

NO. 65052-1-I

King County Superior Court Cause No. 09-2-18636-7 SEA

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

WOODINVILLE ASSOCIATES, LLC,
a Washington limited liability company
Plaintiff/Appellant

v.

CITY OF WOODINVILLE,
a Washington municipal corporation,
Defendant/Respondent

APPELLANT'S OPENING BRIEF

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2010 MAY 24 AM 11:09

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

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- B Complaint of Woodinville Associates, LLC v. City of Woodinville
- C Memorandum Decision June 30, 2009
- D Declaration of Charles E. Watts in Court of Appeals, Cause No. 63953-6-I
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- F Notice of Appeal to Division I Court of Appeals
- G Court of Appeals Decision Denying Late Appeal Filing Request

I. INTRODUCTION

This appeal arises from the denial by the King County Superior Court of a CR 60(b) motion to vacate judgment. The grounds for the CR 60(b) motion are entirely extraneous to the legal issues presented in the pleadings. The motion is focused on the failure of the trial court to follow the strict requirements of CR 54(f)(2) in the manner in which the final judgment of dismissal was signed and entered. This motion is not intended to be a substitute for an appeal on the legal issues raised by the pleadings, rather, it relies entirely on the failure of the Superior Court to follow CR 54(f)(2) in signing and entering the appealable judgment of dismissal with prejudice of the appellant's Complaint.

Directly stated, the CR 60(b) motion arises out of the Superior Court inserting in an envelope and sending by regular, first class mail a dispositive order from which an appeal must be taken, without giving notice of presentation and a five-day opportunity to respond to counsel for the appellant/losing party BEFORE SIGNING AND ENTRY.¹

¹ There is a parallel issue pending before the Supreme Court on a motion set to be decided in early July 2010 regarding the objection by Woodinville Associates, LLC to a Supreme Court Commissioner's determination that the procedure followed by the Superior Court objected to here did not violate CR 54(f)(2) (S.Ct. #84206-0). The Supreme Court has been advised of this appeal. The Supreme Court is considering an appeal by Woodinville Associates, LLC from a determination by the Court of Appeals, appeal no. 63953-6-I, denying a one-day extension of time in which to file a notice of

This appeal involves only the failure of the Superior Court to vacate its judgment pursuant to CR 60(b) based on its violation of CR 54(f)(2).

II. ASSIGNMENTS OF ERROR

Error is assigned to the denial by the Superior Court of the CR 60(b) motion of plaintiff/appellant Woodinville Associates, LLC for vacation of judgment of dismissal of plaintiff/appellant's complaint (copy attached App. A) (CP, 255-6).

III. STATEMENT OF THE CASE

Plaintiff/appellant Woodinville Associates, LLC filed a complaint in the King County Superior Court against the City of Woodinville seeking declaratory relief as to the rights and responsibilities of the parties under a contract they entered into for street improvements. The City of Woodinville responded with a CR 12(b) motion to dismiss.²

The motion was scheduled for hearing and oral argument on June 5, 2009. At oral argument, the court took the matter under

appeal based on RAP 18.8 and upon the violation of the Superior Court of CR 54(f)(2). Before the Supreme Court for decision in early July 2010 is the question of whether it will hear and decide the motion for review of the Court of Appeals decision denying the one-day extension of time to appeal by reason of violation of CR 54(f)(2) by the Superior Court in signing and entering the judgment.

² Complaint attached App. B (CP, 19-137 Ex. 1).

advisement and did not specify a date when a decision would be made. Thereafter, the court mailed its Memorandum Decision dated June 30, 2009 consisting of a multi-page letter signed by the court explaining why the City of Woodinville motion was well-taken and why the complaint should be dismissed. The letter was received on July 6, 2009 by the office of the attorneys for Woodinville Associates, LLC (there was an intervening 4th of July holiday).³

The letter is entirely silent about the inclusion of a signed judgment (not entered until the following day – July 1). There was no document in the letter calling attention to the insertion of the dispositive and appealable judgment. There is no declaration of mailing by court staff. There is no reference to “enclosure” at the foot of the letter Memorandum Decision. There is no reference in the Memorandum Decision text to the fact that a judgment has been signed and will be entered or that a copy is enclosed. There was simply no notice whatsoever given of the signing and entry of the judgment/order dismissing the plaintiff’s complaint.⁴

³ Memo Decision attached App. C (CP, 19-137 Ex. 3).

⁴ Declaration of Counsel Watts attached App. D (CP 19-137 Ex. 3).

Counsel for plaintiff acknowledges his office receiving the Memorandum Decision on July 6. Counsel acknowledges that in the files of counsel in his office is a copy of the signed order dismissing the complaint. Counsel states in declaration that the order was not seen by counsel when received in the mail, and that counsel simply awaited the prevailing party, City of Woodinville, representing a proposed order implementing the Memorandum Decision in accordance with CR 54(f)(2). (CP 19-137 Ex. 3, App D.)

After a month, counsel became concerned about the fact that no presentation notice had been received (although recognizing it was the middle of the summer and delays are to be expected), and counsel on August 3, 2009 checked the Superior Court docket and for the first time learned that an order dismissing the plaintiff's complaint with prejudice had been entered on July 1, 2009, 31 days earlier.⁵ Counsel for Woodinville Associates, LLC immediately filed and served, on August 3, 2009, a Notice of Appeal which, as noted, was 31 days after the July 1 date of entry of the order of dismissal (based on the intervening weekend).⁶

⁵ Superior Court Order dated June 30, 2009 attached App. E (CP 19-137, Ex 3.)

⁶ (CP 19-137, Ex. 3.)

Plaintiff immediately filed a motion with the Court of Appeals seeking leave to file the one-day late appeal. The motion was assigned to a court commissioner for hearing and hearing was held. Following hearing, the court commissioner deferred a decision on the matter to a panel of the Court of Appeals. No further argument was held and it was not until the 17th day of December, 2009 that a decision was made by the Court of Appeals denying the requested one-day extension of time.⁷ The decision of the Court of Appeals on its face is based only on RAP 18.8, and makes absolutely no reference whatsoever to the court having considered the arguments of plaintiff based on CR 54(f)(2). That decision is now in the Supreme Court on a motion/objection to Commissioner's Ruling as outlined in footnote 1 above.

After receipt of the Court of Appeals' decision on the motion for extension of time to file appeal, plaintiff immediately filed this CR 60(b) motion to vacate the judgment based upon subsection (1), (5) and (11). At the request of plaintiff, the court set oral argument on the motion to vacate. Oral argument was held and on the day of argument an order was entered denying the plaintiff's motion to vacate.⁸ Appeal was timely

⁷ Court Appeals Decision Denying Appeal App. G (CP 19-137, Ex. 1.)

⁸ CP 255-6 (copy attached App. A).

taken from this denial. It is the denial of the CR 60 motion that is before the court now and is the subject of this Opening Brief.

IV. ARGUMENT

No one claims that the requirements of CR 54(f)(2) were met in the signing and entry of the CR 12(b) order of dismissal of plaintiff's complaint in this case. There is no dispute about the fact that the rule was not complied with. Case law says that makes the order of dismissal "void." CR 60(b)(5) requires the vacation of a void judgment. RAP 18.8 emphasizes the desirability of finality of decisions, but says nothing about its application to a void judgment or order. Defendant relies on a King County Superior Court Local Rule (KCLR 7(b)(5)(C)) to provide an exception to the requirements of CR 54(f)(2). The Local Rule applies by its very terms only to non-appealable judgments or orders which are not within the scope of CR 54 at all (CR 54(a)(1)). The Local Rule is not an alternative to compliance with CR 54(f)(2).

1. **Appealable orders entered in violation of CR 54(f)(2) are void** – CR 54(f)(2) applies to “. . . the final determination of the rights of the parties in the action [including] any decree and order from which an appeal lies.” (CR 54(a)(1)). The same rule requires that any judgment

“ . . . be in writing and signed by the judge and filed forthwith as provided in rule 58.”

CR 54(f) is mandatory. Subsection (1) provides that judgments “ . . . may be presented at the same time as findings of fact and conclusions of law. . .” (emphasis supplied). Subsection (2) is mandatory and reads:

2. **Notice of Presentation.** No order or judgment shall be signed or entered until opposing counsel have been given 5 days’ notice of presentation and served with a copy of the proposed order or judgment unless:

(A) Emergency. An emergency is shown to exist.

(B) Approval. Opposing counsel has approved in writing the entry of the proposed order or judgment or waived notice of presentation.

(C) After Verdict, etc. If presentation is made after entry of verdict or findings and while opposing counsel is in open court.

Case law confirms that a judgment entered in violation of the procedures required by CR 54(f)(2) is void. *Burton v. Ascol*, 105 Wn.2d 344, 352, 715 P.2d 110 (1986) (“failure to comply with a notice requirement in CR 54(f)(2) generally renders the trial court’s entry of judgment void”); *Seattle v. Sage*, 11 Wn. App. 481, 482, 523 P.2d 942 (1974) (“the effect of the failure to comply with a notice requirement of CR 54(f) is to void the entry of the judgment and make the action of the trial court ineffectual”); *State v. Napier*, 49 Wn. App. 783, 787-8, 746 P.2d 832 (1987) (“Mr. Napier does not establish the required notice of his

presence at the time the order was entered or his approval of the entry of the order. . . . Consequently, on the record before this court we find the trial court erred when it refused to vacate the order entered on February 4, 1985. CR 54(f)(2).”)

The only exceptions are those stated in the rule itself, together with the engrafted exception described in the cited cases where a party has actual knowledge of the entry of an appealable order or judgment, and has actually had the opportunity to file a timely appeal.⁹ Since the Superior Court judgment in this matter was not entered in open court with all counsel present and was not approved for entry in writing by counsel for plaintiff and presentation was not waived in writing by counsel for plaintiff, none of the exceptions stated in CR 54(f)(2) apply. The declaration filed in the Superior Court by counsel for plaintiff shows that counsel had no actual knowledge of the entry of the judgment until the 31st day following entry. (CP 19-137, App. D.)

That should end the matter. The judgment was void for being entered in violation of CR 54(f)(2). It should, therefore, be vacated and

⁹ *Burton v. Ascol*, *supra*, at 352-3 and *Soper v. Knaflich*, 26 Wn. App. 678, 681, 613 P.2d 1209 (Div. I, 1980).

proper notices given of signing and entry so that plaintiff can have the opportunity to file a timely Notice of Appeal.

2. **The King County Superior Court local rules do not supplant CR 54(f)(2)** – Argument is made that King County Superior Court Local Rule 7(b)(5)(C) either supplants CR 54(f)(2) required procedures, or brings local procedures into compliance with CR 54 requirements. Neither is true. The Local Rule KCLR 7(b)(5)(C)¹⁰ only provides for a manner of delivery/notice to counsel for orders that are not appealable. (KCLR 7(b)(3)). The rule provides that as to “nondispositive” motions, the moving party must supply the court with stamped return envelopes addressed to each counsel of record and copies of the proposed order to signing and entry of the order outside the presence of counsel.¹¹

¹⁰ KCLR 7(b)(5)(C) reads:

(C) **Form of Proposed Orders; Mailing Envelopes.** The moving party and any party opposing the motion shall attach a proposed order to the working copies of their documents. The original of each proposed order shall be submitted to the hearing judge but shall not be filed with the Clerk. For motions without oral argument for which working copies are submitted in paper form, the moving party shall also provide the court with pre-addressed stamped envelopes addressed to each party/counsel. Envelopes are not necessary when submitting working copies electronically via the Clerk’s system. (Emphasis supplied).

¹¹ KCLR 7(b)(3) reads:

Argument. All nondispositive motions and motions for orders of default and default judgment shall be ruled on without oral argument, except for the following [nonapplicable to this case].

The King County Local Rule is entirely silent as to the procedure for the entry of orders on dispositive motions and the reason for this is clear. Under the Local Rule, dispositive motions (appealable motions) such as summary judgments and CR 12 motions are the subject of oral argument and court appearance of counsel. Counsel is present to argue these motions. Orders entered in open court with counsel present are an exception to CR 54(f)(2) notice requirements. Only by reading KCLR 7(b)(5)(C) as providing for notice of entry of only nondispositive orders is the Local Rule made consistent with the mandates of the Civil Rule. Local Rules may not conflict with rules adopted by the Supreme Court. CR 83(a); *Harbor Enterprises v. Gudjonsson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991).

Nothing in KCLR 7(b)(5)(C) evidences any intent to supplant the Civil Rule 54 mandate as to signing an entry of appealable orders and judgments. In fact, a thorough reading of the Local Rules demonstrates the contrary. The Local Rule is specific on presentation, entry and notice of orders and judgments in non-dispositive motions, and it leaves to the Civil Rule the notice and entry procedures to be followed in regard to dispositive/appealable judgments and orders described in CR 54(a)(1).

This reading of the Local Rule gives meaning to the Local Rule language as written, preserves the mandates of the Civil Rules as written, and does not require any convoluted or irregular reading of either rule to harmonize both.

3. **The method of signing an entry of the order of dismissal with prejudice in this case violates CR 54(f)(2) and requires vacation pursuant to CR 60(b).** – No notice of presentation was given of the signing or the entry of the order of dismissal by the Superior Court or by any other party to Woodinville Associates. The court simply signed the order in chambers, and delivered it to the Clerk the next day for entry. All of this was done without notice or any formality whatsoever. Nothing in CR 54(f)(2) allows such a relaxed procedure for entry of an appealable judgment or order.

Moreover, there is no proof of mailing (although receipt by the office of Woodinville Associates counsel is not denied), there is no transmittal of an order bringing its attention to counsel, there is no reference to the inclusion or entry of an order in the Memorandum Decision mailed by regular mail to counsel from the chambers of the court, nor is there any other formal or informal notification of the signing

an entry of the order of dismissal with prejudice by the court provided to either counsel.

The order of dismissal with prejudice was simply included in the same envelope as a Memorandum Decision. A Memorandum Decision is not an appealable decision, and therefore, has no immediate legal consequences and requires no response deadlines. RAP 2.2(a).

4. **The grounds upon which the requested vacation is based are “extraneous” to the action** – The use of CR 60(b) to correct judicial errors is improper. *Shaw v. City of Des Moines*, 109 Wn. App. 896, 901, 37 P.3d 1255 (2002).

In the present case, the reasons for the dismissal with prejudice of the Woodinville Associates complaint for declaratory relief on its contract with the City of Woodinville are not the grounds presented here for vacation of the judgment. Rather, the grounds for vacation of a judgment are truly “extraneous” to the legal issues, since the grounds center on the violation by the trial court of the mandates of CR 54(f)(2) in its *sua sponte* signing and entry of the judgment without following the requirements of the Rule.

Using the test found in *Shaw*, the judgment which is sought to be vacated here “embodies the trial court’s intention.” All that Woodinville

Associates asks is that the same judgment, following vacation, be re-entered and that the Civil Rules be followed in doing so, so that Woodinville Associates can timely perfect its appeal from the re-entered final order.

5. **CR 60 motions should be liberally and equitably applied** – In considering whether to grant a motion to vacate under CR 60, a trial court should exercise its authority liberally and equitably to preserve the parties’ substantial rights. CR 60 gives trial courts a broad measure of equitable power to grant parties relief from judgments or orders. *Vaughn v. Chung*, 419 Wn.2d 273, 280, 830 P.2d 668 (1992).

6. **The provisions of CR 60(b)(1) justify vacation of the dispositive order here** – Irregularities pursuant to CR 60(b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unreasonable time or in an improper manner. *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989). *Kennewick Irrigation District v. Real Property*, 70 Wn. App. 368, 371, 853 P.2d 488 (1993).

The failure of the court, without excuse, to follow the requirements of CR 54(f)(2) as to signing and entry of the CR 12(b) order of dismissal

with prejudice of the plaintiff's complaint is just such an "irregularity" as should require the vacation of the order/judgment signed on June 30, 2009 and entered on July 1, 2009 in this case.

7. **A court has a mandatory nondiscretionary duty to vacate a void judgment** – A void judgment must be vacated by the court. (CR 60(b)(5)). This is a mandatory, nondiscretionary duty. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997). A judgment or order entered in violation of CR 54(f)(2) is void; *Burton v. Ascol, supra*.

8. **Review of a trial court ruling under CR 60(b) is abuse of discretion** – Support for the statement in bold is found in *Morris v. Railroad*, 149 Wn. App. 366, 370-1, 203 P.3d 1069 (2009); *Shaw v. City of Des Moines*, 109 Wn. App. 896, 900-01, 37 P.3d 1255 (2002). Discretion is abused if it is exercised without tenable grounds or reasons. *Morris, supra*, at p.370.

9. **Appeal from a decision to grant or deny a CR 60(b) motion is de novo** – Appellate courts review the granting or denial of CR 60(b) motions *de novo*. *Dobbins v. Mendoza, supra*, at 871.

10. **A void judgment must be vacated without requirement of showing a valid defense on the merits** – Precedent establishes that a judgment or order which is appealable and which is entered without

following the requirements of CR 54(f)(2) in signing and entry is void. *Burton v. Ascol, supra*. As such, the order entered here is void under CR 60(b)(5) and the party challenging the judgment need not show a valid defense on the merits in a CR 60(b) motion. *Mid-City Materials, Inc. v. Heater Beaters*, 36 Wn. App. 486, 674 P.2d 1271 (1984).

11. **CR 60(b)(11) applies here as well** – The catch-all provision in the cited subsection of CR 60(b) operates in situations “. . . involving extraordinary circumstances not covered by any other section of the Rules. *Summers v. Department of Revenue*, 104 Wn. App. 87, 93, 15 P.3d 649 (2001). While the situation before the court here does involve other subsections of CR 60 (irregularity in obtaining a judgment, a void judgment), certainly it can be said that relief from the dispositive order of dismissal with prejudice of the Woodinville Associates Complaint is justified by the “extraordinary circumstance” where the court inserted, without transmittal or notice, a copy of the signed and entered order in an envelope sent regular mail containing a multi-page Memorandum Decision. As noted above, the Memorandum Decision itself does not refer to any enclosure of any sort whatsoever, not to mention a signed and entered judgment of dismissal with prejudice. The “extraordinary circumstance” is the fact that the court entirely failed to follow the

required rules of the Superior Court as to notice of presentation before signing an entry.

V. CONCLUSION/RELIEF SOUGHT

CR 54(f)(2) is mandatory – not optional. The reasons for this are apparent. Given the strict standards for timeliness of filing of a Notice of Appeal from a Superior Court order or judgment terminating a case as found in RAP 5.2 and RAP 18.8, it is crucial for counsel to know when that 30-day time period begins to run. That is the purpose and goal of CR 54(f)(2). To allow laxity and uncertainty as to the time and manner in which appealable orders and judgments are signed and entered, would defeat the very purpose of the rule and would defeat the arguments justifying the very strict enforcement of the 30-day appeal provision by the Courts of Appeal (and the Supreme Court). It is for this reason that appellate decisions hold that appealable orders and judgments entered in violation of CR 54(f)(2) are “void.”

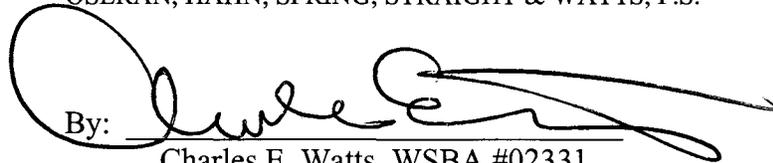
Woodinville Associates asks that the Appellate Court remand this proceeding to the trial court for entry of an order vacating the order of dismissal with prejudice signed on June 30, 2009 and entered July 1, 2009. The trial court should be permitted to re-enter the same order following vacation provided the procedures of CR 54(f)(2) are followed in order to

allow Woodinville Associates the opportunity to file a timely Notice of Appeal from the replacement order of dismissal.

Woodinville Associates does not ask that the court in this matter decide the merits of the appeal from the CR 12(b) dismissal, only that it afford Woodinville Associates the opportunity to present that appeal on a timely basis after reentry.

RESPECTFULLY SUBMITTED this 20th day of May, 2010.

OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

By: 

Charles E. Watts, WSBA #02331
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

The undersigned, Joy Griffin, certifies that on the 21st day of May, 2010, she caused to be served a copy of the attached Appellant's Opening Brief to the following via e-mail and regular US Mail:

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One Union Square
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Seattle, WA 98101-4170

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

Dated this 21st day of May, 2010 in Bellevue, Washington.



Joy Griffin

APPENDIX A

FILED
KING COUNTY, WASHINGTON

EXPO2

MAR 05 2010

SUPERIOR COURT CLERK Judge Susan Craighead
BY LEANNE SYMONS Trial Date: 10/25/2010
DEPUTY Hearing Date: _____
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WOODINVILLE ASSOCIATES, LLC, a
Washington limited liability company,

Plaintiff,

v.

CITY OF WOODINVILLE, a Washington
municipal corporation,

Defendant.

No. 09-2-18636-7 SEA

ORDER ON MOTION OF
WOODINVILLE
ASSOCIATES, LLC
PURSUANT TO CR 60(b)
~~DENYING THE MOTION TO VACATE~~
~~PROPOSED~~ SJC

THIS MATTER coming on before the undersigned judge upon the motion of plaintiff
Woodinville Associates, LLC for entry of order vacating the judgment dated June 30, 2009 and
filed with the Clerk on July 1, 2009 in this action upon the grounds that said judgment was
entered in a manner violative of the Civil Rules and that said judgment is, therefore, void, and
upon the further grounds that irregularity in obtaining the judgment or order and other reasons
justifying relief from the operation to the judgment exist; the court having read and considered
the records and files herein and the motion and supporting documentation of moving party,
Woodinville Associates, LLC, and believing that the judgment of the court dated June 30, 2009
filed with the Clerk on July 1, 2009 should ^{not} be vacated and re-entered with the current date as the

ORIGINAL

1 date of entry in order to allow an appeal to be taken on a timely basis should either party elect to
2 appeal therefrom; now therefore,

3 IT IS HEREBY ORDERED that the judgment dated June 30, 2009 and filed with the
4 Clerk in this cause on July 1, 2009 ^{is} ~~be and the same is hereby~~ ^{is} ~~VACATED~~, and it is ^{in full force and effect and remains} ~~and it is~~

5 ~~FURTHER ORDERED, ADJUDGED AND DECREED~~ that without further hearing or
6 argument the court will reissue its judgment of June 30, 2009 filed July 1, 2009 in this action in
7 identical form with the current date being the date of entry in order to allow any party the
8 opportunity to make a timely appeal therefrom.

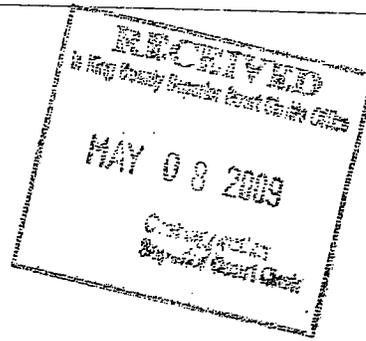
9 DONE and DATED this 5th day of March, 2010.

11 Susan Craighead
12 THE HONORABLE SUSAN CRAIGHEAD

13 Presented by: [Signature] # 6271
14 OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

15 [Signature]
16 By: [Signature]
17 CHARLES E. WATTS, WSBA #2331
18 Attorney for Plaintiff Woodinville Associates, LLC

APPENDIX B



SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WOODINVILLE ASSOCIATES, LLC, a
Washington limited liability company,

Plaintiff,

v.

CITY OF WOODINVILLE, a Washington
municipal corporation,

Defendant.

09-2-18636-7 SEA
No.

COMPLAINT FOR RELIEF
UNDER RCW CH. 64.40; FOR
DECLARATORY
JUDGMENT; FOR
INJUNCTIVE RELIEF; FOR
DAMAGES; AND FOR OTHER
LEGAL AND EQUITABLE
REMEDIES

Plaintiff states as follows:

PARTIES

1. Plaintiff is a Washington Limited Liability Company having its principal place of business in King County, Washington. Plaintiff is developing real property located within the city limits of the City of Woodinville known as "Woodinville Village." The proposed Woodinville Village project involves a mixed-use project of retail, residential, and other uses. Plaintiff has paid all fees and taxes owing the State of Washington.

2. The City of Woodinville is a Washington municipal corporation located in whole or in part in King County, Washington.

COMPLAINT FOR RELIEF UNDER RCW CH. 64.40;
FOR DECLARATORY JUDGMENT; FOR INJUNCTIVE
RELIEF; FOR DAMAGES; AND FOR OTHER LEGAL
AND EQUITABLE REMEDIES -1

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Files\OLKE6D\Complaint-2.doc 5/8/09 (jg) #26530.001

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COPY

VENUE

3. This action is properly laid in the King County Superior Court by reason of the situs of the City of Woodinville, the principal place of business of plaintiff, and the location of the project known as Woodinville Village which gives rise to this action.

4. Venue is properly laid in the Seattle division of the King County Superior Court as the parties and the subject property are located north of I-90.

FACTUAL ALLEGATIONS

5. Plaintiff is the developer of a mixed-use project in the City of Woodinville known as "Woodinville Village."

6. In connection with the development of the project, plaintiff has been and will be in the future required to obtain a large number of permits from the City of Woodinville.

7. In connection with receiving building permit approval for the project from the City of Woodinville, plaintiff will have imposed upon it certain "Traffic Impact Fees" assessed by the City of Woodinville pursuant to its ordinances based upon anticipated impacts of the proposed Woodinville Village project on the traffic and roads systems within the City of Woodinville.

8. Defendant City of Woodinville by Ordinance 470 adopted December 2, 2008 amended its Comprehensive Plan to establish a "Capital Improvement Program" for the six-year period beginning 2009 and ending 2014. Included in Ordinance 470 as a "System Improvement" under the "Capital Improvement Plan: Motorized Transportation" element of Ordinance 470 is the entire street frontage and adjacent frontage improvements surrounding the Woodinville Village property on the north and the east. The System Improvement for the street and frontage improvements is identified as "CIP Plan No. I-8" with a project name of "Roundabouts – 145th

COMPLAINT FOR RELIEF UNDER RCW CH. 64.40;
FOR DECLARATORY JUDGMENT; FOR INJUNCTIVE
RELIEF; FOR DAMAGES; AND FOR OTHER LEGAL
AND EQUITABLE REMEDIES -2

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Phone: (425) 455-3900
Facsimile: (425) 455-9201

1 Ave. NE / SR 202.” The start date for the project is stated to be 2008 with a completion date in
2 2010. Attached to this Complaint as Exhibit A is Ordinance 470 and CIP Plan No. I-8.

3 9. Pursuant to RCW Ch. 82.02 a “System Improvement” such as established for the
4 roadways and frontage improvements adjacent to the Woodinville Village project by Ordinance
5 470 on December 2, 2008 is defined as “. . . public facilities that are included in the capital
6 facilities plan and are designed to provide service to service areas within the community at large, in
7 contrast to project improvements.” Under the same Chapter project improvements are defined as
8 “. . . improvements and facilities that are planned and designed to provide service for a particular
9 development project. . . .” Specifically provided by RCW 82.02.090(6) is the prohibition on the
10 term “Project Improvements” including any designated “System Improvements.” As such, all
11 improvements to the public highway system adjacent to the Woodinville Village project are, as of
12 December 2, 2008, “System Improvements” and must be installed and paid for at no cost to the
13 owners of the adjoining property, rather they are paid for through the Capital Facilities Program of
14 the City of Woodinville. This includes all improvements together with frontage improvements
15 meaning improvements between the curb line of the street and the right-of-way line of the state
16 highway adjacent to the Woodinville Village project. This agreement supersedes any obligations
17 imposed on plaintiff, Woodinville Village under the TRIP Funding Agreement for “frontage
18 improvements” lying between the curb line and the right-of-way line. *See, WAC 365-195-850* that
19 allows “traffic impact fees” to be “used for system improvements that will reasonably benefit the
20 new development.” *See also, Woodinville Municipal Code §3.39.030(4)* which defines “system
21 improvements” to mean:

22 “. . . transportation facilities that are included in the City’s 20-year
Transportation Facilities Plan and are designed to provide service to

COMPLAINT FOR RELIEF UNDER RCW CH. 64.40;
FOR DECLARATORY JUDGMENT; FOR INJUNCTIVE
RELIEF; FOR DAMAGES; AND FOR OTHER LEGAL
AND EQUITABLE REMEDIES -3

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1 the community at large, in contrast to project improvement. (Ord.
2 356, 2004).”

3 10. The City of Woodinville has imposed upon plaintiff as a condition of plaintiff's
4 permits that plaintiff agree to pay for certain "Frontage Improvements" in addition to Traffic
5 Impact Fees described in the preceding paragraph. These "Frontage Improvements" were the
6 subject of a contract between the plaintiff and the defendant entitled "TRIP Funding Agreement."
7 A true copy of the "TRIP Funding Agreement" is attached hereto as Exhibit B.

8 11. Also in connection with the development of the Woodinville Village project and the
9 permitting by the City of Woodinville, plaintiff was required to enter into a "Development
10 Agreement for Woodinville Village" with defendant City of Woodinville.

11 12. Subsequent to the entry of the "TRIP Funding Agreement," the City of Woodinville
12 has adopted amendments to its Capital Improvement Plan to define as "System Improvements" all
13 roadway and frontage improvements adjacent to the plaintiff's project known as "Woodinville
14 Village." By reason of this change in ordinance, the City of Woodinville has superseded the
15 obligations undertaken by plaintiff in the "TRIP Funding Agreement." By reason of having
16 superseded the "TRIP Funding Agreement" by subsequent ordinance, the City of Woodinville has
17 nullified the obligation of plaintiff to pay for frontage improvements or street improvements
18 adjacent to its Woodinville Village project.

19 13. Any claim by the City of Woodinville for contribution by plaintiff to traffic
20 improvement or frontage improvement costs adjacent to its Woodinville Village project are now
21 defined by City of Woodinville ordinance as "System Improvements" and, consequently, are the
22 obligation of the City of Woodinville, not plaintiff. Any contention by the City of Woodinville to

1 the contrary makes its own ordinances and is, consequently, arbitrary and capricious and without
2 lawful basis.

3 14. The plaintiff's project in the City of Woodinville should be treated the same as
4 every other development project in terms of the current applicable definition "System
5 Improvement" by the City of Woodinville. To do otherwise unconstitutionally denies the plaintiff
6 the equal protection of the law and the right to uniform taxation.

7 15. On April 13, 2009, Mr. Richard Leahy, Woodinville City Manager, issued a six-
8 page Final Administrative Decision (with attachments) of the City of Woodinville demanding that
9 plaintiff pay as a condition to its continued development of the Woodinville Village project sums
10 not legally required to be paid by plaintiff under the "TRIP Funding Agreement" identified above.
11 A copy of the Final Administrative Decision of April 13, 2009 is attached hereto as Exhibit C. In
12 addition, the April 13, 2009 "Final Administrative Decision" of the City of Woodinville is in direct
13 conflict with Woodinville Ordinance 470 adopted December 2, 2008 establishing the roadways
14 adjacent to the Woodinville Village Project on the north and east as "system improvements."

15 16. The administrative determination of the City of Woodinville identified in the
16 preceding paragraph is arbitrary and capricious and erroneous and denies fundamental contract and
17 property rights to plaintiff. The decision attempts to expand the liability of plaintiff beyond the
18 limits established in the "TRIP Funding Agreement" by extending responsibility to the cost of
19 street improvements lying outside the area between the curb line and the right-of-way line.
20 Moreover, the Administrative Determination of the City of Woodinville is in conflict with and
21 violates Ordinance 470 of the City of Woodinville by imposing upon plaintiff charges for
22

1 reimbursement for "system improvements" which can only be reimbursed as allowed by statute
2 and ordinance out of "traffic impact fees."

3 17. RCW 64.40.020 establishes liability upon municipal corporations such as the City
4 of Woodinville for arbitrary, capricious, unlawful or actions in excess of lawful authority. Relief
5 under the statute cited includes reasonable costs and attorneys' fees as well as an action for
6 damages and "relief from a failure to act within time limits established by law."

7 18. The April 13, 2009 letter from the City Manager of the City of Woodinville, a true
8 copy of which is attached hereto as Exhibit A, constitutes an "Act" as defined in RCW
9 64.40.010(6).

10 19. This action is timely commenced under RCW 64.40.030, within 30 days after
11 April 13, 2009.

12 **COUNT I**

13 20. By attempting to impose obligations upon plaintiff under the "TRIP Funding
14 Agreement" after having redefined the traffic and frontage improvements in front of the plaintiff's
15 project as "System Improvements," the City of Woodinville is acting arbitrarily and capriciously
16 and in violation of law in doing so.

17 21. By its Administrative Determination of April 13, 2009, the City of Woodinville
18 attempts to impose upon plaintiff obligation for improvements to highway facilities adjacent to its
19 borders determined by Ordinance 470 adopted December 2, 2008 to be "System Improvements."
20 In doing so, the City of Woodinville is acting arbitrarily and capriciously and in excess of lawful
21 authority.
22

COMPLAINT FOR RELIEF UNDER RCW CH. 64.40;
FOR DECLARATORY JUDGMENT; FOR INJUNCTIVE
RELIEF; FOR DAMAGES; AND FOR OTHER LEGAL
AND EQUITABLE REMEDIES -6

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1 24. The Final Administrative Decision of the City of Woodinville as reflected by the
2 April 13, 2009 letter from its City Manager, Richard Leahy, is arbitrary, capricious, unlawful and
3 in excess of the lawful authority of the City of Woodinville as agreed upon in the TRIP Funding
4 Agreement between plaintiff and defendant. As such, the interpretation in the April 13, 2009
5 Final Administrative Decision of the City of Woodinville is violative of the rights of plaintiff as
6 described in RCW 64.40.020 and plaintiff is entitled to all remedies including damages,
7 declaratory relief, injunctive relief, and recovery of reasonable attorneys' fees and costs allowed by
8 that statute.

9 25. Pursuant to the provisions of RCW CH. 7.24, plaintiff is entitled to a declaratory
10 judgment and injunctive relief restraining and enjoining the City of Woodinville from imposing on
11 it any costs for improvements to the public streets and highways adjacent to the Woodinville
12 Village project property on the north and the east which had been included within and denominated
13 as "System Improvements" pursuant to City of Woodinville Ordinance 470 adopted December 2,
14 2008. Any effort by the City of Woodinville to condition any permits for the Woodinville Village
15 project on present or future agreements to pay for or reimburse the City of Woodinville for costs of
16 frontage or roadway improvements or any other improvements to the public street highway
17 adjacent to the Woodinville Village project should be enjoined as being in excess of lawful
18 authority, arbitrary and capricious.

19 26. Also, plaintiff is entitled to declaratory judgment and injunctive relief that the City
20 of Woodinville, in violation of the TRIP Funding Agreement between it and plaintiff and in
21 arbitrary and capricious and unlawful manner as stated in the Final Administrative Decision of the
22 City Manager on April 13, 2009, as erroneously taking the position that plaintiff is obligated to pay

COMPLAINT FOR RELIEF UNDER RCW CH. 64.40;
FOR DECLARATORY JUDGMENT; FOR INJUNCTIVE
RELIEF; FOR DAMAGES; AND FOR OTHER LEGAL
AND EQUITABLE REMEDIES -8

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1 for "street improvement costs within the street fronting the Wine Village [Woodinville Village]
2 site, including "roadway pavement, traffic control structures and devices, and other improvements
3 up to, and including 'half street improvements.'" This demand by the City of Woodinville is
4 without lawful authority and arbitrary and capricious because it specifically violates the express
5 terms of the "TRIP Funding Agreement" between the parties as expressed in Section 5.0 of that
6 agreement.

7 27. Paragraph 5.1.2 of the "TRIP Funding Agreement" limits plaintiff to pay, in
8 addition to Traffic Impact Fees, to costs of "... any curb, gutter, sidewalk, landscaping and street
9 lighting improvements required by this TRIP Funding Agreement. . . ." The same paragraph
10 further provides that:

11 The actual payment for said Frontage Improvement Costs shall
12 reflect actual costs for such frontage improvements.

13 28. Paragraph 5.1.2 of the TRIP Funding Agreement also provides that:

14 The parties agree that any particular frontage improvement,
15 including but not limited to sidewalk, landscaping and lighting, may
16 be delayed, as appropriate in the City's discretion. . . .

17 29. Notwithstanding the clear limitation on the obligation of plaintiff to contribute to
18 "Frontage Improvement Costs" as defined in Section 1.2.3 of the TRIP Funding Agreement
19 between plaintiff and defendant, defendant City of Woodinville now takes a contrary position and
20 in its April 13, 2009 City Manager letter to plaintiff and is doing so in violation of RCW
21 64.40.020.

22 30. Plaintiff acknowledges its responsibility to pay for "traffic impacts" under state law
and Woodinville ordinance, but now that Woodinville ordinances provide for full payment by the
City of Woodinville for "System Improvements" adjacent to the plaintiff's property, any

COMPLAINT FOR RELIEF UNDER RCW CH. 64.40;
FOR DECLARATORY JUDGMENT; FOR INJUNCTIVE
RELIEF; FOR DAMAGES; AND FOR OTHER LEGAL
AND EQUITABLE REMEDIES -9

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1 imposition of those costs directly upon plaintiff beyond legally imposed "traffic impact fees" is
2 illegal, arbitrary and capricious, and unconstitutional.

3 COUNT IV

4 31. Should plaintiffs be liable for any payments to the City of Woodinville, including
5 "traffic impact fees," "TRIP Funding Fees," plaintiff should be adjudged to be entitled to credits
6 against any such monetary obligations to the City of Woodinville.

7 COUNT V

8 32. Plaintiff seeks temporary and permanent injunctive relief restraining and enjoining
9 defendant City of Woodinville from withholding, conditioning, denying any permits or approvals
10 required for the Woodinville Village project on the basis of the unlawful, arbitrary, and capricious
11 actions and threat of action described in this Complaint. Injunctive relief is proper as there are no
12 legal remedies that would adequately substitute for such equitable relief given the fact that the
13 Woodinville Village project is well-along in the development stage, and to allow the City of
14 Woodinville to act contrary to law and arbitrarily and capriciously as it threatens to do or has done
15 herein would be certain to cause severe and reparable injury and harm to plaintiff.

16 33. Injunctive relief is necessary to avoid severe and irreparable harm to the plaintiff.
17 Plaintiff's project depends upon control of costs. The claimed unauthorized and unlawful charges
18 of the City of Woodinville could result in additional costs to plaintiff of \$600,000 or more, to
19 upwards of \$1,000,000 or more. These costs would and will be devastating to the financial
20 feasibility and livelihood of the Woodinville Village project and to the plaintiff and must be
21 enjoined.

1 34. Nothing herein is intended to restrain or enjoin the City of Woodinville from its
2 imposition of lawful "traffic impact fees" imposed pursuant to RCW Ch. 82.02, but only to the
3 extent such fees are lawful and constitutional.

4 COUNT VI

5 35. If the City of Woodinville conditions or withholds or delays any permitting or
6 approval required for the Woodinville Village project because of the unlawful or arbitrary or
7 capricious actions identified in this Complaint, severe damages will occur to plaintiff in amounts
8 not yet capable of determination. Those damages will result from delay, and from possible
9 collapse of the entire project if it is not without facing the financial exactions threatened by the
10 City of Woodinville as described herein.

11 36. By reason of the position taken by the City of Woodinville in the April 13, 2009
12 Final Administrative Decision letter from its City Manager, plaintiff is likely to suffer damages
13 arising out of delay and carrying costs, finance fees, administrative fees, and, possibly payments
14 under duress made to the City of Woodinville in order to avoid being shut down on the
15 Woodinville Village development project which is at a crucial stage in its progression and
16 completion.

17 37. Plaintiff is entitled to a judgment against the City of Woodinville for all damages it
18 may incur as a result of the position taken by the City of Woodinville in the April 13, 2009 Final
19 Administrative Decision by its City Manager.

20 PRAYER FOR RELIEF

21 Based upon the foregoing allegations, plaintiff prays for the following relief:
22

COMPLAINT FOR RELIEF UNDER RCW CH. 64.40;
FOR DECLARATORY JUDGMENT; FOR INJUNCTIVE
RELIEF; FOR DAMAGES; AND FOR OTHER LEGAL
AND EQUITABLE REMEDIES -11

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1 1. For temporary and permanent injunction enjoining the City of Woodinville from
2 imposing any charges or cost reimbursements or other fees or exactions upon plaintiff arising out
3 of or related to or in connection with the public streets and state highways adjacent to the
4 Woodinville Village project on the north and the east which are now included in the category of
5 "System Improvements" pursuant to City of Woodinville Ordinance 470 adopted December 2,
6 2008; and

7 2. Alternatively, for temporary and permanent injunction enjoining the City of
8 Woodinville from imposing any charges, fees, reimbursements, or other exactions based upon the
9 "TRIP Funding Agreement" under Section 5.0 for traffic or roadway improvements or similar
10 improvements lying outside the area defined by the curb line and the right-of-way line (i.e.,
11 "Frontage Improvements"); and

12 3. For all relief afforded under RCW Ch. 64.40 by reason unlawful, arbitrary, and
13 capricious action as described in that statute, including, but not limited to, injunctive relief,
14 declaratory relief, damages, and costs and attorneys' fees; and

15 4. For award of damages in favor of plaintiff against the City of Woodinville for any
16 and all damages arising out of or proximately related or caused by the actions of the City of
17 Woodinville in withholding or delaying or otherwise unlawfully condition permits or approvals or
18 the progress of the Woodinville Village project for the purpose of extracting funds or
19 commitments for payment for roadway improvements for public streets and highways and related
20 improvements adjacent to the Woodinville Village project on the north and east; and

21 5. For plaintiff's reasonable attorneys fees and litigation expenses incurred in
22 connection with this action pursuant to statute and contract between the parties; and

COMPLAINT FOR RELIEF UNDER RCW CH. 64.40;
FOR DECLARATORY JUDGMENT; FOR INJUNCTIVE
RELIEF; FOR DAMAGES; AND FOR OTHER LEGAL
AND EQUITABLE REMEDIES -12

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APPENDIX C

Superior Court of the State of Washington
For the County of King

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JUL 6 2009
BY: _____

SUSAN J. CRAIGHEAD
Judge
June 30, 2009

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King County Courthouse
Seattle, Washington 98104-2312
E-mail: susan.craighead@kingcounty.gov

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800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175

Re: Woodinville Associates v. City of Woodinville, No. 09-2-18636-7
Motion to Dismiss

Counsel,

Before me is the City of Woodinville's motion to dismiss on grounds that this claim is time-barred under LUPA. For the reasons set forth below, the motion to dismiss is granted.

In 2005, the parties entered into a Development Agreement. This agreement provided that the parties would enter into an additional agreement regarding the infrastructure and other improvements related to the winery area in Woodinville, which threatened to become more congested with additional development. This agreement is known as the TRIP Funding Agreement, and it was entered into in October 2007. The TRIP Funding Agreement, among other things, allocates to the developer certain costs related to improving roads near the planned development. Although Woodinville Associates owns land and is planning to build a sizeable mixed-use development, due to economic conditions there is no immediate plan to begin construction and there are no pending permits. Section 10 of the TRIP Funding Agreement provides that

In the event of a dispute between the Parties regarding the interpretation of this TRIP Funding Agreement, the Developer may appeal to the City manager, whose decision shall be the City's final decision unless the parties agree to submit the dispute to mediation within ten days of the City Manager's decision. Appeals of the City's decision shall otherwise be taken to the Superior Court of King County.

In this case, the City Manager issued a decision with which Woodinville Associates disagrees. Woodinville Associates filed a complaint, rather than a LUPA appeal, in King County Superior Court 22 days after the City Manager issues his decisions. The City moves to dismiss on the grounds that LUPA applies to this action and this court no longer has jurisdiction to hear the matter because the action was filed more than 21 days after the City Manager issued his decision.

The precise issue raised here is not directly addressed by statute or case law. Woodinville Associates takes the position that the City Manager's decision is not a "land use decision" under RCW 36.70C.020(1) and that this is a breach of contract claim, not a LUPA appeal. The City contends that LUPA applies. If LUPA applies, the parties agree that the action was untimely filed.

Land Use Decision: The Land Use Petition Act serves as the "exclusive means of judicial review of land use decisions." RCW 36.70C.030; the definition of a "land use decision" is to be construed broadly. Post v. City of Tacoma, 140 Wn. App. 155, 163 (2007). The statute defines a land use decision as

[A] final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on ... (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance of use of real property. RCW 36.70C.020(1)(b).

The City's decision here does not fit neatly within this statutory definition; to the extent that it fits, it does so on the grounds that it constitutes a local jurisdiction's interpretation of rules regulating the improvement of specific property. The City contends that the development agreement here establishes rules relating the approval of development and project permits for the Woodinville Village Project. Therefore, the City argues, its City Manager's decision interprets "rules regulating improvement, development...or use of real property," and RCW 36.70C.020(1)(b) applies. The applicability of LUPA to development agreements is set forth at RCW 36.70B.200; this statute provides that "[i]f the development agreement relates to a project permit application, the provisions of chapter 26.70C RCW shall apply to the appeal of the decision on the development agreement." This statute addresses the approval of development agreements by public hearing – it does not explicitly address the type of decision at issue here. Our Supreme Court has held that imposition of impact fees as a condition on the issuance of a building permit is a land use decision subject to the LUPA. James v. County of Kitsap, 154 Wn.2d 574 (2005). Accord Tapps Brewing Inc. v. city of Sumner, 482 f.Supp.2d 1218, 1233 (2007). The rationale of these cases would appear to apply here, with one significant distinction: there is no pending permit application in this case, whereas, in these and related appellate cases a permit application underlay the dispute at issue.

There is no published case law addressing whether the phrase "relates to a project permit application" means that a contemporaneous permit application has to be affected by the decision, or whether LUPA applies to a decision that establishes the rules that will apply to future permit applications by a particular developer. A careful reading of RCW 36.70B.170 and 180, which authorize and establish the legal effect of a development agreement demonstrates that development agreements may have prospective effect; as such, the applicability of LUPA to development agreements cannot be limited only to those where a project permit application is contemporaneously filed. Indeed, RCW 36.70B.170(1) contemplates that municipalities and developers will enter into development agreements to establish "development standards and other provisions that shall apply to and govern and vest the development,

use, and mitigation of the development of the real property for the duration specified in the agreement." It would make policy sense for a developer aggrieved by the standards approved by a municipality after a public hearing (which might not be the same as those agreed prior to the hearing) to be able to appeal to Superior Court before the formal approval process is complete – indeed, it might be impossible to make a complete permit application until such standards are established. It thus appears to this court that the rules and standards established in the TRIP Funding Agreement relate to future permit applications for the development of Woodinville Village and, therefore, that the timeline provisions of the LUPA apply. This conclusion is buttressed by the language of the TRIP Funding Agreement's dispute resolution clause itself – the agreement specifically refers to "appeal" from the City Manager's decision. Only if LUPA applied would the parties have agreed to an appeal procedure to Superior Court.

Because this action was filed outside the 21 day time limit for a LUPA appeal, this action is dismissed with prejudice.

Sincerely,



Susan J. Craighead
Judge

APPENDIX D

NO. 63953-6-I

King County Superior Court Cause No. 09-2-18636-7 SEA

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

WOODINVILLE ASSOCIATES, LLC,
a Washington limited liability company
Plaintiff/Appellant

v.

CITY OF WOODINVILLE,
a Washington municipal corporation,
Defendant/Respondent

DECLARATION OF CHARLES E. WATTS

Attorneys for Plaintiff/Appellant
Woodinville Associates

Charles E. Watts
Oseran Hahn Spring, Straight & Watts, P.S.
10900 NE Fourth Street #850
Bellevue, WA 98004
425-455-3900

COPY

2/13

Charles E. Watts states and declares under penalty of perjury and upon his personal testimonial knowledge as follows:

1. Declarant is counsel for plaintiff/appellant Woodinville Associates, LLC and is the only counsel for that entity in regard to this matter. Declarant is in all respects competent to testify as to the matters stated herein. Declarant was responsible for filing the Complaint for declaratory relief and other remedies in the King County Superior Court. Declarant was responsible for briefing and arguing the CR 12(b)(6) motion and attended the June 5, 2009 hearing in that regard.

2. At the conclusion of the hearing on argument on the 12(b)(6) motion, the court indicated that the issue was novel and complex and that it would be taken under advisement. At no time during the hearing did the court advise counsel that it would enter the formal order one way or the other without notice to the parties or counsel before doing so.

3. Almost four weeks passed from the oral argument on the CR 12(b)(6) motion to the time of the writing by the court of its Memorandum Decision.. On the afternoon of July 6, 2009, declarant was provided by staff with the June 30, 2009 letter from the court which was

date stamped "Received" by declarant's office that date. Declarant did not see an Order of Dismissal.

4. On July 8, 2009, Declarant was hospitalized at the Overlake Hospital Emergency Room for an attack of "atrial fibrillation." Declarant was administered a sedative and declarant's heart was "shocked" back into normal rhythm. Declarant has previously experienced attacks of atrial fibrillation and the attacks usually begin days before slowly and progress imperceptively over days through stages of profuse sweating, extreme tiredness, exhaustion, anxiety and confusion. The condition is caused by an electrical irregularity in the heart which results in extremely rapid and ineffective atrial heartbeat upwards of 200 beats per minute. Attached is a copy of a partial invoice for the emergency room hospitalization for the shock treatment on July 8, 2009. Declarant believes that he was in atrial fibrillation on Monday, July 6. Declarant's actions in regard to the June 30 Letter Decision from the court, and the apparent overlooking of the undisclosed enclosure of an Order of Dismissal apparently included in the same envelope probably may have resulted in part from the medical condition that led to hospitalization less than 48 hours later.

5. Counsel for plaintiff/appellant remained completely ignorant of the fact that a formal Order of Dismissal had been entered on July 1, 2009. It was not until August 3, 2009 that counsel pulled a Clerk's docket and learned for the first time of the entry of the order. A Notice of Appeal was filed that day with the King County Superior Court Clerk.

6. Declarant has practiced law in the State of Washington since 1965. Declarant's practice focuses on civil litigation in the real estate and business areas, including land-use issues. Declarant has participated in a number of appeals and is currently involved in appeals of civil matters to the Court of Appeals and is currently involved in a matter set for oral argument before the Supreme Court in late October 2009. Declarant is fully versed in the filing requirements for notices of appeal from decisions of the Superior Court to the Court of Appeals. Because the court did not follow the procedures required in CR 54(e) and (f), and because the Memorandum Decision of the court does not refer to the signing of an appealable order, counsel for appellant Woodinville Associates, LLC believed that the presentation and entry of an appealable order would come sometime later than the Memorandum Decision and would come on notice to all parties as required by CR 54.

7. In Declarant's experience, the entry of a Memorandum Decision by the court signifies the desire of the court to have counsel for the prevailing party prepare and present pursuant to CR 54 the proposed judgment or order implementing the Memorandum Decision. In cases where the court has found it necessary to "explain" a decision that it is in the process of entering, there is no reason or justification for the court leaving out the explanation from the order itself. Only in cases where the court desires to assist counsel in the preparation of a formal order does the Memorandum Decision provide guidance to counsel in preparing a proposed order or judgment for presentation. In the present case, instead of including its "explanation" in the formal Order of Dismissal, the court surprisingly rendered an extensive Memorandum Decision, and then without mention to anyone apparently simply enclosed a very brief Order of Dismissal in the same envelope. In all the years of practice of Declarant, this procedure has never been experienced before. It is completely outside the Civil Rules.

8. On the same day the appeal was filed with the Clerk, August 3, 2009, Declarant personally served both counsel for defendant/respondent City of Woodinville with copies of the Notice of

Appeal and attachments. A declaration to that effect has been or will be filed with the Court of Appeals.

9. This case raises important, and novel, first impression issues with respect to the interplay between development agreements or contracts entered into between the government and developers pursuant to RCW 36.70(B), and the provisions of the Land Use Petition Act (“LUPA”), RCW Ch. 36.70 (C). The issue is whether or not LUPA governs the handling of breach of contract or contract interpretation litigation arising out of fully executed development agreements or whether those fully executed development agreements are handled the same as any other common-law contract in terms of enforcement and interpretation. It is the position of plaintiff/appellant that common-law principles apply. It is the position of defendant/respondent City of Woodinville that LUPA applies.

10. At issue here is a dispute over sums of nearly one-half million dollars. While Declarant has errors and omissions insurance coverage in an amount more than sufficient to cover professional negligence liability should it be found to exist, the circumstances of the entry of the order in this case justify a determination that the appeal was timely filed, or that under RAP 18.8(b) extraordinary circumstances exist

so as to require acceptance of the appeal to avoid a gross miscarriage of justice.

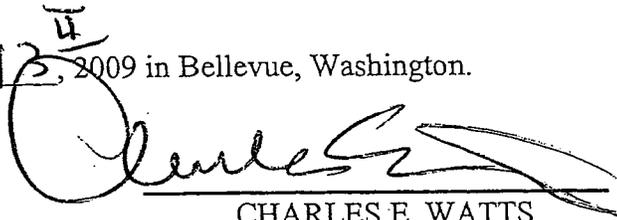
11. As the Superior Court notes in its Memorandum Decision of June 30, 2009, the issue presented is one of first impression and there is no precedent whatsoever for deciding the question. Given the importance of Development Agreements in the State of Washington, and the complexity of those agreements as evidenced by the agreement in question here, the law applicable to deciding breach and interpretation issues of these contracts should be clarified on appeal. This case presents the ideal opportunity for such clarification.

12. In the terms of RAP 18.8, the circumstances here are truly “extraordinary” and justify a determination that the filing of the Notice of Appeal on August 3, 2009 was timely under CR 6(e) or, alternatively, that extraordinary circumstances are present to allow the 1-day late filing of the appeal to prevent a gross miscarriage of justice.

13. A true copy of the Summons and Complaint and the June 30, 2009 Letter/Memorandum Decision of the Superior Court is attached to this declaration.

14. A true copy of the Order of Dismissal found on August 3, 2009 in Declarant’s file is also attached.

Signed on August ¹⁴ 13, 2009 in Bellevue, Washington.

A handwritten signature in black ink, appearing to read "Charles E. Watts", written over a horizontal line.

CHARLES E. WATTS

CERTIFICATE OF MAILING/SERVICE

The undersigned, Joy Griffin, certifies that on the 14 day of August, 2009, she caused to be served via ABC Legal Messenger Service, a copy of the attached DECLARATION OF CHARLES E. WATTS to the Court of Appeals/Division I, Cause No. 63953-6-I and via e-mail and fax to the following:

Greg Rubstello
Ogden Murphy Wallace
1601 Fifth Ave., Suite 2100
Seattle, WA 98101-1686
grubstello@omwlaw.com
(206) 447-0215 (Fax)

Stephanie E. Croll
Keating, Bucklin & McCormack
800 Fifth Ave., Suite 4141
Seattle, WA 98104-3175
scroll@kbmlawyers.com
(206) 223-9423 (fax)

VIA ABC LEGAL MESSENGER

The Court of Appeals/State of Washington, Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

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

Dated this 14 day of August, 2009.


Joy Griffin

APPENDIX E

The Honorable Susan J. Craighead
Hearing Date: June 5, 2009
KING COUNTY, WASHINGTON Time: 10:00 a.m.

JUL 01 2009

SUPERIOR COURT CLERK
BY LEANNE SYMONDS
DEPUTY,

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

WOODINVILLE ASSOCIATES, LLC, a
Washington limited liability company,

Plaintiff,

v.

CITY OF WOODINVILLE, a Washington
municipal corporation,

Defendant.

No. 09-2-18636-7SEA

~~PROPOSED~~ ORDER GRANTING
DEFENDANT CITY OF
WOODINVILLE'S CR 12(B)(6)
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM

[Clerk's Action Required]

I. INTRODUCTION

This Matter having come before the Court on Defendant City of Woodinville's CR 12(b)(6) Motion to Dismiss for Failure to State a Claim, and the Court having reviewed the documents in support of and in opposition to the Motion, and after hearing the arguments of the parties agrees with the arguments of the Defendant, and hereby ORDERS as follows:

II. ORDER

1. Defendant City of Woodinville's CR 12(b)(6) Motion to Dismiss for Failure to State a Claim is GRANTED; and
2. Plaintiff's lawsuit is hereby dismissed with prejudice and without costs.

1 DATED this 30th day of June, 2009.

2
3 Susan Craighead
4 THE HONORABLE SUSAN CRAIGHEAD
5 King County Superior Court Judge

6 PRESENTED BY:

7 KEATING, BUCKLIN & McCORMACK, INC., P.S.

8 Stephanie Croll
9 Stephanie E. Croll, WSBA #18005
10 Attorneys for Defendant City of Woodinville

11 OGDEN MURPHY WALLACE, P.L.L.C.

12 Greg Rubstello, Sec. for
13 Greg A. Rubstello, WSBA #6271
14 Attorneys for Defendant City of Woodinville

APPENDIX F

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The Honorable Susan J. Craighead

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WOODINVILLE ASSOCIATES, LLC, a
Washington limited liability company,

Plaintiff,

v.

CITY OF WOODINVILLE, a Washington
municipal corporation,

Defendant.

No. 09-2-18636-7 SEA

**PLAINTIFF WOODINVILLE
ASSOCIATES, LLC NOTICE
OF APPEAL TO DIVISION I
COURT OF APPEALS**

TO: Clerk, King County Superior Court

AND TO: Stephanie E. Croll and Greg A. Rubstello, Counsel for Defendant City of
Woodinville

PLEASE TAKE NOTICE that Woodinville Associates, LLC, a Washington limited
liability company, appeals from that Order entered June 30, 2009 dismissing pursuant to
CR 12(B)(6) plaintiff's Complaint. Appeal is taken to Division I of the Court of Appeals. A true
copy of the Order appealed from is attached to this Notice.

The names and addresses of the parties and counsel for each of the parties are as follows:

PLAINTIFF WOODINVILLE ASSOCIATES, LLC
NOTICE OF APPEAL TO DIVISION I COURT OF
APPEALS -1
F:\CEW\P\d\MJR\Woodinville\Notice of Appeal.doc 8/3/09 (jg)
#26530.001

OSERAN HAHN SPRING STRAIGHT & WATTS P.S.
10900 NE Fourth Street #850
Bellevue WA 98004
Phone: (425) 455-3900
Facsimile: (425) 455-9201

COPY

81

1 Charles E. Watts
2 Oseran Hahn Spring, Straight & Watts, P.S.
3 10900 NE Fourth Street #850
4 Bellevue WA 98004
5 Counsel for Plaintiff/Appellant Woodinville Associates, LLC
6 425-455-3900
7 425-455-9201
8 tedwatts@ohswlaw.com

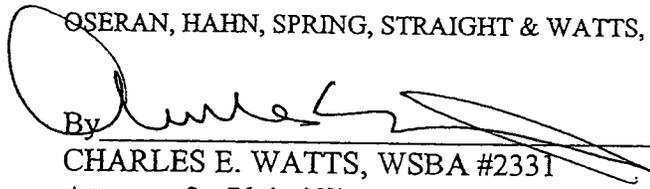
9 Greg A. Rubstello
10 Ogden Murphy Wallace
11 2100 Westlake Center Tower
12 1601 5th Ave
13 Seattle, WA 98101-3621
14 Attorney for Defendant/Respondent City of Woodinville
15 (206) 447-7000
16 (206) 447-0215 (fax)
17 grubstello@omwlaw.com

18 Stephanie E. Croll
19 Keating, Bucklin & McCormack, Inc. PS
20 800 5th Ave., Suite 4141
21 Seattle, WA 98101-3175
22 Attorney for Defendant City of Woodinville
206-823-8861
206-223-9423 (fax)
scroll@kbmlawyers.com

15 This Notice is accompanied by the required filing fee payable to the Clerk, King County
16 Superior Court. Proof of service on opposing counsel is attached.

17 DATED: August 3, 2009.

18 OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

19 By 

20 CHARLES E. WATTS, WSBA #2331
21 Attorney for Plaintiff/Appellant
22

PLAINTIFF WOODINVILLE ASSOCIATES, LLC
NOTICE OF APPEAL TO DIVISION I COURT OF
APPEALS -2

F:\CEW\Pld\MJR\Woodinville\Notice of Appeal.doc 8/3/09 (jg)
#26530.001

OSERAN HAHN SPRING STRAIGHT & WATTS P.S.
10900 NE Fourth Street #850
Bellevue WA 98004
Phone: (425) 455-3900
Facsimile: (425) 455-9201

APPENDIX G

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

WOODINVILLE ASSOCIATES, LLC,)
a Washington limited liability company,)
)
Appellant,)
)
v.)
)
CITY OF WOODINVILLE,)
a Washington municipal corporation,)
)
Respondent.)
_____)

No. 63953-6-1

ORDER

2009 NOV 20 PM 1:42

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON

Appellant Woodinville Associates has filed a motion to confirm the timely filing of its notice of appeal and/or a one-day extension of the time to file its notice of appeal. The motion was referred to a panel of judges for consideration. RAP 17.2(b). After considering the motion, the response, the reply, and the declarations, we conclude that Woodinville Associates' notice of appeal was not timely filed. We also conclude that Woodinville Associates has not demonstrated the extraordinary circumstances required by RAP 18.8(b) to grant an extension of time.

Now, therefore, it is

ORDERED that the appeal is untimely and review is dismissed.

Done this 20th day of November, 2009.

Seach, J.

Seivelle, C
Jay, J.