68739-5

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Case No. 68739-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KHUSHDEV MANGAT and HARBHJAN MANGAT,

Appellants

vs.

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

Respondents

SNOHOMISH COUNTY'S RESPONSE BRIEF

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I. INTRODUCTION

The present action is the third in a series of lawsuits filed by Plaintiffs/Appellants, Khushdev Mangat and Harbhajen Mangat, husband and wife ("Mangats"), seeking to preclude Snohomish County ("County"), from continuing to process a subdivision application originally filed by the Mangats as contract purchasers of certain real property owned by Defendants/Respondents Luigi Gallo and Johannes and Martha Dankers ("Gallo and Dankers"). (CP 463-64). After the Mangats' purchase and sale agreement expired without closing in December 2009, the underlying property owners, Gallo and Dankers, sought to continue processing the subdivision application and submitted a revised application in March 2010, which revised application was granted preliminary subdivision approval on May 17, 2011. (CP 465-66).

During the pendency of the subdivision application the Mangats filed a Complaint for Declaratory and Injunctive Relief on March 22, 2011, under Snohomish County Superior Court Cause No. 11-2-03863-5, seeking to enjoin the County from further processing the application on behalf of Gallo and Dankers, and seeking damages for alleged unconstitutional taking and/or deprivation of due process. (CP 463-64). This complaint was based on the Mangats' contention that the rights arising under the subdivision application were the "personal property" of

the Mangats and, thus, that the County was depriving and otherwise taking such property right from the Mangats by allowing Gallo and Dankers to continue processing the subdivision application. (CP 464). This action was dismissed upon motion for summary judgment by order of the court dated August 17, 2011 (CP 478-82), and is the subject of a separate appeal pending under Case No. 67712-8-I.

After the County acted to approve the revised subdivision application submitted by Gallo and Dankers, the Mangats filed the present action under Snohomish County Cause No. 11-2-06519-5, as an appeal under the Land Use Petition Act (LUPA), Ch. 36.70C RCW, again renewing the contention that the County had erred in concluding that the subdivision application "ran with the land" for purposes of allowing Gallo and Dankers to continue processing the application. (CP 492-500, LUPA Petition, Errors 1-7). In addition, the Mangats alleged three additional causes of action consisting of the following: : (1) Claim for Damages against Snohomish County under Ch. 64.40 RCW for alleged delay in processing the subdivision application; (2) Application for Writ of Mandamus under RCW 7.16.160; and (3) Application for Writ of Prohibition under RCW 7.16.290. (CP 486-504, Land Use Petition; Claim for Damages; Petition for Writ of Mandamus dated July 5, 2011).

As with the issues raised in the LUPA petition, the claims for Writ of Mandamus and Writ of Prohibition were based upon the same allegation of an "unconstitutional taking" of the Mangats' property interest in the subdivision application which had been asserted in the prior Complaint for Declaratory and Injunctive Relief under Snohomish County Superior Court Cause No. 11-2-03863-5 and dismissed by the court in that action. (CP 501-02, Cause of Actions, Title VIII and IX). Accordingly, the County moved pursuant to CR 12(b)(6) to dismiss the Mangats' claims for Writ of Mandamus and Writ of Prohibition arguing that the Mangats were barred by the doctrine of collateral estoppel from relitigating the issue of alleged "unconstitutional taking" as the basis for relief in the form of a Writ of Mandamus and/or Writ of Prohibition. (CP 474-75).

In conjunction therewith, the County also moved to dismiss the LUPA petition pursuant to RCW 36.70C.060 for lack of standing based on the fact that the Mangats' had no further interest in the real property which was the subject of the application and, thus, were not aggrieved parties for purposes of standing under LUPA. (CP 462-476). These combined motions were granted by Order of the Court dated October 19, 2011. (CP 270-72).

On March 12, 2012, the Mangat's filed a Motion for Partial Summary Judgment on their remaining claim for damages under Ch. 64.40 RCW seeking a determination that the County had exceeded the 120 day time period for issuance of a final decision on a project permit application as prescribed in RCW 36.70B.080(1). (CP 159-180, at pg. 172). In this regard, it was undisputed that the 120 day time period for processing of the Mangats' original subdivision application had expired in June 2008. (CP 172; 24).

The County filed a response asserting as a bar to the Mangats' claim the 30-day statute of limitations set forth in RCW 64.40.030 which requires that a claim for damages under Ch. 64.40 RCW must be filed within 30-days (subject to exhaustion of any applicable administrative remedies). (CP 23-44, at pg. 35-40). The Court issued its Order on April 12, 2012, denying the Mangats' motion for partial summary judgment and granting judgment of dismissal "sua sponte" in favor of the County. (CP 19-21). The present appeal seeks review of both the Order Dismissing the LUPA Petition and Complaint for Writ of Mandamus and Writ of Prohibition, together with the subsequent Order Granting Judgment of Dismissal Sua Sponte dismissing the Mangats' remaining claim for damages under Ch. 64.40 RCW. (See Notice of Appeal, dated May 9, 2012).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The issues relating to the Mangats' assignments of error as they pertain to the trial court's Order Dismissing the LUPA Petition and Complaint for Writ of Mandamus and Writ of Prohibition may be stated as follows:

1. Did the trial court err in concluding, as a matter of law, that the Mangats lacked standing to maintain an appeal under LUPA of the County's decision granting preliminary subdivision approval where the Mangats had no further right or interest in the real property which was the subject of the application at the time the land use decision was issued, and where the "interest" the Mangats sought to protect (i.e. their claimed personal property interest in the subdivision application), was not within the zone of interests the County was required to consider in acting upon a subdivision application?

2. Did the trial court err in concluding, as a matter of law, that the Mangats were barred by the doctrine of collateral estoppel from relitigating the issue of alleged "unconstitutional taking" which had been previously asserted by the Mangats as the basis for their claim for declaratory and injunctive relief in the prior action and dismissed, as the basis for seeking relief under the alternative claims of Writ of Mandamus and Writ of Prohibition in the second action?

As it pertains to the trial court's order denying the Mangats' motion for partial summary judgment and Granting Judgment of Dismissal Sua Sponte, the issues may be stated as follows:

3. Did the trial court err in concluding, as a matter of law, that the Mangats' claims for damages under Ch. 64.40 RCW for alleged failure on the part of the County to act

upon the subdivision application within time limits established by law, was barred by the 30-day statute of limitations imposed under RCW 64.40.030 which requires such claims to be brought within 30-days from the date the action becomes tardy?

4. As an alternative grounds for affirming dismissal, did the trial court err in concluding, as a matter of law, that the County's alleged delay in acting upon the subdivision application could not be the proximate cause of any damages claimed where the subdivision as proposed at that time by the Mangats was not in compliance with applicable development regulations and, thus, would have been denied had it proceeded to hearing at that time?

In addition to the above, the Brief of Appellants filed herein raises the following procedural issues:

5. Whether relief to amend the Petition and Complaint should have been granted? (Brief of Appellants, pg. 3, Issue No. 3). There is no record of any motion to amend the Petition and Complaint by Plaintiffs herein nor any argument devoted to such issue in the body of the Brief of Appellants and it is assumed this was an erroneous statement in the Brief of Appellants.

6. Whether sua sponte dismissal of Mangats' Ch. 64.40 claims was appropriate? (Brief of Appellants, pg. 4, Issue No. 8). To the extent intended as a challenge to the procedural authority of the court to grant summary dismissal to a nonmoving party, there is no argument devoted to such issue in the body of the Brief of Appellants and it is assumed this issue has been abandoned. [1]

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[1] See Leland v. Frogge, 71 Wn.2d 197, 201, 427 P.2d 724 (1967) (holding that summary judgment of dismissal may be granted for a nonmoving party upon an opposing party's motion for summary judgment where undisputed facts are dispositive of the claim alleged).

III. STATEMENT OF THE CASE

A. Statement of Facts: In March 2007, the Mangats entered into combined purchase and sale agreements to purchase adjoining parcels of real property situated in Snohomish County owned by Gallo and Dankers. (CP 48). The purchase and sale agreements were contingent on the Mangats as Buyers obtaining a "Conventional First" loan to purchase the property. (CP 64-65). An Addendum to the Purchase and Sale Agreement provided that the Mangats were to submit a subdivision application for development of the property following expiration of a feasibility contingency, and required Gallo and Dankers to consent and otherwise execute all necessary applications as follows:

> Seller will cooperate in signing such applications and other documents as may be required by the County to obtain preliminary approval of the subdivision of the property. The Buyer will promptly provide the Seller with copies of the subdivision application, plat map and all submittals it makes to the County, as well as all soil studies, wetland studies and delineations, streams studies, engineering drawings, topographical surveys and other reports, maps and drawings prepared by professionals and consultants hired by the Buyer to assist in the development of the property. ***In the event the Buyer terminates this agreement under the feasibility Contingency Addendum or defaults on the terms of this agreement, the Buyer shall promptly turn over to the Seller all studies, reports, letters, memorandums, maps,***

> ***drawings and other written documents*** prepared by surveyors, engineers, biologists and other experts and consultants retained by the Buyer to assist in the planning of the development of the property. [emphasis added]

(CP 66).

In accordance with the above, the Mangats proceeded to submit a "Master Permit Application" to Snohomish County on September 24, 2007, for a 29-lot rural cluster subdivision to be known as Trombley Heights, Application #07-111239 SD (hereinafter "Subdivision"). (CP 88-91). The Mangats listed themselves as "Contract Purchasers" on the face of the Application and listed Mr. Gallo and the Dankers as the owners of the subject properties. Id.

Timeline for Processing Subdivision Application: RCW 36.70B.080(1), requires that a local government take action upon a project permit application within 120-days as follows:

> The time periods for local government actions for each type of complete project permit application or project type should not exceed one hundred twenty days, ***unless the local government makes written findings that a specified amount of additional time is needed to process specific complete project permit applications*** or project types. [emphasis added]

See RCW 36.70B.080(1). In accordance with the above, Snohomish County has adopted a 120-day time line for processing project permit applications as follows:

30.70.110 Processing timelines.

(1) Notice of final decision on a project permit application shall issue within 120 days from when the permit application is determined to be complete, unless otherwise provided by this section or state law.

(2) In determining the number of days that have elapsed after an application is complete, the following periods shall be excluded:

(a) Any period during which the county asks the applicant to correct plans, perform required studies, or provide additional required information. The period shall be calculated from the date the county mails notification to the applicant of the need for additional information until the date the county determines whether the additional information satisfies the request for information, or 14 days after the applicant supplies the information to the county, whichever is earlier. If the information submitted by the applicant under this subsection is insufficient, the county shall mail notice to the applicant of the deficiencies and the provisions of this subsection shall apply as if a new request for information had been made;

. . .

See SCC 30.70.110.

Final decision upon an application for preliminary subdivision approval is vested in the Hearing Examiner as a Type 2 decision. See SCC 30.41A.040(1). However, the Hearing Examiner cannot approve a preliminary subdivision until and unless the proposed subdivision is found to conform with all applicable development regulations as follows:

> (2) If the hearing examiner finds that the proposed preliminary subdivision makes appropriate provisions for the matters listed in SCC 30.41A.100(1***) and enters written findings that the subdivision conforms to all applicable development regulations and construction codes, then it shall be approved***. If the hearing examiner finds that the proposed subdivision does not make such appropriate provisions or that development regulations requirements are not met, or the public use and interest will not be served, then the hearing examiner may deny the proposed preliminary subdivision.

SCC 30.41A.100(2). Accordingly, the Snohomish County Department of Planning and Development Services ("PDS") does not schedule a preliminary subdivision application for final hearing until it is determined that the proposed subdivision conforms to all applicable development regulations (otherwise the effect of the hearing would be to simply deny the application). (CP 112, ¶ 8).

The Mangats' subdivision application in this matter was deemed complete on October 22, 2007 (i.e. 28 days from the date of filing in accordance with SCC 30.70.040), which commenced the start of the 120-day processing time line. (CP 111, ¶ 5; CP 118). Following receipt of a subdivision application, PDS reviews the application for compliance with applicable development regulations and issues "Review Letters" to the applicant advising of any errors, deficiencies or omissions relating to requirements of County Code for purposes of compliance with SCC 30.41A.100(2), before the application is set for hearing. (CP 112, ¶ 7).

First Review Letter - December 21, 2007: The Mangats subdivision application had numerous defects and errors in the proposed subdivision plan as well as omitting certain studies and additional information required for review of drainage, grading and traffic issues. (CP 113, ¶ 9). PDS issued its "First Review" letter to the Mangats on December 21, 2007, which tolled the running of the 120-day processing timeline in accordance with SCC 30.70.110(2)(a). As of the date of the issuance of the First Review letter a total of Sixty One (61) days had elapsed. (CP 113, ¶10; CP 120-25).

The First Review letter identified thirty (30) errors or deficiencies in the plat application requiring correction of further information needed prior to further review and evaluation. Id. The Review Letter was accompanied by a more detailed memorandum issued by the Traffic/Drainage Engineering section setting forth detailed comments regarding traffic and road design issues. (CP 113, ¶ 10; CP 127-133). Specifically, the detailed traffic comments accompanying the First Review letter identified eight (8) separate defects or violations of code in the road design layout in the proposed plat application relating primarily to inadequate sight distances and intersection spacing within the plat. (CP 113, ¶ 10; CP 138, Traffic Review Comments).

Second Review Letter – July 29, 2008: The Mangats revised and resubmitted the subdivision application on April 3, 2008, which re-started the running of the 120-day processing timeline effective April 17, 2008 (i.e. 14 days after the date of resubmission). (CP 113, ¶ 11). Following resubmission of the application PDS conducted a second review and determined that a majority of the deficiencies noted in the First Review letter had not been corrected or addressed in the resubmitted application and, thus, that the proposed subdivision design was still not in compliance with applicable code for purposes of proceeding with submitting the application for hearing. (CP 114, ¶ 11).

During this second review period the 120-day processing timeline expired effective June 15, 2008. (CP 114, ¶ 12). Had the County proceeded with issuing a final decision on the Mangats' subdivision application at that time the application would have been denied as follows:

> The 120 day bench mark was reached on June 15, 2008, at which time the applicant could have requested that the County proceed with setting the application on for hearing for a final decision by the Hearing Examiner; however, the application would have been denied at that time had they done so because the subdivision plan was still not in compliance with County Code for purposes of approval. Accordingly, rather than submitting an application for hearing which has remaining deficiencies and is not capable of approval, PDS continues the review process with the applicant until the application is in compliance with applicable code.

(CP 114-15, ¶ 12).

The County proceeded to issue a Second Review letter to the Mangats on July 29, 2008. (CP 114-15, ¶ 11; CP 135-39). In that letter, the PDS Project Manager Mr. Ed Caine specifically apologized for the County being late in the second review as follows:

> The project has been reassigned to me. PDS is very late in providing a review for your April 3, 2008, resubmittal. On behalf of PDS, I apologize!

(CP 135, ¶ (a)). As of the date of the Second Review letter a total of 164 days had elapsed in the processing timeline. (CP 114-15, ¶ 11; CP 118). The Second Review letter still identified twenty-eight (28) separate errors or deficiencies in the resubmitted application which required correction or supplementation before further evaluation could proceed. Id. As before, the Second Review letter was accompanied by a more detailed Memorandum dated April 21, 2008, identifying specific traffic and road design errors or deficiencies. (CP 114-15, ¶ 11; CP 141-43).

Of the 8 previous deficiencies noted in the memorandum dated December 12, 2007, the re-submitted plat application filed by the Mangats on April 3, 2008, was noted as having failed to address or correct four (4) of the road design issues consisting of the following: (1) Failure to address encroachments of proposed access road outside of

designated easement corridor; (2) Failure to address Intersection Sight Distance at 80th street SE and 199th Avenue SE; (3) Failure to provide plan and profile for proposed road access (199th Ave SE) with Stopping Sight Distance analysis; and (4) Failure to provide intersection analysis at Meadow Lake road and 199th Avenue SE for Intersection Sight Distance and Stopping Sight Distance. (CP 141-43).

Third Review Letter – May 5, 2009: Following receipt of the Second Review letter the Mangats waited nearly nine (9) months before attempting a second re-submittal which was filed on March 17, 2009, which re-started the running of the processing timeline effective March 31, 2009. (CP 115, ¶ 13). Once again, PDS reviewed the second re-submittal and determined that the Mangats had failed to correct all of the noted deficiencies and/or omissions rendering the proposed subdivision still not in compliance with applicable development regulations for purposes of approving the subdivision. Accordingly, it was necessary for PDS to issue a Third Review letter dated May 5, 2009. (CP 115, ¶ 13; CP 145-47). As of the date of the issuance of the Third Review letter a total of 199 days had elapsed in the processing timeline (i.e. 79 days beyond the 120-day timeline prescribed in SCC 30.70.110). (CP 115, ¶ 14).

As before, the Third Review letter was accompanied by a third traffic comment memorandum dated April 30, 2009. (CP 115, ¶ 13; CP 149-153). The Third traffic memorandum again noted the same four issues as having failed to be properly addressed in the Mangats' second re-submittal including sight distance and intersection spacing issues. In short, the Mangats repeatedly failed to make the corrections that were identified in both the First and Second Review letters to bring the application into compliance with applicable development regulations and, thus, PDS did not proceed with scheduling the application for hearing before the Hearing Examiner for a final decision as the application continued to have remaining deficiencies precluding subdivision approval under SCC 30.41A.100. (CP 115-16, ¶ 14).

Gallo and Dankers Submit Revised Application – May 28, 2010: After issuance of the Third Review letter the Mangats did not attempt to respond or otherwise resubmit the plat application to the County. (CP 116, ¶ 14). During this time period Gallo and Dankers were advised that the Mangats had been unable to secure financing to purchase the property as follows:

> We learned that in September 2009, the Mangats bank declined their application for a development loan to finance their purchase of our property and the cost of completing the subdivision. The Mangats advised our real estate agent that they would be unable

> to close the transaction. They also stopped processing the subdivision application and paying their consultants. Some of their consultants came to us demanding payment for their work. The Mangats could not and did not close the purchase of our property pursuant to the purchase and sale agreement on December 16, 2009.
>
> We then declared the Mangats in default and began taking steps to complete the subdivision application. . .

(CP 49-50, ¶ 7 and 8).

On May 28, 2010, Gallo and Dankers submitted a revised subdivision application to the County as follows:

> [A] revised application was made on May 28, 2010, that designated the applicant as Luigi Gallo as the applicant, Luigi Gallo and Johannes Dankers as the underlying property owners, and Mr. Ry McDuffy as the applicant's contact.

(CP 95). The proposed subdivision was substantially redesigned by Gallo and Dankers to bring it into compliance with the County's road design standards for sight distances and intersection spacing within the plat as requested in the County's previous Review Letters addressed to the Mangats. (CP 77-78, ¶ 2-3). Thereafter, PDS determined the revised application to be in compliance with the development regulations as required by SCC 30.41A.100(2) and issued its report recommending approval of the subdivision on April 5, 2011, and setting a hearing date before the Hearing Examiner on April 12, 2011. (CP 94-103).

B. Procedural History:

1. Complaint for Declaratory and Injunctive Relief: On March 22, 2011, the Mangats commenced an action for Declaratory and Injunctive Relief under Snohomish County Cause No. 11-2-03863-5, in which Plaintiffs sought to enjoin the County from processing the subdivision application on behalf of Gallo and Dankers arguing that the application constituted the "personal property" of the Plaintiffs as follows:

> It is the position of the Mangats that the permit rights, as related to a permit Application, which has not received final approval from Snohomish County, constitutes personal property owned by the Mangats, as the applicant, and are not owned by the Property owners, Gallo and Dankers.

(CP 464). Concurrent with that action the Mangats also sought damages from the County alleging an unconstitutional taking of their claimed property interest in the subdivision application by virtue of the County allowing Gallo and Dankers to continue processing the subdivision application. Id.

The Mangats filed a Motion for Preliminary Injunction in that action to prohibit the Hearing Examiner from proceeding with a hearing on the revised application which motion was heard by sitting Court of

Appeals Judge Robert Leach, serving as Judge Pro Tem of the Snohomish County Superior Court on May 3, 2011. By order dated May 16, 2011, Judge Leach denied the Mangats' Motion for Preliminary Injunction concluding that they had no clear legal or equitable right to restrain the County's processing of the subdivision application stating, in pertinent part, as follows:

> 6. The filing of the subdivision application by plaintiffs [Mangats] with Snohomish County was merely a request to develop the subject property. While the filing of an application vests certain development rights as they relate to the subject property, there can be no ownership interest in the application itself independent of the real property to which it pertains. Any vested rights created by the filing of such an application belong to the landowner who has the right to develop the property.
>
> 7. The County's decision to continue to process the application for the subdivision of the property owned by Dankers and Gallo after Mangat's default under the contract did not constitute a taking of any property right or interest held by Mangat.
>
> 8. When they defaulted under the contract, the plaintiffs [Mangats] lost the right to purchase the property and were required to turn over to the Dankers and Gallo the maps, drawings, reports and other work product related to the subdivision of the land. There is nothing left for them to own.
>
> 9. The plaintiffs [Mangats] have made no showing of a legal right which is threatened by the actions of Snohomish County or the other defendants.

(CP 464-65).

Following denial of the Mangats' Motion for Preliminary Injunction the subdivision application came on for hearing for preliminary plat approval before the Snohomish County Hearing Examiner which was granted on May 17, 2011. (CP 510-524). Mangats filed a timely appeal of the Hearing Examiner's decision to the Snohomish County Council on May 31, 2011. (CP 531-544). The only issue raised in the Mangats' administrative appeal before the County Council was the same asserted in their Motion for Preliminary Injunction before Judge Leach, to wit: that the County was committing an "unconstitutional taking" of the Mangats' alleged vested rights in the subdivision application and awarding them to Gallo and Dankers by virtue of allowing Gallo and Dankers to continue processing the subdivision application. (CP 534).

Based on Judge Leach's decision denying the Plaintiffs' Motion for Preliminary Injunction on the same grounds, the Snohomish County Council summarily dismissed the Plaintiffs' appeal in accordance with SCC 30.72.075 on June 15, 2011. (CP 506-08). Concurrent with the Council's decision, the County filed a Motion for Summary Judgment in the Declaratory Judgment Action on June 20, 2011, asking the court to declare as a matter of law that the vested rights arising under the subdivision application run with the land and may be exercised by Gallo

and Dankers as the underlying property owners. By order dated August 17, 2011, the court granted the County's Motion for Summary Judgment dismissing the Mangats' Complaint for Declaratory Judgment and Injunctive Relief together with all claims for damages based upon alleged unconstitutional taking and/or deprivation of due process. (CP 478-82). This decision is the subject of a separate appeal pending under Case No. 67712-8-I.

2. <u>LUPA Petition and Claim for Damages</u>: While the County's Motion for Summary Judgment in the Declaratory Judgment action was pending, the Mangats filed the present LUPA Petition under Snohomish County Cause No. 11-2-06519-5 seeking review of the Council's decision summarily dismissing their appeal of the Hearing Examiner's decision granting preliminary subdivision approval. Plaintiffs' LUPA Petition joined three additional causes of action consisting of the following: (1) Claim for Damages Against Snohomish County under Ch. 64.40 RCW; (2) Application for Writ of Mandamus under RCW 7.16.160; and (3) Application for Writ of Prohibition under RCW 7.16.290. (CP 486-504).

As with the Declaratory Judgment action, the Mangats' alleged errors for purposes of the LUPA Petition reasserted the claim that the

Mangats "owned" the vested rights under the subdivision application and, thus, that the County erred in allowing Defendants Gallo and Dankers to continue processing the application. The statement of errors set forth in Plaintiffs' LUPA Petition are as follows:

> Error 1: The County engaged in unlawful process in finding ownership of the Mangats' application ran with the land and/or 2007 vesting date inures to Gallo and Dankers.
>
> Error 2: The County violated the constitutional rights of the Mangats in finding the Mangats application ran with the land and/or 2007 vesting date inures to Gallo and Dankers.
>
> Error 3: The County erroneously found the Mangats' application ran with the land and/or 2007 vesting date inures to Gallo and Dankers.
>
> Error 4: The County erroneously found that the Hearing Examiners decision is consistent with the County's Master Permit Application process.
>
> Error 5: The County erroneously relied upon Judge Krese's order.
>
> Error 6: The County erroneously relied upon Judge Leach's ruling.
>
> Error 7: The County erroneously found that allegations were without merit on their face and frivolous.

(See LUPA Petition, CP 492-500).

Similarly, the Mangats' alternative claims seeking Writ of Mandamus and Writ of Prohibition were based on the same argument asserted in support of their claims for declaratory and injunctive relief in the prior action and alleged that the County had effected an

"unconstitutional taking" of the Mangats' claimed property interest in the subdivision application by allowing Gallo and Dankers to continue processing the subdivision application. (CP 502, ¶ 8.2-8.5 and ¶ 9.2-9.3).

On September 13, 2011, the County filed a Motion to Dismiss the Mangats' LUPA petition pursuant to RCW 36.70C.060 for lack of standing. (CP 462-476). In addition, the County moved pursuant to CR 12(b)(6) to dismiss the Mangats' claims for Writ of Mandamus and Writ of Prohibition on the grounds that such claims were an attempt to relitigate the issues raised in the prior action seeking declaratory and injunctive relief and, thus, were barred by the doctrine of collateral estoppel . (CP 474-75). This motion was granted by Order of the Court dated October 19, 2011. (CP 270-72).

This left the Mangats' remaining claim for damages under Ch. 64.40 RCW for alleged delay in the County's processing of the subdivision application. On March 12, 2012, the Mangat's filed a Motion for Partial Summary Judgment seeking a determination that the County had exceeded the 120 day time period for issuance of a final decision on a project permit application as prescribed in RCW 36.70B.080(1). (CP 159-180, at pg. 172). In this regard, it was undisputed that the 120 day time

period for processing of the Mangats' original subdivision application had expired in June 2008. (CP 172; 24).

In response, the County asserted as an affirmative bar to the Mangats' claim the 30-day statute of limitations set forth in RCW 64.40.030. The County argued that any claim by the Mangats for damages relating to the County's failure to act within the 120-day time period prescribed by RCW 36.70B.080 must be brought within 30 days from the date that the County exceeded that time period (i.e. within 30 days from June 15, 2008). (CP 23-44, at pg. 35-40).

As an alternative grounds for dismissal, the County also argued that the alleged delay in the issuance of a final decision in June 2008, could not have been the proximate cause of any damages claimed by the Mangats as the application was not susceptible of being approved due to lack of compliance with applicable development regulations at that time. (CP 40-43). The Court issued its Order on April 12, 2012, denying the Mangats' motion for partial summary judgment and granting judgment of dismissal "sua sponte" in favor of the County. (CP 19-21).

IV. ARGUMENT

A. Standard of Review. All rulings by the trial court in this matter were issued summarily upon motion for summary judgment and/or motion to dismiss and present solely questions of law based upon the undisputed facts in this matter. Accordingly, the standard of review is de novo. Deveny v. Hadaller, 139 Wn. App. 605, 616, 161 P.3d 1059 (2007).

B. Dismissal of LUPA Petition for Lack of Standing: Standing to maintain an action under LUPA is governed by RCW 36.70C.060 which provides as follows:

> Standing to bring a land use petition under this chapter is limited to the following persons:
>
> (1) The applicant and the owner of property to which the land use decision is directed;
>
> (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
>
> (a) The land use decision has prejudiced or is likely to prejudice that person;
>
> (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
>
> (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that

person caused or likely to be caused by the land use decision; and

(d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

See RCW 36.70C.060.

It is undisputed that Gallo and Dankers submitted a revised application on May 28, 2010, which removed the Mangats as the named applicant and substituted 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. In recognition of this fact, the Mangats' LUPA Petition asserted standing under sub-section (2) as another person aggrieved or adversely affected by the land use decision. (CP 489, Paragraph 3.3, stating: "The Mangats have standing to seek judicial review pursuant to RCW 36.70C.060(2) and Ch. 4.12 RCW.")

1. No Injury In Fact: In order to have standing as a person otherwise aggrieved or adversely affected, the Mangats must demonstrate an actual injury in fact resulting from the land use decision. See Thornton Creek Legal Defense Fund v. City of Seattle, 113 Wn. App. 34, 52 P.3d

522, review denied 149 Wn.2d 1013 (2002). The rule is stated by the Court therein as follows:

> To establish standing under LUPA, Thornton and CFLN must demonstrate they are "aggrieved or adversely affected by the land use decision." [fn omitted] A person is not "aggrieved or adversely affected" under LUPA unless "[t]he land use decision has prejudiced or is likely to prejudice [them]." [fn omitted] To satisfy this requirement, Thornton and CFLN must allege facts showing that they would suffer an "injury-in-fact" as a result of the land use decision. [fn omitted] In other words, Thornton and CFLN must show they personally "will be 'specifically and perceptibly harmed' by the proposed action." [fn omitted]

Thornton Creek, 113 Wn. App. at 47-48.

Conversely, one who merely seeks to preserve protection of zoning interests without an identifiable injury in fact resulting from the land use decision lacks standing under LUPA. See Chelan County v. Nykreim, 146 Wn.2d 904, 934-35, 52 P.3d 1 (2002). The reasoning is stated by the court in Nykreim as follows:

> "In general, parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing." "[A] party need not show a particular level of injury in order to establish standing" to bring an action under LUPA. As neighbors of Respondents alleging injury to their property because of the BLA and proposed development, Intervenors in this case might satisfy the prejudice requirement.
>
> . . .An interest sufficient to support standing to sue, however, must be more than simply the abstract interest of

> the general public in having others comply with the law. Intervenors maintain that their "sole interest in this matter is to preserve the protections of the zoning in the district in which they are located." Without alleging more specific injuries adversely affecting them or their property, Intervenors in this case have not established that they are prejudiced within the meaning of an "aggrieved person" under LUPA. [footnotes omitted]

Nykreim, 146 Wn.2d at 934-35.

In short, the Mangats must be able to demonstrate some injury in fact resulting from the County's issuance of the preliminary subdivision approval which they have not done. Rather, they argue that their injury arises from the "taking" of some claimed property interest in the application itself, and not as a result of some impact arising by virtue of the approval of the preliminary subdivision. This does not satisfy the "injury in fact" test for purposes of standing under LUPA.

2. Not Within Zone of Interests: Second, the interests which the Mangats seek to protect in this matter (i.e. their claimed property interest in the subdivision application), is not an interest which the County was required to consider or protect when acting upon a subdivision application under Ch. 58.17 RCW and the County's subdivision ordinance, Ch. 30.41C SCC. See Nykreim, 146 Wn.2d at 937. In this regard, the rule is stated by the court therein as follows:

> The second condition involves the "zone of interest test."[fn omitted] "[A]lthough the zone of interest test serves as an additional filter limiting the group which can obtain judicial review of an agency decision, the 'test is not meant to be especially demanding.' "[fn omitted] " 'The test focuses on whether the Legislature intended the agency to protect the party's interests when taking the action at issue.' "[fn omitted])

Nykreim, 146 Wn.2d at 937. As set forth above, the County was not required to consider or protect any property interest claimed by the Mangats in the subdivision application itself when deciding whether to grant preliminary subdivision approval.

In the absence of standing under LUPA Plaintiffs are precluded from appealing the land use decision in any form. See Grundy v. Brack Family Trust, 116 Wn. App. 625, 633, 67 P.3d 500, reversed on other grounds 155 Wn.2d 1, 117 P.3d 1089 (2003). The Mangats citation to Ch. 4.12 RCW does not provide an alternate basis for the court to recognize standing where none otherwise exists under Ch. 36.70C. See Grundy, 116 Wn. App. at 633 (holding: "LUPA is the exclusive avenue for appealing a land use decision. . . One who lacks standing under LUPA cannot appeal a land use decision at all.") Accordingly, the trial court correctly dismissed the Mangats' LUPA petition for lack of standing.

C. Dismissal of Claims for Writ of Mandamus and Writ of Prohibition as Barred by Doctrine of Collateral Estoppel:

The doctrine of collateral estoppels prohibits a party from relitigating an issue or determination of fact that has been ruled upon in a prior proceeding in which the party had a full and fair opportunity to present his case. See Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 114, 829 P.2d 746 (1992) (holding: "That doctrine [collateral estoppels] prevents the relitigation of an issue or determination of fact after the party sought to be estopped has had a full and fair opportunity to present his or her case.")

In the present case, the Mangats' complaint devotes one page to the Causes of Action for Writ of Mandamus and Writ of Prohibition. (CP 502). Both claims are predicated on the same issue, to wit: that the County committed an "unconstitutional taking" of the Mangats' alleged property interest in the subdivision application by allowing Gallo and Dankers to continue processing the application. (CP 502, ¶¶ 8.2-8.5; 9.2-9.3). This was the exact same issue asserted by the Mangats as the basis for their claims seeking declaratory and injunctive relief in the prior action in which they also sought damages for alleged unconstitutional taking or deprivation of due process. (CP 464).

The Brief of Appellants submitted by the Mangats in this matter appears to argue that their claims for Writ of Mandamus and Writ of Prohibition in the current action, are different from their claim of unconstitutional taking/eminent domain asserted in the previous action for declaratory and injunctive relief. (Brief of Appellant, pg. 37-40). While they may seek a different form of relief or remedy, the claims for Writ of Mandamus and Writ of Prohibition in this matter were based on the exact same issue raised in the Complaint for Declaratory Judgment and Injunctive Relief as follows:

> 8.5 Upon ***taking*** or use of private property rights by the County, the Mangats, as holder of valuable property interests, are entitled to such petition and process to ascertain or determine the value of their interests.
>
> . . .
>
> 9.2 The County is acquiring the Mangats' application and accompanying vested rights to approve a subdivision.
>
> 9.3 The County is ***taking*** valuable property interests without exercising any lawful authority.

(CP 502).

This is the exact same issue ruled upon by Judge Kurtz in granting the County's Motion for Summary Judgment in the prior action dismissing the Mangats' Complaint for Declaratory and Injunctive Relief. (CP 478-482). Accordingly, the trial court in the present action correctly

dismissed the Mangats' attempt to relitigate this issue in the guise of a claim for Writ of Mandamus and/or Writ of Prohibition.

D. Dismissal of Claim for Damages Under Ch. 64.40 RCW:

1. Claim Time Barred by RCW 64.40.030: Lastly, the Mangats asserted a claim for damages under Ch. 64.40 RCW which recognizes a limited cause of action as follows:

> (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. (Emphasis added). In the present case, the Mangats claim for damages was predicated upon the County's failure to timely act within the 120-day time period established by RCW 36.70B.080(1) and restated in SCC 30.70.110. (CP 490, ¶4.6; CP 172). In this regard, it is undisputed that this time period expired in June 2008, over three (3) years before the Mangats filed their claim for damages in this matter. (CP 172).

In response to the Mangats' motion the County admitted that the time period expired in June 2008 (CP 28), but argued that any such claim

was time barred by the 30-day statute of limitations set forth in RCW 64.40.030 as follows:

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

RCW 64.40.030. Since there is no administrative remedy to challenge a failure to timely act, the County argued that any claim by the Mangats for damages relating to the County's failure to act within the 120-day time period prescribed by RCW 36.70B.080 must be brought within 30 days from the date that the County exceeded that time period (i.e. within 30 days from June 12, 2008). (CP 23-44, at pg. 35-40).

At the time of argument upon the foregoing motion this Court's decision in Birnbaum v. Pierce County, 167 Wn.App. 728, 274 P.3d 1070 (filed April 16, 2012), had yet to be issued. Nevertheless, the County made the same argument subsequently announced as the holding in Birnbaum, to wit: Where there is no administrative remedy or right of appeal to challenge a failure to act or timely process an application, a claim under Ch. 64.40 RCW alleging failure to act within the time limits established by law must be commenced within 30-days from the date the

governmental entity becomes tardy. (CP 35). This argument parallels the holding of this court subsequently announced in Birnbaum as follows:

> The statutory language is unambiguous. An act occurs when there is *either* a final decision *or* a failure to act within established time limits.RCW 64.40.010(6). Every claim under chapter 64.40 RCW is subject to the 30 day statute of limitations in RCW 64.40.030. Callfas v. Dep't of Constr. & Land Use, 129 Wash.App. 579, 593, 120 P.3d 110 (2005). The 30 day limitations period begins when all available administrative remedies are exhausted. RCW 64.40.030. But, no exhaustion is required if there is no adequate administrative remedy. Smoke v. City of Seattle, 132 Wash.2d 214, 224–25, 937 P.2d 186 (1997).
>
> Here, Birnbaum herself argues that there is no adequate administrative remedy for failure to timely process a permit. Thus, the limitations period began when the 120 day time limit was exceeded. Birnbaum filed her application on February 23, 2005. The hearing examiner approved the permit on March 15, 2010. It is beyond dispute that she knew the 120 day time limit had been exceeded far longer than 30 days when she filed her complaint against the County on April 14, 2010. Her claim was time barred. [Footnote omitted]

Birnbaum, 167 Wn.App. at 733-34. The subsequent filing of this Court's decision in Birnbaum affirms the decision of the trial court in this matter and is dispositive of the Mangats' appeal on this issue.

In an effort to avoid the holding in Birnbaum the Mangats make three arguments in their Brief of Appellants consisting of the following: (1) The County failed to follow its own procedures under SCC 30.70.110 for providing notice of any delay (Brief of Appellant, pg. 19-21); (2) The Mangats did attempt to invoke some administrative review process by

bringing their objection to the attention of the Hearing Examiner and PDS and, thus, brought their action timely after exhaustion of those efforts (Brief of Appellants, pg. 23-26); and (3) the Mangats claim for damages is not limited to a failure to act within the 120 day time period and may also be asserted in the alternative as a claim alleging "arbitrary delay." (Brief of Appellant, pg. 19). These will be addressed in order.

a. Failure of County to Issue Notice of Delay Does not Waive Filing Requirements of RCW 64.40.030.

First, Mangats argue that the County failed to issue a notice of delay as provided under SCC 30.70.110 (5) as follows:

> (5) The county shall notify the applicant in writing if a notice of final decision on the project has not been made within the time limits specified in this section. The notice shall include a statement of reasons why the time limits have not been met and an estimated date of issuance of a notice of final decision.
>
> (6) Failure of the county to make a final decision within the timelines specified by this chapter shall not create liability for damages.

SCC 30.70.110(5) and (6).

The provisions in SCC 30.70.110 implement RCW 36.70B.080(1) which provides, in pertinent part, as follows:

> The time periods for local government actions for each type of complete project permit application or project type should not exceed one hundred twenty days, ***unless the local government makes written findings that a specified amount of additional time is needed to process specific complete project permit applications*** or project types. [emphasis added]

See RCW 36.70B.080(1).

Accordingly, RCW 36.70B.080(1) provides a limited extension for municipal entities to process project permit applications where there is a specific reason identified for needing a specified amount of additional time. The giving of such a notice is not a condition precedent to the running of the 30-day statute of limitations in RCW 64.40.030 for purposes of a claim for damages based upon failure to act within the 120 day time period established in RCW 36.70B.080; Rather, 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.

In the present case, the County did not assert that its failure to issue a decision within the 120 day time period was due to some specific need for a specified amount of additional time under the exception allowed in RCW 36.70B.080(1). On the contrary, the County acknowledges that it could have proceeded with placing the Mangats' subdivision application on for hearing in June 2008, although had it done so the result would have been the denial of the application due to the fact that the subdivision as proposed did not conform to the applicable development regulations primarily as it related to traffic design issues. (CP 114-15, ¶ 12).

As for the Mangats ability to take notice of the passing of the 120-day time period, the running of the time period is clearly stated in SCC 30.70.110 and commences upon the date the application is deemed complete (occurs automatically 28 days after the date of submission if no notice issued), and is thereafter tolled and restarted coinciding with issuance of a Review Letter and resubmission of the application in response thereto. (CP 111, ¶ 6). Indeed, the Mangats' own consultant who assisted them with the subdivision application and was named as the contact person on the application had worked as a senior planner for Snohomish County for 18 years and was intimately familiar with the running of the 120-day time period as reflected in that Declaration of Gene Miller submitted by the Mangats in support of their motion. (CP 195-199). As stated therein, the Mangats' consultant believed that the 120-day time period had expired effective June 12, 2008. (CP 199, ¶ 13).

Finally, as noted by this Court in Birnbaum, RCW 64.40.030 places the burden on the party asserting the claim for damages to keep track of the running of the time period as follows:

> The hearing examiner approved the permit on March 15, 2010. It is beyond dispute that she knew the 120 day time limit had been exceeded far longer than 30 days when she filed her complaint against the County on April 14, 2010. Her claim was time barred. [FN1]

> FN1 Birnbaum argues that this conclusion cannot be correct because any available damages would be minimal, and it is too difficult for an applicant to keep track of tolling periods and when the time limit has expired. These are limitations which flow from the language of the statute. We are not at liberty to rewrite them.

Birnbaum, 167 Wn.App. at 734, fn 1. As with the facts at issue in Birnbaum, the Mangats and their consultant clearly knew that the 120 day time limit had been exceeded by over 3 years when they filed the present action against the County on July 5, 2011. Accordingly, the County's failure to issue any notice of delay under SCC 30.70.110(5) did not deny the Mangats the ability to notice the running of the 120-day time period which, by their own admission, they knew had expired in June 2008.

b. Snohomish County has no administrative remedy or review process for failure to timely act on a project permit application.

Second, the Mangats argue that they did attempt to pursue an administrative process which they believed could have rectified their damages based on the following contention:

> The Mangats pursued every administrative remedy made available to them when the County changed the applicant status, by communicating with PDS, enjoing administrative hearing, seeking to clarify their status as applicants (which the Hearing Examiner had power to modify), and objecting to the Hearing Examiner and appealing to the Snohomish County Council for deciding they were not the permit applicants.
>
> Had the Mangats not provided the County an opportunity to rectify their error, their claims would have been subject to the

> prospect of dismissal as unripe for failure to exhaust all administrative remedies.

(Brief of Appellants, pg. 25).

None of what the Mangats cite above constitutes an "administrative remedy". See Brower v. Pierce County, 96 Wn.App. 559, 564, 984 P.2d 1036 (1999) (*holding* that exhaustion of administrative remedies under RCW 64.40.030 is applicable only where "an agency has defined mechanisms for resolving a complaint and the administrative process can provide the relief sought.") Nowhere in the Brief of Appellants do they cite to a defined mechanism in the Snohomish County Code for appealing or otherwise seeking review of a failure to timely act on a project permit application because none exists. Rather, the Mangats pursued judicial remedies consisting of a Complaint for Declaratory Judgment and Injunctive Relief which itself was not filed until March 2011. Accordingly, there was no administrative remedy to be exhausted and, thus, the limitations period began to run when the 120 day time limit expired in June 2008.

c. There is no cause of action under Ch. 64.40 RCW for alleged arbitrary delay.

Third, the Mangats attempt to argue that their claim for damages under RCW 64.40.020 is not limited solely to a claim for failure to act

within time limits established by law, but may also be alleged in the alternative as an "arbitrary delay." (See Brief of Appellants, pg. 19, stating: "[T]heir claims for delay, as stated in the complaint, are also based on "arbitrary delay"). The Mangats' complaint alleges solely a failure of the County to timely process the subdivision application, although couched in the form of both a claim for failure to act within time limits established by law and as an arbitrary, capricious and unlawful delay as follows:

> 6.4 The Mangats claim that the County's violation of applicable time limits caused the Mangats such damage as will be proved at trial.
>
> 6.5 The County's actions and inaction in processing Applications for Trombley Heights were arbitrary, capricious, unlawful, and/or exceeded lawful authority.

(CP 500, ¶¶ 6.4 and 6.5).

As made clear in the Brief of Appellants, the Mangats seek to argue that the County's failure to issue a timely notice of decision may be pursued either as a claim for failure to timely act, or as a claim for arbitrary delay, stating as follows:

> Refusal to process the application according to their own code (Appendix I), i.e. issue a written notice of delay and/or decision may also constitute arbitrary delay by the County.

(Brief of Appellants, pg. 33). In making this argument, the Mangats ignore the definition of the term "act" in Ch. 64.040 RCW which is narrowly defined as follows:

> "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: . . . "

See RCW 64.40.010(6).

As set forth above, the cause of action provided for in RCW 64.40.020 is limited to "***acts*** of an agency". Accordingly, the County's failure to follow a prescribed procedure does not constitute an "act" for purposes of a claim for damages under Ch. 64.40 RCW unless such failure results in a final decision by the agency which places some requirement, limitation or condition upon the use of the real property in excess of lawful authority (not alleged by the Mangats); or, results in the failure of the agency to act within time limits established by law.

The Mangats' claim for alleged delay can only be asserted as a claim for failure to act within times limits established by law under RCW 64.40.020 as such delay does not otherwise constitute 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". See RCW 64.40.010(6). As a claim for failure to act within time limits established by law, it is subject to the 30-day statute of limitations in RCW 64.40.030 which commenced on the date the County became tardy in issuing a final decision on the application (i.e. June 2008).

d. Decision in Birnbaum Should Not be Overruled

Finally, the Mangats request this Court to overrule its decision in Birnbaum. (Brief of Apellants, pg. 27-30). Specifically, the Mangats argue that requiring an applicant to be vigilant in determining when the County has exceeded the 120-day time period for purposes of commencing an action for alleged delay is contrary to what the Mangats believe was the intent of the legislature in adopting Ch. 64.40 RCW as providing a damage action for violation of the permitting process by local agencies. (Brief of Appellants, pg. 28).

The best response to this "policy" argument was articulated in the holding of this Court in Callfas v. Department of Construction and Land Use, 129 Wn.App. 579, 120 P.3d 110 (2005), wherein the court quoted at length from the decision of the trial court as follows:

> ***It is consistent with the law and sound policy to require a claimant to take timely action to redress untimely inaction by an administrative agency. To hold otherwise would risk creation of an exception that would quickly swallow up the rule I believe the legislature intended to create***.

Calfas, 129 Wn.App. at 588-89.

The reasoning of the court in Calfas is similar to that articulated by the court in Hillis Homes, Inc., v. Snohomish County, 32 Wn.App. 279, 647 P.2d 43, review denied 98 Wn.2d 1011 (1982). Although a case pre-dating the adoption of RCW 64.40.020, the plaintiff/developer in Hillis Homes brought a mandamus action under Ch. 7.16 RCW to compel the County to set a hearing date upon the developer's subdivision application based upon former RCW 58.17.140. Hillis Homes, 32 Wn.App. at 281-82. After successfully obtaining a Writ of Mandamus to compel the County to act upon the application the developer sought damages under RCW 7.16.260 for alleged delay damages resulting from the intervening period. Id. at 284.

In affirming the trial court's dismissal of the developer's claim for damages on summary judgment the Court, citing King v. Seattle, 84 Wn.2d 239, 525 P.2d 228 (1974), held that the developer's own delay in pursuing its right to mandamus was the proximate cause of any delay damages as follows:

Apropos of the case at bar, the Supreme Court in King summarized:

> "We do not believe it would be wise judicial policy to allow one party to create legal liability in another by a voluntary exercise of the complaining party's own personal business judgment not to seek to protect his rights in the legal forums provided him. This is especially so where, if the complaining party had exercised his legal rights in the first place, there may well have been no damage to his interests at all.

King v. Seattle, supra at 252.

In the case before us, the failure of the County's planning agency to act, as a matter of law, was not the proximate cause of the developer's claimed damages. . . . RCW 58.17.140 places discretion in the department of planning to approve, ***disapprove, or return for modification or correction*** the proposed preliminary plat. [footnote omitted]

As with the property owner seeking permits in King v. Seattle, supra, the developer here went well beyond the 90-day time limit and delayed instituting mandamus proceedings until some 41/2 months after the expiration of the statutory 90-day period. The County's liability cannot be premised on the developer's independent business judgment that it would be more advantageous to informally work with the County rather than promptly pursuing its legal remedies once the 90 days had expired. See King v. Seattle, supra.

Hillis Homes, 32 Wn.App. at 284-85.

This is exactly what the Mangats chose to do in the present case. The County itself acknowledged that it was late in issuing its review in that Second Review letter dated July 29, 2008. (CP 135), and the Mangats' own consultant knew that the 120-day time period had expired

in June 2008 (CP 199). Rather than pursue the clear legal right to insist on a final decision at that time, the Mangats' (or their consultant) made the independent business judgment that it would be preferable to continue working with the County to resolve the remaining errors and deficiencies in the proposed subdivision and chose to revise and resubmit the proposed subdivision in an effort to bring it into compliance with the County's development regulations.

Had the Mangats insisted on a final decision at that time the only thing they would have accomplished is the issuance of a decision denying preliminary subdivision approval since the proposed subdivision did not comply with the development regulations at that time. See SCC 30.41A.100(2). Had this occurred, the Mangats would have been precluded from reapplying for any subdivision approval for one year.[2]

E. **No Causation for Damages Where Application Would Have Been Denied:**

In addition to the above, the Mangats also sought partial summary judgment on the issue of proximate cause relating to their claimed damages as follows:

---

[2] See SCC **30.70.150** Reapplication after denial of project permit application: The department shall not accept an application for substantially the same matter within one year from the date of the final county action denying the prior application, unless the denial was without prejudice.

> Here, but for the County's delay, the Mangats would not: (1) have lost their ability to exercise their contract option to purchase Gallo and Dankers real property; (2) had to renegotiate extensions of the contract closing date; (3) incurred the expenses associated with extending the agreement; or (4) lost expectation of profit from the subdivision.

(CP 177, lines 12-17). The sole evidentiary basis cited by the Mangats in support of this argument was the Declaration of Harbhajan Mangat (CP 188-90), which provides as follows:

> 2. We hired Gene Miller to assist us with getting the subdivision application prepared and approved for us. Ion September 24, 2007, we submitted our application for subdivision development requesting preliminary plat approval of the trombley heights. We incurred over $196,000 in costs submitting and processing our application included: application fees and consulting costs. At the time, it was my understanding our application, and the rights it created, were ours. We were never advised that the County would or could give our rights away to others.
>
> 3. Throughout 2007, 2008 and 2009, the County delayed processing of our application. We offered, and Gallo and Dankers agreed to, extension fees extending the closing date. The last extension we agreed to extended the closing date to December 16, 2009.
>
> 4. To get any additional extensions, Gallo and Dankers required that we agree to convey our application to them. We refused to do so, but were willing to discuss their payment for the rights to own the application.

(CP 188, ¶¶ 2-4).

In response, the County asserted that any delay in the processing of the application could not have been the proximate cause of the damages as alleged by the Mangats since the application would have been denied had a decision been issued at that time. (CP 40-43). As noted by the court in Hillis Homes, supra., the delay in the "denial" of an application cannot be said to be the proximate cause of any claim for damages alleged by an applicant as follows:

> In the case before us, the failure of the County's planning agency to act, as a matter of law, was not the proximate cause of the developer's claimed damages. . . . RCW 58.17.140 places discretion in the department of planning to approve, ***disapprove, or return for modification or correction*** the proposed preliminary plat. «5» [emphasis in the original]
>
> > Fn 5 As it turned out in the case before us, after processing the application pursuant to the writ of mandate, the Snohomish County Planning Department returned the developer's application for modification.
>
> . . . The County's liability cannot be premised on the developer's independent business judgment that it would be more advantageous to informally work with the County rather than promptly pursuing its legal remedies once the 90 days had expired. See King v. Seattle, supra.

Hillis Homes, 32 Wn.App. at 284-85.

While the issue of proximate cause is ordinarily a question of fact, it may be determined as a matter of law upon motion for summary

judgment where only one reasonable conclusion is possible from the evidence as follows:

> While the issue of proximate cause is ordinarily a question for the jury, " 'when the facts are undisputed and the inferences there from are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.' " Bordynoski v. Bergner, 97 Wn.2d 335, 340, 644 P.2d 1173 (1982) (quoting Mathers v. Stephens, 22 Wn.2d 364, 370, 156 P.2d 227 (1945)). Accordingly, the issue of proximate cause may be determined on summary judgment where the evidence is undisputed and only one reasonable conclusion is possible. Hartley, 103 Wn.2d at 778; LaPlante v. State, 85 Wn.2d 154, 159, 531 P.2d 299 (1975).

Fabrique v. Choice Hotels, Int'l, 144 Wn.App. 675, 683, 183 P.3d 1118 (2008).

The Review Letters issued by the County in December 2007 and again in July 2008 establish that the Mangats' subdivision as proposed in June 2008 did not comply with the County's development regulations and, thus, could not have been approved at that time. Furthermore, the Mangats themselves chose to continue to work with the County to revise and resubmit their application rather than assert their right to insist on a timely decision. Accordingly, the County's liability for any delay damages claimed to have been incurred by the Mangats cannot be premised on the Mangats own independent business judgment to forego insisting on a timely decision.

F. Request for Award of Attorneys' Fees and Costs:

To the extent the County's decision granting preliminary subdivision approval is upheld in this matter, the County requests the award of its attorneys' fees and costs as the prevailing party pursuant to RCW 4.84.370(2). The County requests that the Court reserve the determination of the amount and reasonableness of fees pending filing of a decision in this matter pursuant to RAP 18.1.

V. CONCLUSION

The Mangats' LUPA appeal of the County's decision granting preliminary subdivision approval in this matter has nothing to do with the validity of a land use decision, and everything to do with an attempt by the Mangats to hold that application hostage in an effort to obtain some concession or remuneration from Respondents Gallo and Dankers. As such, the LUPA Petition was properly dismissed in this matter for lack of standing as the Mangats were not aggrieved by the land use decision itself, nor was the interest they sought to protect within the scope of the interests the County was required to consider in making that determination.

Likewise, the Mangats' claims for Writ of Mandamus and Writ of Prohibition were merely an attempt at a different remedy based upon the same fundamental claim asserted in the prior action for declaratory and

injunctive relief which had previously been dismissed by the court in the earlier action. Accordingly, the trial court properly dismissed those claims as barred by the doctrine of collateral estoppel.

Finally, the Mangats' claim for delay damages under Ch. 64.40 RCW was brought more than three (3) years after the County had exceeded the 120-day time line for issuance of a final decision on the Mangats' original application as provided in RCW 36.70B.080. As reflected in the three separate review letters issued by the County to the Mangats, the delay was for the benefit of the Mangats to afford them an opportunity to correct numerous errors and deficiencies in the proposed subdivision which would have precluded approval of the application. Had the County proceeded with issuance of a determination at that time, it merely would have resulted in denial of the application and precluded the Mangats from resubmitting the application for one year. Accordingly, such claim was properly dismissed by the trial court as time barred by the 30-day statute of limitations in RCW 64.40.030; and/or based upon a lack of any proximate cause relating to the damages claimed by the Mangats.

For the reasons set forth above, the County respectfully requests that this Court affirm the decisions of the trial court granting summary dismissal of all claims of the Mangats in this matter and awarding the County its costs and reasonable attorney's fees pursuant to RCW 4.84.370.

Respectfully submitted this 7th day of September, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: _____
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DECLARATION OF SERVICE

I, Stacy Malmstead, hereby declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on this 7th day of September, 2012, Snohomish County's Response Brief was served upon the persons listed and by the method(s) indicated:

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☒ Email

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

SIGNED at Everett, Washington, this 7th day of September, 2012.

Stacy Malmstead