications for Construction of Trails" (EM-7720-102, June 1984 as amended) but in no case shall trails be constructed of concrete, asphalt or other impervious surfaces which would contribute to surface water run-off, unless such construction is necessary for soil stabilization or soil erosion prevention.

3. Construction of public and private utility corridors may be allowed on steep slopes provided that a special sensitive area study indicates that such alteration will not subject the area to the risk of landslide or erosion.

4. Limited trimming and limbing of vegetation on steep slopes shall be allowed for the creation and maintenance of view provided that the soils are not disturbed and the activity is subject to the approval by the development review committee (DRC).

E. Limited Exemptions. The following are exempt from the provisions of this section:

1. Slopes forty (40) percent and steeper with a vertical elevation change of up to twenty (20) feet may be exempted from the provisions of this section based on the DRC's review of a soils report prepared by a geologist or geotechnical engineer which demonstrates that no adverse impact will result from the exemption.

2. Any slope which has been created through previous legal grading activities may be regarded as part of an approved development proposal. Any slope which remains equal to or in excess of forty (40) percent following site development shall be subject to the protection mechanisms for steep slopes.

F. Removal or Introduction of Vegetation on Landslide or Steep Slopes. Unless otherwise specified, the following restrictions apply to vegetation removal or introduction in steep slope hazard areas, landslide hazard areas and their buffers:

1. There shall be no removal of any vegetation from any steep slope hazard area or buffer except for the limited plant removal necessary for surveying purposes and for the removal of hazardous trees determined by the development review committee (DRC) to be unsafe.

2. On slopes which have been disturbed by human activity or infested by noxious weeds, replacement with native species or other appropriate vegetation may be allowed subject to approval by the development review committee (DRC) of an enhancement plan. (Ord. 765 § 1 (part), 1996)

14.42.300 Wetlands--Provisions.

Development proposals on sites containing wetlands shall meet the requirements of this chapter. Wetlands and required buffers shall not be altered except as expressly authorized in this chapter and all approved alterations shall have an appropriate mitigation plan where the development review committee (DRC) determines, upon review of special studies completed by qualified professionals, that either:

A. The wetland does not serve any of the valuable functions of wetlands identified in this code, including but not limited to wildlife habitat and natural drainage functions; or

B. The proposed development would protect or enhance the wildlife, habitat, natural drainage, and/or other valuable functions of wetlands and would be consistent with the purposes of this chapter. The required studies may include habitat value, hydrology, erosion, and deposition, and/or water quality studies. Such studies shall include specific recommendation for mitigating measures which should be

required as a condition for any approval for such development. The recommendations may include, but are not limited to construction techniques, or design, drainage or density specifications.

C. There shall be no introductions of any plant or wildlife which is not indigenous to the Pacific Northwest into any wetland sensitive area. (Ord. 765 § 1 (part), 1996)

14.42.310 Wetlands--Standards.

A. Buffers.

1. All buffers are measured from the wetland edge as marked in the field.

2. The following buffers are minimum requirements:

a. Class 1 wetlands shall have a one hundred (100) foot buffer.

b. Class 2 wetlands shall have a fifty (50) foot buffer.

c. Class 3 wetlands shall have a twenty-five (25) foot buffer.

d. Any wetland restored, relocated, replaced or enhanced because of wetland alterations should have at least the minimum buffer required for the highest wetland class involved.

e. Wetlands within twenty-five (25) feet of the toe of slopes equal to or greater than thirty (30) percent but less than forty (40) percent, shall have the following minimum buffers:

i. Where the horizontal length of the slope including small benches and terraces is within the buffer for that wetland class, the buffer width shall be the greater of:

A. The minimum for that wetland class;

B. Twenty-five (25) feet beyond the top of the slope.

ii. Where the horizontal length of the slope extends beyond the minimum buffer for that wetland class, the buffer shall extend to a point twenty-five (25) feet beyond the minimum buffer for that wetland class.

iii. The development review committee (DRC) may recommend buffer averaging instances where it will provide additional resource protection provided that the total area on-site contained in buffers remains the same.

B. Additional Buffer Requirements for Wetlands. The development review committee (DRC) may recommend increased buffer widths as necessary to protect wetlands. The additional buffer widths and other issues may be determined by criteria set forth in administrative rules and include, but are not limited to, critical drainage areas, location of hazardous materials, critical fish and wildlife habitat, landslide or erosion hazard areas adjacent to wetlands, groundwater recharge and discharge, and the location of trail or utility corridors.

C. Sensitive Area Tracts and Setback Areas for Wetlands. Wetlands and their tracts shall be placed in a separate sensitive area tract and/or setback area.

D. Building Setback Lines. Unless otherwise specified, a minimum setback line of fifteen (15) feet shall be required from the edge of a wetland buffer. Prohibitions on the use of hazardous or toxic substances and pesticides or certain fertilizers in this setback area may be imposed.

E. Permanent Survey Marking, Signs and Fencing.

1. Prior to altering any sensitive area on a development proposal site, the applicant shall mark the sensitive area and buffers.

2. Prior to approval or issuance of permits for master plan developments, subdivisions, short subdivisions, commercial or residential building permits, the common boundary between a wetland or associated buffer and the adjacent land shall be identified using permanent signs as required in this chapter. (Ord. 765 § 1 (part), 1996)

14.42.320 Wetlands--Permitted alterations.

A. Exceptions. The development review committee (DRC) may grant exceptions from the wetland requirements of these regulations in accordance with the allowances of this chapter.

B. Utilities.

1. Construction of utilities shall be permitted in wetland buffers only when no practical alternative location is available and the utility corridor meets the criteria established by the development review committee (DRC) including but not limited to requirements for installation, maintenance and replacement of vegetation.

2. Construction of sewer lines may be permitted in wetland buffers when the applicant demonstrates it is necessary for gravity flow and meets the requirements of this section. Joint use of the sewer utility corridor by other utilities may be allowed.

a. Corridors shall not be allowed when the wetland and buffer is used by species listed as endangered or threatened by the federal government or state, or the presence of critical or outstanding actual habitat for those species or heron rookeries or raptor nesting trees.

b. Corridor alignment, including any allowed maintenance roads, shall follow a path beyond a distance from wetland edges equal to seventy-five (75) percent of the buffer width.

c. Corridor construction and maintenance shall protect the wetland and buffer environment, shall be aligned to avoid cutting trees greater than twelve (12) inches in diameter at breast height when possible, and shall not use pesticides, herbicides, and other hazardous or toxic substances.

d. Corridor shall require an additional, adjacent undisturbed buffer width equal to the proposed corridor width including any allowed maintenance roads.

e. Corridors shall be revegetated with appropriate vegetation at preconstruction densities or greater immediately upon completion of construction or as soon thereafter as possible and the sewer utility shall ensure that such vegetation survives.

f. Any additional corridor access for maintenance shall be provided as much as possible at specific points rather than by a parallel road. If parallel roads are necessary they shall be of a minimum width but no greater than fifteen (15) feet; shall be maintained without the use of herbicides, pesticides, or other hazardous or toxic substances; and shall be contiguous to the location of the utility corridor on the side away from the stream.

C. Surface Water Management. The following surface water management activities may be allowed only if they meet the following requirements:

1. New surface water discharges to wetlands from detention facilities, presettlement ponds, or other surface water management structures may be allowed provided that the discharge does not increase the rate of flow nor decrease the water quality of the wetland.

2. Wetlands shall not be used for retention/detention facilities.

3. Use of wetland buffers for activities such as energy dissipators and associated pipes may be allowed only if the applicant demonstrates:

a. No practical alternative exists;

b. The functions of the buffer or the wetland are not adversely impacted.

D. Trails. Construction of public and private trails may be allowed in wetland buffers only upon approval of the development review committee (DRC) and pursuant to the following guidelines:

1. Trail surfaces shall not be of impervious materials.

2. Where trails are provided, buffers shall be expanded, where possible, equal to the width of the trail corridor including disturbed areas.

E. Docks. Construction of a dock, pier, moorage, float or launch facility may be permitted subject to the approval of the development review committee (DRC).

F. Isolated wetlands are Class 3 wetlands whose total size is less than two thousand five hundred (2,500) square feet excluding buffers, where they are hydrologically isolated from other wetlands or streams, and which do not have permanent open water. Up to three isolated wetlands per twenty (20) acres may be altered per development proposal site by combining their functions and values into one large wetland relocated on site pursuant to a mitigation plan. The replacement wetland shall include enhancement for wildlife habitat. (Ord. 765 § 1 (part), 1996)

14.42.330 Wetlands--Mitigation requirements.

A. Mitigation shall be conducted pursuant to the requirements of this chapter.

B. Standards for restoration, enhancement or replacement:

1. Restoration is required when a wetland or its buffer has been altered in violation of sensitive area regulations or any prior regulations. The following minimum performance standards shall be met for the restoration of a wetland, provided that if it can be demonstrated by the applicant that greater functional and habitat values can be obtained, these standards may be modified:

a. The original wetland configuration should be replicated including depth, width, length and gradients at the original location.

b. The original soil type and configuration should be replicated.

- c. The edge and buffer configuration should be restored to original condition.
 - d. The wetland, edge and buffer should be replanted with vegetation which replicates the original in species, sizes and densities.
 - e. The original function values should be restored including water quality and wildlife habitat.
2. Replacement is required when an approved development proposal alters a buffer. The minimum standards required for restoration of a wetland shall be as described by replacement wetlands.
 3. Enhancement may be allowed when a development proposal will alter a wetland but will improve the habitat and/or hydrologic functions. Surface water management or flood control alternations shall not be considered enhancement, unless other functions and values are simultaneously increased. Minimum performance standards for enhancement shall be established by the development review committee (DRC) to allow for site-specific criteria.
 4. Replacement or enhancement for approved wetland alternations shall comply with these requirements:
 - a. Unless otherwise approved, all alteration of wetlands shall be replaced or enhanced on-site using the following formulas: Class 1 and 2 wetlands on a two to one basis and Class 3 wetlands on a one to one basis with equal to greater biological values including habitat value, and with equivalent hydrological values including storage capacity.
 - b. The development review committee (DRC) may consider and approve off-site replacement or enhancement where the applicant can demonstrate that the off-site location is in the same drainage subbasin and that greater biologic and hydrologic values will be achieved. The replacement/enhancement formulas required above shall apply for the off-site replacement.
 5. Wetponds established and maintained for control of surface water shall not constitute replacement or enhancement for wetland alterations.
 6. Monitoring shall be required in accordance with the provisions of this chapter. (Ord. 765 § 1 (part), 1996)

14.42.340 Streams--Development standards.

A. Stream Buffers.

1. All buffers shall be measured from the ordinary high water mark as identified in the field or, if that cannot be determined, from the top of the bank. In braided channels, the ordinary high water mark or top of bank shall be determined so as to include the entire stream feature.
2. The following buffers on each side of the ordinary high water mark are minimum requirements:
 - a. Class 1 streams shall have a one hundred (100) foot buffer.
 - b. Class 2 streams used by salmonids shall have a one hundred (100) foot buffer.
 - c. Class 2 streams shall have a fifty (50) foot buffer.
 - d. Class 3 streams shall have a twenty-five (25) foot buffer.
 - e. When the ordinary high water mark of any stream is within twenty-five (25) feet of the toe of slopes equal to or greater than thirty (30) percent but less than forty (40) percent the following minimum buffers shall be provided:
 - i. Where the horizontal length of the slope including small benches and terraces is within the buffer for that stream class, the buffer shall be the greater of the minimum buffer for that stream class or twenty-five (25) feet beyond the top of the slope.
 - ii. Where the horizontal length of the slope extends beyond the minimum buffer for that stream class, the buffer shall extend to a point twenty-five (25) feet beyond the minimum buffer for that stream class.
 - f. Any stream adjoined by riparian wetland or other adjacent sensitive area shall have the buffer which applies to the wetland or other adjacent sensitive area unless the stream buffer requirement is more expansive.
 - g. Any stream restored, relocated, replaced or enhanced because of alternations should have at least the minimum buffer required for that class of stream involved.
3. The development review committee (DRC) may recommend buffer averaging in instances where it will provide additional natural resource protection provided that the total area on-site contained in buffer remains the same.

B. Additional Buffer Requirements for Streams. The development review committee (DRC) shall require increased buffer widths as necessary to protect streams. The additional buffer widths and other issues shall be determined by criteria set forth in administrative rules and include, but not limited to, critical

drainage areas, location of hazardous materials, critical fish and wildlife habitat, landslide or erosion hazard areas, groundwater recharge and discharge, and the location of trail or utility corridors.

C. Sensitive Area Tracts and Setback Areas for Streams. Streams and their buffers shall be placed in a separate sensitive area tract as required in this chapter.

D. Building and Setback Lines. Unless otherwise specified, a minimum building setback line of fifteen (15) feet shall be required from the edge of the stream buffer. Prohibitions on the use of hazardous or toxic substances and pesticides or certain fertilizers in this area may be imposed.

E. Permanent Survey Markings, Signs and Fencing. The permanent survey markings, signs and fencing requirements of this chapter shall apply. (Ord. 765 § 1 (part), 1996)

14.42.350 Streams--Permitted alterations.

A. Exceptions. The development review committee may grant exceptions from the stream requirements of these regulations in accordance with the provisions of this chapter.

B. Stream Crossings. Stream crossings may be allowed only if they meet all of the following requirements:

1. All road crossings shall use bridges or other construction techniques which do not disturb the stream bed or bank; provided, however, in the case of Class 2 or 3 streams, bottomless culverts or other appropriate methods demonstrated to provide fisheries protection may be used if the applicant demonstrates that such methods and their implementation will pose no harm to the stream or inhibit the migration of fish.

2. All crossings shall be constructed during summer low flow and be timed to avoid stream disturbance during periods when use is critical to salmonids.

3. Crossings shall not occur over salmonid spawning areas unless no other possible crossing site exists.

4. Bridge piers or abutments shall not be placed within the FEMA floodway or the ordinary high water mark.

5. Crossings shall not diminish the flood-carrying capacity of the stream.

6. Underground utility crossings shall be laterally drilled and located at a depth of four feet below the maximum depth of scour for the base flood predicted by a civil engineer licensed by the state.

7. Crossings shall be minimized and serve multiple purposes and properties whenever possible.

C. Relocations. The following relocations may be allowed if they meet requirements and are approved by the development review committee (DRC):

1. Class 2 streams shall not be relocated except for public road projects which have been authorized by the development review committee (DRC).

2. Class 3 streams may be relocated under a mitigation plan for the purpose of enhancement of in-stream resources. Appropriate floodplain protection measures must be used. The relocation shall occur on-site, provided that upon demonstration that any on-site relocation is impracticable, the development review committee (DRC) may consider off-site relocation if the location is in the same drainage subbasin, subject to applicant providing all necessary easement and waivers from affected property owners.

3. An applicant must demonstrate, based on information provided by a civil engineer and a qualified biologist, that:

a. The equivalent base flood storage volume and function will be maintained.

b. There will be no adverse impact to local groundwater.

c. There will be no increase in velocity.

d. There will be no interbasin transfer of water.

e. Performance standards as set out in the mitigation plan are met.

f. The relocation conforms to other applicable laws.

g. All work will be carried out under the direct supervision of a qualified biologist.

D. Trails. Construction of public and private trails may be allowed in stream buffers only upon approval by the development review committee (DRC) and pursuant to the following guidelines:

1. Trail surfaces shall not be of impervious materials, except that impervious public multipurpose trails like the Burke-Gilman Trail may be allowed if they meet all other requirements including water quality.

2. Where trails are provided, buffers shall be expanded, where possible, equal to the width of the trail corridor including disturbed areas.

E. Stream Channel Stabilization. Stream channels may be stabilized when movement of the stream channel threatens existing residential or commercial structures, public improvements, unique natural

resources or the only existing access to property and is done in accordance with the requirements of this chapter.

F. Surface Water Management. Surface water discharges to streams from detention facilities, presettlement ponds or other surface water management structures may be allowed provided that the discharge complies with the provisions of the surface water design manual.

G. Utilities.

1. Construction of utilities shall be permitted in stream buffers only when no practical alternative location is available and the utility corridor meets the criteria of the development review committee (DRC) including, but not limited to, requirements for installation, replacement of vegetation and maintenance.

2. Sewer utility corridors may only be located in stream buffers when the applicant demonstrates it is necessary for gravity flow. Joint use of the sewer utility corridor by other utilities is allowed. The requirements for utility corridors defined in this chapter shall also apply to streams.

H. Enhancement.

1. Enhancement of streams, not associated with any other development proposal may be allowed when enhancement would enhance stream functions, as determined by the development review committee (DRC) and any county or state agency with jurisdiction. Such enhancement shall be performed under a plan for the design, implementation, maintenance and monitoring prepared by a civil engineer and a qualified biologist and carried out under the direct supervision of a qualified biologist pursuant to criteria set out by the development review committee (DRC).

2. Minor stream restoration projects for fish habitat enhancement by a public agency, whose mandate includes such work, unassociated with mitigation of a specified development proposal and not to exceed twenty-five thousand dollars (\$25,000.00) in cost, may be allowed. Such projects are limited to placement of rock weirs, log controls, spawning gravel, and other specific salmonid habitat improvements and shall involve hand labor and light equipment only, to be performed under the direct supervision of a qualified biologist.

I. Drainage Ditch Maintenance. Roadside drainage ditches that carry streams with salmonids may be maintained through use of best management practices development in consultation with county, state and federal agencies with expertise and/or jurisdiction. These practices shall be subject to the approval of the development review committee (DRC). (Ord. 765 § 1 (part), 1996)

14.42.360 Streams--Mitigation requirements.

A. Mitigation shall be conducted pursuant to the requirements of this chapter.

B. Restoration is required when a stream or its buffer has been altered in violation of this title or any prior ordinance applying to the treatment of streams, or when an unapproved or unanticipated alternation occur during the construction of an approved development proposal, provided that a mitigation plan for the restoration demonstrates that:

1. The stream is degraded and will not be further degraded by the restoration activity.

2. The restoration will reliably and demonstrably improve the water quality and fish and wildlife habitat of the stream.

3. The restoration will have no lasting significant adverse impact on any in-stream functions.

4. All work will be carried out under the direct supervision of a qualified biologist.

C. The following minimum performance standards shall be met for restoration of a stream, provided that these standards may be modified if the applicant can demonstrate that greater habitat value can be obtained:

1. Natural channel dimensions should be replicated including identical depth, width, length and gradient at the original location, and the original horizontal alignment (meander lengths) should be replaced.

2. The bottom should be restored with identical or similar materials.

3. The bank and buffer configuration should be restored to the original condition.

4. The channel, bank and buffer areas should be replanted with native vegetation which replicates the original vegetation in species, sizes, and densities.

5. The original habitat value should be recreated.

D. Replacement or enhancement is required when the development review committee (DRC) permits or approves the alteration of a stream or buffer. There shall be no net loss of stream functions on a development proposal site and no impact on stream functions above or below the site due to approved alterations.

1. When an approved alteration involves the relocation of a stream, the performance standards identified above are required in order to replicate the structure and function of the original stream, unless the applicant can demonstrate that greater habitat value can be obtained through varying these standards.

2. Enhancement, when allowed, should improve the functions and values of the stream. Surface water management or flood control alterations shall not be considered enhancement unless other functions and values are simultaneously increased.

3. Replacement or enhancement for streams shall be accomplished in streams, and shall occur on-site unless the applicant demonstrates that on-site replacement or enhancement is not possible, that the off-site alternative is in the same drainage basin, and that greater biological and hydrological value will be derived.

4. Monitoring shall be required as provided in this chapter. (Ord. 765 § 1 (part), 1996)

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DECLARATION OF SERVICE

I certify that on the 14th day of December, 2011, I caused a true and correct copy of this Respondent's Brief to be served on the following in the manner indicated below:

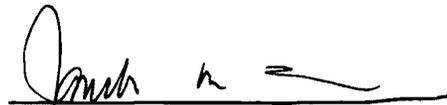
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DATED this 21st day of December, 2011 at Mercer Island, Washington.


Janelle M. Elrod

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