No. 44404-6-II

COURT OF APPEALS, DIVISION 2
OF THE STATE OF WASHINGTON

WOODS VIEW II, LLC and DARLENE PIPER,

Appellants/Cross-Respondents,

v.

KITSAP COUNTY,

Respondent/Cross-Appellant.

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

APPELLANTS' BRIEF FOR OPPOSITION TO RESPONDENT'S CROSS-APPEAL, AND FOR REPLY IN SUPPORT OF APPEAL

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In urging this Court to affirm the trial court's improper dismissal of the Appellants' claims, Kitsap County relies on unsupported and misrepresented statements of fact and misstatements of law. The Court should not be misled by Kitsap County; the dismissal should be reversed, and the Appellants should be permitted to try their claims to a jury.

I. APPELLANTS' OPPOSITION TO CROSS-APPEAL

Kitsap County argues that the trial court's dismissal order was justified not only on the grounds included in its October 12, 2012 summary judgment motion (CP 1369-1389), but also on the grounds argued in its August 12, 2011 motion for summary judgment (CP 27-59) denied by Judge Buckner. CP. 1365.[1] The County cross-appealed Judge Buckner's denial of its motion and asserts that Judge Serko's dismissal order is also supported by grounds Judge Buckner rejected. However, Judge Buckner's ruling was correct, and none of the bases the County asserted in its first motion support dismissal of the Appellants' claims.[2]

A. The Appellants were not required to file a LUPA petition.

The County argues that the Appellants' claims are barred because

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[1] Kitsap County states that Judge Buckner did not "address" its legal defenses to liability. Brief at 9-10. However, Judge Buckner carefully considered the County's arguments and determined that dismissal was not appropriate. *See* Declaration of Neil R. Wachter re: Status Conference (attached as Appendix No. 1). Mr. Wachter's declaration has been additionally designated as part of the record on appeal.

[2] The County made several of the same arguments in both motions. This brief addresses only those arguments not discussed in Appellants' Opening Brief that the County discussed in its Reply Brief.

they didn't file a petition under the Land Use Petition Act (LUPA) challenging the County's actions. The County is wrong.

This is a lawsuit seeking money damages; thus, by the express provisions of the statute, LUPA does not apply to these claims. *See* RCW 36C.70C.030(1)(c) ("[T]his chapter does not apply to ... [c]laims provided by any law for monetary damages or compensation."); *Asche v. Bloomquist,* 132 Wn. App. 784, 791-92, 133 P.3d 475 (2006) ("LUPA does not apply ... to actions for monetary damages.").

A LUPA petition is only required when a person who believes himself aggrieved by a "land use decision" wishes to challenge that decision. The Appellants did not challenge the County's approval of Woods View II, LLC's ("WVII's") SDAP application or its SEPA MDNS, or any other land use decision. Thus, no LUPA petition was required for them to pursue their damages claims. While they *do* challenge the County's delay in processing the SDAP application and making the MDNS determination and its tortious conduct related to these processes, these claims are not a proper subject of a LUPA petition.

Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 296 P.3d 860 (2013) resolves this issue. In *Lakey,* property owners brought a claim against the City of Kirkland for inverse condemnation to recover for the City's grant of a variance to Puget Sound Energy to build a power

substation and the resulting electromagnetic fields the neighboring property owners alleged would emanate from the power station. The City moved to dismiss the claim, arguing that to preserve their right to pursue a claim for damages, the neighbors were required to timely file a LUPA petition to challenge the City's decision to grant the variance; because they had not, the claim for damages was time-barred. The trial court agreed and dismissed the neighbors' claim for damages.

The Supreme Court reversed the dismissal, ruling that the neighbors were not required to file a LUPA petition to pursue their claims for damages. First, because the neighbors were only seeking money compensation rather than a reversal or modification of a land use decision, the exemption in RCW 36.70C.030(1)(c) for "[c]laims provided by any law for monetary damages or compensation" applied. *Id.* at 926-27. Second, because LUPA provides for judicial review of a local jurisdiction's land use decisions and the neighbors were "making a claim that they could not make before the [City of Kirkland's] hearing examiner," they were "not invoking the superior court's appellate jurisdiction and LUPA [did] not govern their claim." *Id.* at 927-28. The neighbors were not required to file a LUPA petition to preserve their right to seek damages against the City.

Just as in *Lakey,* the Appellants do not seek reversal or

modification of any land use decision, and never sought to invoke the superior court's appellate jurisdiction. They seek the recovery of money damages. Thus, like the neighbors in *Lakey,* they were not required to timely file a LUPA petition to preserve their right to do so.

The County cited *James v. Kitsap County,* 154 Wn.2d 574, 115 P.3d 286 (2005); *Mercer Island Citizens v. Tent City,* 156 Wn. App. 393, 232 P.3d 1163 (2010); and *Asche* in support of its claim that the Appellants were required to file a LUPA petition. Brief at 23-25. The Supreme Court in *Lakey* distinguished each of those cases, explaining that they "all involved damage claims where the relief required a judicial determination that the land use decision was invalid or partially invalid; none involved damages claims generally." *Lakey,* 176 Wn.2d at 926. Therefore, the cases were "inapposite to the homeowners' claim, which only seeks compensation rather than a reversal or modification of a land use decision." *Id.* at 927. The cases are inapposite to this case for the same reason: the Appellants seek to recover only money, and not a reversal or modification of any County land use decision. Nor does *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 120 P.56 (2005), support the County's contention that the Appellants were required to file a LUPA petition following the SDAP approval. The sole relief sought in *Habitat Watch* was invalidation of Skagit County's land use decisions; no request for

money damages was made.

Because the Appellants were not required to file a LUPA petition, the time requirements of RCW 36.70C.040(3) do not apply.

B. The public duty doctrine did not require dismissal of the negligence claims.

The Appellants base their negligence claims on the inordinate delay that occurred from the time its SDAP application was "complete," May 5, 2006, to the time the permit was finally issued, December 10, 2007; on the County agents' acts and failures to act that resulted in that delay; and on the delay that occurred between the time the Hearing Examiner heard the appeal of the SDAP approval, and when he issued his decision affirming it.[3] *See Westmark Development Corp. v. City of Burien,* 140 Wn. App. 540, 550, 166 P.3d 813 (2007) ("Chapter 64.40 RCW also does not bar Westmark's claim for negligent delay."). The Appellants' negligence claims are also based on the County agents' communications with other agencies in their effort to prevent the Woods View development from being built.

Kitsap County argues that the public duty doctrine insulates it from liability to the Appellants for any negligent acts or omissions by its

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[3] The Hearing Examiner heard the neighbors' appeal of the SDAP approval on March 20, 2008, but did not issue a decision on the appeal until June 6, 2008. CP 354-389. This violated Kitsap County Code 21.04.080, which required the County Hearing Examiner to issue decisions within fourteen days of the hearing date.

officials.[4] The public duty doctrine, however, is inapplicable to this case.

First, the public duty doctrine only protects public officials for their failures to act; it does not protect government agents who are sued for their affirmative acts. *Coffel v. Clallam County,* 47 Wn. App. 397, 403, 735 P.2d 686 (1987). While a plaintiff may have no cause of action against a municipality for its agents' failure to act, if the agents *do* act, "they have a duty to act with reasonable care." *Id.* Thus, to the extent Appellants' negligence claims against the County are based on its agents' affirmative communications with the Governor's office, Karcher Creek Sewer District, and the State Department of Health ("DOH"), the public duty doctrine does not protect the County from liability.

As to the County's failures to act and the negligent delay of the processing and issuance of SDAP approval, the public duty doctrine does not insulate it from liability. Washington courts have long held that a government agency obliged to handle building and land use permit applications is "...under a duty to act fairly and reasonably." *King v. City of Seattle,* 84 Wn.2d 239, 247-248, 525 P.2d 228 (1974), *overruled on other grounds by City of Seattle v. Blume,* 134 Wn.2d 243, 947 P.2d 223 (1997). Thus, the "failure to issue" and the "inordinate delay" permit issuance cases are different than all other cases brought against a

[4] The public duty doctrine is not applicable to the Appellants' claim for intentional interference with business expectancies. *Vergeson v. Kitsap County,* 145 Wn. App. 526, 543-44, 186 P.3d 1140 (2008) (public duty doctrine is not a defense to intentional torts).

municipality. The rule is based upon the obligations that a county has when asked to pass upon a permit application. When a permit is properly requested, it is mandatory for the government agency to issue it. *See, e.g., State ex rel. Klappsa v. City of Enumclaw,* 73 Wn.2d 451, 454, 439 P.2d 246 (1968). The Appellants clearly raised a genuine issue of material fact concerning whether Kitsap County and its officials satisfied the duty to act fairly and reasonably, and whether any breach resulted in damages.

Even if a "public duty doctrine" analysis is undertaken, however, the Appellants can establish the duty owed and breached by the County, through the "failure to enforce" and "special relationship" exceptions to the doctrine.

1. The "failure to enforce" exception provides a basis for duty.

The "failure to enforce" exception to the public duty doctrine applies where: (1) government agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation; (2) the agents fail to take corrective action despite a statutory duty to do so; and (3) the plaintiff is within the class of persons the statute was intended to protect. *Vergeson,* 145 Wn. App. at 538 (citations omitted). While no reported cases appear to have applied the failure to enforce exception where a municipality has failed to timely process a permit application despite its agents' knowledge that time requirements have been violated,

there are likewise no reported cases holding that it does not apply in circumstances like this. The facts of this case fit within the exception's requirements, so there is no reason it should not apply.

Here, the County was required to make a decision on WVII's SDAP application within 78 days of the day it was "complete." KCC 21.04.110 (repealed by Kitsap County Ordinance No. 490 (2012)) ("KCC 21.04.110") ("Decisions on Type I, II, and III applications shall be issued not more than seventy-eight days after the date of the determination of completeness."); *Erection Co. v. Dep't. of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993) (use of word "shall" in statute imposes mandatory requirement unless contrary legislative intent is apparent); *Sandona v. City of Cle Elum,* 37 Wn.2d 831, 836-837, 226 P.2d 889 (1951) (same rules of statutory construction apply to construction of ordinances); *see also Norco Const., Inc. v. King County,* 97 Wn.2d 680, 686-87, 649 P.2d 103 (1982) (where County did not refer final plat application back to applicant for modification or correction within 90-day period for plat approval following application, County was bound to approve application). WVII, the applicant, was a property developer and within the class of persons whom the ordinance was intended to protect. WVII alerted the County and several County representatives about the inordinate delay occurring in the processing of its SDAP application. CP

338, 489-491, 504, 540-542. The County was responsible for enforcing statutory requirements concerning the need to issue a permit to WVII in a timely manner, and it failed miserably in following the required mandate. Therefore, the "failure to enforce" exception to the public duty doctrine applies; the Appellants are entitled to pursue their claims for negligence.

The cases cited by the County do not compel a different result. They involve claims for damages made against a municipality by persons other than the permit applicant for failure to enforce building permit and plan requirements, not by the applicant itself who requests relief for the municipality's negligence in the processing of the application. In *Taylor v. Stevens County,* 111 Wn.2d 159, 759 P.2d 447 (1988), plaintiffs were the purchasers of a home not constructed in accordance with building permit requirements. The Supreme Court held that municipalities are not guarantors that buildings have been constructed in accordance with a permit application and in compliance with all applicable codes. *Id.* at 168. The Supreme Court deemed it significant that the county officials had no knowledge that the home was not constructed in accordance with the plans and permits. *Id.* at 165-166. Further, the court made it clear that in the proper case, a municipal official may be held liable for mistakes in the enforcement of city codes:

> Our holding that there is no duty owing to an individual in the routine handling of building permits and building code

> inspections does not absolve local government from all liability and responsibility for the enforcement of building codes. A duty of care may arise where a public official charged with the responsibility to provide accurate information fails to correctly answer a specific inquiry from a plaintiff intended to benefit from the dissemination of the information.

Id. at 171. Thus, in a case like this, where there were specific communications about the permit application and specific assurances were made to the applicant, a municipality owes a duty to the applicant, the breach of which gives rise to liability.

Similarly, *Smith v. City of Kelso,* 112 Wn. App. 277, 48 P.3d 372 (2002), and *Pepper v. J.J. Welcome Construction Company,* 73 Wn. App. 523, 871 P.2d 601 (1994), both involved claims made by persons other than those who had applied for building permits. In both cases, neighboring homeowners brought actions against the municipalities alleging that their negligent subdivision plat approval and issuance of building permits in the plats were the causes of a landslide in *Smith* and excessive water runoff in *Pepper.* Nothing in either case can be construed, however, to apply to a situation like the one in this case, where the County has actual knowledge that it is violating the time requirements of its own permitting ordinance yet ignores those requirements.

Zimbleman v. Chaussee Corporation, 55 Wn. App. 278, 777 P.2d 32 (1989), also was a case where someone other than the permit applicant sought recovery against the municipality; there, it was the owner

association for the condominiums constructed pursuant to the allegedly negligently issued permits. The association sought damages for negligent and defective construction, alleging that King County should have realized that the plans for the construction of the condominiums did not include several items required by the Uniform Building Code ("UBC"). The court ruled that the association had not submitted evidence sufficient to create a material issue of fact that the County had knowledge that the condominiums had been constructed with violations of the UBC. *Id.* at 283. Therefore, the trial court's dismissal of the association's damages claim against King County was affirmed.[5]

2. The "special relationship" exception also applies.

Where a municipal agency takes steps to create a particularized relationship with a given person or entity, the "special relationship" exception to the public duty doctrine applies. It has three elements:

(1) there is direct contact or privity between the public official and the injured Plaintiff which sets the latter apart from the general public;
(2) there are express assurance(s) given by a public official; which
(3) give(s) rise to justifiable reliance on the part of the plaintiff.

Babcock v. Mason County Fire District No. 6, 144 Wn.2d 774, 786, 30

[5] In its Brief, the County cited *Smith* and *Zimbleman* for the proposition, "In the context of permits, the [failure to enforce] exception applies only where 1) a building official has *mistakenly approved* a project with actual knowledge of a code violation by the applicant which created an "inherently hazardous and dangerous condition," and 2) the municipality had a specific mandatory *enforcement* obligation which was breached." Brief at 34 (emphasis in original). These purported maxims do not appear anywhere in *Smith* or *Zimbleman* and are not correct statements of law.

P.3d 1261 (2001).

The term "privity" is used in the broad sense of the word and refers to the relationship between the government agency and any reasonably foreseeable plaintiff. *Chambers-Castanes v. King County,* 100 Wn.2d 275, 286, 669 P.2d 451 (1983). In this case the record is replete with contact between WVII and Ms. Piper, and Kitsap County. *See, e.g.,* CP 338, 489-491, 504, 540-542, 598-599, 605-606. Thus, there is "privity" for the special relationship exception.

The second element, requiring "express assurances," is also satisfied. There were numerous communications from the County to WVII confirming that approval of the SDAP application would be processed no differently than any other such application, and that it would be issued forthwith. CP 605-606. Indeed, in November 2006, Ms. Piper, for WVII and herself, met with County officials and they promised her that the County would issue the MDNS and SDAP for the project right away. CP 598, 621. The SDAP was not issued until more than a year later. CP 316-317. By making the specific promise in November 2006 to issue the MDNS and SDAP, the County formed the "special relationship" with the Appellants required for application of this exception.

Not only were express assurances made to WVII which reasonably led it to believe that approval of the permit was "on track," but the record

shows that neither Kitsap County nor its officials ever told WVII the truth about what it was doing behind its back in order to kill the project. This was nothing less than an express concealment, and WVII relied on the County's silence as it did upon the false prommises that were expressly made to it. Flatly stated, the County should have informed WVII at the very outset that it would do everything it could to deny the permit and prevent the project from being built. *See* CP 436-437 ("[T]he County staff and elected officials believe that they have actively worked to find ways within the law to deny the project."); CP 443 ("This is not a project we support."); CP 1274 ("The Board as a whole didn't think this was a very good project, and Larry [Keeton] carries out the will of the Board.").

"Justifiable reliance" is reliance that is reasonable under the circumstances. *ESCA Corp. v. KPMG Peat Marwick,* 135 Wn.2d 820, 828, 959 P.2d 651 (1998). Whether a plaintiff detrimentally relied on a municipality's assurances is a question of fact generally not amenable to summary judgment. *Munich v. Skagit Energy Communication Center,* 175 Wn.2d 871, 879, 288 P.3d 328 (2012) (citation omitted). Nevertheless, WVII and Ms. Piper justifiably relied on the County's representations and misrepresentations. Had the County told WVII and Ms. Piper the truth about its intention to delay SDAP approval and to attempt to prevent the development from ever occurring, WVII might have abandoned its

development plans, sold the property to another developer, or developed the property in another way, thus avoiding the expenditure of hundreds of thousands of dollars and the suffering by WVII and Ms. Piper of millions of dollars of damages. CP 605-606, 767-768. WVII was entitled to rely on the County's express assurances that its permit application would be treated no differently than other similar permit applications, and would be passed upon in a timely manner. WVII's "justifiable reliance" is established; at a minimum, it adduced sufficient evidence on this issue to raise a genuine issue of material fact, thus requiring a jury trial. WVII having established this special relationship with Kitsap County, the County cannot now assert the public duty doctrine to avoid liability for its breach of its assurances and obligations.

The cases cited by the County in support of its contention that the "special relationship" exception does not apply here are not on point. First, the County cites *Taylor* for the proposition that in order for the exception to exist, there must be a specific inquiry to confirm that "a building or structure is in compliance with the building code." Brief at 35. However, the exception requires only a showing of "express assurances given by a public official" in order to prove the second requirement for the exception to apply. *Babcock*, 144 Wn.2d at 786. For example, in *Munich,* the Supreme Court affirmed a trial court's ruling that there were issues of fact

concerning whether a special relationship between the plaintiff and Skagit County was established for purposes of the public duty doctrine, where a 911 operator made assurances to a caller who was being shot at by a neighbor that the police were on the way. *Munich,* 175 Wn.2d at 885. Thus, the special relationship exception can exist in situations other than where the person who attempts to invoke it inquires about compliance with a county's building code. The exception applies to the facts here.

The other cases cited by the County are inapplicable. In *Williams v. Thurston County,* 100 Wn. App. 330, 997 P.2d 377 (2000), the court held that the plaintiff's contractor had not made any specific inquiries about construction requirements and that the municipality defendant had not provided any express assurances. Therefore, the special relationship requirements were not met. *Id.* at 335. In *Fishburn v. Pierce County Planning and Land Services Dept.,* 161 Wn. App. 452, 250 P.3d 146 (2011), plaintiffs did not explain how they fulfilled the requirements of the special relationship exception, and did not identify an express assurance by the defendant upon which they justifiably relied to their detriment. Those cases are clearly distinguishable from this one, where the Appellants have provided specific examples of the County's assurances, and how WVII justifiably relied on them. The special relationship exception applies; therefore, the County owed a duty to the Appellants that

was breached, causing them significant damages.

C. The Appellants have a meritorious claim for tortious interference.

The County focuses only on its improper communications with The Legacy Group in arguing that the Appellants do not have a claim for intentional interference with their business expectancies or contracts. It completely ignores all its other actions which constitute interference: (1) its purposeful delay in processing WVII's SDAP and SEPA applications; (2) its strong-arming of Karcher Creek Sewer District ("Karcher Creek") to pressure it not to serve as the owner, operator, or to guarantee operation of the LOSS; and (3) its communications with DOH seeking to prevent it from approving WVII's LOSS permit application and request for change in LOSS management plan.

There are five elements necessary for a claim for tortious interference with business expectancy:

(1) The existence of a valid contractual relationship or business expectancy;
(2) That defendants had knowledge of that relationship;
(3) An intentional interference inducing or causing a breach or termination of the relationship or expectancy;
(4) That defendants interfered for an improper purpose or used improper means; and
(5) Resultant damages.

Westmark, 140 Wn. App. at 557 (citations omitted). "A cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means

that in fact cause injury to plaintiff's contractual or business relationships." *Id.* at 558 (internal quotations and citation omitted).[6] Further, a claim for tortious interference lies where "the actor does not act for the purpose of interfering ... but knows that the interference is certain or substantially certain to occur as a result of his action." 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 352.01 (6th ed. 2012), comment (citation omitted).[7]

A valid business expectancy "includes any prospective contractual or business relationship that would be of pecuniary value." *Newton Ins. Agency & Brokerage v. Caledonian Ins. Group,* 114 Wn. App. 151, 158, 52 P.3d 30 (2002). A developer pursuing construction or development of real property has a protected business expectancy in that project. *Westmark,* 140 Wn. App. at 544; *Pleas v. City of Seattle,* 112 Wn.2d 794, 796, 774 P.2d 1158 (1989). The Appellants had a business expectancy in the Woods View project, and their completion of it.

The County clearly had knowledge of the Appellants' business expectancies and contracts related to the project. The knowledge requirement is satisfied when the person interfering knows of "facts giving

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[6] Because intentional interference can be proven by showing the County employed wrongful means that caused injury to the Appellants' contracts and/or business relationships, they do not need to prove that the County's actions were "purposely improper," as the County asserts. Brief at 36-37.

[7] Thus, the County's assertion that "no liability arises" when a defendant "interferes in an incidental manner" is also incorrect. Brief at 36.

rise to the existence of the relationship." *Calbom v. Kundtzon,* 65 Wn.2d 157, 165, 396 P.2d 148 (1964). Knowledge will be found in the absence of specific knowledge of the relationship when one possesses awareness of "some kind of business arrangement" being present. *Topline Equip., Inc. v. Stan Witty Land, Inc.,* 31 Wn. App. 86, 93, 639 P.2d 825 (1981). Here, the County's knowledge of the Appellants' planned development is what fueled its attempts to delay and prevent it from being built.

A real estate developer may recover against a municipality for tortious interference where it has engaged in conduct that frustrates and delays permitting matters. *See, e.g., Westmark; Blume; and Pleas v. City of Seattle*. A municipality's delay in passing on an applicant's construction permit may be an "improper means" sufficient to constitute an interference with the applicant's business expectancy. *Westmark,* 140 Wn. App. at 558 ("A municipality may not single out a building project and use its permitting process to block its development."). In *Westmark,* the court affirmed a jury verdict in favor of a developer for $10,710,000 against the City of Burien, agreeing that the city had tortiously interfered with the developer's expectancies by attempting to delay review of its permit application for construction of an apartment building; the purposeful delay was an "improper means" to prevent construction of the building. *Id.* at 556.

In *Pleas,* the Supreme Court ruled that the City of Seattle's delay in issuing building permits for a high-rise apartment building opposed by neighbors "because it 'thought it politically expedient for them to cater to those opposing an apartment house on the property,'" supported the trial court's decision that the City had committed intentional interference with the developer's business expectancies. *Pleas,* 112 Wn.2d at 799 (internal quotation omitted).[8]

The Appellants presented evidence that the County didn't want the Woods View project to be constructed, even though it met all development requirements, and "actively worked to find ways" to prevent it from being built. CP 433, 436-437, 443, 1274-1275. Part of the basis for the County's opposition to the project was the neighbors' vocal opposition to it. CP 980-981, 1265. It even suspended processing the application while it sought assistance from the State on means to prevent it. CP 321-322, 497, 504, 508, 586-592, 598, 898-906. This evidence created an issue of fact concerning the Appellants' claim for intentional interference based on the County's purposeful delay.

The County's communications and interactions with Karcher Creek and DOH are additional evidence of the County's interference with

[8] The Court explained, "The improper motives arise from the City officials' apparent desire to gain the favor of a politically active and potentially influential group opposing the ... project. The improper means arise from the City's actions in refusing to grant necessary permits and arbitrarily delaying this project." *Id.* at 805.

the Appellants' expectancy in the completion of the Woods View development. As to Karcher Creek, WVII had a contract for it to manage or operate the LOSS system. CP 834. Ms. Kneip, the County's attorney, conceded she knew of that relationship and interfered with it by telling Karcher Creek it was not permitted to do so. CP 428-431, 812-813.[9] She also told Karcher Creek that the County did not want it to serve as the owner or operator of the LOSS. CP 835. The County then declared a moratorium that prevented Karcher Creek from participating in projects like Woods View. *Id.* This caused Karcher Creek to terminate its relationship with WVII, because it "did not wish to own or operate the LOSS ... if Kitsap County had an ordinance prohibiting it." *Id.*[10]

As to the County's communications with DOH regarding the Woods View project, the County understood that it had no authority over whether the proposed LOSS and operating plan should be approved for the

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[9] Ms. Kneip identified RCW 57.16.010(6) as the basis for the County's instruction that Karcher Creek was not permitted to operate the LOSS. CP 429. Nothing in that statute prohibited Karcher Creek from serving as the operator the LOSS or as third-party guarantor of a private operator's responsibilities. Simply put, Ms. Kneip told Karcher Creek it wasn't permitted to participate with WVII for the Woods View LOSS without any legal basis.

[10] The County suggests that the Appellants had already decided in October 2006 that Karcher Creek would not own or operate the LOSS. Brief at 5. However, this ignores several facts that contradict this view of the evidence: (1) the General Manager of Karcher Creek at the time testified that Karcher Creek intended in 2007 to operate or own the LOSS (CP 835); (2) County representatives Ms. Kneip and Mr. Bolger learned in 2007 that Karcher Creek intended to operate or own the LOSS (*Id.*); and (3) Ms. Piper testified that WVII had a signed contract with Karcher Creek for it to operate the LOSS when Kneip and Bolger told Karcher Creek it wasn't permitted to do so, causing Karcher Creek to withdraw from the contract. CP 599-600. At a minimum, this creates an issue of fact about whether there was an agreement or arrangement in place between WVII and Karcher Creek in 2007 when the County interfered.

Woods View development, and that the sole authority for making that decision should have rested with DOH. *See, e.g.,* CP 316-318, 321-322, 324, 326, 328, 396, 401, 402, 408. Yet the County repeatedly falsely told DOH that Woods View's development did not comply with applicable statutes and county ordinances, to induce DOH not to approve the LOSS permit or WVII's request for approval of the management plan, even after the County had issued the SDAP to permit the project to be constructed. CP 330-333, 335-336, 340-341, 343, 349-352, 372-373, 375-376, 391, 407-408, 417, 428-431, 433, 473.[11] The purpose of these communications was to prevent DOH from issuing a LOSS permit, which would prevent construction of the project. CP 433.[12]

The County's interference with the LOSS permitting process significantly delayed DOH's consideration of the permit request. CP 1172-1173. And when the County again represented in September 2009 that the Woods View project did not comply with the County's Comprehensive Plan or the Growth Management Act ("GMA"), it again affected and delayed DOH's consideration of the request. CP 127, 1184, 1668, 1683, 1694, 1704, 1719, 1784-1785, 1787-1790, 1811-1812, 1815-1816, 1819,

[11] The County's approval of the SDAP was not conditioned in any way on what type of LOSS management plan WVII employed; all that WVII had to show was that the DOH had issued a LOSS permit for the project. CP 316-318.

[12] The Washington Administrative Code regulation in effect at the time required a LOSS permit applicant to show that the LOSS complied with local land use standards. *See* WAC 246-272B-08001(2)(a)(ii) (repealed, effective July 1, 2011).

1831, 1838-1841, 1846-1848, 1851-1852.[13]

"Interference by improper means" may also be proven by showing a municipality's conduct that violates an established standard of the trade or profession. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 352.03 (6th ed. 2012). Whether an actor engages in improper means, whether surrounding circumstances justify the conduct, and the existence of such circumstances, are all issues for the jury. *Id.,* comment (citation omitted). Appellants' land use expert, Robert Thorpe, testified that the County's conduct concerning the Woods View project, including the delay in processing the SDAP and SEPA applications and its surreptitious communications with Karcher Creek and DOH, violated standards applicable to municipal land use regulators. CP 864-866, 879-893. At a minimum, Mr. Thorpe's testimony created a genuine issue of material fact about whether the County had committed intentional interference with the

[13] In its Brief, the County falsely represented that the County's 2009 communications to DOH did not affect its consideration of WVII's LOSS management plan change request, and that the DOH paid no attention to those communications. Brief at 31, 49. These statements blatantly misrepresent the record. Indeed, when WVII made its request in 2009 for a change in the management plan, the issue was monitored by a senior management official in the State Environmental Health Division, Gregg Gruenenfelder, as well as by two lower management officials, none of whom are normally involved in LOSS permit approval issues. CP 1766-1767, 1816-1817, 1819. This illustrates how seriously DOH considered the County's objections. Ms. Lahmann, one of the engineers in the DOH who considered the management change request, testified that DOH does not like to be in conflict with counties on issues important to them "without having an opportunity to work through the issues." CP 1817. Clearly, DOH was concerned about the County's objections, and it affected its review of the original LOSS permit application, and the subsequent request for management plan change.

Appellants' business expectancies and contracts.[14]

While the County points out that one's exercise in good faith of his own legal interests cannot constitute improper interference, it makes no effort to show why the County's good faith should not be an issue to be decided by the jury. Good faith is "a state of mind consisting in honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. *Morris v. Swedish Health Services,* 148 Wn. App. 771, 777, 200 P.3d 261 (2000) (citation omitted). A party's good faith is usually a question of fact. *Id.*

The evidence precludes a finding that the County's actions towards the Appellants were undertaken in good faith. The County's suspension of SDAP approval processing violated well-known legal authority preventing municipalities from singling out development projects for delay. *See, e.g., Westmark.* With respect to the County's communications with DOH, the County knew that the project did not violate the County's Comprehensive

[14] The County cites *Bakay v. Yarnes and Clallam County,* 431 F. Supp.2d 1103 (W.D. Wash. 2006) and *Kane v. City of Bainbridge Island,* 866 F. Supp.2d 1254 (W.D. Wash. 2011) for the maxim, "A local government's exercise of its land use authority ordinarily cannot be a basis for a claim of tortious interference with a business expectancy." However, *Bakay* involved a criminal prosecution for animal cruelty; the court simply held that the plaintiff could not prove that the alleged interference was improper because a statute authorized the county to euthanize her sick animals. *Id.* at 1113. And while *Kane* was a case involving land use regulation, nowhere in it or *Bakay* is the proposition for which the County cites it stated or implicit.

Plan or the GMA but represented to DOH that it did. Further, the County knew that the GMA cannot be applied to prevent a specific development, but it invoked it with the DOH and Karcher Creek in its attempt to prevent the Woods View project. *See Woods v. Kittitas County,* 162 Wn.2d 597, 174 P.2d 25 (2007); CP 407-408, 973-974, 981-982. The communications with DOH were part of a scheme concocted by Ms. Kneip, a County attorney, to attempt to prevent the DOH from issuing the LOSS permit, even though County regulations permitted the development. CP 433. And none of the County's communications to the Governor's office, Karcher Creek, or DOH were provided by the County to the Appellants when they occurred. CP 598, 600, 601, 946, 989. All of these facts put the County's good faith squarely in dispute; a jury should be permitted to consider this evidence to evaluate the propriety of the County's actions.

Finally, the Appellants submitted extensive evidence of the damages they suffered due to the County's delay in processing their SDAP application and other interference with their business expectancies. The SDAP should have been approved in early 2007, not in December 2007. Had the SDAP been timely processed, even half a year earlier, based on the time it eventually took to resolve all appeals, WVII would have been able to begin construction in 2008, before WVII's development loan with Venture Bank came due. CP 602-603, 766. Had the County not interfered

in the relationships WVII had established with Karcher Creek and DOH, it would have obtained LOSS approval, pursuant to which it would have been able to sell individual lots in the development, well before the funding crisis it encountered in late 2009. Had LOSS approval occurred that would have permitted it to sell individual lots, The Legacy Group would have extended take-out financing for the remaining construction of the development. CP 603-606, 840-844. WVII would not have lost the property to foreclosure, and Ms. Piper would not have gone bankrupt. Neither WVII nor Ms. Piper would have suffered the millions of dollars in damages they sustained. CP 762-768. Instead, they would have made significant sums of money from sales of residences in the development. CP 840-844. Clearly, the Appellants produced enough evidence on this claim to defeat summary judgment, and Judge Buckner's denial of the County's motion was correct.

D. WVII's takings claim should not have been dismissed.

Without citation to any authority, the County argues that "there is no substantive difference between the U.S. Constitution and the Washington State Constitution with regard to liability for inverse condemnation arising from land use regulation."[15] Therefore, the County argues, res judicata applies; because Judge Settle ruled that there was no

[15] Brief at 43.

taking under federal law, the Appellants' state takings claim should similarly be dismissed. As it does throughout its Brief, the County misrepresents the law. Our State Constitution provides much broader protection to property owners than the U.S. Constitution. There is no identity of issues, res judicata is inapplicable and the Court should not have dismissed the takings claim.

To begin with, the Ninth Circuit Court of Appeals rejected Judge Settle's dismissal of the federal takings claim. CP 1474-1475. However, the Court determined that the claim was not "ripe" because WVII had "not demonstrated that it pursued and was denied just compensation in Washington state court prior to filing its federal takings claim." CP 1475 (citation omitted). In other words, Judge Settle's ruling on the merits of the federal takings claim was rejected. But even if it binding, it is of no consequence to WVII's claim for inverse condemnation under the Washington Constitution.

In *Manufactured Housing Communities of Washington v. State,* 142 Wn.2d 347, 360, 13 P.3d 183 (2000), the Supreme Court made it clear that Article 1, Section 16 of the State Constitution provided more protections to property owners in Washington than the Fifth Amendment to the United States Constitution:

> [S]tructural differences between the federal and state constitutions also favors enhanced protections to Washington

> citizens by maintaining a literal interpretation of "private use." As previously noted, there are marked differences between the two relevant provisions. But, because the United States Constitution is a grant of enumerated powers to the federal government and the Washington State Constitution serves to limit the otherwise plenary powers of the state government, the state constitution can be looked at as a source of great protections directly reserved in the people. (Citation omitted). Thus, the structural differences allow Washington courts to forbid the taking of private property for private use even in cases where the Fifth Amendment may permit such takings.

Because there are differences between what is a "taking" under federal law and state law, Judge Settle's decision is irrelevant to the Appellants' state takings claims. He dismissed the state court claims without prejudice, including the State Constitutional takings claim. CP 1470. Res judicata does not apply. *Woodley v. Myers Capital Corp.,* 67 Wn. App. 328, 336, 835 P.2d 239 (1992) (res judicata requires identity of causes of action).

The County also argues that there cannot be a taking where there is still some economic value to the property after the subject government actions have occurred. This is another misstatement of the law; in Washington, a permanent and substantial reduction in property value is sufficient to state a successful takings claim. *See, e.g., Borden v. Olympia,* 113 Wn. App. 359, 374, 53 P.3d 1020 (2002); *see also, Lambier v. Kennewick,* 56 Wn. App.275, 279, 783 P.2d 596 (1989) (holding that a "taking" occurs where government conduct interferes with the use and enjoyment of private property, with a subsequent decline in market value).

The Appellants easily meet the burden here. With a permitted LOSS, the Woods View project would support 78 homes, for which it had vested development rights. Without a permitted LOSS, the property would only support 39 homes, due to size constraints, each of which would need its own individual septic and drainfield system. At a minimum, the loss in value for this decrease was 39 times $75,000 -- $2,925,000. CP 601.

Next, the County contends that it was not the government agency that caused the taking. The facts, however, show that the County simply badmouthed the project to other governmental agencies and plaintiff's lender, and did whatever it could to delay and prevent the project until the developers ran out of money and the project was abandoned – the point of the County's scheme in the first place.

Property in a thing consists not merely in its ownership and possession but in the unrestricted right to dispose of it; anything that destroys that right, without compensation, constitutes a taking. *Manufactured Housing Communities,* 142 Wn.2d at 364. Here, the County compelled DOH to require WVII, in 2007, as a condition of receiving a LOSS permit, to burden its property with a covenant prohibiting the transfer of individual lots in the development. CP 428-430, 812-813. This was a taking under our State Constitution.

The takings provision of the Washington Constitution does not state precisely what government action must be proved in order for the court to determine that a taking occurred. The reason for this is simple: there are myriad ways a government agency can ruin the value of one's land. Inverse condemnation opinions are narrowly drawn for this very reason. Landowners are entitled to compensation when government action undermines "one or more fundamental attributes of property ownership." *Borden, supra,* at 374. Preventing the development of platted and vested lots by resorting to a set of guerilla tactics unreasonably intended to hold up and prevent construction of a project, like occurred in this case, can cause every bit as much a "taking" as an unreasonable withholding of a permit. The effect is the same: huge damage to a development project by unwarranted government intermeddling.

The Appellants made a substantial record of state action (*e.g.,* encouraging delay of the needed LOSS permit) which was initiated and implemented by the County. The County knew it had no legal right to delay or prevent the project on its own, so it acted surreptitiously to wreck WVII's right to fully develop the vested and platted lots. Judge Buckner's denial of the County's request to dismiss the State takings claim was proper.

E. Ms. Piper has standing to pursue her own claims.

Judge Buckner's decision that Ms. Piper had standing to pursue her own individual claims against the County was correct.[16]

"Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Kim v. Moffett,* 156 Wn. App. 689, 700 n.9, 234 P.3d 279 (2010) (citation and internal quotation omitted). In Washington, to have standing to enforce private rights, a litigant "must show that [she] has some real interest in the cause of action"; "[her] interest must be a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and [she] must show that [she] will be benefitted by the relief granted." *State ex rel. Hays v. Wilson,* 17 Wn.2d 670, 672, 137 P.2d 105 (1943) (citation omitted). In short, a plaintiff must have a personal stake in the outcome of a case. *Sabey v. Howard Johnson & Co.,* 101 Wn. App. 575, 584, 5 P.3d 730 (2000).

Ms. Piper had a financial stake in the outcome of the Woods View development because she personally funded development expenses (which will never be reimbursed to her), and because she was a guarantor of credit that was obtained for the project for which WVII was not an obligor. CP 596-606. While normally a guarantor is not permitted to bring suit to

[16] The County represented that Judge Serko "correctly ruled" that Ms. Piper had no standing to bring a lawsuit against the County related to its conduct pertaining to the Woods View development. Brief at 13. Judge Serko made no such ruling; the issue was not presented to her in the County's second motion for summary judgment. CP 1369-1389.

recover damages arising from the guarantee of a corporate debt,[17] when the guarantor's damages are different than the primary borrower due to the wrongful conduct, the guarantor has standing to pursue her own claims. *Barger v. McCoy Hillard & Parks,* 488 S.E.2d 215, 221 (N.C.1997).[18]

Sabey is instructive. David Sabey was interested in purchasing the parent of the Frederick & Nelson Department Store. An actuarial firm, Howard Johnson, Inc. ("Johnson"), assisted that company in phasing out its pension plan and replacing it with a profit-sharing plan. Johnson communicated to Sabey that the pension plan funding and its compliance with ERISA was adequate. Sabey relied on those representations and formed a corporation, of which he was the sole shareholder, to purchase the business. However, the plan was underfunded in violation of ERISA, exposing Sabey to liability for the shortfall. Sabey sued Johnson, which argued that Sabey had no standing because the claims belonged to the corporation that purchased the business.

The court disagreed, concluding that Sabey had standing to pursue personal recovery against Johnson:

The standing doctrine requires that a plaintiff must have a

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[17] *See e.g., Sparling v. Hoffman Constr. Co., Inc.,* 864 F.2d 635, 641 (9th Cir.1988).

[18] The court in *Barger* held that guarantors of corporate debt who suffer injury personal to them and distinct from the injury sustained by the corporation may prosecute their own claims, and that an injury is "peculiar or personal" to a shareholder/guarantor "if a legal basis exists" to support the guarantor's "allegations of an individual loss, separate and distinct from any damage suffered by the corporation. *Id.* at 220-221.

> personal stake in the outcome of the case in order to bring suit. Ordinarily, a shareholder cannot sue for wrongs done to a corporation, because the corporation is a separate entity; the shareholder's interest is viewed as too removed to meet the standing requirements. ...
>
> There are two often overlapping exceptions to the general rule: (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder; and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders.
>
> ... As to the second exception to the shareholder standing rule, Sabey alleges individual injury. When Sabey was identified as member of the controlled group and paid $1.95 million to the PBGC in exchange for release of his and Sabey Corporation's liability, he suffered an injury separate and distinct from that of other shareholders. Thus, both exceptions to the shareholder standing rule are applicable, and the rule does not preclude Sabey's standing.
>
> ... We hold that despite Sabey's status as sole shareholder in F & N Holding, he has standing to seek reimbursement from Howard Johnson because he alleges ... a separate and distinct injury, i.e., personal liability under ERISA.

Sabey, 101 Wn. App. at 586.

Similarly in this case, Ms. Piper personally paid expenses for the development for which she will never be reimbursed and incurred guaranty liability that did not duplicate WVII's liability. She thus has standing to pursue her own claims for damages against the County.

WVII obtained a loan from Venture Bank to acquire the Woods View property. CP 597. In the fall of 2010, its successor, First Citizens Bank, completed a non-judicial foreclosure of the property, thereby

extinguishing any liability owed by WVII,[19] but preserved its right to pursue a deficiency judgment against Ms. Piper on her guaranty. CP 605, 1287-1288, 1290-1294. The successful bid for the Woods View property at the sale was $745,000, significantly less than the debt secured by the property,[20] so liability for the deficiency attaches to the guaranty. This loss is "separate and distinct from any damage suffered by the corporation";[21] Ms. Piper therefore has standing to pursue recovery for these damages.

The County cited *Sparling* for the proposition that "the fact that a shareholder may have been a guarantor of a corporate debt does not create standing." Brief at 14. *Sparling* is inapplicable, however, because there the shareholders/guarantors were attempting to recover on a RICO claim that was wholly based on injury to the corporation and duplicated the damages it suffered. *Sparling,* 83 F.2d at 640. In this case, the damages that Ms. Piper incurred due to her guaranty were not incurred by and do not duplicate damages suffered by WVII, because its debt to First Citizens Bank was extinguished when the foreclosure was completed.

Ms. Piper has additional damages completely independent of those suffered by WVII, giving her standing here. *Coto Settlement v. Eisenberg,*

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[19] RCW 61.24.100(1) provides that no deficiency judgment may be obtained against a borrower for debt secured by real property subject to a deed of trust foreclosed non-judicially except against a guarantor of that debt if the beneficiary complies with RCW 61.24.100(3).
[20] CP 1287-1288, 1292.
[21] *See Sabey,* 101 Wn. App. at 586.

593 F.3d 1031, 1037 (9th Cir. 2010) (shareholders injured separately from the corporation's injury have standing apart from the corporation). Ms. Piper personally guaranteed debts incurred by Norpac Construction, the construction company for the site work that was underway at Woods View when the project collapsed. Norpac was the principal obligor for these already-incurred construction expenses, and WVII was not liable for them. CP 597, 605, 1296-1324. The debts were personally guaranteed by Ms. Piper. *Id.* When WVII could not obtain takeout and development financing for the First Citizens Bank loan due to the County's interference, there was no money to pay vendors and subcontractors at the site. Ms. Piper became a defendant and incurred personal liability in, and was required to incur attorney's fees to defend against, several Superior Court lawsuits. *Id.* In all but one of these lawsuits, WVII was not a defendant. *Id.* Ms. Piper thus incurred money damages due to the County's actions that neither duplicated nor derived from WVII's liability. She is also entitled to recover damages for the attorney's fees she incurred for the lawsuits that were filed against her due to the inability to pay subcontractors and materialmen. *See Wells v. Aetna Ins. Co.,* 60 Wn.2d 880, 882, 376 P.2d 644 (1962) (citations omitted). She has claims for damages arising from the County's actions that do not duplicate WVII's claims.

The County also argues that Judge Settle's order concluding that

Ms. Piper had no standing to pursue federal claims should be given preclusive effect in this action. The County's argument is totally without merit. First, standing requirements are different in federal courts than they are in state courts. *See, e.g., Lee v. Amer. Nat'l Ins. Co.,* 260 F.3d 997, 1001-02 (9th Cir. 2001) ("[A] plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury."). Further, Judge Settle himself expressly limited his decision on Ms. Piper's standing "to the federal claims alleged by her and [WVII]." CP 1462.[22]

Accordingly, Ms. Piper has standing to be a plaintiff and to recover damages from the County. Judge Buckner's Order denying the County's motion for summary judgment was proper, and should be affirmed.

II. APPELLANTS' REPLY FOR APPEAL

As stated above, the County's arguments are based on unsupported and inaccurate statements of fact, and misrepresentations of law. Some of those misrepresentations have already been discussed. Others are included immediately below:

1. "[A]n owner of land not served by sewer must ordinarily combine several small lots to create a buildable lot of sufficient size to accommodate an on-site septic system." Brief at 4.

[22] The County's statement that Judge Settle concluded that Ms. Piper had no standing to pursue her state law claims, Brief at 14, completely misrepresents Judge Settle's ruling. CP 1462.

2. "Woods View felt that by utilizing a LOSS, it could squeeze 'urban' or 'suburban' density onto its rural parcel." *Id.*

3. "Kitsap County issued a decision approving the SDAP on November 26, 2007." *Id.* at 5.[23]

4. "[T]he County's emails in September 2009 did not affect the timing or result of DOH's LOSS decision." *Id.* at 7.[24]

5. "The County employees said that the approval of the LOSS was up to DOH, and refused to speculate as to what would happen if approval of the proposed modified LOSS were issued by the state. *Id.* at 8.[25]

The County's arguments based on unsupported or misrepresented facts should be rejected by the Court.

A. None of the Appellants' claims are barred by statutes of limitation.

1. The 78-day period for processing the application did not run until December 13, 2006, at the earliest.

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[23] The County approved the SDAP on December 10, 2007. CP 316-319.

[24] The County cited to CP 94-99 of the record for this statement. On CP 95 was an excerpt of the deposition testimony of Mamdouh El-Aarag, P.E., a DOH engineer who ultimately approved WVII's LOSS management plan change request in August 2010. He testified he was not aware of the September 2009 communications from the County. CP 94. This is not surprising, since he was not assigned the file to consider the request for management plan change until February 2010. CP 1779. The remainder of those pages are excerpts of the deposition of Dorothy Jaffee, an attorney in the Washington State Attorney General's Office. CP 95. Ms. Jaffee did not testify that the County's communications did not affect the timing or result of the DOH's LOSS decision. Rather, she merely testified that the September 2009 communications did not change her "legal opinion with respect to the State's obligations or requirements vis-à-vis compliance with Kitsap County's 'comp plan.'" CP 99. As discussed above at 21-22, the DOH decision on WVII's request for management plan change was significantly affected and delayed by the County's September 2009 objections.

[25] The County cited Brent Eley's testimony for this representation. In fact, Mr. Eley's testimony at the cited page was as follows, in direct contradiction to how it is represented by the County: "The County lawyer stated that the ownership change was a 'big change of use' and that it could necessitate hearings and delay timelines since the LOSS system had been approved one way, and now that it was proposed in another way, there would be a hard look at the [County] DCD review process assuming that the state approved the modification to the LOSS system." CP 124.

In their Opening Brief, the Appellants provided a detailed analysis of when the 78-day period mandated by KCC 21.04.110 expired. Opening Brief at 26-28. As demonstrated there, because the County requested additional information after the SDAP application was deemed "complete," the 78-day period expired no earlier than December 13, 2006, and this action commenced on October 14, 2009, less than three years later. The case was timely commenced.

The County argues that the case was not timely commenced because the Appellants' Complaint alleges the 78-day period for SEPA review expired on July 1, 2006, and that the period for action on the SDAP application expired on July 22, 2006. Brief at 17. As with many other things in the County's brief, these are blatant misrepresentations; the Complaint states no such thing. Concerning SEPA, the Complaint alleges that "[p]ursuant to KCC 21.04.110, Kitsap County was required to issue a final decision on the ... application within 78 days of that date." CP 4. For the SDAP application, the Complaint states, "[p]ursuant to KCC 21.04.110(A), Kitsap County was required to provide a final decision on the application within 78 days of May 5, 2006." *Id.* Appellants did *not* allege the expiration dates were July 1, 2006 and July 22, 2006. Because the allegation referenced the ordinance and the tolling provisions are contained in the ordinance, the timeline provided by the Appellants in

their Supplemental Brief to the trial court was entirely consistent with the allegations in the Complaint.

Even if true, however, because the County did not object to the additional evidence and briefing concerning the timeline when it was submitted, it waived any objection, and the pleadings were amended to conform to the proof. *Jensen v. Ledgett,* 15 Wn. App. 552, 555, 550 P.2d 1175 (1976).[26] The trial court's summary judgment order confirms that in ruling on the motion for summary judgment, Judge Serko considered the Supplemental Declaration of Darlene Piper re: Statute of Limitations and Plaintiffs' Second Supplemental Brief re: Statute of Limitations. CP 1982-1983. These filings include the timeline discussion and the evidence that supports it. It was within Judge Serko's discretion to consider this evidence and argument. *Cf. Martini v. Post,* __ Wn.2d __, __ P.3d. __, 2013 WL 6182929, *4 (2013) (court may consider additional evidence submitted with motion for reconsideration following decision on summary judgment). Because the evidence considered by Judge Serko confirmed that the County was not entitled to summary judgment that the statute of limitations had run, summary judgment should not have been granted. *Id.* at *6 (if additional evidence submitted with motion for reconsideration after summary judgment is entered against party moving for

[26] In their Complaint, the Appellants prayed for, among other things, "leave to amend the pleadings to the proof presented at trial[.]" CP 20.

reconsideration is considered by the trial court and raises genuine issue of fact, it is error for court not to grant motion for reconsideration).[27]

The County argues that the Appellants' contention that the delay claim could not have accrued until no earlier than December 13, 2006 is inconsistent with their claim that the County's suspension of its processing of the SDAP application starting on October 13, 2006 was a tortious act of delay supporting their claims. There is no inconsistency in these arguments. Whether the 78-day timer clock was stopped while the Appellants were responding to the County's request for additional information for the SDAP application is an issue entirely different than whether the County had an obligation to continue processing the application while the timer was stopped. For any permit application of this magnitude, the impacts of permit approval must be evaluated on numerous level – traffic, hydrology, engineering, and fire and police protection are just a few. If one department or division needs additional information, that may, but does not typically affect another department's evaluation. Therefore, even though the 78-day timer clock might have been stopped while an item of information to study one potential impact was obtained, the other departments and divisions were required to process WVII's applications. Instead, *all* processing was suspended while the County

[27] The County also states that the supplemental evidence and briefing was submitted after the deadline set by Judge Serko for such material. This is also untrue; Judge Serko established no fixed deadline. RP 36-37.

waited for the State to assist it with its efforts to deny the permit approval. This was wholly improper.

2. The Appellants were not required to assert a claim under RCW 64.40.020 to recover for the County's delay.

The County argues that the only cause of action available to the Appellants is for its delay in processing the SDAP and SEPA applications was the one provided in RCW 64.40.020. This argument has been rejected in several cases. *See, e.g., Westmark,* 140 Wn. App. at 548; *Blume,* 134 Wn.2d at 251. This Court should reject it as well.

The County argues that the Court must affirm dismissal under the statute of limitations pursuant to *Birnbaum v. Pierce County,* 167 Wn. App. 728, 274 P.3d 1070 (2012). But *Birnbaum* is inapplicable to this case, because Birnbaum sought recovery under RCW Chapter 64.40 for Pierce County's delay in processing his permit application and waited more than the thirty-day period mandated by RCW 64.40.030 to file suit. The thirty-day period, however, only applies to a claim brought under RCW 64.40.020, and no such claim was made in this case. Indeed, *Birnbaum* states that a claim under RCW 64.40.020 could *not* be brought in this case: "Simply put, the statute does not contemplate damages – for delay or otherwise – under the final decision prong that occurred *prior* to the final decision." *Id.* at 737 (emphasis in original).

3. Mr. Broughton's November 15, 2006 letter does not affect the statute of limitations analysis.

The County argues that Mr. Broughton's November 15, 2006 letter "establishes" that the Appellants were aware of the 78-day time period, that WVII had a potential claim under RCW 64.40.020, and that it had a potential claim for tortious interference. Brief at 18. Mr. Broughton's letter, however, is irrelevant to the statute of limitations analysis. With respect to the 78-day time period, it doesn't matter that WVII knew about it prior to its expiration. Kitsap County had no obligation to issue the permit before the 78-day period expired, and it didn't expire until at least December 13, 2006. Before then, the Appellants had no right to sue the County for delaying the permit approval.[28] This action was timely commenced within three years of that date.

As to how the letter relates to a potential tortious interference claim, Mr. Broughton's letter merely states that he spoke to someone at the County DCD "in early October," and that person told him the County had all of the information it needed to issue "a DNS and SDAP approval." CP 1481. Even if that is true, the County had no obligation to issue either until the last day of the 78-day period. Significantly, Mr. Broughton informed Mr. Gears that his "early October" conversation predated Mr.

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[28] *See Murphey v. Grass,* 164 Wn. App. 584, 589, 267 P.3d 376 (2011) (citation omitted) (statute of limitations begins to run when all the elements necessary to the claim exist and the plaintiff has a right to seek relief in the court).

Gears' October 13, 2006 letter to the Governor's office; therefore, Mr. Broughton could not have learned about that letter in that earlier conversation. Mr. Broughton did state his opinion that Mr. Gears' letter and the suspension of permit processing constituted tortious interference, but the letter is dated November 15, 2006, less than three years before this case was commenced.[29]

Finally, while Mr. Broughton threatened the commencement of a claim under RCW 64.40, no such claim was commenced. And according to *Birnbaum,* no such claim existed at that time.

In short, Mr. Broughton's letter is irrelevant to the statute of limitations analysis, except as further proof that this case was timely commenced.

4. The continuing tort doctrine has been applied to a negligence claim.

The County states that the continuing tort doctrine only applies "in the narrow context of an ongoing trespass or nuisance on another's property." Brief at 19. The County simply ignores that the doctrine has been applied to a negligence claim, in *Doran v. City of Seattle,* 24 Wash,. 182, 183, 64 P. 230 (1901). Although the Court need not rely on the continuing tort doctrine to conclude that this case was timely commenced,

[29] *See Murphey,* 164 Wn. App. at 589 (citation omnitted) (injury is a necessary element for the commencement of the statute of limitations, and a claim does not accrue until the plaintiff should have discovered the injury, which must be "actual or appreciable injury," not speculative or merely potential liability).

it is yet another reason for the Court to conclude that it was.

B. The dismissal of Appellants' federal substantive due process claim has no preclusive effect in this action.

The Appellants explained in detail in their Opening Brief why the federal court decisions do not compel the dismissal of the state court claims. Opening Brief at 31-42. The County has failed to adequately respond to that explanation. Simply put, the County's argument is that the Ninth Circuit said that the County's purpose– ensuring that local development complied with state law – was legitimate; therefore, the County could employ any means it saw fit to achieve that purpose. The Ninth Circuit did not say that, and that is not the correct standard.

While the Ninth Circuit Court stated the obvious – that it is a legitimate interest for government to ensure that local development complied with state law -- it did not say that the County's goal of preventing the Woods View project from being built was a legitimate government interest. The Ninth Circuit's statement cannot be parsed out so finely. Rather, it merely stated that it was open to question or dispute whether the County's delays were rationally related to a legitimate state interest. Because the Appellants could not show that the County's actions were "clearly arbitrary and unreasonable,"[30] dismissal of the substantive due process claim was appropriate."

[30] *See* CP 1464.

As discussed above at 16-25, a party injured by the conduct of another can prove an intentional interference by showing, among other factors, *either* interference for an improper purpose, *or* by using improper means. *Westmark,* 140 Wn. App. 557. The federal decisions foreclosed neither avenue for the Appellants to prove their claim for intentional interference.[31]

Nor should the federal court decisions preclude the Appellants' negligence case for the delay. A jury need not decide that the County's actions were "clearly arbitrary and unreasonable" and "egregious," or that they "shock the conscience" – what they needed to prove to prevail on their substantive due process claims[32] – for it to determine that the County was negligent. All that a jury needs to find for the Appellants to prevail on that claim is that the County did not exercise "ordinary care" in the processing of the SDAP and SEPA applications.[33] The federal court decisions should have no impact on the Appellants' state claims to recover for the County's delay.

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[31] The County argues that to recover for intentional interference, a plaintiff must show that the defendant's conduct was "purposefully improper," and that the defendant must have intentionally set out to damage the plaintiff's relationships. Brief at 21. As discussed above at 17, n.6 & 7, these are incorrect statements of the proof requirements. Further, the County cites *Leingang v. Pierce County Medical,* 131 Wn.2d 133, 157, 930 P.2d 288 (1997) for the maxim, "[T]ortious interference does not arise where one is merely asserting an arguable interpretation of existing law," but *Leingang* does not so hold.

[32] *See* CP 1464; *County of Sacramento v. Lewis,* 523 U.S. 833, 845-846, 118 S.Ct. 1708 (1998).

[33] *See* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 352.03 (6th ed. 2012).

C. The Noerr-Pennington doctrine does not bar Appellants' claims.

The County has offered nothing in its Brief to suggest that this Court should be the first Washington court of record to employ the Noerr-Pennington doctrine to dismiss state common law tort claims against a government defendant. The Court should reject the County's invitation to do so.

The doctrine was originally created by the U.S. Supreme Court as a defense to antitrust liability in actions under the Sherman Act. *Nunag-Tanedo v. East Baton Rouge Parish School Bd.,* 711 F.3d 1136, 1138-39 (9th Cir. 2013). It was based on the premise that persons exercising the First Amendment right to petition the government for redress of grievances should not face civil liability for doing so. *Id.* Since its creation, it has been extended by courts to serve as a defense to claims for liability under statutes other than the Sherman Act, where the defendant is being sued for speech or other communication constituting a petition to the government for redress of grievances. *Id.*

At best, it is unclear whether the court in *Lange v. The Nature Conservancy,* 24 Wn. App. 416, 601 P.2d 963 (1970) applied the Noerr-Pennington doctrine to dismiss the plaintiff's claims in that case. There was no mention of the doctrine by name in the opinion, and the court explained its decision affirming the dismissal of the plaintiff's claim by

noting that the defendant had "a First Amendment right to try to influence government action." *Id.* at 422. It is not clear that the court adopted the doctrine as a recognized defense in Washington based on this offhand remark. In any event, it cannot be disputed that the plaintiff in *Lange* asserted a right to recover under a cause of action created by a statute, not a common law tort claim like the causes of action in this case. It is undisputed that the doctrine has never been applied in a reported Washington decision to dismiss a common law tort claim, and the County has cited no cases to support such a result. This Court should not be the first court of record in the State to base the dismissal of common law tort claims on the doctrine.

It is further undisputed that no reported Washington cases have applied the doctrine in an action against a government defendant. In view of the legal underpinnings for the defense – that citizens have a First Amendment right to petition their government to redress grievances – and in view of the fact that governments have no First Amendment rights,[34] the doctrine should not be used in our state's courts as a basis to insulate governments from liability for their wrongful acts. The Court should reject the doctrine as a defense to the Appellants' claims.

In the event the Court decides that the doctrine may be asserted as

[34] *See* Opening Brief at 44-45.

a defense to tort claims against government defendants, nevertheless, it is inapplicable here, because the communications made by the County to the other government agencies were knowingly false. The County claims that the federal court decisions preclude the application of the "sham litigation" exception in this case, because they determined that "the County's position relative to the potential illegality of the proposed LOSS was 'at least fairly debatable.'" Brief at 30. But, as with the County's argument regarding the preclusive effect of the federal court decisions, the fact that the federal courts may have found it "fairly debatable" that the County's actions were rationally related to a legitimate government interest does not preclude a jury from finding they were not. The County's communications to Karcher Creek that caused it to withdraw from its agreement to operate the LOSS for the development, and its communications to DOH that caused significant delay in the original LOSS permit approval and the later approval of the management plan change, included false statements about the project's compliance with the County's Comprehensive Plan and GMA. It is an issue of fact whether the County's statements concerning these issues were intentional misrepresentations. Thus, if the Noerr-Pennington doctrine applies at all, it is up to the jury to determine whether the sham litigation exception applies to the County's actions. Under any analysis, the Noerr-Pennington

doctrine should not be employed to dismiss the Appellants' claims without a trial.[35]

D. The County's actions proximately caused damage to the Appellants.

The County delayed the approval of the SDAP permit for almost one year. It delayed the Hearing Examiner's decision on the neighbors' appeal for two months after it was due. It caused Karcher Creek to back out of its agreement to operate the LOSS for the project, thereby requiring the Appellants to search for another municipality that would be willing to operate, or guarantee a private contractor's operation of, the LOSS, a task that took the Appellants two years. And once the Appellants secured another municipality to assist it with LOSS operations, the County caused DOH to delay approving the request for management plan change for several additional months. Because the County had successfully prevented WVII from obtaining a LOSS permit in the first instance that would have enabled it to sell individual lots in the development, the Appellants were not able to obtain replacement development financing for its prior lender. After years of paying several hundreds of thousands of dollars to lenders, consultants, contractors, vendors, and attorneys for the project, the delays caused by the County's efforts to prevent the development finally took

[35] The County argued that there must be a finding that the County engaged in fraud for the sham litigation exception to apply. Brief at 30. However, fraud is not required; the exception also applies where the defendant intentionally misrepresented facts to the agency. *Kottle v. Northwest Kidney Centers,* 146 F.3d 1056, 1060 (9th Cir. 1998).

their toll – the Appellants ran out of money. WVII lost the property to foreclosure, and Ms. Piper went bankrupt, essentially losing everything.

The County's contention that the project would have failed regardless of its actions is laughable. The County set out in 2006 to prevent the development from occurring despite the fact that it complied with all county and state requirements, and four years later, it was finally successful. The County cannot argue that the development would not have been successful anyway due to the problems it encountered, when those problems were the natural result of the County's own actions designed and designed to make it unsuccessful and prevent the development from occurring.

Cause in fact, or "but for" causation, refers to the "physical connection between an act and an injury." *Martini,* 2013 WL 6182929, at *5 (citation omitted). A plaintiff need not prove cause in fact to an absolute certainty; rather, it is sufficient if the plaintiff presents evidence that allows a reasonable person to conclude that the harm more probably than not happened in such a way that the moving party should be held liable. *Id.* (citations omitted). The evidence presented to prove causation may be circumstantial as long as it affords room for reasonable minds to conclude that there is a greater probability that the conduct complained of was a cause in fact of the injury than there is that it was not. *Id.* (citation

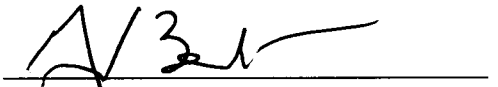
omitted).

Whether the plaintiff has proven cause in fact is usually a question for the trier of fact, and it is generally not susceptible to summary judgment. *Id.* (citation omitted). The Appellants presented an overwhelming amount of evidence to the trial court supporting their claims that the County's actions caused the damages which they seek to recover. Certainly they presented sufficient evidence to show a genuine issue of material fact. If Judge Serko dismissed this action on the ground that the Appellants did not submit sufficient evidence creating a genuine issue of material fact that the County proximately caused the Appellants' injuries and damages, that ruling was error. The dismissal order should be reversed.

III. CONCLUSION

In *Washburn v. City of Federal Way,* __ Wn.2d __, 310 P.3d 1275 (2013), the Supreme Court once again confirmed that "The deterrence of unreasonable behavior through tort liability is ... one of the guiding principles of the abolition of sovereign immunity." *Id.* at 1291. The Appellants should be given the opportunity to present their claims for the County's unreasonable behavior to a jury. This Court should reverse the trial court's order dismissing this action and remand the case with instructions to the Superior Court to set the case for trial.

DATED December 6, 2013.



Guy W. Beckett, WSBA#14939
Attorneys for Appellants

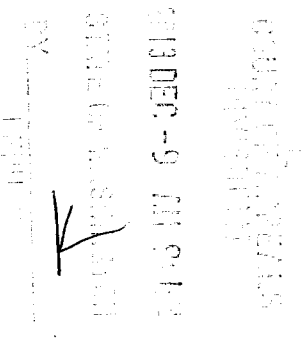
DECLARATION OF MAILING

Guy W. Beckett declares:

On December 6, 2013, I mailed by first-class mail, postage prepaid, a copy of the foregoing document to:

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

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



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

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

Guy W. Beckett, WSBA #14939

APPENDIX

**DECLARATION OF NEIL R. WACHTER RE:
STATUS CONFERENCE FOR RENEWED
SUMMARY JUDGMENT MOTION**

Hon. Susan K. Serko
Dept. 14
June 20, 2012
8:45 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

WOODS VIEW II, LLC, a Washington limited liability company; and DARLENE A. PIPER, a single woman, Plaintiffs, -vs- KITSAP COUNTY, a Washington municipality, Defendant.	NO. 11-2-11450-9 DECLARATION OF NEIL R. WACHTER RE: STATUS CONFERENCE FOR RENEWED SUMMARY JUDGMENT MOTION

DECLARATION OF NEIL R. WACHTER

I, Neil R. Wachter, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am a Senior Deputy Prosecuting Attorney for the Kitsap County Prosecuting Attorney's Office (Civil Division), and am counsel for Defendant Kitsap County in the above-named case along with Mark R. Johnsen. I am over the age of 18 and am competent to testify to the matters herein.

2. This declaration is offered to provide background information for the status hearing

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scheduled for June 20, 2012 at 8:45 a.m.[1] From my co-counsel Mark Johnsen I understand that the Court will want to discuss Kitsap County's renewed summary judgment motion. This motion is presently noted for July 13, 2012. Mr. Johnsen is unavailable for the June 20th status hearing because he will be involved in a jury trial scheduled to begin on Monday June 18th (which I am told will actually start that date). I will be on a previously planned family vacation in the Methow Valley area and appreciate the opportunity to appear via Court Call.

3. This action was previously assigned to Hon. Rosanne Buckner, of the Pierce County Superior Court (Dept. 6). On October 14, 2011, Judge Buckner presided over the hearing for the County's summary judgment motion filed shortly after the case was re-filed in state court. Mr. Johnsen recently provided me with a rough transcript of the Court's ruling from that hearing, a true and correct copy of which is attached hereto as Exhibit 1. I attended this hearing and can affirm that the rough transcript accurately recites the Court's on-the-record ruling.

4. Judge Buckner denied the summary judgment motion, per the attached transcript. Once the ruling was delivered and acknowledged, the Court went off the record. Judge Buckner next remarked to all counsel that this action was to be transferred to another Department of the Superior Court, per a reorganization of case assignments to take place later in fall 2011. This was the first mention of the case re-assignment.

5. If any part of Judge Buckner's ruling can be taken as a decision on a legal issue, it is her ruling on Darlene Piper's standing. Based on Judge Buckner's ruling, Kitsap County regards the remaining legal issues as deferred to the time of trial. It is in this spirit that the instant renewed

[1] This declaration will also serve to correct my declaration subjoined in the County's motion to compel discovery responses filed on March 12, 2012, in which I reported that Judge Buckner issued her summary judgment ruling "without explanation" (Motion and Declaration for an Order Compelling Discovery Responses, note 1).

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motion is brought: The County asks the Court to resolve the legal issues now – specifically the immunities and defenses raised in the motion – as well as the factual causation issue.

6. By happenstance, only minutes after the County filed its renewed summary judgment motion, the Ninth Circuit issued its ruling affirming Judge Settle's dismissal of the federal claims.[2] By its terms, the Ninth Circuit memorandum opinion is citable as provided in 9th Cir. R. 36-3, which provides in pertinent part:

> Circuit Rule 36-3. Citation of Unpublished Dispositions or Orders
>
> (a) Not Precedent. Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.[3]

DATED this 15th day of June 2012 in Port Orchard, Washington.

NEIL R. WACHTER

[2] *See* Supplemental Declaration of Mark R. Johnsen in Support of Defendant's Renewed and Amended Motion for Summary Judgment, Exhibit A (Memorandum Opinion).

[3] Current publication at http://www.ca9.uscourts.gov/datastore/uploads/rules/rules.htm#1265904.

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DECLARATION OF SERVICE

I, Tracy L. Osbourne, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

Guy William Beckett BERRY & BECKETT, PLLP 1708 BELLEVUE AVE SEATTLE , WA 98122-2017 206-441-5444 Email: gbeckett@beckettlaw.com *Attorney for Plaintiff* [ ] Via U.S. Mail [X] Via Email: [ ] Via Hand Delivery	Mark R. Johnsen KARR TUTTLE CAMPBELL 1201 3rd Ave Ste 2900 Seattle, WA 98101-3284 206-223-1313 Fax: FAX 206-682-7100 Email: mjohnsen@karrtuttle.com [ ] Via U.S. Mail [X] Via Email: [ ] Via Hand Delivery

SIGNED in Port Orchard, Washington this 18th day of June 2012.

Tracy L. Osbourne
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EXHIBIT 1

IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON

WOODS VIEW II LLC, a Washington limited liability company; and DARLENE A. PIPER, a single woman,	)	
Plaintiffs,	)	
vs.	)	No. 11-2-11450-9
KITSAP COUNTY, a Washington municipality,	)	
Respondent.	)	

VERBATIM REPORT OF PARTIAL PROCEEDINGS

BE IT REMEMBERED that on the 14th day of October, 2011, the above-mentioned cause came on duly for hearing before the HONORABLE ROSANNE BUCKNER, Superior Court Judge in and for the County of Pierce, State of Washington; the following proceedings were had, to-wit:

APPEARANCES

FOR THE PLAINTIFF: GUY WILLIAM BECKETT
Attorney at Law

FOR THE RESPONDENT: MARK ROBERT JOHNSEN
Attorney at Law

Reported by,
Carla J. Higgins, CSR

OCTOBER 14, 2011

JUDGE'S DECISION

(Excerpt begins.)

THE COURT: Thank you, counsel. I'm going to be denying the County's motion for summary judgment because I think it would be important that the trier of fact, both and jury and myself, hear the testimony in this case. And then before the case actually goes to the jury, I would make a decision as to each one of these concerns or issues raised by the County, in that I have a better idea as to the total picture of what happened in this case.

I was concerned about her standing. However, it does appear to me that the plaintiff has made some showing that she stood in quite a different situation than the LLC did and incurred more expenses and liability than -- in regard to this project -- than Woods View did under these circumstances. So I do find that she does have standing at this point.

MR. BECKETT: Thank you. Your Honor, I have a proposed order that I know Mr. Johnsen will want to review. It's fairly vanilla like, but I know he wants to look at it.

THE COURT: Okay.

MR. BECKETT: Thank you, Your Honor.

THE COURT: You're welcome.

MR. JOHNSEN: Thank you, Your Honor.

THE COURT: You're welcome.

(Adjourned.)

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF PIERCE

DEPARTMENT NO. 6 HON. ROSANNE BUCKNER, JUDGE

WOODS VIEW II LLC, a Washington limited liability company; and DARLENE A. PIPER, a single woman, Plaintiffs, vs. KITSAP COUNTY, a Washington municipality, Respondent.	)	No. 11-2-11450-9

STATE OF WASHINGTON)
) ss
COUNTY OF PIERCE)

I, Carla J. Higgins, Official Reporter of the Superior Court of the State of Washington, County of Pierce, do hereby certify that the foregoing comprises a true and correct partial transcript of the proceedings held in the above-entitled matter.

Dated this day of 2011.

Carla J. Higgins, CSR
Official Reporter