No. 44404-6-II

COURT OF APPEALS, DIVISION 2
OF THE STATE OF WASHINGTON

WOODS VIEW II, LLC and DARLENE PIPER,

Appellants/Cross-Respondents,

v.

KITSAP COUNTY,

Respondent/Cross-Appellant.

On Appeal From Pierce County Superior Court
The Hon. Susan Serko
Pierce County Superior No. 11-2-11450-9

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellants Woods View II, LLC ("WVII") and Darlene Piper ("Piper") spent several years acquiring nearly twenty acres in Kitsap County, and planning for the development of 78 homes on that property. The project complied with all State and County land use requirements, the property was vested for the proposed development, and WVII obtained all permits and approvals necessary from the County for the development to occur. However, behind the scenes, County political leaders did not want the development and were trying to prevent it. Acting on the back-channels direction of the Board of Commissioners, the County engaged in a four-year campaign to delay and interfere with, and ultimately scuttle, the project. Due to the County's delay and interference, WVII was unable to complete the project, the property was lost to foreclosure, and Piper, its principal who had personally guaranteed hundreds of thousands of dollars of WVII's debt, lost her life savings and went bankrupt.

WVII and Piper filed this action against the County to recover the damages caused by its improper delay and interference. Mere days before trial, the trial court dismissed on summary judgment, without explanation, all of the Appellants' damages claims, even those for which the County had not requested dismissal. This Court should reverse the trial court's dismissal and permit the Appellants' claims to be decided by a jury.

II. ASSIGNMENT OF ERROR

1. The trial court committed error when it dismissed all of Appellants' damages claims on summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court commit error when it dismissed all of Appellants' damages claims on summary judgment, even though Appellants raised genuine issues of material fact?

2. Were Appellants' claims barred by statutes of limitations?

3. Were Appellants' tortious interference claims barred by collateral estoppel?

4. Were Appellants' tortious interference and negligence claims barred by the *Noerr-Pennington* doctrine?

5. Were Appellants' tortious interference and negligence claims barred by the absence of proximate cause?

6. Did the trial court commit error when it dismissed Appellants' takings claims, when the County did not request dismissal of these claims in its motion for summary judgment?

IV. STATEMENT OF THE CASE

A. Facts giving rise to lawsuit.

In 1909, parts of Kitsap County were platted with lots measuring 40' x 100'. CP 240. WVII acquired several of these contiguous platted lots,

totaling 19.76 acres. *Id.*; CP 29. Under applicable health regulations, these lots were too small to support individual septic systems, and there was no public sewer. CP 240-241. Washington State Department of Health ("DOH") regulations permitted waste treatment for residential developments to occur by means of a "Large Onsite Sewer System" ("LOSS") when certain conditions were met. CP 241. A LOSS does not require a single septic system for each residence, but instead utilizes a shared waste treatment system and drainfield. *Id.*[1] WVII proposed a residential development for the "Woods View" property, utilizing a LOSS. CP 29. If a LOSS was used for waste treatment, 78 single-family homes could be built in the development. CP 241.

Ms. Piper was the sole owner of WVII. CP 597. WVII filed its application with Kitsap County for a Site Development Activity Permit ("SDAP") for the project on April 14, 2006; the application was deemed complete by the County for land use vesting on May 5, 2006. CP 306-308. Also in April 2006, WVII submitted a request for a SEPA determination of non-significance. CP 597. The SDAP was the only permit required for the grouping of the lots. *Id.* The County Ordinance required the County to make decisions on the SDAP application, and to issue a SEPA determination, within 78 days of the date the applications were deemed

[1] LOSS systems are common; there are hundreds of them in Washington. CP 758.

complete. CP 310-311. When WVII submitted the SDAP application, Ms. Piper was told by County officials that the application would be processed as a vested permit request, meaning that WVII would receive the SDAP under the land use requirements in place at that time. CP 605-606. Once the SDAP issued, 78 lots in the development could be constructed and sold for single-family residences. CP 606, 696.

The County didn't issue the MDNS until January 4, 2007. CP 313-314. The County's approval of the SDAP didn't occur until December 10, 2007. CP 316-317. During part of this period, the County Department of Community Development ("DCD") was instructed by the County not to process the application. CP 491, 598. Ms. Piper learned about this instruction in late October 2006. CP 598.

The County repeatedly stated to WVII and many others (including the Kitsap County Superior Court) that it had no authority or jurisdiction to approve or disapprove the LOSS system proposed for the project, and that the sole authority for making that decision rested with the DOH. CP 316, 322, 324, 326, 328, 396, 401, 402, 408.

DOH regulations provided three management methods for an approved LOSS: (1) the LOSS could be owned or maintained by a public entity; (2) the property served by the LOSS could be held by one owner and the LOSS operated by a private operator; and (3) the LOSS could be

operated by a private operator, with operation guaranteed by a third-party public entity. *See* WAC 246-272B-08100(2)(a)(vi)(A)(I), (II) (repealed, effective July 1, 2011); CP 1580-1583. The first and the third methods permitted individual lots of the property served by the LOSS to be sold, while the second didn't. *Id.*

Karcher Creek Sewer District, an independent municipality, entered into a contract with WVII to provide operation and maintenance for the LOSS, which enabled the DOH to approve the LOSS as owned or maintained by a public entity. CP 600, 834-835. The Sewer District believed that the relevant Washington statutes and regulations authorized it to own and/or operate the LOSS. CP 835. However, when the County learned in June 2007 that the Sewer District had agreed to own and/or operate the LOSS, it pressured the Sewer District to back out of the agreement. *Id.* The County told the Sewer District it did not have authority to own or operate the LOSS; although the District did not agree with the County, it bowed to the pressure exerted upon it and informed WVII it would not own or operate it. *Id.*

The District's withdrawal from the contract left WVII without a municipal operator for the LOSS. CP 600. In order to keep the project moving, WVII agreed to a Single-Owner Management System for the LOSS, while it sought a successor public entity for maintenance of the

LOSS or as a guarantor for a private contractor operator. *Id.*

The County knew that although it did not want to approve WVII's SDAP application, it had to do so, because the proposed development complied with all applicable County ordinances and regulations. CP 330-333, 433, 436-437, 443. Nevertheless, the County devised another way – a secret way – to prevent its construction. An attorney in the County Prosecuting Attorney's office, Shelley Kneip, came up with a plan. CP 433. One of the requirements for DOH LOSS approval was proof that the LOSS complied with local land use standards. *See* WAC 246-272B-08001(2)(a)(ii) (repealed, effective July 1, 2011). Even though the County DCD had determined that the development complied with applicable standards,[2] Ms. Kneip believed that if the County informed DOH that it didn't, the "[S]tate would have to deny" the LOSS permit application. CP 433. On October 30, 2007, Ms. Kneip wrote to DCD staff members,

> The state is required to ensure that these LOSS systems comply with the local comprehensive plan. In the case of the Woods View project – it did not comply with the current comprehensive plan, but was considered vested and the only permits required was a building permit and a SDAP, neither of which include land use approval. In my conversations with Mr. Benson, the state considers a project complies with local plans if the county does not denying (sic) it. But I think they are two differing things – even though it is "vested" it is not conforming to our current plan. Thus, if the state were to inquire of DCD whether this meets our plan – DCD could say

[2] *See* CP 330-333. The Kitsap County Hearing Examiner and the Superior Court both agreed that the proposed development complied with all local and State development requirements. CP 354, 372-373, 375-376, 391, CP 393.

> no, and the state would have to deny it. I am not sure if they do inquire or if they just rely on the developer to tell them it is permitted.
>
> What do you all think? Should we make this a "loop" with the state to ensure that the county is not allowing urban development in a rural area?

Id.

The County indeed completed the "loop"; it repeatedly communicated to the DOH its unfounded assertions that the project didn't comply with the County's Comprehensive Plan or the Growth Management Act ("GMA"). *See, e.g.,* 335-336, 340-341, 343-344, 350-351, 417, 428-430.

WVII and Ms. Piper spent significant funds and went to great lengths to meet the County's requirements in order to obtain SDAP approval. CP 596-606. They were not aware the County was trying to torpedo the project with the DOH. CP 601, 604. The County finally approved WVII's SDAP on December 10, 2007, over nineteen months after the application had been deemed "complete." CP 316-317. The County placed no conditions on SDAP approval concerning the LOSS, except that the LOSS had to be approved by the DOH. *Id.*

Neighbors appealed the County's issuance of the MDNS and the SDAP approval. CP 354-386. On March 18, 2008, for the Hearing Examiner's appeal hearing, DCD submitted a Staff Report stating that the lots in the proposed development were "historic non-conforming lots, also

known as 'lots of record,' that "Kitsap County Zoning regulations allow for development" of such lots, and that "[N]either the GMA nor Kitsap County Comprehensive Plan prohibit construction" of single-family homes on such lots. CP 331-332.

Just five days earlier, however, on March 12, 2008, at a meeting concerning the Woods View project called at the County's request and attended by, among others, DOH officials; Larry Keeton, the County's DCD Director; and Ms. Kneip, the County's true position regarding the project, and whether the DOH should approve the LOSS – regardless of whether the development was consistent with applicable County ordinances and regulations -- was revealed. CP 340-341. Notes taken by a DOH employee state:

> The County believes DOH should not approve the LOSS project because the over-all development is not consistent with the County's and GMA's land use designations. They assert this violates the State's duty to ensure projects are consistent with local planning.
>
> The key issue is land use, not public health or environmental protections. If DOH had asked the County if this project is consistent with their planning and zoning regs, they would have told us "no". However, the County sees that it has no authority to deny the project.
>
> They point to the Central Hearings Board order which dismisses an appeal on this development, but issued 8 pages of opinion, including that Health and Ecology must look at the county comprehensive plan and local zoning as the controlling factor in approving a LOSS (technology, soil, etc. that we use to determine LOSS approval is secondary, according to the

> Board). CTED[3] notes that the Board will likely continue to voice this opinion in future decisions.
>
> Both CTED and DOH AAGs question this interpretation. The DOH regs (290-272B) only require the project proponent to include "a discussion of compliance with other state and local zoning, platting, health, and building regulations as they relate to sewage treatment and disposal". The developer met this test.

Id. The point of the meeting was for the County to tell DOH that it must not approve the LOSS proposed for the Woods View development. 1673-1674.[4] No representative of WVII was invited to or even informed about this meeting. CP 601.

Shortly after the meeting, on March 19, 2008, DOH approved WVII's LOSS application, with the single-owner condition requested by the County. CP 346-347, 601, 1626-1627. The County's interference delayed DOH's consideration and approval of the application. CP 1626.[5]

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[3] "CTED" is an acronym for the State of Washington's Department of Commerce, Trade, and Economic Development.

[4] A March 12, 2008 DOH "weekly report" e-mail described the meeting as follows:

> CTED representatives set up a meeting for us this week to discuss Kitsap County's assertion that OSWP must not approve a LOSS project ("Woods View") because it is not consistent with local and state land use requirements. (We are near approval after a lengthy review process.) The county contends the lots proposed for development are too small for the rural area they exist in. However, they recognize the lots as valid/vested (due to plat date). Our AAG and the CTED AAG do not believe we have the authority to deny the project on these grounds. The County will now ask us to put conditions in our approval and operating permit to ensure that the property (and LOSS) remain under single ownership.

CP 343.

[5] Figuring out whether the development actually met the County's land use requirements, despite the County's protests that it didn't, "was a significant issue" for DOH, "a

The day after the DOH approved the LOSS, on March 20, 2008, the neighbors' appeals of the SDAP approval and MDNS were heard before the County Hearing Examiner. CP 355. The Examiner affirmed the SDAP approval and the MDNS determination. CP 384-385. Findings of Fact included:

> 9 ...Section 17.310.010 [of the Kitsap County Code] also recognized rural areas "which had been committed ... for rural residential uses on smaller lots." Thus the RR [Rural Residential Code] classification recognized smaller lots within the rural area. Furthermore, the KCC does not prohibit development of historic or legacy lots.
>
> 10. ... [T]he comprehensive plan recognizes the existence of historic or legacy lots and also recognizes the difficulties in directing growth to UGAs until development of the legacy lots is completed. The comprehensive plan contemplates the development of these lots. Thus, both the comprehensive plan and the KCC recognize historic lots and anticipate their development.... Thus, the development of historic lots within a rural area of the County and within the RR zone classification violates no provision of the comprehensive plan or zoning regulations. ... [T]he applicant may develop the historic lots.

CP 372-373. With respect to the neighbors' argument that the County's approval of the project violated the GMA, the Examiner found,

> 17. Appellant asserts that approval of the project would constitute urbanization of a rural area and thus violates GMA and the comprehensive plan. Such allegation does not address a deficiency in the stormwater design. As set forth above, development of historic lots violates neither the comprehensive plan nor the KCC. The lots already exist.

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relatively important issue in the final approval" that DOH "grappled with", and took DOH time that could have been used to work on other technical issues concerning the LOSS. CP 1631.

CP 375-376. The Examiner's affirmation of the SDAP approval and the MDNS designation was not conditioned on the property being maintained as single-ownership. CP 384-385. No restrictions on the development related in any way to the LOSS were required. *Id.*

The Hearing Examiner's decision was appealed to the Kitsap County Superior Court. The County, citing *Woods v. Kittitas County,* 162 Wn.2d 597, 174 P.3d 25 (2007), argued that the neighbors' contention that the project violated the GMA should be rejected, as the GMA cannot be used to challenge site-specific land use decisions for alleged noncompliance, CP 407-408. The County did not disclose its desire to prevent the project.

In May 2009, the Superior Court affirmed the Hearing Examiner's decision, specifically finding that the County's Zoning Code and Comprehensive Plan allowed the proposed development, and that the proposed development was not a nonconforming use. CP 391, 393.

By the time the neighbors' appeal to the proposed development was dismissed, development and construction financing had tightened. CP 603. However, Ms. Piper had contacted The Legacy Group ("Legacy"), a real property development lender, in March 2009; it had expressed interest in financing the WVII's development. *Id.* One of Legacy's conditions for lending was that the LOSS Management Plan had to be changed so that individual lots and homes could be sold. CP 125, 603-604. Without

financing from Legacy, WVII's project would fail. CP 605.

Because the County had run Karcher Creek Sewer District off, the only way WVII could sell individual lots in the development was to have a private operator manage the LOSS, with a public entity guaranteeing performance. *See* WAC 246-272B-08100(2)(a)(vi)(A)(I), (II) (repealed, effective July 1, 2011). By the summer of 2009, WVII located a new public entity to serve as guarantor for a private LOSS operator and made a request to DOH for a change in LOSS management approval to the third method, which was private operator with a third-party public entity guarantor. CP 745-746, 759.

When WVII applied for the management change, Richard Benson, the DOH engineer considering the request, believed that approval of the request was "doable." CP 1643-1646. Before September 3, 2009, WVII submitted a letter of intent to DOH signed by Kittitas Sewer District No. 8 to become the guarantor for the operation of the LOSS, and the complete contract was submitted to DOH on October 26, 2009. CP 1702-1703, 1706. No later than November 6, 2009, WVII submitted everything that DOH had requested for the management change. CP 1707.

In September 2009, Mr. Benson told Brett Eley of Legacy that he did not see any legal impediments to WVII's request for LOSS management change, and that he believed that the request could be processed and

approved within one to two months. CP 127, 1838. In a September 2009 conversation with Dave Walden, a Kitsap County realtor assisting WVII, Mr. Benson said that approval of the management change would take about a week or two unless the County opposed it; if the County opposed it, approval would take six months to a year. CP 1846-1847, 1848-1852.

Under DOH regulations, in order to obtain the requested management change, WVII had to again show that the proposed method of operation complied with the County Comprehensive Plan and local land use and development regulations. CP 1651; *see also* WAC 246-272B-08001(2)(a)(ii) (repealed, effective July 1, 2011). Despite the Supreme Court's decision in *Woods v. Kittitas County* that the GMA cannot prevent a site-specific request for a land use if the proposed use meets local standards and the County's citation of that case to the Superior Court in the neighbors' appeal, despite the Hearing Examiner's and Superior Court's rulings that the proposed development complied with the GMA and the County Comprehensive Plan and ordinances, and despite the fact that the County placed no restrictions on WVII's SDAP related to the LOSS, when the County learned of the 2009 request for management change, Mr. Keeton, DCD Director, wrote Mr. Benson:

> The county objects to any change of conditions that allows the property to be sold as individual units and allows for governmental or quasi-governmental entities to operate and bond the system.

> Our understanding of the State's Growth Management Act, which State Departments are to adhere to as well, precludes urban levels of service to be provide[d] in rural areas. Our County does not allow the extension of urban level of services to rural areas by government/quasi-governmental entities. ...[Y]our changing of the conditions puts this county at risk regarding the Growth Management Act.
>
> Therefore, I am requesting on behalf of the County that no conditions be changed until we have had ample opportunity to explore the impact and if they are consistent with the County's Comprehensive Plan, the State's Growth Management Act, and Hearing Board orders related to this issue.

CP 417. Twelve days later, Mr. Keeton wrote Mr. Benson again:

> [W]e cannot support any government entity to act as a "third party guarantor" as it would appear that urban levels of service are being provided outside an urban growth area, which is inconsistent with the County's comprehensive plan and the Growth Management Act.

Id. Mr. Keeton didn't forward a copy of his correspondence to WVII or Ms. Piper. CP 421-426.

When County Attorney Ms. Kneip found out about WVII's request for the management change, she wrote the State Attorney Generals working on this issue:

> Although we do not know who this "public entity" may be, we're doubtful that any public entity has the authority to assume this maintenance, given the GMA restrictions. In our view, this is an "after the fact" change, outside the public process, and is essentially is (sic) circumventing the law. We feel it cannot be approved and are hereby lodging our objections.

CP 428-429.[6] Ms. Kneip didn't forward a copy of her correspondence to WVII or Ms. Piper because she "didn't think [she] needed to. CP 989.[7]

The County's objections affected the DOH's review process for the requested management change. Mr. Benson told Mr. Eley there could be "legal impediments" to his approval of the requested management change, as Mr. Eley testified in his deposition:

> Q. (MR. JOHNSON) Now, in Paragraph 3, starting with Line 10, it says: "As my notes show, Mr. Benson informed me he did not see any legal impediment to Woods View II, LLC's request for management change from the State's perspective, and he believed he could process the request for management change in one to two months, assuming there were no issues." Is that your best recollection?
> A. I believe so, yes.
>
> Q. Okay. And did Mr. Benson ever tell you there were legal impediments to his being able to approve this matter?
> A. He indicated there could be, yes.
>
> Q. Did he tell you what those legal impediments could be?
> A. I believe it was in opposition to the change of use of the system.
> ...
> Q. And do you remember that E-mail we looked at that Darlene sent, saying that they had looked at the management issue from a legal standpoint and did not see a concern?
> A. Mr. Benson felt that the system could and would be approved.

---

[6] Ms. Kneip was aware of the Supreme Court's holding that in *Woods v. Kittitas County* that the GMA can't be used to challenge site-specific land uses if they comply with local land use requirements when she sent this correspondence. CP 981-982.

[7] Ironically, although the County was adamantly opposed to WVII's request for LOSS management change to involve a public entity guarantor, the DOH actually prefers, and encourages, the involvement of public entities as guarantors for private LOSS operators; they are seen as more reliable than private operators. CP 1770-1771, 1778-1779.

Q. All right. But you don't know why it took twelve months for him to do it?

A. I don't.

...

Q. (MR. BECKETT) So as I understand your answer, Mr. Eley, Mr. Benson said that something that could factor into his decision whether to approve the requested management change would have been opposition. That's my understanding of your answer to that question. Is that correct?

A. I don't think that Mr. Benson felt that there was going to be – that there was any reason why he couldn't approve the system.

Q. Did he believe – well, when you said that he believed that something that (sic) could be a legal impediment to his approval, I understood your answer was, yes, that there could be opposition, which would be a legal impediment to his approval.

A. Right.

MR. JOHNSON: Objection to the form.

Q. Is that –

A. Correct.

Q. Did Mr. Benson indicate who that opposition would have come from that would be a legal impediment to his approval?

A. From the County.

CP 1838-1841. For DOH, the County's objections in September 2009 to WVII's request for change in the LOSS management method reopened the issue of whether the project complied with county land use standards and forced DOH to reconsider whether it did. CP 1682-1683. Mr. Benson was still unsure about whether the County's insistence that the requested LOSS management change didn't comply with its land use standards was incorrect. CP 1704. Due to the County's opposition to the request, Mr. Benson was "communicating closely" about the request and the County's

position on it with his supervisor at the DOH, Denise Lahmann. CP 1694.

Ms. Lahmann required WVII to once again submit proof that the project complied with local land use standards, despite Ms. Piper's repeated prior communications confirming that it did, and despite the DOH's prior approval of the LOSS as a single-ownership system. CP 1784-1785, 1788-1789. Ms. Lahmann attributed that requirement to the County's insistence that it did not comply:

> Q. (MR. BECKETT) So is it fair to say that the issue of whether the request for management – let me ask it this way: If Kitsap County hadn't been so adamant that it didn't – that the project did not comply with local land use standards, would you have been this concerned about it?
>
> MR. WACHTER: Object to the form; lack of foundation.
>
> A. I think the concern that was going on around that issue, yes, prompted us to think about, talk about, and act upon that issue.

CP 1787-1788, 1790, 1811-18123. Ms. Kneip's correspondence also prompted Ms. Lahmann's supervisor's supervisor to write to the assistant secretary for the Washington State Environmental Health Division by e-mail, "we haven't made any commitments to the proponent that we would approve the change in plans." CP 1815-1816, 1831.[8]

Ms. Lahmann explained why DOH was so concerned about the

[8] The author of this e-mail was Maryann Guichard, to whom Ms. Lahmann's supervisor, Stuart Glasoe, reported. CP 1766-1767, 1816-1817. Ms. Guichard, Mr. Glasoe, and the recipient of Ms. Guichard's correspondence, Assistant Secretary Gregg Grunenfelder, "were concerned about the outcome" of DOH's review of WVII's request for LOSS management change and what DOH was "doing with it." CP 1819. Ms. Guichard, Mr. Glasoe, and Mr. Grunenfelder are not normally kept informed about the status of permit requests for LOSS systems at the DOH, but were kept informed on the status of the review of WVII's request for LOSS management change. *Id.*

County's insistence that WVII's request for LOSS management change should not be approved by DOH:

> I would venture a guess in saying that Department of Health is very sensitive to our working relationship with counties, and while that is typically the local health jurisdiction, county planning and building is another part of that, and we don't like to surprise them.
>
> We don't always agree with what they want or say, but we don't like to surprise them or be in conflict with them without having an opportunity to work through the issues.

CP 1817.

The County's objections also affected Mr. Benson's autonomy to review the LOSS issues and approve the permit request. CP 1676-1677. Neither Mr. Benson nor Ms. Lahmann had ever before encountered a situation where a municipality had approved a development permit, like the County did with WVII's SDAP, then attempted to convince DOH that the development did not comply with the county ordinances and comprehensive plan and so should not receive DOH approval. CP 1728.[9]

On about February 17, 2010, Ms. Piper received a letter from Ms. Lahmann informing her that Mr. Benson had still not issued comments or approval of the requested management change. CP 1709. DOH review of the requested management change was shortly thereafter transferred from Mr. Benson to Mr. El-Aarag, although Ms. Lahmann also was responsible

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[9] Mr. Benson characterized the County's position as "unusual". CP 1728.

for part of the time after February 17, 2010. CP 1708-1710, 1802-1803.

Though the proposed development complied with County land use standards and ordinances, nevertheless, the County took extraordinary efforts to prevent it from being built, starting with the delay in approving the permit application. In public and under oath, DCD Director Mr. Keeton said he supported the project. CP 441. In private communication to the County Commissioners, however, Mr. Keeton expressed his regret that the County Code allowed the development, stating "this is not a project we support". CP 443. When asked about this, County Commissioner Steve Bauer testified, "The Board [of Commissioners] as a whole didn't think this was a very good project, and Larry carries out the will of the Board." CP 1274-1275. The Commissioners' view of the matter was based, at least in part, on political considerations: Mr. Bauer testified, "There was a lot of concern from the neighbors about the intensity of the development[;] [t]hey were sending lots of communications up to the commissioners about that." CP 1265. The County was also afraid that it would be sued by the neighbors and by the Growth Management Hearings Board if the project was constructed. CP 980-981, 1265-1266. In correspondence to a constituent while the neighbors' appeal of the SDAP approval was pending before the Superior Court, Mr. Bauer wrote, "From what I've heard, the County staff and elected officials believe that they have actively

worked to find ways within the law to deny the project." CP 436-437. Mr. Bauer, however, could not give any grounds to support a conclusion that WVII's project was not consistent with the County's zoning ordinances or Comprehensive Plan requirements. CP 1267-1268.

Without DOH approval of the LOSS management change, Legacy would not make the loan that WVII needed to pay for development expenses. CP 603-604. Without the development financing expected from Legacy, Ms. Piper and WVII were unable to continue to fund the project. CP 605. Ms. Piper had placed all of her personal savings into the project, and had personally guaranteed the acquisition loan with Venture Bank and major construction material accounts and subcontractors' agreements for work at the site. *Id.* As a result of Legacy's withdrawal of its loan, Ms. Piper had several lawsuits filed against her personally in early 2010 to recover on her guaranties. *Id.* She filed Chapter 7 bankruptcy in May 2010, and WVII's property was foreclosed on, and title transferred to the lender, in October 2010. *Id.*

The DOH finally approved WVII's requested LOSS management change in late August 2010, CP 1492, but it came several months too late to do WVII and Ms. Piper any good. CP 605.

B. Procedural history.

The Appellants delivered their tort claims to Kitsap County on

October 14, 2009. CP 16. They filed their original lawsuit in Superior Court on December 18, 2009, asserting claims under 42 U.S.C. § 1983 for violations of the Appellants' due process rights and for a taking under the federal and state Constitutions, and for state law torts. *Id.* The County removed the action to the U.S. District Court. CP 16-17. U.S. District Court Judge Settle dismissed Appellants' federal Constitutional claims with prejudice, and dismissed the state claims without prejudice. CP 17, 1455-1471. The Appellants refiled their Complaint on July 11, 2011, asserting state law causes of action against the County for (1) tortious interference with contract and/or business expectancies, (2) negligence, (3) a taking under the Washington State Constitution; and (4) declaratory and injunctive relief. CP 1-20.[10]

On April 12, 2011, the County filed its first motion for summary judgment to dismiss all of the Appellants' claims. CP 27-59. The trial court denied the motion in its entirety. CP 1365-1368.

While this action was pending, the Ninth Circuit Court of Appeals affirmed Judge Settle's decision, on different grounds. CP 1473-1476. Relying in part on the Ninth Circuit Court's decision, the County filed another motion for summary judgment on October 12, 2012. CP 1369-1389. The County specifically requested dismissal of Appellants' tortious

[10] Under 28 U.S.C. § 1367, in order to toll the running of the statute of limitations on their state law claims, Appellants had thirty days from the date of Judge Settle's order to refile their action in the Superior Court. Appellants timely refiled this action. CP 1-22.

interference and negligence claims, but did not specifically request dismissal of Appellants' State Constitutional takings claims or their declaratory judgment claim. *Id.*

Judge Susan Serko granted the County's motion and dismissed the Appellants' tortious interference and negligence claims. CP 1982-1983. She also dismissed the takings claim, even though the County had not requested that relief in its motion. *Id.* Judge Serko provided no explanation for her rulings. *Id.* The parties later stipulated to the dismissal of the causes of action for declaratory and injunctive relief. CP 1984-1986. The Appellants timely filed their Notice of Appeal, requesting reversal of Judge Serko's dismissal order. CP 1995-2001.

V. ARGUMENT

Judge Serko did not specify the basis for her dismissal order. Whatever the basis was, she committed error, and the order should be reversed.

A. Standard of review.

Review of the trial court's order on the motion for summary judgment is *de novo*. *Mohr v. Grantham,* 172 Wn.2d 844, 859, 262 P.3d 490 (2011). An order granting summary judgment is to be affirmed only if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Qwest Corp. v. City of Bellevue,* 161 Wn.2d 353, 358,

166 P.3d 6678 (2007). The evidence presented to the trial court is to be reviewed in the light most favorable to the non-moving party, and all reasonable inferences from that evidence must be drawn in the non-moving party's favor. *Id.*[11]

B. Appellants' claims are not barred by statutes of limitations.

In the trial court, the County argued that the Appellants' tortious interference and negligence claims are barred by the statute of limitations. The County is incorrect.

1. The tortious interference claim did not accrue until, at the earliest, late October 2006.

The Appellants have identified five separate actions, or series of actions, by the County that constituted tortious interference with their business expectancies or contracts: (1) the County's suspension of the processing of WVII's SDAP application while it waited for a response to Cris Gears' October 13, 2006 letter to Governor Gregoire and other Washington officials (CP 321-322, 338), requesting assistance with how to respond to WVII's SDAP application; (2) the June 2007 strong-arming by the County (through Shelley Kneip and Jim Bolger) of Karcher Creek Sewer District that resulted in Karcher Creek's decision to withdraw from its contract with WVII for LOSS management (CP 835); (3) the County's

[11] An "inference" is "a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." *Dickinson v. Edwards,* 105 Wn.2d 457, 461, 716 P.2d 814 (1986) (citations omitted).

communications with the DOH in 2007 and 2008 concerning the original permitting of the LOSS, starting with Ms. Kneip's communications to Mr. Benson in 2007 (CP 1196) and Mr. Keeton's 2007 and 2008 correspondence to Mr. Benson (CP 335-336, 346-347), and including the March 12, 2008 meeting attended by, among others, Mr. Keeton and Ms. Kneip, representatives of DOH, and representatives from other State agencies (CP 340-341, 343); (4) the County's communications with DOH, by Ms. Kneip and Mr. Keeton, in September 2009, in which they once again told DOH that the WVII's proposed development did not comply with the County's local land use regulations or the GMA (CP 349-352, 417-418, 473); and (5) the County's purposeful delay of the approval process for the project.[12]

Tortious interference has a three-year statute of limitations. RCW 4.16.080(2); *City of Seattle v. Blume,* 134 Wn.2d 243, 251, 947 P.2d 223 (1997). The claim for the earliest of the County's actions, the suspension of the processing of the SDAP while the County waited for a response to Mr. Gears' letter, did not accrue until WVII knew or should have known all of the essential elements of the cause of action. *White v. Johns-Mansville Corporation,* 103 Wn.2d 344, 348, 693 P.2d 687 (1985). In this case, the cause of action did not accrue at least until late October 2006,

[12]A municipality's delay in passing on an applicant's construction permit may be an "improper means" sufficient to constitute an interference with the applicant's business expectancy. *Westmark Development Corp.,* 140 Wn. App. 540, 560, 166 P.3d 813 (2007).

when Ms. Piper learned of Mr. Gears' letter and that the County was waiting for a response to the letter before it continued to process WVII's application. CP 598.[13]

The Appellants delivered their tort claims to Kitsap County on October 14, 2009. They timely filed their original action in the trial court within the sixty-five day period prescribed by RCW 4.96.020(4), and when, after the action was removed to the federal court and Judge Settle dismissed their federal claims, they timely refiled this action. The date this case commenced, therefore, is October 14, 2009, prior to three years after WVII learned of the earliest of the County's tortious acts.

Even if the Court somehow concludes that the statute of limitations has run on the claim for the County's suspension of SDAP processing while it waited for a response to Mr. Gears' letter, the statute cannot be deemed to have run on the County's claims for all of the County's actions, which occurred from September 2007 at least through September 2009. And, as explained immediately below, the statute of limitations on the claim for intentional delay in approving the SDAP could not have accrued at the earliest until December 13, 2006, less than three years before this action was filed.

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[13] "The question of when a plaintiff should have discovered the elements of a cause of action so as to begin the running of the statute of limitations is ordinarily a question of fact." *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

2. The Appellants' negligence and tortious interference claims for the County's delay in processing and approving the SDAP accrued less than three years before this action was commenced.

WVII's SDAP application was deemed "complete" by the County on May 5, 2006. CP 306-308. At that time, the relevant County ordinance, KCC 21.04.110(A) (repealed by Kitsap County Ordinance No. 490 (2012)), required the County to issue a decision on the application "not more than seventy-eight days after the date of the determination of completeness." CP 310-311. The ordinance also required the exclusion of the following periods from the calculation of the 78 days:

> Any period during which the applicant has been required by the county to correct plans, perform studies, or provide additional information. The period shall be calculated from the date the county notifies the applicant of the need for additional information to the earlier of either: (1) the date the county determines whether the additional information provided satisfies the request for information; or (2) fourteen days after the date the information has been provided to the county[.]

Id.

On or prior to July 13, 2006, the sixty-ninth day of the 78-day period, the County DCD informed WVII that it needed to provide proof from the State of Washington Department of Natural Resources that two depressions on the proposed development site were not protected streams. CP 1955. WVII provided a report on this issue on July 19, 2006, but never received confirmation that the report resolved the issue. CP 1955-1956.

Therefore, the 78-day counter would have resumed running on August 2, 2006 (fourteen days after submission), but prior to that date, the County made additional requests for information, which kept the counter stopped.

The first of these requests was made on July 31, 2006. *Id.*; CP 1970.[14] These requests for information and revisions to plans were not resolved until WVII's project engineer delivered his Second Submittal to the County on November 20, 2006. CP 1956, 1974-1981. There was no confirmation from the County that the issues in its later requests had been resolved by the Second Submittal; therefore, the 78-day counter was stopped at 69 days from the date the County made the first request for additional information, July 31, 2006, to fourteen days after November 20, 2006: December 4, 2006. Thus, the 78-day period ran no sooner than December 13, 2006.

In the trial court, the County argued that the three-year statute of limitations for the Appellants' claims pertaining to the County's delay in processing the SDAP application accrued when the 78-day period expired. CP 1374-1376. Because the 78-day period ran no earlier than December 13, 2006, and the commencement date for this action was less than three years later, the statute of limitations did not run on the Appellants' negligence or tortious interference claims based on the County's delay in

[14] The second of these requests was made on or after August 7, 2006. CP 1972.

approving the SDAP.[15]

3. The "continuing tort doctrine" prevented the statute of limitations from running on the claims based on the County's delay in approving the SDAP.

The statute of limitations also did not bar the Appellants' delay claims because the County's tortious conduct was continuing, at least through the last communication between the County and DOH in September 2009.

Washington recognizes the continuing tort doctrine. *Pacific Sound Resources v. Burlington Northern Santa Fe Ry. Corp.,* 130 Wn. App. 926, 941, 125 P.3d 981 (2005). When a tort is continuing, the "statute of limitations runs from the date each successive cause of action accrues as manifested by actual and substantial damages." *Fradkin v. Northshore Util. Dist.,* 96 Wn. App. 118, 125, 977 P.2d 1265 (1999). Although no Washington published decision has applied the doctrine in a tortious interference case, the doctrine has been applied in a negligence action. *Doran v. City of Seattle,* 24 Wash. 182, 183, 64 P. 230 (1901). No cases state or imply that the doctrine should not be applied in the appropriate tortious interference case.

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[15] Under an alternative analysis, one examining accrual of the cause of action under the discovery rule, the earliest WVII knew or should have known of the County's delay in processing the SDAP application was in late October 2006, when Ms. Piper learned that DCD staff had been instructed not to process the application. CP 598; *White v. Johns-Manville Corporation, supra.* As discussed at 24-25 above, this action was commenced before three years after that date. Even under this alternative analysis, however, the statute of limitations did not begin running until the Appellants sustained "damages." *Steifel v. Hansch,* 40 Wn. App. 233, 235, 698 P.2d 570 (1985). Appellants could not have been deemed to sustain any damages until after the 78-day period prescribed by KCC 21.04.110(A) had run, on December 13, 2006.

Illinois' iteration of the continuing tort doctrine is similar to Washington's. In *City of Rock Falls v. Chicago Title & Trust Company,* 300 N.E.2d 331, 13 Ill. App.3d 359 (1973), a city sued a property owner for authorization to repair or demolish a building alleged to be dangerous and unsafe. The owner counterclaimed, alleging that the mayor, whose bid to purchase the property had been bettered by the beneficial owner of the property, had tortiously interfered with the use of the property from 1961 to 1969 by using his position to prevent the owner from obtaining the business advantages he should have derived from his ownership. The record contained many examples of such interference. The statute of limitations for tortious interference was five years, and the owner's counterclaim was asserted within five years of the mayor's completion of his last term of office in 1969. The Illinois appeal court held that because the mayor's actions were continuing during his time in office, the owner's claims were timely asserted: "Where a tort involves a continuing or repeated injury, the statute of limitations does not begin to run until the date of the last injury or when the tortious acts cease." *Id.* at 364.

City of Rock Falls is instructive. The County's actions to delay WVII's project and to interfere with its business expectancies occurred in many forms and in many instances. They took place over a number of years, all with the ultimate goal of stopping the development. Under these

facts, the Court should hold that the continuing tort doctrine applies, and the statute of limitations did not begin running until, at the earliest, the County's last communications with the DOH in September 2009. Under any analysis, the action was timely commenced.

4. The statute of limitations had not expired on the Appellants' claim for a taking under the State Constitution.

The County did not specifically request dismissal of the Appellants' claim for a taking under Washington's State Constitution. Nevertheless, the trial court dismissed this claim, over the Appellants' objection. CP 1931-1934. This was error, as it violated the twenty-eight day notice requirement for summary judgment motions in CR 56(c) and therefor violated Appellants' due process rights. *Cf. Davidson Series & Associates v. City of Kirkland,* 159 Wn. App. 616, 638, 246 P.3d 822 (2011) (trial court committed error and dismissal order was reversed where it dismissed spot zoning claim on summary judgment even though moving party had not specifically requested such dismissal).

Further, the statute of limitations on the Appellants' takings claim had not run, as such actions have no limitations period, save for the ten-year period provided by RCW 4.16.020. *Highline School District N. 401, King County v. Port of Seattle,* 87 Wn.2d 6, 11, 548 P.2d 1085 (1976). Judge Serko's dismissal of the takings claim must be reversed.

C. The federal court order on Appellants' civil rights claims has no claim preclusion effect.

In the federal case, the Appellants alleged that the County had violated their procedural and substantive due process rights, and that they were entitled to compensation for a taking under the U.S. Constitution. With respect to procedural due process, the Ninth Circuit ruled that the County's interference with WVII's LOSS permit application could not give rise to a claim because WVII "did not have a legitimate claim of entitlement to a LOSS permit" and thus did not have "a cognizable property interest" in the LOSS permit. CP 1475.[16] With respect to WVII's claim of entitlement to a decision on its SDAP and SEPA applications within 78 days, no due process right was violated because "meaningful post-deprivation remedies were available to address [the County's] failure to act by the statutory deadline." CP 1476.[17]

With respect to the claim that the County had violated substantive due process rights, the Ninth Circuit disposed of that claim in one sentence:

> Finally, because it is at least fairly debatable that Appellees' delays in issuing the SDAP and SEPA approvals were

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[16] Because the Ninth Circuit ruled that WVII did not have a cognizable property interest in the LOSS permit, it also did not have "a legitimate entitlement to a decision on its LOSS permit application within a particular period of time." *Id.* However, even if WVII did not have an entitlement to a LOSS permit, it certainly had a business expectancy in receiving one. An expectancy is not a property interest, *In re Marriage of Hamilton,* 85 Wn. App. 613. 624, 93 P.2d 1397 (1997), but includes any prospective contractual or business relationship that would be of pecuniary value. *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.,* 114 Wn. App. 151, 158, 52 P.3d 30 (2002) (citation omitted).

[17] The court did not specify which "post-deprivation remedies were available."

> rationally related to a legitimate governmental interest in ensuring that local development complied with state law, [WVII] cannot meet the "exceedingly high burden" for establishing a substantive due process claim.

CP 1476.[18]

In its motion for summary judgment, the County requested the trial court to apply collateral estoppel to the Ninth Circuit decision to dismiss the tortious interference claims, the claims for the County's delay in issuing the SDAP, and for its claim that dismissal is proper under the *Noerr-Pennington* doctrine. CP 370. The County argued that because the Ninth Circuit determined "that the County's actions were rationally related to a legitimate governmental interest in complying with state law," the Appellants could not prove that they were purposely improper. CP 1378.[19]

At best, the County's argument exhibited a misunderstanding of the Ninth Circuit decision. The Ninth Circuit did not say that all of the County's actions were "rationally related to a legitimate interest in complying with state law." Rather, the Ninth Circuit ruled that it was "fairly debatable" whether the County's delays in issuing the SDAP and

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[18] The Ninth Circuit also ruled that the federal takings claim was not ripe because WVII had "not demonstrated that it pursued and was denied just compensation in Washington state court prior to filing its federal takings claim." CP 1475.

[19] There are five elements necessary to prove a claim for tortious interference with a business expectancy: (1) the existence of a valid contractual relationship or business expectancy; (2) that the defendant had knowledge of that relationship or expectancy; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that the defendant interfered for an improper purpose or used improper means; and (5) resultant damages. *Westmark Development Corp. v. City of Burien,* 140 Wn. App. at 557 (citations omitted). The County argued that the Ninth Circuit decision meant that the Appellants could not prove the fourth element. CP 1378-1381.

SEPA approvals were rationally related to a legitimate government interest in ensuring that local development complied with state law. CP 1476. The decision said nothing about the County's interference with WVII's contract with the Karcher Creek Sewer District, its lobbying of the DOH to attempt to prevent issuance of the original LOSS permit, and the County's subsequent lobbying to prevent DOH's approval of WVII's requested LOSS management change. The Ninth Circuit decision thus has no effect on the claims to recover for those actions.

Also, that the Ninth Circuit determined, for purposes of evaluating the Appellants' substantive due process claim, that it was "fairly debatable" whether the County's delays in issuing the SDAP and SEPA approvals were rationally related to a legitimate governmental interest in ensuring that local development complied with state law, does not mean that it ruled that the delays were not caused for an improper purpose or by improper means, or that the Appellants are not entitled to recover for the delay under general negligence principles.

Further, even if the Ninth Circuit's decision could be interpreted to mean that it determined that the County did not have an improper purpose in delaying the processing of the SDAP application or SEPA determination, it does not speak to whether the means employed by the

County to do so were improper.[20]

Collateral estoppel prevents relitigation of an issue already resolved in a prior proceeding. *Lutheran Day Care v. Snohomish County,* 119 Wn.2d 91, 113-14, 829 P.2d 746 (1992), *cert. denied*, 113 S. Ct. 1044 (1993). However, collateral estoppel is confined to ultimate facts, *i.e.* facts directly at issue in the first controversy upon which the claim rests, and does not extend to evidentiary facts: those facts which may be in controversy in the first action and are proven but which are merely collateral to the claim asserted. *Seattle-First National Bank v. Cannon*, 26 Wn. App. 922, 928, 615 P.2d 1316 (1980) (citation omitted). Collateral estoppel cannot apply to bar relitigation of an important question of law. *Kennedy v. Seattle,* 94 Wn.2d 376, 379, 617 P.2d 713 (1980).

The party asserting collateral estoppel bears the burden of proof. *State v. Polo,* 169 Wn. App. 750, 763, 282 P.3d 1116 (2012). Relitigation of an issue is precluded when each of the following four factors is present: (1) the issue decided in the prior adjudication is identical with one presented in the second action; (2) the prior adjudication ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is

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[20] Whether an actor has used improper means is an issue for the jury. 6A Wash. Prac., Washington Pattern Jury Instr. Civ. WPI 352.03 (6th ed. 2012), Comment (citing Restatement (Second) of Torts § 767, comment 1 (1979)). Even if a tortfeasor has no specific purpose to interfere with the victim's business expectancy, a claim for tortious interference lies if the means of interference is wrongful. *Pleas v. City of Seattle,* 112 Wn.2d 794, 806, 774 P.2d 1158 (1989).

asserted was a party or in privity with a party to the prior litigation; and (4) application of the doctrine will not work an injustice. *Id.* at 927. Here, two of the four requirements are absent: the issue decided in the Ninth Circuit is not identical with the ones presented in this case, and application of the doctrine would work an injustice on the Appellants.

1. There is no identity of issues in the two cases.

Collateral estoppel applies only where the issue presented in the second proceeding is identical in all respects to an issue decided in the prior proceeding, and "where the controlling facts and applicable legal rules remain unchanged." *LeMond v. Dep't of Licensing,* 143 Wn. App. 797, 805, 180 P.3d 829 (2008) (citations omitted). Further, issue preclusion is appropriate only if the issue raised in the second case "involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment," even if the facts and the issue are identical. *Id.* (citations omitted). Where it is ambiguous or indefinite whether the issue was determined in a prior action, collateral estoppel will not be applied in the second case. *Davis v. Nielson,* 9 Wn. App. 864, 875, 515 P.2d 995 (1973). Thus, collateral estoppel was held not to bar a state court SEPA challenge to the Port of Seattle's supplemental environmental impact statement for expansion of Seatac Airport's runways, where in a prior case a federal court ruled that the same document satisfied the

federal Airport and Airway Improvement Act, because the federal and state acts "have markedly different obligations." *City of Des Moines v. Puget Sound Regional Council,* 98 Wn. App. 23, 34, 988 P.2d 27 (1999).[21]

The Ninth Circuit considered whether Judge Settle's dismissal of the Appellants' Constitutional claims should be affirmed. This presented a significantly different "bundle of legal principles" than whether the County committed tortious acts under the state common law. The burden of proof for Appellants' substantive due process claim was much higher than the "more probable than not" standard for their state law tort claims. To sustain a federal substantive due process claim, a plaintiff must prove that the government's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." CP 1464. Only "the most egregious official conduct" can be considered arbitrary "in the constitutional sense." *County of Sacramento v. Lewis,* 523 U.S. 833, 845-46, 118 S.Ct. 1708 (1998).[22] Indeed, the Ninth Circuit noted that WVII could not meet the "exceedingly high burden" required to establish the claim. CP 1476. Because the burden of proof required for the federal claims was different than the burden

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[21] *See also Williams v. Lifestyle Lift Holdings, Inc.,* 175 Wn. App. 62, 75, 302 P.3d 523 (2013) (jury decision rejecting patient's informed consent claim against plastic surgery clinic did not bar by collateral estoppel her claim under the CPA that the clinic's deceptive marketing caused her to undergo an unwanted surgical procedure).

[22] To prove a substantive due process violation, the complaining party must also prove that the municipality's conduct "shocks the conscience." CP 1465 (citation omitted).

required for the state law claims in this action, collateral estoppel cannot apply. *Stadlee v. Smith,* 83 Wn.2d 405, 408-09, 518 P.2d 721 (1974) (even though probation revocation hearings and criminal trials are premised on the same alleged violation, because they carry different burdens of proof, collateral estoppel does not apply).

In relevant part, all a state court jury must decide in this case for the Appellants to prevail on their tortious interference claim is that it is more probable than not that the County interfered for an improper purpose or by improper means. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 352.03 (6th ed. 2012). For the negligence case, the Appellants merely need to prove that it is more likely than not that the County did not exercise "ordinary care" in the processing of the SDAP application and SEPA determination. *Id.,* WPI 10.01.[23] A jury does not need to decide that the County's actions were "clearly arbitrary and unreasonable" and "egregious," or that they "shock the conscience," in order for the Appellants to prevail on their claims.

But even if the burdens of proof in the two proceedings were the same, the fact that the County's conduct is "at least fairly debatable" does

[23] "The failure to exercise ordinary care "is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances." *Id.* Appellants' land use expert, Robert W. Thorpe, expressed his opinion that the County's delay in processing the SDAP and issuing the MDNS on the SEPA matter "did not comply with the standard of care for municipalities processing and permitting their permitting responsibilities." CP 880. A jury is entitled to resolve this claim.

not mean that a state court jury cannot determine that the delay was improper. By their nature, contested issues in a jury trial are "fairly debatable"; if they were not, they may be established as a matter of law in pretrial motions or by stipulation. In short, the Ninth Circuit didn't decide whether the County's actions were, or were not, committed for an improper purpose or by improper means; it simply concluded that it was "fairly debatable" whether they were "rationally related to a legitimate governmental interest." At best, it is ambiguous whether the Ninth Circuit concluded that the County's delay was improper, which is not enough to prevent the matter from being resolved by a jury. *Davis v. Neilson,* 9 Wn. App. at 875.[24]

A fact-finder is to consider the following factors in determining whether the County's actions were for an improper purpose:

(a) the nature of the conduct;
(b) the motive;
(c) the interests of the other with which the County's conduct interfered;
(d) the interests sought to be advanced by the County;
(e) the societal interests in protecting the County's freedom of action and the contractual and/or expectancy interests of the Appellants;
(f) the proximity or remoteness of the County's conduct to the interference; and
(g) the relation between the parties.

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[24] *See also* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 352.03 (6th ed. 2012), Comment (quoting Restatement (Second) of Torts § 767, comment I (1979)) ("[T]he determination of whether the interference was improper or not is ordinarily left to the jury, to obtain its common feel for the state of community mores and for the manner in which they would operate on the facts in question.").

6A Wash. Prac. Wash. Pattern Jury Instr. Civ. WPI 352.03 (6th ed. 2012), comment (citing Restatement (Second) of Torts § 767 (1979)). To prove the County's actions were improper for the tortious interference and negligence claims, the Appellants need to prove none of the things they needed to prove for their due process violation claims.

Nor did the Ninth Circuit say the County did not do anything improper. The decision stated that it was "fairly debatable" that the delays were "rationally related to a legitimate government interest." Decisions from the Ninth Circuit and Washington cases provide little assistance in ascertaining the meaning of the phrase "fairly debatable."[25] Other courts have concluded that the phrase "fairly debatable" means there exists a legitimate question or difference of opinion over the matter at issue;[26] that reasonable minds can differ on the proposition;[27] that "the issue is debatable among jurist of reason";[28] and that the matter is "subject to controversy or contention" or "open to question or dispute."[29] Thus, the Ninth Circuit's ruling that it was "at least fairly debatable" whether the County's delays in processing the SDAP application and SEPA

[25] In the context of a criminal defendant's request for bail pending appeal of a conviction, the Ninth Circuit has ruled that a "substantial question" is one that is "fairly debatable" or of more substance than would be necessary to a finding that it was not frivolous. *U.S. v. Handy,* 761 F.2d 1279, 1282 (9th Cir. 1985).
[26] *Robinson v. State Farm Mut. Ins. Co.,* 45 P.3d 829, 832, 137 Idaho 173 (2002).
[27] *Bellville v. Farm Bureau Mut. Ins. Co.,* 702 N.W.2d 468, 473 (Iowa 2005).
[28] *U.S. v. Rodakov,* 2005 WL 32630487, *2 (E.D. Pa. 2005).
[29] *American Petroleum Equip. & Constr. v. Gancher,* 708 So.2d 129, 131 (Ala. 1997).

determination was rationally related to a legitimate governmental interest merely means that the subject is open to dispute. It does not mean that the Ninth Circuit concluded that the County did nothing improper, did not use improper means to accomplish the goal, or complied with the standard of ordinary care. The Ninth Circuit made no determinations whatsoever regarding those matters. Thus, there is no identity of issues between this action and the federal case, and the Ninth Circuit decision should have no bearing on whether the Appellants should be permitted to recover on their state law tort claims.

Lucas v. County of Los Angeles, 47 Cal. App.4th 277, 54 Cal. Rptr.2d 655 (1996), is instructive. In that case, the court considered whether California's collateral estoppel doctrine, which is essentially the same as Washington's, barred a plaintiff's second lawsuit asserting state law tort claims for the wrongful death of a prisoner, when a previous federal action for the same incident resulted in the dismissal of federal civil rights claims under 42 U.S.C. §1983. The federal action turned on whether the government officials' actions were "reasonable" for purposes of qualified immunity; the court concluded they were and dismissed the federal claims. As to the pendent state law claims asserted in that case, the federal court declined to exercise pendent jurisdiction.

In the subsequent state court action, the municipality moved for

summary judgment, in part arguing that the federal court decision as to the government actors' reasonableness precluded the state law claims. While the trial court granted the motion, the appeals court reversed the trial court and reinstated the state law claims, ruling that determining whether the government actors' "reasonableness" as it applied to the civil rights claims was not the same as it applied to the state law claims. *Id.* at 288. Thus, the prior federal decision did not bar the subsequent effort to recover on the state law claims and had no collateral estoppel effect in the second case.

Similarly, the standards required for the Appellants to prevail on their federal claims were significantly different than those required for their state law claims. There is no identity of issues between the two cases; therefore, the decision in the federal case should have no bearing on the claims asserted in this one.

2. Application of collateral estoppel would be unjust.

Application of collateral estoppel must not be unjust. *Robinson v. Hamed*, 62 Wn. App. 92, 100, 813 P.2d 171 (1991). This means that the party against whom collateral estoppel is sought to be applied must have been offered a full and fair hearing on the issues in the first proceeding, with a full opportunity to present its case. *Id.*

The Appellants were not provided the opportunity to litigate their state law claims in the federal courts. The Ninth Circuit only addressed the

District Court's dismissal of the Constitutional claims, because Judge Settle declined to exercise supplemental jurisdiction over the state law claims. CP 1470. Thus, the legal and evidentiary standards for the Appellants' state law claims were not at issue in the Ninth Circuit, and the parties devoted no attention to the state law claims in their appellate briefing. The Appellants were not offered a "full and fair hearing" on the matters integral to the state law claims in the federal proceedings, and they should not be bound in this case by the Ninth Circuit's comments about facts that pertained only to the Constitutional claims at issue in that case.

D. The Ninth Circuit decision is irrelevant to the County's argument that it is immune from liability under the *Noerr-Pennington* doctrine.

The County argued that the Ninth Circuit decision confirmed its claim that it is immune from liability under the *Noerr-Pennington* doctrine "for claims related to [the County's] communications with DOH and other public entities, based on the Ninth Circuit's decision that the County's actions were grounded in an arguable interpretation of law." CP 370. The *Noerr-Pennington* doctrine has never been approved in a published Washington decision as a basis to immunize a defendant for liability from its tortious conduct, and there is no applicable basis to apply it here. Even if it is a recognized basis for immunity for a municipality's tortious conduct, however, the Ninth Circuit did *not* hold or say that the County's

communications "were grounded in an arguable interpretation of law." There can be no collateral estoppel in a second case on an issue not resolved in a prior action; thus, there was no basis for the trial court to conclude that the County's actions were grounded in an arguable interpretation of existing law. Even if there was, however, even if its actions were "grounded in an arguable interpretation of existing law," the County is not immune from tortious interference or negligence liability. And the doctrine would not immunize the County's permit-delaying actions in any event, because they did not involve any petitioning activity. Finally, there is no protection afforded under the doctrine for petitioning activity containing misrepresentations, as the County's communications did here. Therefore, neither collateral estoppel nor the *Noerr-Pennington* doctrine provided a basis for the trial court to dismiss the Appellants' claims.

The *Noerr-Pennington* doctrine is a judicially-created immunity from statutory liability that protects the federal First Amendment right of the people to petition the Government for a redress of grievances. *Nunag-Tanedo v. East Baton Rouge Parish School Bd.*, 711 F.3d 1136, 1138-39 (9th Cir. 2013). It was originally applicable only to Sherman Act antitrust matters, but since has been extended to other statutory schemes. *Id.*

The doctrine has never been applied in a published Washington case

to immunize a defendant from his tortious conduct. In the trial court, the County represented that the doctrine is "recognized and endorsed" by Washington courts. This is untrue. In the only Washington case cited by the County for this representation, *Lange v. The Nature Conservancy,* 24 Wn. App. 416, 601 P.2d 963 (1979), the words, "*Noerr-Pennington* doctrine" or "*Noerr-Pennington* immunity" are nowhere to be found. In that case, landowners sued an environmental group under state anticompetition statutes because their property had been included in a county's inventory of natural areas. The owners argued that the group lobbied the county to include the property in the inventory so that it could acquire the property for less than its worth. The Court of Appeals affirmed the trial court's dismissal of this claim, noting merely that the environmental group had "a First Amendment right to try to influence government action." *Id.* at 422.

Governments do not have a First Amendment right of petition. *See e.g., Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 139, 93 S.Ct. 2080 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the [g]overnment."); *Nat'l Foreign Trade Council v. Natsios,* 181 F.3d 38, 61 (1st Cir. 1999) (citations omitted) ("a state entity itself has no First Amendment rights"); *Warner Cable*

Cmmc'ns, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990) (holding that a government speaker is not protected by the First Amendment); *Creek v. Village of Westhaven,* 80 F.3d 186, 193 (7th Cir. 1996) (government right to speak cannot be equated for all purposes to speech by an individual). Also, there are no published cases providing that county governments in Washington have a First Amendment right to petition another government or government agency. Without a First Amendment right to petition, there can be no *Noerr-Pennington* immunity.

The County cited *Manistee Pound Center v. City of Glendale,* 227 F.3d 1090, 1093-94 (9th Cir. 2000), *Sanghvi v. City of Claremont,* 328 F.3d 532, 542-43 (9th Cir. 2003), and *DeLaO v. Mattawa,* 2009 WL 262059 (E.D. Wash. 2009), for the proposition that local governments may avail themselves of *Noerr-Pennington* immunity, but those federal cases do not bind the Court here. Further, and more important, in none of those cases were state common law tort claims asserted. The doctrine was only permitted to be used to dismiss federal claims asserted against the municipalities under 42 U.S.C. § 1983. Thus, those cases do not compel the dismissal of the Appellants' claims.

The County represented that the Ninth Circuit ruled that the County's communications to other governments were "grounded in an arguable interpretation of law." CP 1370. The Ninth Circuit did no such thing. CP

1473-1476. Even if it had, however, communication to another based on "an arguable interpretation of law" does not necessarily immunize the speaker or publisher from liability. As to tortious interference, the speaker must also prove that the communication was made in good faith. *Schmerer v. Darcy,* 80 Wn. App. 499, 506, 910 P.2d 498 (1996). Whether an actor's conduct was undertaken in good faith is usually a question of fact. *Morris v. Swedish Health Services,* 148 Wn. App. 771, 777, 200 P.3d 261 (2009). The Appellants have certainly raised a genuine issue of material fact about the County's good faith in making the communications and engaging in the conduct giving rise to their claims. *Id.* (identifying factors for evaluation of actor's good faith).

The *Noerr-Pennington* doctrine does not protect petitioners from liability for their petitioning activity to a government agency acting in a quasi-judicial capacity, when the communication contains false statements that affects the agency's actions. *Kottle v. Northwest Kidney Centers,* 146 F.3d 1056, 1063 (9th Cir. 1998).[30] The DOH, in considering WVII's LOSS permit application and request for change in LOSS management authority, was acting in a quasi-judicial capacity. The County's false representations that the project did not comply with its Comprehensive Plan or the GMA affected and delayed DOH's decision-making process.

[30] This exclusion from immunity falls under the "sham litigation" exception to the *Noerr-Pennington* doctrine. *Id.* at 1060-1063.

Thus, even if *Noerr-Pennington* immunity is available to the County, it does not bar the Appellants' claims based on the County's communications to DOH. *Id.; see also Williams v. Citigroup, Inc.,* 2009 WL 3682536, *7 n.7 (S.D.N.Y. 2009) (citing *In re Tamoxifen Citrate Antitrust Litigation,* 466 F.3d 187, 216-17 (2d Cir. 2006)) ("[t]he *Noerr-Pennington* Doctrine does not cover sham lobbying efforts"); *Fed. Prescription Serv. v. Am. Pharm. Ass'n,* 663 F.2d 253, 263 (D.C. Cir. 1981) (fraudulent acts are not protected by the doctrine when they occur in the adjudicatory process or where false information is filed with an administrative agency with deceptive intent).

The Appellants' tortious interference and negligence claims for permitting delays are not affected by the *Noerr-Pennington* doctrine because, even if the County has immunity for petitioning activities, its permit delaying activities involved no petitioning.

Finally, because the County exercised undue pressure on Karcher Creek Sewer District and misrepresented that it was not authorized to serve as the owner or operator of the Woods View LOSS, which resulted in the District's withdrawal from its contract with WVII to operate it, the sham litigation exception to *Noerr-Pennington* immunity applies to the County's communications with the Sewer District as well. *Fed. Prescription Serv. V. Am. Pharm. Ass'n, supra.* Even if the immunity

defense is recognized, it does not apply to any of the County's conduct; the *Noerr-Pennington* doctrine does not support the trial court's dismissal of the Appellants' claims.

E. The County's communications to Legacy is evidence of its tortious interference with Appellants' contracts and expectancies.

The County moved to dismiss Appellants' tortious interference claims based on the testimony of Mr. Eley. Mr. Eley testified that Legacy would not loan money to WVII until the DOH approved the request for LOSS management change and until WVII applied for building permits. The County argued that because DOH did not approve the management change until August 2010 and because WVII never applied for building permits, Legacy's loan would not have been made in time to save the project, and the Appellants were therefore unable to prove that the County's actions proximately damaged them. CP 1385-1387.[31] This was not an appropriate basis for dismissal of Appellants' claims.

The issue of proximate cause is generally one for the jury. *Mathers v Stephens,* 22 Wn.2d 364, 370, 156 P.2d 227 (1945) (citations omitted). WVII clearly had an expectancy that it would obtain a development loan from Legacy upon obtaining approval of the requested LOSS management

[31] The County's argument is circular, as WVII could not have applied for building permits for individual lots until it had lots to sell, and it had no individual lots to sell until the DOH approved its LOSS management change request.

change from DOH. CP 603-604, 721-724, 1442-1451, 1837-1841.[32] Had the County not delayed approving the SDAP and issuing the MDNS; had the County not interfered with WVII's contract with Karcher Creek Sewer District in 2007; had the County not interfered with the DOH's consideration of the original LOSS permit request in 2007 and 2008, and the later request for management change in 2009, the Woods View project would have been developed and lots ready to be sold no later than February 2009. CP 767. In fact, Mr. Eley's testified that DOH told him that if the County objected to the request for LOSS management change, it could cause a "legal impediment" to DOH's approval of the request that would result in a delay of its approval. CP 1838-1841. And the Appellants have shown that the County communicated its objection to DOH concerning the request (even though it had no jurisdiction to approve or disapprove the request) by falsely claiming that the development didn't comply with the County's land use requirements or the GMA. All of these factors led to the DOH's delay in approving the request. But for the County's interference with the Appellants' business expectancies in all the ways that have been laboriously discussed in this brief, financing would have been obtained, construction would have been completed, 78 individual building lots would have been sold, and WVII and Ms. Piper

[32] *See Newton Ins. Agency & Brokerage, Inc.*, 114 Wn. App. at 158.

would have realized the economic reward from the development that they instead must seek here.

Brent Eley's testimony simply confirmed that the County would go to inordinate measures to prevent the Woods View development project. Rather than providing an independent basis for the trial court to dismiss the Appellants' claims, it supports their causes of action.

VI. CONCLUSION

Over the course of several years, the County conducted a surreptitious campaign to prevent the Woods View project from being built, even though it met all State and County land use requirements. It ultimately succeeded in preventing the development from being built, but, as the Appellants have demonstrated, it committed tortious interference and was negligent in doing so. WVII and Ms. Piper were collateral damage to the County's overarching effort to prevent the project, and they are entitled to have a jury hear their claims. Further, because the County did not request dismissal of the Appellants' takings claims, they should not have been dismissed. The Court should reverse the trial court's order dismissing the claims and remand the case to the Superior Court for trial.

DATED September 6, 2013.

Guy W. Beckett, WSBA#14939
Attorneys for Appellants

DECLARATION OF MAILING

Guy W. Beckett declares:

On September 6, 2013, I mailed by first-class mail, postage prepaid, and send via e-mail, a copy of the foregoing document to:

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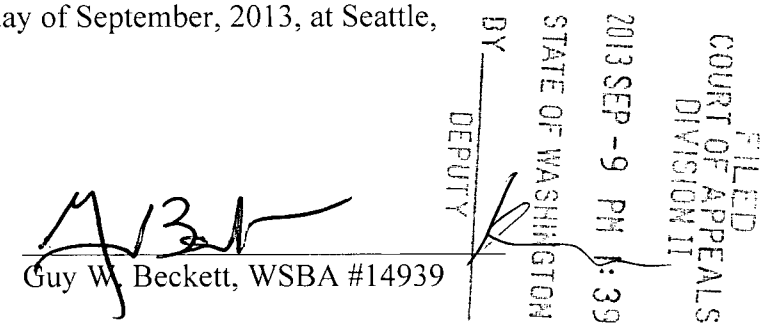
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED THIS 6th day of September, 2013, at Seattle, Washington.



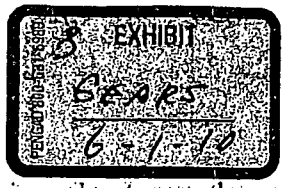
Guy W. Beckett, WSBA #14939

APPENDICES:

No. 1: Kitsap County Code (KCC) 21.04.110 (repealed by Kitsap County Ordinance No. 490 (2012)).

No. 2: WAC 246-272B-0001 (repealed, effective July 1, 2011).

Appendis No. 1: Kitsap County Code (KCC) 21.04.110 (repealed by Kitsap County Ordinance No. 490- (2012)).



21.04.110 **Timelines and duration of approval.**

A. Decisions. Decisions on Type I, II, and III applications shall be issued not more than seventy-eight days after the date of the determination of completeness.

1. If a determination of significance (DS) is issued, the decision shall not issue sooner than seven days after a final environmental impact statement is issued.

2. An applicant may agree in writing to extend the time in which the review authority shall issue a decision. The review authority may consider new evidence the applicant introduces with or after such a written request.

3. If the county determines that the information submitted by the applicant under subsection (C) of Section 21.04.050 is insufficient, it shall notify the applicant of the deficiencies and the procedures under Section 21.04.050 shall apply as if a new request for studies had been made.

4. In determining the number of days that have elapsed after Kitsap County has notified the applicant that the application is complete, the following periods shall be excluded:

a. Any period during which the applicant has been required by the county to correct plans, perform studies, or provide additional information. The period shall be calculated from the date the county notifies the applicant of the need for additional information to the earlier of either: (1) the date the county determines whether the additional information provided satisfies the request for information; or (2) fourteen days after the date the information has been provided to the county;

b. Any period of time during which an environmental impact statement is being prepared, which shall not exceed one year from the issuance of the determination of significance unless the county and applicant have otherwise agreed in writing to a longer period of time. If no mutual written agreement is completed, then the application shall become null and void after the one-year period unless the director determines that delay in completion is due to factors beyond the control of the applicant;

c. Any period during which the applicant has requested additional time to supplement the application or has otherwise requested that processing be delayed; and

d. Any period during which the application has been postponed at the request of the applicant in accordance with subsection (J) of Section 21.04.050.

B. Duration of Development Approval. Preliminary approval of land divisions, site plan review, approval of uses permitted subject to director review, approval of conditional use permits, approval of performance based developments, and approval of variances, shall be valid for a period of three years after approval, during which time a complete application for final plat approval (in the case of preliminary land division approval) or a building permit (for all other listed approvals) meeting all the legal requirements and conditions of approval shall be made.

C. Extensions - Phased Developments.

1. Applications specifically approved for phased development may receive one two-year extension in accordance with the criteria below, so long as at least one phase was finally approved within two years prior to each such subsequent extension request. Subsequent extensions will be subject to a Type III process.

a. An extension request must be filed in writing with the director at least thirty days prior to the expiration of the approval period or any subsequent approved extension.

b. The applicant must demonstrate to the director tangible progress toward the next phase of the application.

c. The applicant must demonstrate to the director that there are no significant changes in conditions which would render approval of the extension contrary to the public health, safety or general welfare.

2. The director may take either of the following actions upon receipt of a timely extension request:

a. Approve the extension if no significant issues are presented under the criteria set forth in this section;

b. Conditionally approve the extension if any significant issues presented are substantially mitigated by minor revisions to the original approval; or

c. Deny the extension if any significant issues presented cannot be substantially mitigated by minor revisions to the approved plan.

3. A request for extension shall be processed as a Type I action. Appeal and post-decision review of a Type I action is permitted as provided in this chapter.

D. Developer Agreements. Notwithstanding the foregoing, the board may approve a developer agreement under RCW 36.70B.170 *et seq.*, providing for a longer approval duration. The hearing examiner is

delegated authority to conduct hearings and make recommendations for developer agreements, but final approval thereof is reserved to the board.
(Ord. 219 (1998) (Exh. 1, § 110), 1998)

21.04.120 Appeals.

Appendix No. 2: WAC 246-272B-0001 (repealed, effective July 1, 2011).

(f) Provide notice of the consequences of failure to comply or repeated violation, as appropriate. Such notices may include a statement that continued or repeated violation may subject the violator to:

(i) Denial, suspension, or revocation of a permit approval, or certification;

(ii) Referral to the office of the county prosecutor or attorney general; and/or

(iii) Other appropriate remedies.

(g) Provide the name, business address, and phone number of an appropriate staff person who may be contacted regarding an order.

(5) Enforcement orders shall be personally served in the manner of service of a summons in a civil action or in a manner showing proof of receipt.

(6) The department shall have cause to deny the application or reapplication for an operational permit or to revoke, suspend, or modify a required operational permit of any person who has:

(a) Failed or refused to comply with the provisions of chapter 246-272A WAC, or any other statutory provision or rule regulating the operation of an OSS; or

(b) Obtained or attempted to obtain a permit or any other required certificate or approval by misrepresentation.

(7) For the purposes of subsection (6) of this section and WAC 246-272A-0440, a person is defined to include:

(a) Applicant;

(b) Reapplicant;

(c) Permit holder; or

(d) Any individual associated with (a), (b) or (c) of this subsection including, but not limited to:

(i) Board members;

(ii) Officers;

(iii) Managers;

(iv) Partners;

(v) Association members;

(vi) Agents; and

(vii) Third persons acting with the knowledge of such persons.

[Statutory Authority: RCW 43.20.050. 05-15-119, § 246-272A-0430, filed 7/18/05, effective 9/15/05.]

WAC 246-272A-0440 Notice of decision—Adjudicative proceeding. (1) All local boards of health shall:

(a) Maintain an administrative appeals process to consider procedural and technical conflicts arising from the administration of local regulations; and

(b) Establish rules for conducting hearings requested to contest a local health officer's actions.

(2) The department shall provide notice of the department's denial, suspension, modification or revocation of a permit, certification, or approval consistent with RCW 43.70.115, chapter 34.05 RCW, and chapter 246-10 WAC.

(3) A person contesting a departmental decision regarding a permit, certificate, or approval may file a written request for an adjudicative proceeding consistent with chapter 246-10 WAC.

(4) Department actions are governed under the Administrative Procedure Act chapter 34.05 RCW, RCW 43.70.115, this chapter, and chapter 246-10 WAC.

[Statutory Authority: RCW 43.20.050. 05-15-119, § 246-272A-0440, filed 7/18/05, effective 9/15/05.]

WAC 246-272A-0450 Severability. If any provision of this chapter or its application to any person or circumstances is held invalid, the remainder of this chapter, or the application of the provision to other persons or circumstances shall not be affected.

[Statutory Authority: RCW 43.20.050. 05-15-119, § 246-272A-0450, filed 7/18/05, effective 9/15/05.]

WAC 246-272A-990 Fees. (1) Fees for proprietary product registration are as follows:

Category	Base Fee	Hourly Fee
Product registration - treatment or distribution - initial application	$400.00	$100.00 per hour if the application requires more than four hours of review time
Transition from list of approved products and systems (both treatment and distribution products)	$200.00	$100.00 per hour if the application requires more than two hours of review time
Annual registration renewal	$100.00	

(2) The base fee is required at the time of application. Any hourly fees for additional review time must be paid in full before the product will be registered.

[Statutory Authority: RCW 43.70.110 and 43.70.250. 06-20-078, § 246-272A-990, filed 10/2/06, effective 1/1/07. Statutory Authority: RCW 43.20.050. 05-15-119, § 246-272A-990, filed 7/18/05, effective 9/15/05.]

Chapter 246-272B WAC
LARGE ON-SITE SEWAGE SYSTEM REGULATIONS

WAC

246-272B-00101 Purpose, objectives, and authority.
246-272B-00501 Administration.
246-272B-01001 Definitions.
246-272B-03001 Applicability.
246-272B-07001 Connection to public sewer system.
246-272B-08001 Application and approval process.
246-272B-09501 Location.
246-272B-11001 Soil and site evaluation.
246-272B-11501 Design.
246-272B-12501 Holding tank sewage systems.
246-272B-13501 Installation.
246-272B-15501 Operation and maintenance.
246-272B-16501 Repair of failures.
246-272B-17501 Expansions.
246-272B-18501 Abandonment.
246-272B-19501 Septage management.
246-272B-20501 Developments, subdivisions, and minimum land area requirements.
246-272B-21501 Areas of special concern.
246-272B-24001 State advisory committee.
246-272B-25001 Waiver of state regulations.
246-272B-26001 Enforcement.
246-272B-27001 Notice of decision—Adjudicative proceeding.
246-272B-28001 Severability.
246-272B-990 Fees.

WAC 246-272B-00101 Purpose, objectives, and authority. (1) The purpose of this chapter is to protect the public health by minimizing:

(b) May apply this chapter to LOSS for sources other than residential sewage, excluding industrial wastewater, if pretreatment, siting, design, installation, and operation and maintenance measures provide treatment and effluent disposal equal to that required of residential sewage.

(2) Preliminary plats specifying general methods of sewage treatment, disposal, system designs and locations approved prior to the effective date of these regulations shall be acted upon in accordance with regulations in force at the time of preliminary plat approval for a maximum period of five years from the date of approval or for an additional year beyond the effective date of these regulations, whichever assures the most lenient expiration date.

(3) A valid sewage system design approval, or installation permit issued prior to January 15, 1995:

(a) Shall be acted upon in accordance with regulations in force at the time of issuance;

(b) Shall have a maximum validity period of two years from the date of issuance or remain valid for an additional year beyond January 15, 1995, whichever assures the most lenient expiration date; and

(c) May be modified to include additional requirements if the health officer determines that a serious threat to public health exists.

(4) The Washington state department of ecology has authority and approval over:

(a) Domestic or industrial wastewater under chapter 173-240 WAC; and

(b) Sewage systems using mechanical treatment, or lagoons, with ultimate design flows above three thousand five hundred gallons per day.

(5) The Washington state department of health has authority and approval over:

(a) Systems with design flows through any common point between three thousand five hundred to fourteen thousand five hundred gallons per day; and

(b) Any large on-site sewage system "LOSS" for which jurisdiction has been transferred to the department of health under conditions of memorandum of agreement with the department of ecology.

(6) The local health officer has authority and approval over:

(a) Systems with design flows through any common point up to three thousand five hundred gallons per day;

(b) Any large on-site sewage system "LOSS" for which jurisdiction has been transferred to a local health jurisdiction from the department by contract.

(7) Where this chapter conflicts with chapter 90.48 RCW, Water pollution control, the requirements under those statutes apply.

[Statutory Authority: RCW 43.20.050. 03-22-098, § 246-272B-03001, filed 11/5/03, effective 12/6/03.]

WAC 246-272B-07001 Connection to public sewer system. (1) When adequate public sewer services are available within two hundred feet of the residence or facility, the local health officer upon the failure of an existing large on-site sewage system may:

(a) Require hook-up to a public sewer system; or

(b) Permit the repair or replacement of the LOSS only if a conforming system can be designed and installed.

(2) Except as noted in subsection (1) of this section, the owner of a failure shall abandon the LOSS under WAC 246-272B-18501 and connect the residence or other facility to a public sewer system when:

(a) The distance between the residence or other facility and an adequate public sewer is two hundred feet or less as measured along the usual or most feasible route of access; and

(b) The sewer utility allows the sewer connection.

(3) Local boards of health may require a new development to connect to a public sewer system to protect public health.

[Statutory Authority: RCW 43.20.050. 03-22-098, § 246-272B-07001, filed 11/5/03, effective 12/6/03.]

WAC 246-272B-08001 Application and approval process. (1) Persons proposing a new LOSS for which the department has jurisdiction by WAC or memorandum of agreement with the department of ecology shall meet the requirements specified in "*Design Standards for Large On-site Sewage Systems*," 1993, Washington state department of health (available upon written request to the department).

(2) Persons shall submit the documents and fees specified under (a) through (f) of this subsection and obtain approval from the department before installing a LOSS to serve any facility:

(a) A preliminary report, stamped and signed by an engineer, including:

(i) A discussion of the proposed project, including the schedule of construction;

(ii) A discussion of compliance with other state and local zoning, platting, health, and building regulations as they relate to sewage treatment and disposal;

(iii) An analysis of the site's capacity to treat and dispose of the proposed quantity and quality of sewage;

(iv) An analysis of the factors identified in WAC 246-272B-20501 (2)(d)(ii)(A); and

(v) A soil and site evaluation as specified in WAC 246-272B-11001 signed by the evaluator;

(vi) A management plan describing the:

(A) Management entity consisting of one of the following:

(I) For residential subdivisions where the lots are individually owned, a public entity serves as the primary management entity, or as the third party trust for a private management entity; or

(II) For other uses, including single ownership, a public entity or a private entity via an appropriate contract or agreement provides management;

(B) Duties of the management entity, including specific tasks and frequency of operation and maintenance;

(C) Controls to ensure the continuity and permanency of proper operation and maintenance;

(D) Methods and frequency of monitoring, recordkeeping, and reporting to the department;

(E) Rights and responsibilities of management; and

(F) Rights and responsibilities of persons purchasing connections to the LOSS.

(b) Complete plans and specifications of the LOSS:

(i) Showing a conventional pressure distribution system with three feet of vertical separation;

(ii) Meeting all other design criteria within "*Design Standards for Large On-site Sewage Systems*," 1993, Washington state department of health (available upon written request to the department); and

(iii) Stamped and signed by an engineer;

(c) A schedule of inspections to confirm the installation conforms to the plans and specifications;

(d) A draft operation and maintenance manual, describing the LOSS and outlining routine maintenance procedures for proper operation of the system;

(e) Required fees; and

(f) Other information as required by the department.

(3) Persons desiring to repair, modify or expand a facility served, or to be served by a LOSS shall submit all documents and fees specified under subsection (2)(a) through (f) of this section, unless the department waives submission of some elements as unnecessary, and obtain approval from the department.

(4) The department:

(a) Shall not change the terms of a project's construction approval during a two-year validity period. However, additional terms to protect public health may be included before granting one-year approval permit extensions;

(b) Shall not permit an experimental LOSS;

(c) Shall only permit installation of alternative systems for which there are alternative system guidelines;

(d) Shall conduct a presite inspection; and

(e) May allow the applicant to renew approval under the initial terms for successive one-year periods if:

(i) The LOSS is incomplete two years after the department's approval;

(ii) The applicant requests renewal in writing; and

(iii) The applicant submits required fees.

(5) A qualified installer shall install the LOSS.

(6) The applicant or applicant's agent:

(a) Shall comply with all conditions set forth in the department's construction approval;

(b) May request extensions to the construction approval permit; and

(c) Shall comply with any additional conditions upon construction approval extensions set forth by the department, and pay required fees for renewing the approval.

(7) Before a new LOSS is used:

(a) An engineer shall stamp, sign, and submit a LOSS construction report to the department within sixty days following the completion of construction of the LOSS including:

(i) A completed form stating the LOSS was constructed in accordance with the department's approved plans and specifications; and

(ii) An "as built" or "record" drawing;

(b) The department shall conduct a final inspection; and

(c) The owner shall:

(i) Submit an operation and maintenance manual developed by an engineer for the installed LOSS to the department for review and approval; and

(ii) Obtain a LOSS operating permit from the department by:

(A) Completing and submitting forms to the department; and

(B) Paying required fees.

(8) The owner of a LOSS that has been approved by the department or local health officer or constructed after July 1, 1984, shall:

(a) Obtain a LOSS operating permit from the department; and

(b) Annually renew it.

(9) The owner shall annually renew the LOSS operating permit by:

(a) Continued retention of an approved management entity to operate and maintain the LOSS;

(b) Submitting a report to the department demonstrating the LOSS is operated, maintained, and monitored in accordance with this chapter and the approved operation and maintenance manual; and

(c) Submitting required fees.

(10) The department:

(a) Shall issue a LOSS operating permit to owners of LOSS meeting the requirements of subsections (1) through (7) of this section;

(b) Shall annually renew the LOSS operating permit when the owner has complied with the requirements under subsection (9) of this section;

(c) May revoke the LOSS operating permit when the:

(i) Approved management entity ceases to operate and maintain the LOSS;

(ii) Owner does not meet other conditions of the LOSS operating permit; or

(iii) LOSS fails;

(d) Shall monitor the performance of LOSS; and

(e) Shall apply the requirements under WAC 246-272B-16501 to failing LOSS.

(11) A local health officer and the department may enter into a contract under which:

(a) The local health officer will assume the department's responsibilities in subsections (2), (4), (6), (7)(a), (b) and (c)(i) of this section to regulate LOSS; and

(b) The local health officer may charge fees to a LOSS applicant or owner for services provided if the authorization for such fees is set forth in local regulations adopted under this chapter.

[Statutory Authority: RCW 43.20.050. 03-22-098, § 246-272B-08001, filed 11/5/03, effective 12/6/03.]

WAC 246-272B-09501 Location. (1) Persons shall design and install LOSS to meet the minimum horizontal separations shown in Table I, Minimum Horizontal Separations:

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

WOODS VIEW II, LLC and DARLENE PIPER, Appellants, v. KITSAP COUNTY, Respondent.	NO. 44404-6-II APPELLANTS' NOTICE OF ERRATA

The Appellants hereby inform the Court and the Respondent that the legal citation appearing at page 39, footnote 28, of their Opening Appeal Brief contains typographical errors. The correct case citation is *U.S. v. Roudakov,* 2005 WL 3263048, *2 (E.D. Pa. 2005).

DATED THIS 2nd day of December, 2013.

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DECLARATION OF MAILING

Guy W. Beckett declares:

On December 2, 2013, I mailed by first-class mail, postage prepaid, a copy of the foregoing document to:

Mark R. Johnsen
KARR TUTTLE CAMPBELL
701 5th Avenue, Ste. 3300
Seattle, WA 98104-7055

Neil R. Wachter
Kitsap County Deputy Prosecutor
614 Division Street, MS 35
Port Orchard, WA 98366

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

SIGNED THIS 2nd day of December, 2013, at Seattle, Washington.

Guy W. Beckett, WSBA #14939