

No. 36066-7-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

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

Respondents,

v.

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

Appellant.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The City of Camas (the "City") adopted an ordinance — Camas Municipal Code § 18.62.020 — that required every landowner to set aside 30 percent of its land for parks and open space as a condition of obtaining subdivision approval. Notwithstanding express statutory language, and a line of Washington appellate court decisions that prohibited such a blanket condition, the City applied the 30 percent set-aside to the proposed residential subdivision of plaintiffs, Isla Verde International Holdings, Ltd. and Connaught International Holdings, Ltd. (collectively, "Isla Verde"). Isla Verde challenged the City's condition, and the superior court, this court, and the Washington Supreme Court all held that under well-established law, the City's action was unlawful.

On remand to the superior court for consideration of Isla Verde's damages claim, Isla Verde moved for partial summary judgment establishing the City's liability for violation of RCW 64.40. The question presented by the motion was whether the City knew or should have known that the 30 percent set-aside was unlawful given that there was no record that justified the imposition of the condition. The superior court correctly decided as a matter of law that the City knew or should have known that

the imposition of the set-aside condition was unlawful and that the City was therefore liable under RCW 64.40.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Isla Verde owned real property in Camas. Isla Verde submitted an application to the City for a 51-lot subdivision to be called Dove Hill. The City Council initially denied the application but soon changed course and approved it subject to a number of conditions, including that Isla Verde set aside 30 percent of the property for open space. Isla Verde challenged this condition, and as noted, the superior court, this court, and the Washington Supreme Court all agreed that the condition was unlawful.

As the Washington Supreme Court held, the City failed to conduct the analysis required by RCW 82.02.020.¹ Specifically, the City failed to demonstrate that the 30 percent set-aside was “reasonably necessary as a direct result of the proposed development.”² Additionally, the court found that the City failed to conduct a comprehensive assessment of park and open-space needs. Under the well-established case law, such an

¹ *Isla Verde v. City of Camas*, 146 Wn.2d 740, 759, 49 P.3d 867 (2002).

² RCW 82.02.020.

assessment could have satisfied the City's legal burden of linking the open-space condition to impacts of the proposed subdivision.³ As the court of appeals observed, "the record here is devoid of evidence of studies or formulas showing a reasonable relationship between the impact of Dove Hill and the 30 percent set-aside requirement."⁴

The summary judgment motion at issue on this appeal relates to the second phase of this case. In its land use petition challenging the City's conditions of approval, Isla Verde asserted a claim for damages under RCW Chapter 64.40. Under this statute, the City is liable for Isla Verde's damages and attorney fees because it knew or should have known that the 30 percent set-aside was unlawful given that there was no required record that justified the imposition of the condition on Isla Verde.

B. CHRONOLOGY OF KEY APPELLATE RULINGS

The following chronology of key appellate decisions demonstrates that before the City imposed the unlawful condition, the City knew or should have known that the blanket 30 percent set-aside was unlawful.

³ *Id.* at 760 (citing *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994)).

⁴ *Isla Verde v. City of Camas*, 99 Wn. App. 127, 141, 990 P.2d 429 (1999), *aff'd*, 146 Wn.2d 740 (2002).

April 16, 1987	Supreme court holds that RCW 82.02.020—which prohibits municipalities from taxing the “development, subdivision, classification, or reclassification of land”—applies to taxes, fees, or charges imposed <i>in kind</i> . <i>San Telmo Assocs. v. City of Seattle</i> , 108 Wn.2d 20, 24, 735 P.2d 673 (1987).
August 21, 1990	Court of appeals holds that—under RCW 82.02.020—municipalities must show that required exactions mitigate the <i>direct impact of the development</i> . <i>Southwick, Inc. v. City of Lacey</i> , 58 Wn. App. 886, 895, 795 P.2d 712 (1990).
November 4, 1991	Court of appeals holds that a requirement to pay for road improvements violated RCW 82.02.020 because it was not necessitated by the <i>direct impact of the proposed project</i> . <i>Cobb v. Snohomish County</i> , 64 Wn. App. 451, 459, 829 P.2d 169 (1991).
October 19, 1992	Court of appeals upholds an ordinance requiring construction of on-site recreational facilities, or payment in lieu thereof, but only because this condition was shown to mitigate a <i>direct impact of the development</i> . <i>View Ridge Park Assocs. v. Mountlake Terrace</i> , 67 Wn. App. 588, 598, 839 P.2d 343 (1992).

July 21, 1994	Supreme court upholds an ordinance requiring dedication of land for open space, or payment in lieu thereof, because the requirements were “reasonably necessary as a direct result of Trimén’s development. ” <i>Trimén Dev. Co. v. King County</i> , 124 Wn.2d 261, 274, 877 P.2d 187 (1994).
July 21, 1994	Supreme court holds that a per-lot park-impact fee violated RCW 82.02.020 because the city “did not undertake any understandable analysis to identify the direct impacts of the developments. ” <i>Henderson Homes, Inc. v. City of Bothell</i> , 124 Wn.2d 240, 244-45, 877 P.2d 176 (1994).
August 22, 1994	Court of appeals holds that the imposition of a per-lot traffic impact fee was a “clear violation of the plain and unambiguous language of RCW 82.02.020” because it was based on the cumulative impact of all new developments, not just the specific development. <i>Castle Homes & Dev., Inc. v. City of Brier</i> , 76 Wn. App. 95, 106, 882 P.2d 1172 (1994).
July 7, 1995	Camas City Council denies Isla Verde’s Dove Hill subdivision application because, <i>inter alia</i> , it fails to comply with Camas’s blanket ordinance requiring 30 percent of the property to be set aside for open space.
July 24, 1995	Camas City Council, sua sponte, reconsiders its denial and approves the Dove Hill subdivision, but it requires Isla Verde to set aside 30 percent of the property for open space.

August 8, 1995	Isla Verde sues the City, challenging the conditions and requesting an award of damages and attorney fees and costs, on the grounds that Dove Hill causes <i>no specific adverse impacts</i> to parks and open space, so the City cannot lawfully demand mitigation in cash or in kind.
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III. ARGUMENT

A. THE SUPERIOR COURT CORRECTLY FOUND THE CITY LIABLE UNDER RCW 64.40 FOR IMPOSING AND CONTINUING TO ENFORCE AN UNLAWFUL PERMIT CONDITION

The City is liable under RCW 64.40 because it imposed and continued to enforce an unlawful permit condition, not for its litigation conduct as the City argues. In an effort to create a straw-man argument, the City ignores its actions related to the unlawful-permit condition and argues instead that the superior court imposed liability under RCW 64.40 based on its litigation conduct.

The City's argument was rejected by the superior court in its ruling on motion for reconsideration:

As stated in the original ruling on Summary Judgment, it was the insistence of the City in attempting to enforce the ordinance that constituted the "act" as contemplated by the statute. 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. It is this act of enforcement not the appeals that violated the statute.⁵

Division I of the Court of Appeals in *Callfas v. Department of Construction and Land Use*⁶ explained what the statute so clearly provides:

That "act" may either be a "final decision" on an application or a "failure . . . to act within time limits established by law" when processing a land use permit application. RCW 64.40.010(6). When the "final decision" as defined by RCW 64.40.010(6) is "arbitrary, capricious, unlawful or exceed[s] lawful authority," the applicant has a valid claim under RCW 64.40.020(1).

Here, the "act" that the superior court, this court, and the Washington Supreme Court found unlawful in the LUPA action was the City's imposition of the 30 percent set-aside condition despite its failure to establish a record that justified the imposition of that condition. Even though the City had a right to appeal the trial court's ruling, the City's appeals did not change the fact that the act of imposing the condition was unlawful.

Moreover, the act of appealing did not insulate the City from liability for imposing and enforcing a condition that it should have

⁵ Clerk's Papers ("CP") 415.

⁶ 129 Wn. App. 579, 592, 120 P.3d 110 (2005).

reasonably known was unlawful. According to the City's argument, all a municipality would need to do in order to avoid liability under RCW 64.40 would be to litigate any challenges to its land use decisions even if that land use decision is eventually found to be lawful. Obviously, that is not the law.

The legislature has determined that a municipality is liable for damages when it knew, or reasonably should have known, that it was imposing an unlawful land use condition. When a municipality, such as the City, engages in such conduct, it is liable regardless of whether it engages in litigation to defend its actions. It is liable not because of its decision to litigate, but because of its decision to impose and enforce the unlawful condition.

B. THE SUPERIOR COURT CORRECTLY FOUND THAT THE CITY KNEW OR SHOULD HAVE KNOWN THAT THE SET-ASIDE CONDITION WAS UNLAWFUL

1. The supreme court has already determined that the set-aside condition imposed by the City was unlawful.

The supreme court has already confirmed that the City's imposition of a 30 percent set-aside condition in this case violated RCW 82.02.020.⁷

⁷ *Isla Verde*, 146 Wn.2d at 765.

Accordingly, that issue has already been decided, and despite the City's attempts, there is no basis for relitigating that issue at this phase of the case.

RCW 82.02.020 prohibits municipalities from imposing taxes, fees, or charges, directly or indirectly, on the development, subdivision, classification, or reclassification of land. There are several narrow exceptions, all of which require the municipality to establish that the dedication of land or payment in lieu thereof is reasonably necessary as a direct result of the proposed development.

In direct contravention of this statute, the 30 percent set-aside that the City imposed in this case was a blanket condition that it applied to all subdivisions, without regard to individual site conditions. The supreme court held that the condition was unlawful because it was an in-kind tax subject to the restrictions of RCW 82.02.020. Moreover, this in-kind tax did not fall within any of the statute's exceptions

[b]ecause the City has failed to establish that the 30 percent open space set aside is reasonably necessary as a direct result of the proposed subdivision or reasonably necessary

to mitigate a direct impact that is a consequence of the proposed subdivision.⁸

2. The City knew or should have known that imposing the condition without a record that justified its imposition on Isla Verde was unlawful.

a. *The City knew or should have known that the condition was unlawful.*

As noted, the plain language of the statute, as well as a line of Washington appellate decisions, clearly establishes that state law preempted exactions such as the blanket 30 percent set-aside. Those decisions, taken together, clearly articulate that the taxes and fees proscribed in RCW 82.02.020 can be in kind as well as in dollars,⁹ that municipalities must show that required exactions mitigate the direct impact of the development,¹⁰ and that those exactions shown to mitigate a direct impact of the development are lawful,¹¹ while those that are simply

⁸ *Id.* at 759.

⁹ *San Telmo*, 108 Wn.2d at 24.

¹⁰ *Southwick*, 58 Wn. App. at 895; *Cobb*, 64 Wn. App. at 459; *Henderson Homes*, 124 Wn.2d at 244-45; *Castle Homes*, 76 Wn. App. at 106.

¹¹ *View Ridge*, 67 Wn. App. at 598; *Trimen*, 124 Wn.2d at 274.

applied to all developments without consideration of the developments' impact are not lawful.¹²

That was the state of the law as of 1994, the year *before* the City imposed the unlawful condition. The City is charged with knowledge of that state of the law.¹³ Or, to invoke the maxim so often invoked by the government, "ignorance of the law is no excuse." The Washington Supreme Court has specifically held that a city is presumed to act with knowledge of existing decisional law.¹⁴ In light of that presumption, and the well-developed state of the law outlined above, the City knew that the blanket 30 percent set-aside condition was unlawful when it imposed the condition in 1995. Thus, the City is liable for any damages incurred as a result of the imposition of that unlawful condition.

While Washington courts have not specifically analyzed the "should have known" standard under RCW 64.40, the same principle is

¹² *Southwick*, 58 Wn. App. at 895; *Cobb*, 64 Wn. App. at 459; *Henderson Homes*, 124 Wn.2d at 244-45; *Castle Homes*, 76 Wn. App. at 106.

¹³ See e.g. *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 661, n.26, 101 S. Ct. 1287 (1981) ("After all, if a policeman must know the Constitution, then why not a planner?") (Brennan, J., dissenting).

¹⁴ *State ex rel. Bradway v. De Mattos*, 88 Wash. 35, 42, 152 P. 721 (1915) (city officials held to constructive knowledge of previous supreme court decisions holding city not generally liable for failure of special improvement district funds).

found in the federal qualified immunity doctrine, which provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁵ This test avoids a subjective analysis of what the official knew and instead focuses on what the official should reasonably have known. A presiding judge must evaluate the applicable law and determine whether the law is clearly established.

If it is clearly established, qualified immunity will not apply to violations of the law because "a reasonably competent public official should know the law governing his conduct."¹⁶ A law need not have been previously held unlawful for a reasonable official to know of its unlawfulness, but the unlawfulness must be apparent in light of preexisting law.¹⁷

¹⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

¹⁶ *Id.* at 819.

¹⁷ *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

Washington courts have applied the "should have known" standard in the qualified immunity context on several occasions. The supreme court held that a law was not clearly established because:

No appellate court has previously construed the meaning of resistance in [former] RCW 10.75.040 nor has the Supreme Court ever explicitly applied the Fourth Amendment warrant requirement to an arrest for a misdemeanor committed outside of the officer's presence.¹⁸

The officer was therefore able to use the qualified immunity defense because it did not violate clearly established rights that a reasonable person would have known about.

In *Edwards v. Department of Transportation*,¹⁹ the court evaluated the "objective legal reasonableness of an official's acts" to determine whether "the official knew or should have known of the relevant legal standard."²⁰ The Court held that because the U.S. Supreme Court had stated in a 1968 case that public employees had a clearly established First Amendment right to comment on matters of public interest and it had established the scope of such rights in a subsequent case, thus it was not

¹⁸ *Staats v. Brown*, 139 Wn.2d 757, 773, 991 P.2d 615 (2000).

¹⁹ 66 Wn. App. 552, 832 P.2d 1332 (1992).

²⁰ *Id.* at 565.

reasonable for the defendant to discipline the plaintiff for exercising his First Amendment rights.

Thus, in *Staats*, the court held that the law governing the false-arrest claim was not clearly established because no appellate court had previously ruled on the particular question of law. In contrast, the *Edwards* court held that, as a matter of law on summary judgment, the official should have known of a 1968 U.S. Supreme Court case deciding the issue and a subsequent case defining the scope of the holding. Those cases demonstrate that the Washington Supreme Court continues to hold that public officials are presumed to have knowledge of controlling decisional law and must to conform their conduct to those decisions.

The facts of this case are even more compelling. The illegality of the City's open-space requirement was clearly established by a line of supreme court and court of appeals decisions before the condition was imposed. The law was thus clearly established, and as a matter of law, the City should have known about it.²¹

²¹ The City cites *Morton v. Lee*, 75 Wn.2d 393, 397, 450 P.2d 957 (1969), for the proposition that constructive notice is generally a question of fact for the jury. But *Morton* involved the issue whether a defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care. That is much different from the issue whether a law is clearly established for purposes of putting a city

b. *The City's argument that it presented evidence establishing a genuine issue of material fact as to the "knowledge of unlawfulness" is without merit.*

The City argues that through the submission of the declaration of the City's attorney, Roger A. Knapp, it created an issue of fact as to the "knowledge" element of RCW 64.40. But the Knapp declaration did not, and could not, create an issue of fact as to the City's constructive knowledge of the law.²² Mr. Knapp's declaration merely gives excuses as to why the City did not establish a record that justified its imposition of the set-aside condition. Those excuses do not go to the "knowledge" element: they go to the issue whether the imposition of the set-aside condition was legal. As discussed above, the City has already lost that argument at the supreme court. What matters at this stage of the case is whether the City reasonably should have known that it was required to create a record that justified the imposition of the set-aside condition. Nothing in the Knapp declaration creates an issue of fact as to that issue.

on constructive notice that its conduct is unlawful. See e.g. *Staats*, 139 Wn.2d at 757 (issue of whether law was clearly established was question of law); *Edwards*, 66 Wn. App. 552 (same).

²² The state of the law at the time the City imposed the condition is a matter of record and undisputable. Nothing that Mr. Knapp could say in his declaration would create an issue of fact as to that issue.

Moreover, there is no dispute that the City did not demonstrate that the 30 percent set-aside condition was "reasonably necessary as a direct result of the proposed development."²³ The City's reliance on the Vancouver View study attached to the Knapp declaration does not help its argument. First, the study, and its inclusion with the Knapp declaration, is an improper attempt to make an end run around the superior court's rejection of that evidence in 1996 and this court's opinion affirming that decision:

The City moved for reconsideration and for the admission of the declaration of a city planner and city planning records. This additional evidence indicated that the set-aside *ordinance* was based on conclusions in a 1991 land use study that 30.5 percent of potential development area contained slopes between 15 and 45 percent and forested areas, which are most likely to contain significant wildlife habitat. The trial court refused to consider the additional evidence . . .

....

Nor do we find any abuse of discretion in the trial court's denial of the City's motion for reconsideration. Essentially, the City complains that the trial court would not allow it to submit additional evidence.

....

²³ RCW 82.02.020.

. . . The untimely proffered evidence came from sources under the City's control. With minimal diligence, the City could have produced the evidence during the limited pretrial discovery permitted under [LUPA].²⁴

Second, the Vancouver View study and the Knapp declaration merely amplify the unlawful nature of the 30 percent set-aside condition: the study *does not* apply to any portion of the Dove Hill subdivision. Finally, the Knapp declaration merely states that the City considered the study when it enacted *the ordinance* containing the 30 percent set-aside requirement, but *did not* do so when it applied that ordinance to the Dove Hill subdivision.

c. *The City fails to meaningfully distinguish the controlling case law.*

The City's attempt to distinguish the controlling case law is also without merit. As outlined above, a line of Washington appellate decisions established that state law preempted an exaction such as the City's blanket 30 percent set-aside.

Those decisions, taken together, clearly articulate that the taxes and fees proscribed in RCW 82.02.020 can be in kind as well as in

²⁴ *Isla Verde*, 99 Wn. App. at 132-42 (emphasis added).

dollars,²⁵ that municipalities must show that required exactions mitigate the direct impact of the development,²⁶ and that those exactions shown to mitigate a direct impact of the development are lawful,²⁷ while those that are simply applied to all developments without consideration of the developments' impacts are not lawful.²⁸

The City's primary argument—that the cited decisions do not involve a set-aside condition that preserves property in the private ownership of subdivision lot owners—is a distinction without a difference.²⁹ The superior court correctly ruled that "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."³⁰

²⁵ *San Telmo*, 108 Wn.2d at 24.

²⁶ *Henderson Homes*, 124 Wn.2d at 244-45; *Castle Homes*, 76 Wn. App. at 106; *Cobb*, 64 Wn. App. at 459; *Southwick*, 58 Wn. App. at 895.

²⁷ *Trimen*, 124 Wn.2d at 274; *View Ridge*, 67 Wn. App. at 598.

²⁸ *Southwick*, 58 Wn. App. at 895; *Cobb*, 64 Wn. App. at 459; *Henderson Homes*, 124 Wn.2d at 244-45; *Castle Homes*, 76 Wn. App. at 106.

²⁹ *Isla Verde*, 99 Wn. App. at 138 ("[A]lienation of title is not a necessary predicate to a taking; the essence of the harm is the government's unconstitutional interference with one's right to use and enjoy property.").

³⁰ Ruling on Motion for Summary Judgment at 2; CP 390.

d. *The Supreme Court held that the law was clearly established.*

In its decision in this case, the Supreme Court squarely rejected the City's argument that RCW 82.02.020 did not apply to the set-aside. First, the court observed that the statute's language was "not limited to monetary charges" and "contemplates that a required dedication of land or easement is a tax, fee or charge."³¹ Second, the court noted that its own prior decisions had already "recognized that for purposes of RCW 82.02.020 a tax, fee, or charge can be in kind as well as in dollars."³² Third, the court stated that "[t]he open space condition here is comparable to conditions in a number of cases analyzed under RCW 82.02.020."³³ The court then cited half a dozen cases in which similar ordinances or conditions were found to be controlled by RCW 82.02.020. In light of this overwhelming authority, it is objectively reasonable that the City should have known that application of its ordinance was also subject to this statute.

Moreover, the supreme court rejected the City's argument that even if RCW 82.02.020 applied, the ordinance still fell within one of its

³¹ *Isla Verde*, 146 Wn.2d at 757.

³² *Id.* at 758 (citing *San Telmo*, 108 Wn.2d at 24).

³³ *Id.*

exceptions. The statute expressly carves out dedications of land “within the proposed development” that the City can demonstrate are “reasonably necessary as a direct result of the proposed development.”³⁴ While the City argued to the supreme court “that the open space condition is authorized to mitigate direct impacts of the proposed development,” the court rejected this argument because “the City has failed to establish that the 30 percent open space set-aside is reasonably necessary as a direct result of the proposed subdivision or reasonably necessary to mitigate a direct impact that is a consequence of the proposed subdivision.”³⁵

Despite the fact that the supreme court has already specifically rejected its argument, the City continues to try to argue that its ordinance was consistent with the supreme court’s decision in *Trimen*.³⁶ The supreme court rejected the City’s argument because, in *Trimen*, “the fees imposed were reasonably necessary as a direct result of the proposed subdivisions, i.e., the need for park land was directly attributable to the projected population of the developments and the fees were calculated

³⁴ RCW 82.02.020.

³⁵ *Isla Verde*, 146 Wn.2d at 759.

³⁶ 124 Wn.2d 261.

based upon the value of land that would otherwise be required to be dedicated or reserved for parks to serve the developments' populations."³⁷

The supreme court further criticized the City's ordinance as inconsistent with numerous decisions interpreting this exception under RCW 82.02.020: "We have repeatedly held, as the statute requires, that development conditions must be tied to a specific, identified impact of a development on a community."³⁸

In sum, the supreme court held that RCW 82.02.020 clearly applied to the City's set-aside requirement. In addition, the supreme court rejected the City's arguments that the ordinance fell within one of the exceptions to the statute. In fact, even the concurring and the dissenting opinions agreed that RCW 82.02.020 applied to the City's set-aside requirement.³⁹ The City reasonably should have known that its blanket ordinance, and the application of the ordinance to the Dove Hill subdivision, was unlawful and in excess of its lawful authority.

³⁷ *Isla Verde*, 146 Wn.2d at 760-61.

³⁸ *Id.* at 761.

³⁹ *Id.* at 771-74.

C. THE CITY'S CLAIM THAT ISLA VERDE FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES IS WITHOUT MERIT

1. Isla Verde exhausted all available remedies before filing its LUPA petition.

The City's argument that summary judgment is inappropriate because Isla Verde failed to exhaust its administrative remedies is also without merit. The City argues that Isla Verde failed to object to the 30 percent set-aside condition at the administrative level and as a consequence could not raise the issue in its LUPA petition. The City even quotes from the superior court's ruling on motion for summary judgment to demonstrate that the superior court agreed. The City's argument fails both on factual grounds and on legal grounds. As an initial matter, Isla Verde challenged the 30 percent set-aside condition at its first opportunity and in the proper forum. The superior court itself noted that the validity of the City's action did not arise until the superior court proceedings.⁴⁰

A review of the record clearly reveals that the City Council did not impose the full 30 percent set-aside condition until it made a final decision after the record was closed. Before then, the proposed condition of

⁴⁰ Ruling on Motion for Summary Judgment at 2; CP 390.

approval, requiring less than a 30 percent set-aside, was acceptable to Isla Verde. Accordingly, there was no reason for Isla Verde to object to the full 30 percent set-aside during the administrative proceedings because it was not a proposed condition of approval until the City Council made its final decision.⁴¹ And once the City Council made its decision, no procedure was available to appeal the City Council's decision administratively. At the time the City Council approved the Dove Hill subdivision, its decision was considered the final land use decision for the purposes of appeal, as evidenced by the fact that Isla Verde filed a land use petition under LUPA following the City Council's decision—something that Isla Verde would not have been able to do had it not been a final land use decision.⁴² What is also clear from the record is that Isla Verde objected at both Planning Commission and City Council to a less than a 30 percent set-aside condition if coupled with the payment of a

⁴¹ Obviously, an applicant is not required to object to every possible condition that might be imposed before a condition is actually imposed. For instance, Isla Verde would also have objected to a \$1 billion fee — yet there was no reason to raise an objection to such a fee because the fee was never imposed by the City.

⁴² RCW 36.70C.020(1) defines "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 . . . [a]n application for a project permit or other governmental approval required by law before real property may be improved"

"buy down" fee and park and open-space impact fees, since all these exactions were designed to mitigate the same impacts.

In its briefing, the City attempts to make much out of the superior court's statement that up until the LUPA petition was filed, the City could have assumed that the set-aside condition was voluntary. The court's discussion came up within the context of recognizing that RCW 82.02.020 allows for "voluntary" agreements with the City for the dedication of specific areas for certain purposes. Importantly, the court recognized that the first opportunity that Isla Verde had to object to the 30 percent set-aside condition was its LUPA petition.

Moreover, the superior court was incorrect when it stated that until the LUPA petition was filed, the City could have assumed that the 30 percent set-aside condition was voluntary. First, the City did not, and could not, put forth any evidence that Isla Verde ever agreed to the 30 percent set-aside condition. In addition, even in the case of "voluntary" agreements, RCW 82.02.020 still imposes a burden on the municipality to show that the condition imposed is directly related to the impact of the

development.⁴³ As discussed above, the City failed to show any connection between the 30 percent set-aside condition and the proposed development.

2. The City had the burden to create a record that justified the set-aside condition.

The City's argument that it is Isla Verde's fault that the City failed to create an adequate record to justify the imposition of the site condition is also an argument that has already been rejected by the supreme court in this case. During administrative proceedings, Isla Verde did put the City on notice about the legality of the open-space and park exactions. Whether it did so or not, however, is irrelevant. It was the City's burden to create a record that justified the conditions imposed, whether Isla Verde challenged them or not.

This rule was most recently reaffirmed in *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*.⁴⁴ In *Home Builders*, this court noted that RCW 82.02.020 forbids the imposition of any fee, either direct or indirect, on construction activities unless expressly allowed under a statutory exemption. The court further explained that the burden of

⁴³ *Castle Homes*, 76 Wn. App. at 105-07.

⁴⁴ 137 Wn. App. 338, 153 P.3d 231 (2007).

establishing a statutory exemption is on the party claiming the exemption — in this case, the City. Appropriately, the court cited *Isla Verde* for the same proposition. In this very case, the supreme court found that the City had the burden to justify the 30 percent set-aside.

Moreover, the court expressly rejected the criticism that there was an inadequate administrative record to decide this case under RCW 82.02.020.

The concurrence misreads the majority. The record is sufficient to decide the issue presented. The problem to which the criticism is more appropriately addressed is the *City's failure* to establish a record that justifies its imposition of the set-aside condition on *Isla Verde*. That is a matter of the City failing to meet its burden of proof, not a matter of an inadequate record on which to make a decision under RCW 82.02.020.⁴⁵

Accordingly, the City cannot blame *Isla Verde* (or anybody else, for that matter) for the fact that the record is insufficient to support the imposition of the set-aside condition. The supreme court has already determined that the City was solely responsible for creating a record sufficient to justify the imposition of such a condition. Because the City failed to create such a record, it must be held liable.

⁴⁵ 146 Wn.2d at 763, n.16.

3. The City waived its exhaustion argument.

Even if the City had a valid exhaustion argument, and it does not, that argument has been waived. First, the City waived that argument per its agreement with Isla Verde. At the City Council meeting where the City imposed the 30 percent set-aside condition, the city attorney put on the record the following agreement:

One other thing. The ordinance and state law require that if you are not going to follow the recommendation of the Planning Commission, i.e., if they vote to approve it and you vote to deny it or vice-a-versa, that you're required to hold a public hearing before you adopt your findings and decision. . . . I brought that to the attention of the applicant's attorney and said, you know, we haven't complied with this particular requirement, do you want to go forward with us having another public hearing, or do you just want to get on with it. And they said they would prefer to get on with it. . . . **In exchange for that they've asked that we . . . are precluded from raising the issue that they have failed to exhaust the administrative remedies for not having that hearing and my recommendation would be that if you're inclined to accept their waiver, that you also do so by giving up that particular defense, which wouldn't probably have much merit anyway.**⁴⁶

In addition, the City faces a more fundamental problem with its exhaustion argument. The City failed to raise this defense during the

⁴⁶ Reply to Answer to Motion for Discretionary Review, App. P (emphasis added).

LUPA portion of the case. In 1995, the City made a final land use decision approving the Dove Hill subdivision with certain conditions. LUPA provided the exclusive means for challenging the land use decision.⁴⁷ In order for Isla Verde to have standing to bring a LUPA petition, as LUPA expressly states in RCW 36.70C.060(2)(d), it must exhaust its administrative remedies.

In every LUPA case, a petitioner must schedule an initial hearing before the court for the consideration of jurisdictional and preliminary matters. LUPA in no uncertain terms states that:

The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.⁴⁸

Taking these provisions together, Isla Verde can have standing to bring a LUPA petition only if it exhausted its administrative remedies and the City waives the defense of lack of standing if it is not raised in the initial hearing. The City did not raise this defense at the initial hearing. Raising this issue more than ten years into the litigation is not proper or

⁴⁷ RCW 36.70C.030.

⁴⁸ RCW 36.70C.080(3).

allowed. The City also failed to articulate its exhaustion argument in every brief that it filed in the superior court, this court, and the supreme court.

In other words, the City filed no fewer than nine separate briefs and pleadings without once arguing that Isla Verde's claims are barred because they failed to exhaust its administrative remedies. Only in its motion for reconsideration of the superior court's order finding it liable for violating RCW Chapter 64.40 did the City make its exhaustion argument. Thus, even assuming that Isla Verde failed to exhaust its administrative remedies, the City waived that argument by failing to raise it in its answer to the LUPA petition and at the initial hearing required by RCW 36.70C.080.

4. Isla Verde properly plead an RCW 64.40 claim as to the open-space condition.

There is also no basis to the City's argument that 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. Isla Verde did specifically plead such

a claim in its petition for review.⁴⁹ Moreover, this claim was specifically recognized by the superior court in its decision.⁵⁰

The City's argument that this court's first decision in this case recognized that Isla Verde had not plead an RCW 64.40 claim as to the set-aside condition is 180 degrees off from the City's earlier arguments of record. Specifically, the City argued in its petition for supreme court review that "the Court of Appeals, Division II, affirmed the superior court regarding the condition requiring the developer to set aside 30 percent of the plat area as open space . . ."⁵¹ The court of appeals "**did not address the superior court's decision regarding RCW 82.02.020, and ch. 64.40 RCW.**"⁵² Now the City argues that the court of appeals rejected Isla Verde's claim under RCW 64.40. The City was right the first time.

D. THE SUPERIOR COURT CORRECTLY REJECTED THE CITY'S ARGUMENT REGARDING DAMAGES

The City's argument that the superior court should have denied its motion for summary judgment because Isla Verde did not provide the

⁴⁹ CP 4-6.

⁵⁰ Order; CP 434-36.

⁵¹ Appellant's Petition for Review, Washington Court of Appeals Case No. 23225-1-II, at 5.

⁵² *Id.* at 6.

superior court with evidence of damages is also without merit. Isla Verde moved for summary judgment on liability alone, and reserved the issue of damages for trial.

When Isla Verde puts on its damages case at trial, it need show only "reasonable expenses and losses . . . 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."⁵³

The delay between the imposition of the unlawful condition in 1995 and the eventual issuance of the building permits in 2004 clearly raises a presumption of damages. The City's contrary assertion at the superior court—that Isla Verde has "no other imaginable damages" besides litigation expenses—defies common sense. The opportunity costs associated with having a very significant real estate investment tied up for such an extended period—nearly a decade—clearly support a finding that Isla Verde incurred damages. The superior court correctly rejected the City's damages argument and ruled that the extent and amount of Isla Verde's damages can be established at trial.

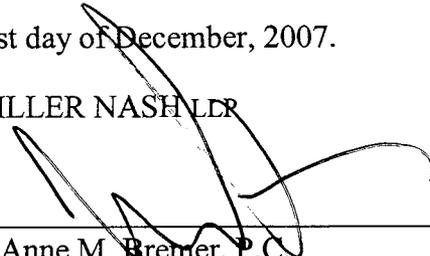
⁵³ RCW 64.40.010(4).

IV. CONCLUSION

Isla Verde is entitled to summary judgment and entry of an order establishing the City's liability on its claims under RCW 64.40 for damages arising from the City's unlawful imposition of a permit condition because it knew or should have known of its unlawfulness. Accordingly, the superior court's order granting summary judgment should be affirmed.

Respectfully submitted this 31st day of December, 2007.

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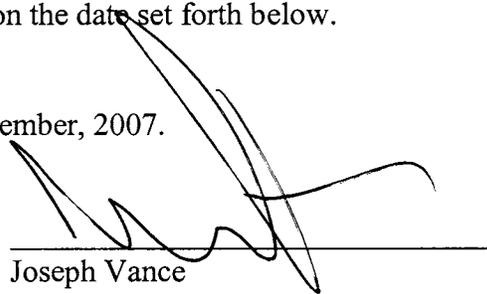
I hereby certify that I served the foregoing Brief of Respondents
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by the following indicated method:

- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below.

DATED this 31st day of December, 2007.



Joseph Vance