

NO. 36066-7-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

BY \_\_\_\_\_

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ISLA VERDE INTERNATIONAL HOLDINGS, LTD.,  
a foreign corporation and  
CONNAUGHT INTERNATIONAL HOLDINGS, LTD.,  
a foreign corporation,

Respondents,

v.

CITY OF CAMAS, WASHINGTON,  
a municipal corporation of the State of Washington,

Appellant.

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On Appeal from Clark County Superior Court  
Cause No. 95 2 03438 5

BRIEF OF APPELLANT

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W. Dale Kamerrer, WSBA No. 8218  
Law, Lyman, Daniel, Kamerrer &  
Bogdanovich, P.S.  
P.O. Box 11880  
Olympia, WA 98508-1880  
(360) 754-3480  
Attorney for the City of Camas

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**A. Assignments of Error**

1. The superior court erred in granting the plaintiffs’ motion for summary judgment because the City’s litigation conduct was not an “act” which could produce liability under RCW 64.40.

2. The superior court erred in granting the plaintiffs’ motion for summary judgment because, after recognizing that the plaintiffs failed to raise the issue on which their RCW 64.40 claim was based at the administrative level, the motion should have been denied.

3. The superior court erred in granting the plaintiffs’ motion for summary judgment because the facts and the law do not support a conclusion that the City knew or should have known that its 30% open space condition was unlawful.

4. The superior court erred in granting the plaintiffs’ motion for summary judgment because they failed to present evidence supporting the essential elements of damages and causation.

**B. Statement of the Case<sup>1</sup>**

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<sup>1</sup>This case was previously before the Court of Appeals and the Washington Supreme Court (*See* 99 Wn. App. 127, 990 P.2d 429 (1999), *affirmed, partially on alternative grounds*, 146 Wn.2d 740, 49 P.3d 867 (2002)), to review decisions of the Clark County Superior Court under the Land Use Petition Act, RCW 36.70C (LUPA). Those opinions were submitted to the superior court as exhibits to the City’s response to Isla Verde’s motion for summary judgment and its cross-motion for summary judgment, and they are part of the Clerk’s Papers in this appeal. They are cited herein by reference to the Clerk’s Papers, followed by the pertinent case citation.

Plaintiffs, Isla Verde International Holdings, Ltd., and Connaught International Holdings, Ltd. (hereafter, "Isla Verde"), commenced this action with a Petition for Review under the Land Use Petition Act (LUPA), RCW 36.70C, on August 9, 1995. CP 3. The Petition challenged two conditions placed on the preliminary plat approval of Isla Verde's proposed "Dove Hill" housing subdivision in the City of Camas. One of those conditions required Isla Verde to provide a secondary route for emergency access to the subdivision (the "secondary access condition"). CP 10. The second condition required Isla Verde to set aside and preserve 30% of the subdivision property as undeveloped open space (the open space condition). CP 10. The Petition for Review alleged a damages claim pursuant to RCW 64.40, only in relation to the secondary access condition. CP 3.

In 1998, the superior court ruled that both plat conditions were invalid. CP 272. The City appealed and the Court of Appeals reversed as to the secondary access condition, but affirmed as to the open space condition. CP 275-76 (99 Wn. App. 127, at 135-37). Discretionary review was granted by the Washington Supreme Court on the City's petition relating to the open space condition, and on Isla Verde's answer to the City's petition relating to the secondary access condition. CP 301-

03 (146 Wn.2d 740, at 765-71).

The Supreme Court affirmed the Court of Appeals as to both plat approval conditions, but on different grounds relating to the open space condition. CP 290 (146 Wn.2d at 745). The Court declined to address the constitutional grounds relied on by the Court of Appeals for deciding that the open space condition was invalid. Instead, it applied RCW 82.02.020 to rule that the administrative record lacked sufficient evidentiary support showing that the open space condition was “reasonably necessary as a direct result” of the Dove Hill subdivision. CP 293-301 (146 Wn.2d 740, at 750-765). The Supreme Court’s decision was issued on July 11, 2002. CP 281 (146 Wn.2d 740).

In 2006, Isla Verde moved the superior court for summary judgment on the “knowledge” element of a damages claim under RCW 64.40.020(1). CP 15. That statute creates and defines the RCW 64.40 damages action by providing:

Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

CP 24. Emphasis added.

The City responded to Isla Verde's motion with opposing evidence, arguments and authorities, and with its own motion for summary judgment. CP 54, CP 86, CP 94, CP 103, CP 105, CP 108, CP 118, CP 120, CP 187, CP 243, CP 266, CP 281, CP 308, & CP 310. Counsel for each party presented arguments on the cross motions for summary judgment in open court, and the superior court subsequently issued its memorandum "Ruling on Motion for Summary Judgement", explaining why Isla Verde's motion would be granted and the City's motion would be denied. CP 388. An Order on Cross-Motions for Summary Judgment was entered on December 15, 2006. CP 391.

In the "Ruling on Motion for Summary Judgement" ("Ruling"), the superior court acknowledged that Isla Verde had not objected to the open space set-aside condition at the administrative level, saying:

Prior to appealing to the Superior Court, petitioner (Isla Verde) did not object to the 30% dedication.

CP 389, Ruling at 2. The superior court also recognized that Isla Verde's failure to make a proper objection to the open space condition amounted to a waiver, saying:

"Here, the City could assume that the set off of 30% was voluntary."

CP 389, Ruling at 2.

Despite the superior court's recognition that Isla Verde failed at the administrative level to raise the issue that later became dispositive as to the open space set-aside condition, the court ruled that the City was liable under RCW 64.40 because it had appealed the 1998 LUPA-related decision on that condition. The Ruling stated:

Prior to appealing to the Superior Court, petitioner did not object to the 30% dedication. It was during the original proceedings that this issue was raised and it formed the basis of Judge Lodge's ruling.<sup>2</sup> Thus the issue of validity of the City's actions on this subject did not arise until the Superior Court proceedings.

...

Once this issue was raised, the City had the option of withdrawing the condition or appealing the Superior Court's decision. The City elected to appeal not only the Superior Court but also that of the Court of Appeals. Clearly, at this juncture, the City should have known that the ordinance as applied was invalid. The wealth of reported case law in existence at this time supports this conclusion. Thus I find that the City's actions in defending the ordinance after the issue was raised, invokes the ramifications of RCW 64.40.

CP 389. Emphasis added.

The superior court ignored the fact that the City's "actions in defending" its land use decisions achieved reversal of the 1998 order invalidating the secondary access condition on the Dove Hill plat. CP 275-76; and CP 301-03. Nor did the superior court acknowledge that it

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<sup>2</sup>Judge Lodge was the superior court judge who issued the order invalidating the two contested conditions on the Dove Hill subdivision in 1998.

was Isla Verde who sought review by the Washington Supreme Court of the Court of Appeals' ruling that the secondary access condition was valid, including arguing that the secondary access condition would be "economically fatal to its development." CP 303 (146 Wn.2d at 768-69).<sup>3</sup> In addition, the superior court did not explain how the City could have made a "knowingly unlawful" decision under RCW 64.40, where its "arguing at the trial level and ... appealing the subsequent decisions of the Courts" (CP 415), included successful arguments in support of the secondary access condition which were presented at the same time as its unsuccessful arguments that the superior court believed had "invoke(d) the ramifications of RCW 64.40." CP 389.

The City's cross-motion for summary judgment also argued that Isla Verde did not have a valid claim under RCW 64.40 relating to the open space set-aside condition. CP 67-73. This was based on the allegations of the Petition for Review, which did not plead a RCW 64.40 claim in relation to that condition (*see* CP 5), and from the Court of Appeals' treatment of Isla Verde's RCW 64.40 claim. CP 275-76 (99 Wn. App. at 136-37). There, in reversing the superior court's ruling on the secondary access condition, the Court of Appeals implicitly recognized

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<sup>3</sup>That argument to the Supreme Court is also consistent with Isla Verde's near exclusive focus on the secondary access condition at the administrative level. *See* CP 89, Declaration of Roger D. Knapp, and Exhibits A & B thereto (CP 94 & CP 103 (memorandums on behalf of Isla Verde presented at the administrative level)).

that Isla Verde had pled a RCW 64.40 claim solely as to that condition by rejecting its claim for damages and attorney's fees "because Isla Verde's claim under RCW 64.40 failed". CP 279-80 (99 Wn. App. at 143). The Court of Appeals gave no consideration to a damages and attorney's fees claim under RCW 64.40 in relation to the open space condition because no such claim was included in the Petition for Review. CP 5.

But the superior court disagreed with the City's argument that the Court of Appeals recognized that Isla Verde did not have a RCW 64.40 claim in its Petition for Review, saying:

This is a misreading of the Court's opinion. The provisions referred to (in the Court of Appeals opinion) were limited to the second access road and not to the open space issue. The Court (of Appeals) further noted that "trial court reserved the issue of damages and attorney fees for any subsequent proceeding."

CP 390.

The City moved the superior court for reconsideration of its summary judgment order (CP 415), emphasizing that the litigation-related actions of a party to a lawsuit are immune from tort-like liability, and emphasizing Isla Verde's failure to exhaust through its failure to make a relevant objection to the open space condition at the administrative level.

CP 399-401.

Ruling on the motion for reconsideration, the superior court left no doubt that it believed the "knew or should have known" standard of RCW

64.40.020 was established because the City had argued in court in favor of its land use decision and then appealed the 1998 superior court ruling that the open space set-aside condition was invalid. In the first paragraph of the “Ruling on Motion for Reconsideration,” the superior court said:

The City, by arguing at the trial level and in appealing the subsequent decisions of the Courts, evidenced their intent to enforce an invalid ordinance.<sup>4</sup> It is this act of enforcement not the appeals that violated the statute.

CP 415. Emphasis added.

The City then sought discretionary review of the superior court’s decisions in the Court of Appeals. CP 419. The Court of Appeals partially granted review on the City’s motion to modify. The Order Granting Motion to Modify (Appendix A) states in pertinent part:

Following consideration, this court grants discretionary review of the trial court’s order granting Isla Verde’s motion for summary judgment and denies discretionary review of the trial court’s order denying the City’s cross-motion for summary judgment.

### **C. Argument**

#### **1. Standards for review of summary judgment.**

On review of summary judgment, appellate courts perform the same inquiry as the trial court. *City of Sequim v. Malkasian*, 157 Wn.2d

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<sup>4</sup>This statement was made despite the fact that the City’s ordinance was not challenged on its face or found facially invalid in this action. Instead, it was the application of the 30% open space ordinance to the Dove Hill plat that was eventually ruled to be unsupported by substantial evidence. CP 300 (146 Wn.2d 740, at 762).

251, 261, 138 P.3d 943 (2006); *Hisle v. Todd Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The standard of review is de novo. *Id.*

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A court should grant summary judgment only if reasonable persons could reach but one conclusion from the evidence. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). The moving party bears this burden of proof. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

"The reviewing court considers the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Right-Price Recreation, L.L.C v. Connells Prairie Community Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002), *cert. denied*, 124 S.Ct. 1147, 157 L.Ed.2d 1043 (2004).

**2. The superior court erred in granting Isla Verde’s motion for summary judgment because the City’s litigation conduct was not an “act” that could produce liability under RCW 64.40.**

**a. The definition of an “act” in RCW 64.40.010(6) does not apply to litigation conduct.**

In ruling on the cross motions for summary judgment, the superior court initially recognized that Isla Verde failed to raise an issue at the administrative level about whether the City’s open space requirement was supported by evidence that the condition was reasonably necessary as a direct result of the proposed Dove Hill development. CP 389 (*and see* Part 3, beginning at p. 13, below). But rather than rule that Isla Verde’s RCW 64.40 claim was precluded by its failure to exhaust administrative remedies, the superior court inexplicably shifted direction and said: “The City, by arguing at the trial level and in appealing the subsequent decisions of the Courts, evidenced their intent to enforce an invalid ordinance.”<sup>5</sup> CP 415, *and see* CP 389. Therefore, the superior court equated the City’s litigation conduct with an “act” that may produce liability under RCW 64.40. But the definition of “act” in RCW 64.40, plainly does not apply to litigation-related decisions and conduct.

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<sup>5</sup>The City reiterates that it was defending an administrative decision which adopted conditions on the approval of the Dove Hill plat. It was not enforcing an “invalid ordinance”, since the validity of that ordinance was not challenged by Isla Verde, and the 30% open space condition was precisely what the City’s ordinance on the subject allowed. *See* CP 315.

The remedy provided for by RCW 64.40.020, is for “acts of an agency that are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law...”

Emphasis added. RCW 64.40.010(6) defines such “acts” as:

“act” means a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed.

None of the decisions made in defending a challenged land use-related condition during litigation is a “final decision by an agency which places requirements, limitations, or conditions upon the use of real property”. RCW 64.40.020 & 64.40.010(6). Rather, those are decisions to advocate or to appeal, and the law gives a party to litigation a clear right to make those decisions and take those actions. *See* RAP 4.1(a); and RAP 2.2(a). Therefore, litigation-related decisions and actions are not “acts” under RCW 64.40.020, and liability under RCW 64.40 cannot arise for such conduct.

**b. Litigation conduct is not tortious.**

In addition to the plain fact that legally authorized litigation conduct is not an “act” under RCW 64.40, it also is not tortious or otherwise wrongful. A party to litigation has a right to make arguments, to defend its actions, and to take appeals. *See Jeckle v. Crotty*, 120 Wn.

App. 374, 386, 85 P.3d 931 (2004) (attorney's litigation-related conduct is privileged); *Bowe v. Eaton*, 17 Wn. App. 840, 843-44, 565 P.2d 826 (1977) (insurance company's refusal to negotiate further after rejecting a counter offer from a party with whom it had no contractual relationship was not actionable since company had a legal right to conduct litigation as it did); *Grant Realty Co. v. Ham, Yearsley & Ryrie*, 96 Wash. 616, at 627-28, 165 Pac. 495 (1917) (a landowner's resistance to condemnation in court is not wrongful resistance); *see also Taggart v. State*, 118 Wn. 2d 195, at 213, 822 P.2d 243 (1992) (absolute immunity is accorded to those functions that are an integral part of a judicial proceeding); *and Gilliam v. DSHS*, 89 Wn. App. 569, 583, 950 P.2d 20 (1998) (functions integral to a judicial proceeding include judging, advocating, prosecuting, fact-finding, and testifying).

**c. Parties to civil litigation have a right to argue and appeal.**

In criminal cases, "the 'right to appeal in all cases' is expressly guaranteed by our Washington Constitution." *City of Seattle v. Klein*, \_\_\_ Wn.2d \_\_\_, 166 P.3d 1149, at 1152 (2007) (citing Wash. Const. art. I, § 22). The Washington Rules of Court similarly guarantee appeals from decisions of the superior court to the Court of Appeals in civil cases. RAP 2.2(a); RAP 4.1(a). Even where an appeal is judged frivolous in the end,

the question of whether it is frivolous is governed by standards which recognize the right to appeal, and, therefore, the standards weigh heavily in favor of appellants. As explained in *In re Marriage of Penry*, 119 Wn. App. 799, 82 P.3d 1231 (2004):

Whether an appeal is frivolous requires consideration of the following: (1) A civil appellant has a right to appeal under RAP 2.2; . . .

119 Wn. App. at 804, n. 2 (*quoting Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980)), emphasis added.

Notably, the City's arguments and procedures in defense of its open space condition in this case have never been judged frivolous, and its position prevailed on one of the two conditions on the Dove Hill plat which the superior court declared invalid in 1998.<sup>6</sup>

A party to litigation who elects to pursue the legal procedures and remedies available to it, including appeal, cannot be liable under general civil law or under RCW 64.40 for acting on those legal rights. The superior court erred by granting summary judgment to Isla Verde on the basis that the City defended its land use decisions before that court and appealed the court's adverse ruling. Therefore, the summary judgment granted by the superior court in favor of Isla Verde should be reversed.

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<sup>6</sup>And that ultimately-validated condition was the one which Isla Verde most vigorously sought to overturn because it allegedly was "economically fatal to its development." *See* CP 302-03 (146 Wn.2d at 768-69), and CP 95.

**3. The superior court erred in granting summary judgment because after recognizing that Isla Verde had failed to raise the relevant claim of invalidity at the administrative level, the motion should have been denied.**

**a. Isla Verde failed to exhaust administrative remedies.**

When the Dove Hill plat was before the City Planning Commission and City Council, Isla Verde confined its opposition to the open space requirement to a contention that the requirement was “duplicative” of the City’s Parks and Open Space Impact Fee. That narrow basis of opposition arose in a memorandum to the City from Isla Verde’s attorney dated June 14, 1995. CP 94. There, Isla Verde primarily complained about the possibility that there would be a secondary access condition imposed on the Dove Hill plat.<sup>7</sup> CP 94.

But the June 14, 1995 memo also stated a narrow objection to the open space condition. Out of the memo’s nine pages, two paragraphs were devoted to the open space issue. CP 101. In those paragraphs, Isla Verde did not object to the open space preservation requirement standing alone. Nor did it challenge the validity of the City’s open space ordinance, and it said nothing about insufficient evidence in support of the open space requirement. Instead, Isla Verde objected to the combination

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<sup>7</sup>See Footnote 5, supra.

of an open space requirement and the City's separate park and open space impact fee, saying that the combination amounted to "paying two fees for the same facilities". CP 101.

The July 14, 1995 memo was followed by two more written communications on behalf of Isla Verde, neither of which addressed the open space set-aside condition whatsoever. CP 103 & CP 105.

Isla Verde's attorney also made an oral presentation to the City Council on June 26, 1995. Counsel's statement about open space was:

The second issue just briefly is we continue to challenge the City's park impact fee ordinance in addition to your open space set aside program. In this situation we have some open space dedicated. We'll pay a park's impact fee. We'll pay an open space impact fee and we'll pay some money towards the buy down. Those are four exactions for the same public facility.

CP 308-09.

Thus, the record is clear that Isla Verde failed to challenge the City's open space requirement on a basis that was even remotely related to the evidentiary requirements of RCW 82.02.020 (*i.e.*, proof that the condition was "reasonably necessary as a direct result" of the subdivision in question).

Isla Verde's argument that the open space condition was a duplication of the City's impact fees was recognized by the Court of Appeals to be premature and irrelevant. CP 279 (99 Wn. App. 127, at

142-43). Since the same argument was the sole basis for Isla Verde's contention at the administrative level that the open space condition was improper, it failed to raise the issue on which its claim under RCW 64.40 was based in its 2006 summary judgment motion.

In addressing the parties' 2006 cross-motions for summary judgment, the superior court expressly and correctly recognized that Isla Verde failed to properly raise the open space issue at the administrative level,<sup>8</sup> saying: "(p)rior to appealing to the Superior Court, petitioner (Isla Verde) did not object to the 30% dedication."<sup>9</sup> CP 289. The superior court also recognized that Isla Verde's failure to make a proper objection to the open space condition effectively waived that issue at the administrative level, by saying: "(h)ere, the City could assume that the set off of 30% was voluntary." CP 389. Nevertheless, the court granted summary judgment in favor of Isla Verde, without explaining why its obvious failure to exhaust administrative remedies should be ignored.

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<sup>8</sup>The superior court said nothing about Isla Verde's failure to plead a RCW 64.40 claim in its Petition for Review as to the open space condition (CP 5), although the City raised that issue to the court. CP 74-76.

<sup>9</sup>Here, the term "dedication" was incorrect, because the open space was to be owned by a Dove Hill homeowners association. Thus its preservation did not involve a "dedication" of the property to the public. A dedication is an owner's donation of land or its use to the public. See *City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 503, 206 P.2d 277 (1949) (quoting *Corning v. Aldo*, 185 Wash. 570, 576, 55 P.2d 1093 (1936)). The dedicated land must be used by the public at large, not "one person or a limited number of persons, or for the exclusive use of restricted groups of individuals." *Knudsen v. Patton*, 26 Wn. App. 134, 141, 611 P.2d 1354 (citing 23 Am. Jur. 2d Dedication, § 5 (1965)), review denied, 94 Wn.2d 1008 (1980).

The action authorized by RCW 64.40.020, is specifically tied to a requirement for exhaustion of administrative remedies before such an action may be brought. RCW 64.40.030 provides:

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

“On its face, RCW 64.40.030 unambiguously imposes an exhaustion prerequisite to damages actions.” *Smoke v. City of Seattle*, 132 Wn.2d 214, 221, 937 P.2d 186 (1997) (emphasis added).

Similarly, LUPA requires exhaustion of administrative remedies before a land use decision can be appealed. Under RCW 36.70C.120(1), LUPA confines review of land use decisions to the record created in a proceeding where the parties had “an opportunity consistent with due process to make a record on the factual issues”. This limitation has the same meaning as the exhaustion of administrative remedies doctrine. *See Scarsella Bros., Inc. v. Department of Licensing*, 53 Wn. App. 882, 886 n. 4, 771 P.2d 760 (1989); *and Peste v. Mason County*, 133 Wn. App. 456, at 467, 136 P.3d 140 (2006).

The exhaustion doctrine is founded on the belief that the judiciary should give deference to a body possessing expertise in areas outside the conventional expertise of judges. *South Hollywood Hills Citizens v. King County*, 101 Wn.2d 68, at 73, 677 P.2d 114 (1984); *Retail Store*

*Employees Local 1001 v. Washington Surveying & Rating Bur.*, 87 Wn.2d 887, 906, 558 P.2d 215 (1976) (citing *Robinson v. Dow*, 522 F.2d 855, 857 (6th Cir. 1975)).

The United States Supreme Court recognized in *McKart v. United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969), that the policies underlying this principle: (1) insure against premature interruption of the administrative process; (2) allow the agency to develop the necessary factual background on which to base a decision; (3) allow exercise of agency expertise in its area; (4) provide for a more efficient process; and (5) protect the administrative agency's autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts. *McKart*, 395 U.S. at 193-94; *South Hollywood Hills Citizens*, 101 Wn.2d at 73-74.

In Washington, it is well established that when a party appeals an administrative decision, it may not raise an issue that was not presented at the administrative level. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997) (“prior to judicial review of an administrative action, the appropriate issues must first be raised before the agency.”) Recently, the Court of Appeals reiterated that “an issue not raised in a contested case before the Board (of Health) may not be raised for the first time on review of the Board's decision.” *Griffin*

*v. Thurston County*, 137 Wn. App. 609, 154 P.3d 296 (2007) (citing *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 201 n.4, 884 P.2d 910 (1994)); see also *Washington Shell Fish, Inc. v. Pierce County*, 132 Wn. App. 239, 260, n. 29, 131 P.3d 326 (2006) (citing *Orion Corp. v. State*, 109 Wn.2d 621, 632, 747 P.2d 1062 (1987) (failure to raise a taking issue at the administrative level precludes it being raised in a judicial appeal); *Leschi Imp. Council v. Wash. State Hwy. Comm'n*, 84 Wn.2d 271, 274, 525 P.2d 774 (1974) (“The general rule is that objections or questions which have not been raised or urged in the proceedings before the administrative agency or body will not be considered by the court on review of the order of such agency or body”).

**b. If the proper issue had been raised at the administrative level, the City had the necessary evidence of impacts to support the open space condition.**

It was especially important to correctly apply the exhaustion doctrine here because evidence that the open space condition was reasonably necessary as a direct result of the Dove Hill plat did exist, and this evidence was presented to the superior court in opposition to Isla Verde’s motion for summary judgment. CP 86-93, & CP 108-117. At the administrative level in 1995, the City was misled by Isla Verde’s silence on the evidence issue and its reliance on the irrelevant “duplicative exactions” argument, and the City failed to present the available evidence

into the administrative record at that time. CP 389 (superior court's Ruling on Motion for Summary Judgment at 2: "(h)ere, the City could assume that the set off of 30% was voluntary.") Allowing a plaintiff to obtain summary judgment on an issue it had not raised at the administrative level, where the evidentiary omission that resulted in invalidation of the challenged condition could have been avoided if the issue had been raised, violates the fundamental purposes of the exhaustion doctrine.

Because Isla Verde did not raise the proper issue at the administrative level, *i.e.*, whether the open space set-aside condition had to be based on evidence that it was "reasonably necessary as a direct result" of its proposed subdivision (RCW 82.02.020), it should not have been able to rely on that basis to establish that the open space condition was "unlawful" for its post-appeal assertion of a claim under RCW 64.40.

As shown above by the quotations from the superior court's memorandum opinion,<sup>10</sup> the court was fully apprised of the fact that at the administrative level, Isla Verde failed to raise the issue that the open space set-aside condition was not based on evidence that it was "reasonably necessary as a direct result" of the development in question. RCW

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<sup>10</sup>Reiterating, the Court said: "(p)rior to appealing to the Superior Court, petitioner did not object to the 30% dedication", and, "(h)ere, the City could assume that the set off of 30% was voluntary." CP 389.

82.02.020. The court simply excused that failure without explanation.

Ignoring Isla Verde's failure to raise the proper issue at the administrative level was error that requires reversal of the Order granting summary judgment.

**c. Isla Verde did not plead a RCW 64.40 claim as to the open space condition.**

In addition, Isla Verde did not plead a claim based on RCW 64.40 as to the open space set-aside condition in its Petition for Review (*see* CP 5). The Court of Appeals' first decision in this case recognized that by omitting any discussion in its opinion of RCW 64.40 in relation to the open space condition, even though the Court ruled in Isla Verde's favor that the condition was invalid. *See* CP 266 (99 Wn. App. at 127). Instead, the Court of Appeals addressed RCW 64.40 only in connection with the other condition at issue (*i.e.*, the secondary access condition), because that was the only issue which was connected to a claim under RCW 64.40. *See* Petition for Review, CP 5. The Court rejected Isla Verde's claim under RCW 64.40 as to the secondary access condition, and denied its request for attorney's fees based on RCW 64.40.020(2), "because Isla Verde's claim under RCW 64.40 failed". CP 279-80 (99 Wn. App. at 143). By those rulings, the Court of Appeals recognized that no RCW 64.40 claim had been asserted in relation to the open space set-aside condition which had been declared invalid. Accordingly, Isla Verde never

had a RCW 64.40 claim to present to the superior court in relation to the open space condition, whether by summary judgment motion or otherwise. Obviously, summary judgment should not have been granted to Isla Verde on such a claim.

**4. The superior court erred in granting Isla Verde's motion for summary judgment because the facts and the law do not support a conclusion that the City knew or should have known that the 30% open space condition was unlawful.**

**a. The City presented evidence establishing a genuine issue of material fact as to the "knowledge of unlawfulness" element of a RCW 64.40 claim.**

The specific objective of Isla Verde's motion for summary judgment was to obtain a ruling consistent with the words of RCW 64.40.020(1), that the City's decision to impose a 30% open space condition, "was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority." CP 15 & CP 19.

In support of this "knowledge" standard of RCW 64.40.020(1), Isla Verde presented no evidence of actual knowledge of unlawfulness in the City's decision to adopt the 30% open space condition. Instead, Isla Verde relied a constructive notice theory based on:

(t)he existence of well-established, controlling law precluding the blanket 30% set aside, and the reliance by the City on arguments that had already been repeatedly rejected by the courts, demonstrates that the City knew or reasonably should have known

that the condition was unlawful when imposed.

CP 23. Isla Verde cited seven decisions of the Washington Supreme Court and Court of Appeals issued before the City's decision to require the open space condition on the Dove Hill subdivision, and argued that those cases gave the City the knowledge necessary under RCW 64.40.020(1).<sup>11</sup> CP 20-21.

“What will constitute constructive notice will vary with time, place, and circumstance.” *Albin v. National Bank of Commerce of Seattle*, 60 Wn.2d 745, at 748, 375 P.2d 487 (1962). Constructive notice is generally a question of fact for the jury. *Morton v. Lee*, 75 Wn.2d 393, 397, 450 P.2d 957 (1969).

The City responded to Isla Verde's motion for summary judgment with evidence that countered the “knowledge” element of RCW 64.40.020(1). That evidence consisted primarily of the declaration of City Attorney, Roger D. Knapp. CP 86-93. In the Knapp declaration, the City Attorney stated:

If the plaintiffs had made a timely objection to the 30% open space set-aside, the City could have submitted into the record the studies and reports leading to adoption of CMC 18.62.020 (which established the 30% open space requirement for subdivisions).

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<sup>11</sup>In support of the “knowledge” element, Isla Verde also cited reported decisions issued after the City imposed the open space condition on the Dove Hill plat, including the Court of Appeals and Supreme Court decisions in this case, thereby contributing to the superior court's error in granting summary judgment against the City liable for its litigation decisions and actions. *See* CP 22.

Those materials were developed and utilized by City planners and the City Council in connection with adoption of zoning regulations for what has been called the "Vancouver View" area of the City. The 30% requirement followed from an analysis of the Vancouver View area showing that 30.5% of the entire 3090 acre study area (made up of 37 sub-areas) consisted of slopes of a degree between 15% and 45%, and forested areas with significant wildlife habitat. The 30% requirement mirrored the degree to which those characteristics existed, and was adopted to encourage preservation of some of such lands on each subdivision site. The area of the Dove Hill subdivision was immediately south of the southern boundary of sub-areas 34 (105 acres) and 35 (111 acres) of the study area. Those sub-areas had slopes and forested areas equal to 50% and 60% of their total area. The Dove Hill property had similar slope, forest, and habitat characteristics. Attached hereto as Exhibit D, are true and correct copies of portions of the Vancouver View study report related to the open space set-aside requirement, including the ordinance I drafted which became CMC 18.62.020. Alternatively, the City could have required the plaintiffs to perform a Dove Hill site-specific study to determine the exact percentage of that parcel which had the kind of slope, forest, and habitat characteristics which the 30% open space set-aside sought to preserve. Again, the lack of an objection to the open space set-aside requirement itself left the City with no suggestion that such a study was needed.

CP 91. The pertinent part of the study identified and explained in the Knapp declaration was attached to it as an exhibit. CP 108.

Mr. Knapp's declaration continued:

The City Council had no basis to "know," nor should it have known, that the 30% open space set-aside requirement was improper as applied to the Dove Hill subdivision because the plaintiffs did not assert that it was improper, aside from their complaint that the combination of the set-aside requirement with the City's park and open space impact fee amounted to duplicative costs. That narrowly limited complaint was raised late in the administrative plat review process and was recognized as invalid due to the separate and distinct nature of the impact fee, described above. Moreover, that complaint was determined to be invalid by

the Court of Appeals. In addition, the 30% open space set-aside had been applied, without challenge, to twelve other subdivisions in Camas before the Dove Hill subdivision was conditionally approved in July 1995. Furthermore, neither the Court of Appeals or the Supreme Court ruled that the open space set-aside ordinance was invalid on its face.

CP 92-93.

The fact that evidence did exist which supported the open space ordinance referred to in the Knapp declaration fully justified the City in believing that the 30% open space requirement was legally valid. It provided no basis for the City to believe that the requirement was unlawful. Moreover, Isla Verde's single, narrow and irrelevant objection to the open space condition (discussed at Part 3, *supra*), did not provide a basis for such knowledge either.

Additionally, the study referred to in the Knapp declaration had originally been relied on to support the City's ordinance requiring open space equal to 30% of a subdivision's area. CP 91. Since that was the ordinance which applied to the Dove Hill subdivision, the City's open space condition in this case was based on an ordinance which itself was supported by evidence. This means that the condition was not a "requirement( ), limitation( ), or condition( ) upon the use of real property in excess of those allowed by applicable regulations". RCW 64.40.010(6), emphasis added (defining the kinds of "acts" that may produce liability under RCW 64.40). Instead, the open space condition was specifically

allowed by the City's applicable regulatory ordinance. This put the Dove Hill plat's open space condition into the same status as the ordinance challenged but upheld in *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994).

In *Trimen*, a regulatory fee in lieu of dedication of land was imposed for park development purposes on approval of two subdivisions. The fee was upheld under the "reasonably necessary as a direct result of the proposed development or plat" requirement of RCW 82.02.020 (the same requirement relied upon by the Supreme Court to invalidate the open space condition in this case due to insufficient evidence supporting the condition). 124 Wn.2d at 275. The *Trimen* Court found the requisite evidence of necessity in a "comprehensive assessment" by King County that determined park needs in the area of the Trimmen subdivisions and concluded that there was a deficit of park space in that area. 124 Wn.2d at 274. The Court did not require a site-specific study to justify the fee-in-lieu of park space dedication. *Id.*

In the summary judgment proceeding in this case, Isla Verde did not dispute the evidence presented in and with the Knapp declaration about the City's "comprehensive assessment" of sensitive lands that led to the 30% open space ordinance which was applied to the Dove Hill subdivision. That evidence of the basis for the City's open space

ordinance shows that it fit the model of *Trimen v. King County, supra.*, and it demonstrates that the City had no basis for believing that the open space condition on the Dove Hill subdivision was “unlawful or in excess of lawful authority.” RCW 64.40.020(1).

The Knapp declaration also shows that if Isla Verde had objected to the lack of evidence showing that the open space condition was reasonably necessary as a direct result of the Dove Hill subdivision, the City could have submitted its open space study into the administrative record as the same kind of evidence utilized in *Trimen* to justify the open space condition. Speaking to this issue, City Attorney Knapp said in his declaration:

If the plaintiffs had made a timely objection to the 30% open space set-aside, the City could have submitted into the record the studies and reports leading to adoption of CMC 18.62.020 (which established the 30% open space requirement for subdivisions).

CP 91.

The undisputed evidence of the Knapp declaration and exhibits established that there was a genuine issue of material fact relating to the “knew or should have known” element of RCW 64.40.020. At a minimum, this should have precluded summary judgment in Isla Verde’s favor. But that evidence was ignored by the superior court. Accordingly, the summary judgment granted to Isla Verde was erroneous.

**b. The cases relied on by Isla Verde in support of the “knowledge” element of a RCW 64.40 claim involved materially different conditions on development approval.**

The City’s response to Isla Verde’s motion for summary judgment also addressed the knowledge element of RCW 64.40.020, by analyzing how the cases cited by Isla Verde were distinguishable on the basis that none of them involved a no-cost condition that did not require a dedication of the open space area to public use. CP 76-82; *and see* CP 93 (City Attorney Knapp’s declaration).

In addition, no case prior to the Washington Supreme Court’s decision in this action had held that a “no cost, no dedication, no public use” condition could be deemed an “in kind equivalent” to a “tax, fee, or charge” (RCW 82.02.020), subject to the evidentiary requirements of that statute. Thus, the City demonstrated to the superior court that the cases Isla Verde relied on could not have imparted the knowledge necessary to support the RCW 64.40 claim.

In reply to the City’s evidence challenging the motion for summary judgment, Isla Verde failed to particularize its arguments to the circumstances of this case or to demonstrate that any case prior to the Supreme Court’s ruling in this action held that such a “no cost, no dedication, no public use” condition was subject to the evidentiary requirement of RCW 82.02.020. But the superior court addressed the

“notice” cases cited by Isla Verde simply by saying:

Once this issue was raised (in the court proceedings), the City had the option of withdrawing the condition or appealing the Superior Court’s decision. The City elected to appeal not only the Superior Court but also that of the Court of Appeals. Clearly, at this juncture, the City should have known that the ordinance as applied was invalid. The wealth of reported case law in existence at this time supports this conclusion. Thus I find that the City’s actions in defending the ordinance after the issue was raised, invokes the ramifications of RCW 64.40. In proceeding in this manner I am persuaded by the ruling in *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992).

CP 389.

At a minimum, the City’s evidence and the disparity between the circumstances of this case and the cases cited by Isla Verde as providing notice of invalidity, created genuine issues of material fact which should have precluded summary judgment in favor of Isla Verde.

**5. The superior court erred in granting summary judgment because Isla Verde failed to present evidence supporting the essential elements of damages and causation.**

In its cross-motion for summary judgment, the City contended that Isla Verde did not have evidence that the City caused damages to it as defined by RCW 64.40.020. CP 82-83; CP 93. Isla Verde failed to respond to that contention with evidence of damages or causation. *See* CP 337; and see Isla Verde’s argumentative assertions at CP 345.

Damages and causation are essential elements of a RCW 64.40 action. RCW 64.40.010(4) provides:

Damages must be caused by an act, necessarily incurred, and actually suffered, realized, or expended, but are not based upon diminution in value of or damage to real property, or litigation expenses.

Moreover, compensable damages under RCW 64.40 may not include “speculative losses or profits, incurred between the time a cause of action arises and the time a holder of an interest in real property is granted relief as provided in RCW 64.40.020.” RCW 64.40.010(4). Instead, the damages must have been “actually suffered, realized, or expended,” and they cannot consist of the “diminution in value of or damage to real property, or litigation expenses.” *Id.*

Isla Verde’s claim for damages is speculative and lacks a causal relationship to the invalid open space condition. The City appealed all of the superior court’s rulings against it in 1998. The Court of Appeals reversed the superior court on the secondary access condition, as the City requested, but upheld invalidation of the open space set-aside condition on the basis that it was an unconstitutional taking. Isla Verde contested the City’s arguments to the Court of Appeals on the valid secondary access condition and cross-petitioned the Supreme Court for review of the Court of Appeals’ decision holding that the condition was valid. (*See* CP 249, “Respondents’ (Isla Verde) Answer to Appellant’s (City) Petition for Review” to the Washington Supreme Court.) The Supreme Court affirmed the Court of Appeals’ decision upholding the validity of the

secondary access condition. Therefore, Isla Verde's litigation actions contributed as equally to the time this lawsuit took to reach finality as did the City's, and each party prevailed on one issue and lost on another. Given this equal success and failure, Isla Verde cannot establish a causal connection between the City's act of imposing what ultimately proved to be one valid condition and one invalid condition, and whatever damages allegedly arose over the time the litigation took before it could develop the Dove Hill property. This equal contribution to the time required to resolve the LUPA appeal issues does not allow causal linkage solely to the invalid open space condition.

Alternatively, if Isla Verde contended that it had damages which skirted the causation conundrum discussed above, and did not run afoul of the severe limits on compensable damages imposed by RCW 64.40.010(4),<sup>12</sup> they were required to present proof of those damages in response to the City's assertion in the summary judgment proceedings that there were no compensable damages. CP 82-83. But in response to the City's contention that there were no compensable damages, Isla Verde merely argued:

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<sup>12</sup>Under RCW 64.40, damages may not be awarded for "speculative losses or profits, incurred between the time a cause of action arises and the time a holder of an interest in real property is granted relief as provided in RCW 64.40.020." RCW 64.40.010(4). The damages must have been "actually suffered, realized, or expended," and they cannot consist of the "diminution in value of or damage to real property, or litigation expenses." *Id.*

The opportunity costs associated with having a very significant real estate investment tied up for such an extended period clearly demonstrates that Petitioners (Isla Verde) incurred damages. The extent and amount of those damages will be established at trial.”

CP 345-46.

Isla Verde provided no evidence of damages and no analysis of the causation issue. Therefore, it failed to satisfy its obligation to support those essential elements of a RCW 64.40 claim. Since a plaintiff must establish the essential elements of its claim when those elements are challenged in a summary judgment motion, judgment should not have been granted in favor of Isla Verde. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (adopting summary judgment standard in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 265 (1986)). All elements of a statutory claim must be established in order for a plaintiff to be entitled to relief. *Campbell v. Seattle Engine Rebuilders & Reman., Inc.*, 75 Wn. App. 89, 876 P.2d 948 (1994) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986) (both Consumer Protection Act claims)).

Damages are one of the essential elements of a RCW 64.40 claim because that is its essential purpose (see title to RCW Chapter 64.40: “Property Rights--Damages from Governmental Actions”), just as damages are an essential element of a common law negligence claim. See *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 61, 738 P.2d 665 (1987)

(where injury and damages are essential elements of a statutory anti-trust claim their absence precludes the claim); *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984) (essential elements of actionable negligence include proof of injury caused by breach of duty of care); *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976) (same). This also requires the showing of a reasonable probability of a causal connection between the act in question and a loss by the plaintiff. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d at 61. Necessarily then, if Isla Verde could not establish causation and damages, its motion for summary judgment should have been denied.

Although this issue was raised as a basis for granting the City's motion for summary judgment and dismissing the remaining issues in this case (CP 83-84), Isla Verde should not have been granted summary judgment where it presented no evidence in support of the essential causation and damages elements of its RCW 64.40 claim.

#### **D. Conclusion**

The superior court erred in four ways in granting Isla Verde's motion for summary judgment. First, the court erred by concluding that the City's litigation conduct was an "act" which could produce liability under RCW 64.40. Second, the court erred by failing to properly apply the exhaustion of administrative remedies doctrine after recognizing that

Isla Verde failed to raise the issue on which their RCW 64.40 claim is based at the administrative level. Third, the court erred by concluding that the City knew or should have known that the 30% open space condition was unlawful. Fourth, the court erred by failing to recognize that Isla Verde did not present evidence to support the essential elements of causation and damages for its RCW 64.40 claim.

The superior court's order granting summary judgment should be reversed and this action should be remanded with appropriate instructions.

Respectfully submitted this 7<sup>th</sup> day of November, 2007.

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.



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W. Dale Kamerrer, WSBA N<sup>o</sup> 8218  
Attorney for the City of Camas, Washington

# **APPENDIX A**

RECEIVED

AUG 31 2007

Law, Lyman, Daniel  
Kamerrer & Bogdanovich

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ISLA VERDE INTERNATIONAL HOLDINGS, LTD., A FOREIGN CORPORATION, AND CONNAUGHT INTERNATIONAL HOLDINGS, LTD., A FOREIGN CORPORATION,,  
Respondents,

v.

CITY OF CAMAS, WASHINGTON, A MUNICIPAL CORPORATION OF THE STATE OF WASHINGTON,  
Petitioner.

No. 36066-7-II

ORDER GRANTING MOTION TO MODIFY

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

**PETITIONER** has filed a motion to modify a Commissioner's ruling dated May 29, 2007, in the above-entitled matter. Following consideration, this court grants discretionary review of the trial court's order granting Isla Verde's motion for summary judgment and denies discretionary review of the trial court's order denying the City's cross-motion for summary judgment. The Clerk will issue a perfection schedule.

**SO ORDERED**

DATED this 30<sup>th</sup> day of August, 2007.

PANEL: Jj. Quinn-Brintnall, Van Deren, Penoyar

FOR THE COURT:

Van Deren A.C.J.  
ACTING CHIEF JUDGE

cc: Jeffrey Thomas Lindberg  
Le Anne Marie Bremer  
William Dale Kamerrer

NO. 36066-7-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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ISLA VERDE INTERNATIONAL HOLDINGS, LTD.,  
a foreign corporation and  
CONNAUGHT INTERNATIONAL HOLDINGS, LTD.,  
a foreign corporation,

Respondents,

v.

CITY OF CAMAS, WASHINGTON,  
a municipal corporation of the State of Washington,

Appellant.

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On Appeal from Clark County Superior Court  
Cause No. 95 2 03438 5

DECLARATION OF FILING & SERVICE

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Law, Lyman, Daniel, Kamerrer &  
Bogdanovich, P.S.  
P.O. Box 11880  
Olympia, WA 98508-1880  
(360) 754-3480  
Attorney for the City of Camas

November 7, 2007

PURSUANT TO RCW 9A.72.085, Toni Allen declares as follows:

On Wednesday, November 7, 2007, I caused to be filed with the Clerk of Court, Court of Appeals, Div. II, 950 Broadway, Suite 300, M.S TB-06, Tacoma, WA 98402-4454, via ABC Legal Messenger, to arrive no later than Thursday, November 8, 2007, true and correct originals and/or copies of the Brief of Appellant and this Declaration of Filing & Service. On this same date, I caused to be served on respondents by depositing the same in the United States Mail, postage prepaid, from Tumwater, Washington:: LeAnne Bremer and Joseph Vance, Miller Nash LLP, 500 E. Broadway, Suite 400, P.O. Box 694, Vancouver, WA 98666-0694.

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

DATED this 7<sup>th</sup> day of November, 2007 at Tumwater,  
Washington.

  
\_\_\_\_\_  
Toni Allen