68739-5

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NO. 68739-5-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

KHUSHDEV MANGAT and HARBHAJEN MANGAT,
Appellants,

vs.

SNOHOMISH COUNTY, LUIGI GALLO,
JOHANNES DANKERS and MARTHA DANKERS
Respondents.

CONSOLIDATED REPLY TO SNOHOMISH COUNTY'S RESPONSE BRIEF and BRIEF OF RESPONDENTS LUIGI GALLO, JOHANNES DANKERS and MARTHA DANKERS

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I. INTRODUCTION

Appellants Khushdev and Harbhajen Mangat (the "Mangats") reply to the Consolidated Reply to Snohomish County's Response Brief ("County's Brief") and Brief of Respondents Luigi Gallo, Johannes Dankers and Martha Dankers ("GD Brief"). Snohomish County (the "County") argues that this suit seeks to preclude the County from "continuing to process a subdivision application"; and that Luigi Gallo, Johannes Dankers and Martha Dankers ("Gallo and Dankers") "sought" continuation in March 2010. (County's Brief at * 1). Between January and March of 2010, the County Planning and Development Services ("PDS") decided to substitute Mangats with Gallo and Dankers, and then allow Gallo and Dankers to continue the application. The County's Hearing Examiner then made a final appealable decision on the application with substituted applicants. The County recognizes that its conduct in substitution of applicants is about both a "takings" and an issue of "process". *See* County's Brief at 1-2.

This appeal concerns the County's processes under its code. The piecemeal nature of the Mangats dispute is in part due to State Court's authority to review final administrative decisions[1] versus its authority to

[1] Applying Const. Art. I § 4 and statutory framework of land use and permitting.

adjudicate the taking of private property.[2] At the time PDS decided to make a substitution no final land use decision had been made under Snohomish County Code ("SCC"). Accordingly the Mangats followed the process outlined by the SCC. Under this process, could the Hearing Examiner have rectified the application substitution issue, changed the record or remedy Mangat's injuries? Yes.

II. REPLY TO RESPONDENTS' ISSUE STATEMENTS

The Mangats reincorporate their issue statements from their opening brief. With respect to GD Brief, their issue 3 conflates res judicata with collateral estoppel. These are separate doctrines. *See Meder v. Ccme Corp.*, 7 Wn. App. 801, 802-803, 345 P.2d 173 (1972)(*citations omitted*). That issue may be stated separately as:

> Whether appellants' claims are barred by res judicata where Mangat's July 5, 2011, petition and complaint was filed prior to a Court's grant of Summary Judgment in August 17, 2011?

In reply to the County's Brief Issues 1-2, the Court should be cognizant of the record and the standard of review in determining what facts are material. *See* Infra. IV A-B. Similarly, County Brief's Issue no. 4, makes particular allegations as material ("the Mangats was not in compliance") but the issue has additional dimensions: e.g., whether PDS had final authority to approve or deny Mangats' application (usurping the

[2] Applying Const. Art. I § 16 and statutory framework of Ch. 8.08 RCW.

Hearing Examiner's authority) and whether an application's ultimate code compliance is material to a Ch. 64.40 RCW action based on delay.

County's Issue no. 5 (no argument devoted to such issue of amendment) the Mangats discussed amendment in their opening brief: "if standing is defective because the Mangats alleged other person aggrieved in complaint, then the appropriate remedy is to allow Mangats to amend their petition to reflect their past applicant status." Opening Brief of Appellants (Opening Brief) at 43. In reply to County's Issue No. 6, Mangats are not challenging authority of Superior Court rather whether such spontaneous order was appropriate given the record, and noting such should be reviewed *de novo*. *See* Opening Brief at 13, 15.

III. REPLY TO RESPONDENTS STATEMENT OF THE CASE

Mangats seek to clarify a few points and characterizations in Respondents briefs, not made in their opening brief:

1.) The Intent and Agreement of the Parties in the addendum was not determined (*see* GD Brief at 5) and Mangats proffer different evidence in response to the meaning of "studies, reports, letters, memorandums, maps, drawings and other written documents. *See* CP at 185-85, 223.

2.) What constitutes a "revised" application is not defined in the SCC (County Brief at 15-16); and, is inconsistent with the record. CP 49-50 ("We then declared the Mangats in default and began taking steps to

complete the subdivision application); *see also*, CP at 431 ("I believe it was a single application"). A substantial revision, as opposed to corrections, perform studies, and additional information are defined in the code. *See* SCC 30.70.110(2)-(3); *see also*, CP 425-27. Further the application that was considered by the Hearing Examiner adopted the same completion date, project number, and review letters, responses to review letters. CP at 511. Mangats also contend the Hearing Examiner considered the issue of control over the plat application. Id.

3.) Respondents characterize the Mangat's application as containing "deficiencies", "defects", or "errors", specifically related to the traffic comments section. *See* GD Brief at 6; County Brief at 11-14. This is disputable, and misstates the content of review letters. Rather there were review comments, and requests for additional information. CP at 117-199. This also conflates whether the Hearing Examiner would have approved the preliminary plat or added conditions. *See* CP 97-98 (staff recommendation to approve with conditions.) No Hearing Examiner decision issued until May 17, 2011. *See* SCC 30.41A.100; CP at 520-23.

IV. ARGUMENT

A. Standard of Review

Appellate courts perform the same inquiry into the material facts as the trial court. *See Hisle v. Todd Shipyards Corp.*, 151 Wn.2d 853, 860, 93

P.3d 108 (2004); *see also*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("As to materiality, the substantive law will identify which facts are material [***] [f]actual disputes that are irrelevant or unnecessary will not be counted");[3] c.*f.*, *LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027, *cert. denied*, 493 U.S. 814, 110 S. Ct. 61, 107 L. Ed. 2d 29 (1989)(the concern being judiciary's infringement upon a litigant's right to hearing). Statutory interpretation is also a question of law that this court reviews *de novo*. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179, 1183 (2009)(*citing*, *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 87, 134 P.3d 1166 (2006)). For e.g., in determining the applicability of LUPA to a city ordinance the Supreme Court, in *Post*, stated:

> Our objective in interpreting a statute is to determine legislative intent. When statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. The "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. A

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[3] Herein, U.S. Supreme Court states regarding the relationship between material facts and substantive law:

> [***] while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes

Liberty Lobby, Inc., 477 U.S. at 248.

> reading that produces absurd results should be avoided, if possible, because we presume the legislature does not intend them.

Post , 217 P.3d at 1183 (citations omitted). Here, Mangats argue that this is primarily an issue of law. The decisions below and respondents' briefs failed to identify the material facts and/or interpretation of statutes with respect to standing under LUPA, application of collateral estoppel, Writs of Mandamus and Prohibition, and exhaustion of administrative remedies under Ch. 64.40 RCW.

B. Respondents Argument Confuses Legal Framework

This matter involves a final administrative decision by the County Hearing Examiner to approve a preliminary plat, and affirm many of PDS's process and recommendations therein. Throughout their briefs, the Respondents apply isolated sections of statute, common law, or county code to individual facts concluding that the Mangats' are barred in one way or another. *See e.g.,* County Brief at p. 25. This approach should not survive policy and equitable considerations of the County's own regulations and Washington's land use regulatory scheme as an integrated system of laws and rules. It also ignores a former applicant's judicially cognizable grievances that may be brought after a final land use decision.

Following enactment of the Growth Management Act in 1990 and 1991, LUPA was enacted in 1995: "to reform the process for judicial

review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. LUPA exclusively governs judicial review of non-excluded land use decisions, its uniform procedural provisions operate in the context of a broader framework of federal, state, and local environmental and land use laws and regulations. *James v. Kitsap County*, 154 Wn.2d 574, 586, 115 P.3d 286 (2005).

A challenge of substantive law, e.g., a permitting decision, necessarily implicates LUPA, but not to the exclusion of other relevant laws. *See Ward v. Board of Skagit County Comm'rs*, 86 Wn. App. 266, 272-74, 936 P.2d 42 (1997) ("the review to which the provision [RCW 36.70C.010] refers is review by state courts of local governmental land use decisions"); *see also*, *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 177-78, 4 P.3d 123 (2000)(LUPA exhaustion of remedies, when decisions appealed to the GMHB). Additionally, the court's review under LUPA is informed by the procedural and substantive requirements of other applicable environmental and land use laws and regulations circumscribing the local body or officer making the land use decision. RCW 36.70C.130; *Westside Bus. Park, LLC v. Pierce County*, 100 Wn. App. 599, 615, 5 P.3d 713 (Div. 2, 2000).

Further, neither LUPA, nor its legislative history, contain any preemption language indicating LUPA's deadline for review supersedes "ordinances establishing deadlines for local governmental agencies deciding applications under local zoning codes." *Ward*, 86 Wn. App. at 274; *see also*, *James*, 154 Wn.2d at 588. (where a superior court is not divested of its original jurisdiction under Washington's Constitution because it is well established that where statutes prescribe procedures for the resolution of a particular type of dispute, they will require substantial compliance or satisfaction of the spirit of the procedural requirements before exercising jurisdiction). Here, it can hardly be said Mangats have not made a substantial effort to comply with administrative proceedings before coming before the Superior Court.

1. Application of *Grundy*, *Shen-Yen Lu*, and *Tent City IV* to preclude Writs of Mandamus and Prohibition Turns on Whether LUPA is Adequate Alternative Remedy.

Respondents urge that *Grundy*, *Shen-Yen Lu*, and *Tent City IV* effectively preclude any other review of PDS actions and processes except LUPA. GD Brief at 23-24 (*Grundy v. Brack Family Trust*, 116 Wn. App. 625, 632-633 (2003); *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 292 P.3d 1163 (2012); *Grand Master Shen-Yen Lu v. King County*, 110 Wn. App. 92, 95, 38 P.3d 104 (2002)); County Brief at 28. Not so, such cases emphasize utilization of LUPA where it controls,

not the elimination of other causes of action when it does not. *See Sheng-Yen Lu*, 110 Wn. App. at 99; *c.f.*, *Brower v. Pierce County*, 96 Wn. App. 559, 564, 984 P.2d 1036 (1999)(the central question we must decide is whether the appeal to the hearing examiner provided adequate relief).

Here, Mangats phrase their Writs of Mandamus and Prohibition as alternative claims to their LUPA (which the legislature deemed fit to substitute the process for a writ of certiorari). The very idea being that if the actions complained of are not remedied by the LUPA (because LUPA does not control or provide remedy) then an alternative review can be used.

C. Petitioners Have Standing Under LUPA

The County's assertion that the Mangats' lack standing to maintain an action under LUPA, also typify the County's fragmented application of facts and law to the Mangats' case. The County stated:

> Gallo and Dankers ***submitted a revised application*** on May 28, 2010, which removed the Mangats as the named applicant and submitted the underlying property owners (i.e. Gallo and Dankers) as the named applicant on the subdivision application. (CP 95). ***It was this revised application***, in turn, that proceeded to hearing before the Snohomish County Hearing Examiner. (CP 94-95; CP 510). ***Accordingly, the Mangats were neither the applicant nor the owner for purposes of standing*** under sub-section (1) of RCW 36.70C.060.

County Brief, p. 25 (emphasis supplied). This argues that because the application was revised by Gallo and Dankers then the Mangats have no standing. But this assumes the definition of applicant already applies to Gallo and Dankers. *See* SCC 30.70.110(3)(b). The respondent's assertion conflates a new application or resubmitted application, with PDS's decision to transfer the applicant status to Gallo and Dankers. *See e.g.*, *Westway Constr., Inc. v. Benton County*, 136 Wn. App. 859, 866, 151 P.3d 1005 (2006)(Owners who did not file the application have no standing under Ch. 64.40 RCW)

If revision is tantamount to a new or separate application, it would be *ultra vires* for planning officials like Ed Caine to "back-date" the application's completion date. *See Graham Neighborhood Ass'n v. F.G. Assocs.*, 162 Wn. App. 98, 101-102, 252 P.3d 898 (Div. 1, 2011). It is under this shaky characterization, the County attempts to raise the standing bar prohibitively high by arguing the Mangats cannot show (1) an injury in fact, and (2) that the Mangats are not within the zone of interests the County was required to consider.

1. Mangats Are Injured in Fact As Former Applicants

Absent in the County's argument is any rationale explaining why the taking of the Mangats' property interest is not an injury in fact. (County Brief p. 27). In order to establish standing, "a party need not show

a particular level of injury." *Chelan County v. Nykreim* 146 Wn.2d 904, 934-35, 52 P.3d 1 (2002)(*citing, Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 832, 965 P.2d 636 (1998)). Taking a property right secured to the Mangats through their submission of a complete subdivision application and transferring that benefit to another party is a specific and perceptible harm that is more than simply the abstract interest of the general public in having others comply with the law. *Nykreim,* 146 Wn.2d at 935. The injury suffered is specific to the Mangats because their application had vested to a particular set of land use regulations (involving critical area setbacks and densities) which made their application have a particular and specific value. CP at 225-230 (Dec. of Eric Cassel); *see*, CP 206 (Application vested to former Critical Area Ordinances).

Even, assuming arguendo, that Gallo and Dankers' "revised application" (County Brief, p. 25) was tantamount to some resetting of interests, then the Mangats' also suffer injury in that persons, who did not go through the County's application process, obtained an older completion date without being subject to the requisite process to which the Mangats and similarly situated applicants are subjected to. It would also be erroneous for the Hearing Examiner to then approve an application which did not comply with its own completeness regulations. *See Graham Neighborhood Ass'n*, 162 Wn. App. at 101-102 (the County lacks

authority to reinstate application in contravention of the pertinent ordinances).

Regardless, the injury suffered by the Mangats cannot simply be framed as either/or characterization. In exercising its police power in making land use decisions under its adopted regulations, the County has a duty to act reasonably. *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 685, 649 P.2d 103 (1982). It is immaterial the County did not anticipate injury to the Mangats' when it transferred the subdivision application and subsequently approved it. As the decision in *King v. Seattle* stated:

> Liability extends to foreseeable results from unforeseeable causes. It was foreseeable that arbitrary and capricious delay of the plaintiffs' building project could cause them damages, increase in the price of materials, the cost of labor, the interest rate on borrowed money, and many other specific areas of harm. Liability is not predicated upon the ability to foresee the exact manner in which the injury may be sustained. *Citing Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940).

King v. Seattle, 84 Wn.2d 239, 248-49, 525 P.2d 228 (1974).

2. Former Applicants Are Within the Zone of Interests Protected by LUPA

The zone of interests test cited by the County (County Brief pp. 27-28), "is not meant to be especially demanding" *Nykreim*, 146 Wn.2d at 937. 52 P.3d 1 (2002)(citations omitted). Without supporting its statement

with any rational or case citation, the County asserts the Mangats' property interest in the subdivision application was not an interest that it "was required to consider or protect when acting upon a subdivision application under Ch. 58.17 RCW and the County's subdivision ordinance." (County Brief pp. 27-28).

To the contrary, the Mangats' interests were directly within the zone of interests the County was required to consider. The legislature in finding "the process by which land is divided is a matter of state concern and should be administered in a uniform manner by cities, towns, and counties throughout the state[,]" enacted Ch. 58.17 RCW, regulating the subdivision of land. RCW 58.17.010. Among the stated purposes of the statute is "to provide for the expeditious review and approval of proposed subdivisions which conform to zoning standards and local plans and policies." RCW 58.17.010.

Similarly, adoption of the GMA lead to further reform of project permitting and judicial review of land use decision processes. LUPA's purpose is "to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. The County adopted these regulations as required, and has a duty to comply with them; it cannot dismiss that duty. *See Norco Constr.*, 97 Wn.2d at 684-85 (we hold Norco did have a right to have a decision on its preliminary plat application made within 90 days after

filing its application and based on the factors relevant during that period). The protections provided by the legislature apply to the Mangats' and the processing of their subdivision application.

D. Petitioners Are Not Collaterally Estopped or Claim Precluded From Asserting a Petition From a Land Use Decision or Seeking Relief Under RCW 7.16.160 or 7.16.290.

1. Res Judicata Does Not Apply to Mangat's Petition Because No Final Judgment.

While a related doctrine, res judicata applies only under certain conditions. As GD Brief states: "[t]here must be a final decision on the merits to invoke res judicata Summary Judgment fulfills that criteria." GD Brief at 28. Here, the LUPA petition was filed on July 5, 2011, the order granting summary judgment was issued on August 17, 2011. CP 481, 486. No final decision on the merits had issued that could factually support claim preclusion. Thus use of res judicata without final decision would be erroneous and adding cases like *Shoemaker* into the discussion muddles the analysis of collateral estoppel; or fuddles the claim preclusion analysis. GD Brief at 28 (*citing* to *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987); *Karlberg v. Otten*, 167 Wn. App. 522, 280 P.3d 1123, 1130 (2012)). Here, review need not reach the application of the elements of res judicata.

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2. Mangats Were Not Collaterally Estopped From LUPA, or Writ of Mandamus.

On the issues of Collateral Estoppel, the Mangats incorporate their arguments in the Opening Brief (at pp. 34-42) as if stated fully herein.

E. Petitioners Have Claim For Damages Under Ch. 64.40 RCW

The County argues dismissal of the Mangats' damages claims under Ch. 64.40 RCW is appropriate for various reasons. County Response Brief, p. 31-44. First, the County nonsensically asserts its own failure to comply with its mandatory requirement to provide notice of a final decision within 120-days is somehow not for the benefit of providing the applicant with notice, but "[r]ather it is a condition precedent to a municipal entity availing itself of the limited right to extend the 120-day processing timeline as provided in RCW 36.70B.080." *Id.*, p. 34. Secondly, the County mistakenly asserts it provides no administrative remedy or review process that an applicant can exhaust prior bring a claim for delay. *Id.*, p. 37. The County misconstrues the statutory meaning of "act" to assert that any delay in processing an application may only be caused by the County's inaction, and not by its deliberate actions. *Id.*, p. 38. Finally, the County rests on the anomalous holding in *Birnbaum*. *See* County Brief at p. 41.

The County's arguments are premised on its discredited notion that it is immune from liability caused by the actions of its land use officers. *See, Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 98-111, 829 P.2d 746 (1992)("we find that RCW 64.40.020 evidences a legislative intent to abrogate the Creelman rule of vicarious municipal immunity for the quasi-judicial acts of its officials."). The plain language of the statute and rules statutory construction, a fair reading of case law, public policy, or common sense and logical reason do not support such arguments.

1. The County Bears The Burden Of Its Processes and Has Two Processes For Delay and Limiting Liability

The County attempts to shift its own affirmative duty to comply with project review procedures to the permit applicant. County Brief, p. 35; *c.f.,* Opening Brief, pp. 19-23. Strictly speaking, the County may be correct that issuing written findings under RCW 36.70B.080(1) is a condition precedent to the County "availing itself of the limited right to extend the 120-day processing timeline," however, its conclusion that it also cannot be a condition precedent in a damages claim for delay under Ch. 64.40 RCW results in an absurd interpretation of its own codes, unsupported by either Ch. 36.70B RCW or Ch. 64.40 RCW. *See State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983) ("We have consistently held statutes should receive a sensible construction to effect the legislative

intent and, if possible, to avoid unjust and absurd consequences")(citation omitted).

Following the legislative mandate for local governments planning under the Growth Management Act ("GMA") to adopt development regulations establishing project review processes, including time limits, (RCW 36.70B.060; RCW 36.70B.080(1)("***must*** establish and implement time periods")), Snohomish County did so. *See* SCC 30.70.010. There is no ambiguity in the language of SCC 30.70.110(1) "notice of final decision on a project permit ***shall*** issue within 120 days [***]." (Emphasis supplied). This mandatory, non-discretionary requirement is placed on the County and cannot be read to shift the burden to the applicant. It is County who is required to adopt implementing development regulations and make final decisions on projects applications.

The County's forthrightly admits it had no legitimate reason to ignore its application review deadline to issue notice of a final decision or to provide written notification stating the reasons it exceeded the time limits. County Brief, p. 35. However, its conclusion, that it bears no liability for damages caused by its failure to comply with the law, is erroneous, irrespective of the County's attempt to indemnify itself by the language of SCC 30.70.110(6). *See Schultz v. Snohomish County*, 101 Wn. App. 693, 5 P.3d 767 (2000)(In light of the explicit time limits imposed on

the County by Ch. 36.70B RCW, "the County has no authority to abridge the applicants' rights conferred by this state statute").[4] Implicit in the County's argument that it "has no administrative remedy or review process for failure to timely act on a project permit application," (County Response Brief, p. 37), is that each discrete element of the review process, which is susceptible to unlawful action on the part of the County, must have its own explicit appeal process. This is an error because there is a clear and effective process in place by which the County may exceed its deadlines without subjecting itself to a claim for damages.

In codifying its review timeline processes (pursuant to RCW 36.70B.080(1)), the County explicitly excluded application of the 120-day deadline for issuing notice of a final decision "[w]hen the applicant consents to an extension." SCC 30.70.110(3)(d). Adhering to its development regulations ensures that applications are processed without unnecessary or inappropriate delays based on arbitrarily or parochially conceived rules. Availing itself of this simple procedure could have immunized the County from liability under Ch. 64.40 RCW, which explicitly bars claims in such an event. RCW 64.40.010(6). The SCC has

[4] SCC 30.10.040: "Nothing in this title shall be construed to excuse compliance with other applicable federal, state, or local laws or regulations." This applies to the actions of the County itself. SCC 30.70.010(3) ("This subtitle applies to all project permit applications, unless specifically exempted, and to legislative decisions, code interpretations, and other decisions on applications as specifically set forth herein")(emphasis supplied).

another explicitly defined process under SCC 30.70.110(5) to issue a notice of delay. Opening Brief, p. 19-23 (explanation of Notice of Delay).

Because there was no specific need for PDS to have exceeded the 120-day time period; the County's mandate was to place the Mangats' application on for hearing in 2008. County Response Brief, p. 35. An alternate and SCC consistent course(s) of action for PDS was to explain the reason for its delay and seek written consent from the Mangats to exceed 120 days. The absurdity of the County's reasoning is that by failing to utilize the very measures which permit it to exceed its deadline the County can now flout its statutory duties at will. *See*, *King*, 84 Wn.2d at 244 ("The most promising way to correct the abuses, if a community has the political will to correct them, is to provide incentives to the highest officials by imposing liability on the governmental unit").

The Mangats argue that the County made a conscious decision based on it parochial perceptions of what would be the best course of action, without regard to its specifically adopted ordinances. No basis in evidence or law, simply an unwritten subjective opinion that applicant would rather continue the process without notification or waiver of deadline. This had no basis in the actual merits of the application (and it eventually was approved).

2. Application Would Have Been Denied By Hearing Examiner Is Speculative and Without Basis.

The County's conclusory statement that the application would have been denied is completely baseless. While PDS reviews subdivision applications and makes recommendations, it has no authority to make the final decision. As argued in the Opening Brief (at pp. 21-22), that duty is tasked to the hearing examiner, who "shall have authority" *inter alia*, to "[c]onduct public hearings and prepare a record thereof," and to "[m]ake and enter decisions." SCC 2.02.100 (2), (6); *see also*, SCC 30.72.060.

Here, the hearing examiner made no decision prior to 2010, so there is nothing to support the County's assertion. In fact, given that the application was approved is evidence demonstrating the application was approvable. The Mangats' application could have been approved outright, or subjected to modification or conditional approval. SCC 30.70.010(3). Whether the application was approvable, as submitted by the Mangats, is an issue which unfortunately has never been determined as a matter of fact and as such, is not before this Court for resolution.

3. Respondents Defense of Birnbaum Is Flawed.

The County relies on this court's decision in *Birnbaum v. Pierce County*, 167 Wn. App. 728, 274 P.3d 1070 (2012), to support its notion that the applicant bears the burden of determining when the County

exceeds its statutory deadline in the absence of written notice by the County. County Response Brief, p. 37. To the extent the court's decision was based on the opinion of *Birnbaum*'s at FN1, then for two reasons such basis is flawed. *Birnbaum*, 167 Wn. App., at 734, fn 1.

First, the issue is not that damages would be minimal; they may be nonexistent on the day the 120-day deadline has been exceeded. Ch. 64.40 RCW defines damages:

> "Damages" means reasonable expenses and losses, other than speculative losses or profits, *incurred between the time a cause of action arises and the time a holder of an interest in real property is granted relief* as provided in RCW 64.40.020. *Damages must be* caused by an act, *necessarily incurred, and actually suffered, realized, or expended*, but are not based upon diminution in value of or damage to real property, or litigation expenses.

RCW 64.40.010(4) (emphasis supplied). Under the statute, until damages are actually incurred a claim is not ripe for judicial review. *Id.* In *Brower* the plaintiff satisfied timeliness prerequisite for appellate jurisdiction, but this court dismissed because the administrative decision provided the relief sought. *See Brower*, 96 Wn. App. at 564.[5]

Secondly, the record here makes it apparent that precise calculation of the processing timeline may impossible or so subject to interpretation

[5] In Distinguishing *Mission Springs* the opinion in *Brower* determined mere delay does not give rise to monetary damages, because the Legislature created a cause of action arising only when the administrative process fails to provide adequate relief. *Brower* at 564-65 (*Mission Springs*, unlike the *Browers*, had vested rights in the permits that the Council refused to issue)

and dispute that it becomes a material fact to be determined by the trier of fact and improper for summary judgment. *See* CP 118 (for one interpretation of the clock). For example, SCC 30.70.040(2) is ambiguous in that it can be interpreted to mean either that absent a written notice of determination the application is deemed complete as of the date submitted or the date the 28-day time limit expires. Furthermore, the County required the Mangats to wait as much as 30 days and 21 days before permitting submission of supplemental information. Opening Brief, p. 6. Are these days countable or excluded from the calculation of elapsed time under SCC 30.70.110(2)? The ordinance makes no mention of County-initiated waiting periods.

The holding in *Birnbaum* also renders the definition of "act" superfluous. *See Birnbaum*, 167 Wn. App. at 733-734. *Birnbaum*'s interpretation that "[a]n act occurs when there is ***either*** a final decision ***or*** a failure to act within established time limits[,]" is not strictly accurate. *Id.* The statutory definition states, in relevant part:

> "Act" means a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed. "Act" ***also*** means the failure of an agency to act within time limits established by law in response to a property owner's application for a permit[.]

RCW 64.40.010(6). An "act" is a final decision, but may also be a failure to act within the deadlines. The use of "also" does not have the effect that use of the disjunctive "or" would have had, but rather is additive. *See, Lutheran Day Care*, 119 Wn.2d at 111-112. A reading of the statute as providing relief only for one or the other act, precludes claims where the Legislature purposefully created a new cause of action beyond those previously existing. RCW 64.40.040. ("The remedies provided by this chapter are ***in addition to*** any other remedies provided by law.") (emphasis supplied). Further, such a reading presumes an applicant will have only a claim based on the agency's "act" or "failure to act," but not both simultaneously.

In light of the aforementioned considerations the finality requirement serves a very practical purpose; it sets the definitive date for determining statutory filing time limits. *See Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 633, 733 P.2d 182 (1987)("The rationale for the exhaustion requirement is that the administrative officer or agency may possess special expertise necessary to decide the issue, and that an administrative remedy may obviate the need for judicial review.").

4. Alternatively, Birnbaum Should Be Distinguished

To hold an applicant to the strict statutory interpretation in *Birnbaum*, results in the anomalous situations where a potential plaintiff

must either risk filing prematurely to preserve its claim, or alternatively, to risk being time barred if injury does not occur within 30 days of the unlawful delay. These results are contrary to the explicit intent of the legislature in enacting Ch. 64.40 RCW, which provides: "(1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law[.]" RCW 64.40.020(1).

Should the court determine not to overturn *Birnbaum* in full, it should be distinguished on the facts of this case. Namely, *Birnbaum* is inapplicable: (i) where the County had a an affirmative duty to issue a final decision under SCC 30.70.110(1) or (5), (ii) where the under the plain language of the County code, an applicant cannot reasonably or accurately determine the true date on which the statute of limitation begins to run; or, (iii) where damages did not necessarily begin to accrue until sometime after 30-days following expiration of the 120-day deadline.

Such a ruling would be consistent with *Callfas* and *Hayes*. *See Callfas v. Dep't of Constr. & Land Use*, 129 Wn. App. 579, 598, 120 P.3d 110 (2005); *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997). Regarding *Hayes*, there was no action triggering the statute of limitations until the city's final decision. *Hayes*, 131 Wn.2d at 712-13.

Here, the County failed to trigger the statute of limitations by not issuing notice as prescribed by County code. With respect to *Callfas*, this court stated, "we concluded that an action for damages is not ripe until the city has, in fact, acted." *Callfas,* 129 Wn. App. at 598. So too, is it consistent with *Callfas*, as this court noted, "The term 'failure to act' in the statute does permit recovery of delay damages. But it is inextricably tied to some action by the City which causes the clock to begin to run on the statute's 30-day limitation period." *Id.*, at 581.

V. CONCLUSION

For the foregoing additional reasons, this Court should reverse the trial court's orders under review; grant Mangats' Motion for Partial Summary Judgment on their Ch. 64.40 RCW delay claim; and remand the matter for further proceedings.

RESPECTFULLY SUBMITTED this 8th day of October, 2012, by:

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No. 68739-5-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

KHUSHDEV MANGAT and HARBHAJEN MANGAT,
Appellants,

vs.

SNOHOMISH COUNTY, LUIGI GALLO, JOHANNES DANKERS and MARTHA DANKERS,
Respondents.

DECLARATION OF SERVICE

I, Chessa Tachiki, declare under the penalty of perjury that I caused to be served a true and correct copy of Appellant's Reply Brief on Respondents' attorneys by giving a copy of that document to ABC Legal Messenger Service for delivery to the following individuals:

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