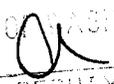


NO. 41158-0-II

FILED  
COURT OF APPEALS  
DIVISION II  
11 APR 20 PM 1:17  
STATE OF WASHINGTON  
BY   
DEPUTY

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**IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JOHN ALTON BURNELL,

Appellant,

v.

THURSTON COUNTY, WASHINGTON,

Appellee.

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**CORRECTED BRIEF OF APPELLANT  
JOHN ALTON BURNELL**

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## TABLE OF CONTENTS

Table of Contents.....	ii
Table of Authorities .....	iii
I. Introduction.....	1
II. Assignment of Error & Issues Presented .....	1
III. Statement of the Case.....	2
IV. Argument .....	7
A. Standard of Review – Summary Judgment.....	7
B. Any Application of Res Judicata was Error.....	8
1. No identity of subject matter.....	9
2. No identity of cause of action. ....	11
C. Any application of collateral estoppel was error. ....	14
D. The County was not entitled to judgment as a matter of law under any other theory argued to the court below. ....	16
1. The County does not have qualified immunity.....	16
2. The Appellant did not fail to exhaust any prerequisite administrative remedies. ....	19
E. There are genuine issues of material fact in dispute. ....	21
V. Conclusion .....	25
Certificate of Service .....	1

**TABLE OF AUTHORITIES**

**Cases**

*Abramson v. University of Hawaii*, 594 F.2d 202, 206 (9th Cir.1979)..... 11

*Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88  
(1972)..... 8

*Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96  
P.3d 957 (2004)..... 15

*City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138  
Wn.App. 1, 25, 154 P.3d 936 (2007)..... 14

*City of Arlington v. Central Puget Sound Growth Mgmt. Hearings Bd.*,  
164 Wn.2d 768, 193 P.3d 1077 (2009)..... 14

*Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th  
Cir.1982)..... 12

*Curtiss v. Crooks*, 190 Wash. 43, 53-54, 66 P.2d 1140 (1937) ..... 12

*Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 108, 751 P.2d 282  
(1988)..... 23

*Graves v. P.J. Taggares Co.*, 94 Wash.2d 298, 302, 616 P.2d 1223 (1980).  
..... 23

*Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir.1980)..... 12

*Hash by Hash v. Children's Orthopedic Hosp. and Medical Center*, 110  
Wn.2d 912, 915, 757 P.2d 507 (1988)..... 23

<i>In re Election Contest Filed by Coday</i> , 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006).....	9
<i>In re Estate of Williams</i> , 153 Wn.App. 1047, 2009 WL 5092865, 11 (Div. 1, 2009). .....	10
<i>Kelly v. County of Chelan</i> , 157 Wn.App. 417, 423, 237 P.3d 346 (2010)22	
<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 763, 887 P.2d 898 (1995)) .....	9
<i>Meder v. CCME Corp.</i> , 7 Wash.App. 801, 806, 502 P.2d 1252 (1972)..	12
<i>Meyer v. University of Washington</i> , 105 Wn.2d 847, 852, 719 P.2d 98 (1986).....	22, 24
<i>Owen v. Independence</i> , 445 U.S. 622, 100 S.Ct. 1398 (1980) .....	18
<i>Rains v. State</i> , 100 Wn.2d 660, 663, 674 P.2d 165 (1983). .....	11
<i>Sintra, Inc. v. City of Seattle</i> , 119 Wn.2d 1, 25, 829 P.2d 765 (1992).	18, 20
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 437, 665 P.2d 1030 (1982) .....	7

**Statutes**

42 U.S.C. § 1983.....	passim
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## I. INTRODUCTION

This appeal seeks review of the Thurston County Superior Court's Order granting summary judgment to Thurston County ("County"). Appellant John Burnell ("Burnell") filed the case below in September 2003. The Complaint alleged that the County had committed a number of Federal civil rights violations against Burnell, converted Burnell's application fees, and tortuously interfered with Mr. Burnell's contractual relationships.

## II. ASSIGNMENT OF ERROR & ISSUES PRESENTED

### Assignment of Error:

1. The Superior Court erred in granting summary judgment because there are genuine issues of material fact at issue in the case and the County is not entitled to judgment as a matter of law.

### Issues presented:

- a) Are the doctrines of *res judicata* and collateral estoppel applicable to this case such that the County was entitled to judgment as a matter of law?
- b) Has the County-Appellee satisfied its burden of establishing that there are no genuine issues of material fact between the parties?
- c) If the County met its initial burden, has the Appellant presented evidence showing that material facts are in dispute?
- d) When all facts and reasonable inferences are considered in the light most favorable to the Appellant, is the County entitled to judgment as a matter of law?

### III. STATEMENT OF THE CASE

When this case began, Mr. Burnell owned four parcels of real property in Thurston County, Washington. Mr. Burnell owned the properties since the late 1980s. Mr. Burnell's Complaint in the case below relates that since roughly April 1975, Mr. Burnell has "worked at and operated a vehicle salvage and storage business at the property known as 2923 Kaiser Road... and has continued to do so since that time." CP at 211.<sup>1</sup> Since approximately 1997, the County has maintained, in the County's own words, "an ongoing prosecution" of Burnell related to various vehicles, structures, and mobile homes which were on Burnell's property. CP 102. From 1997 through 2003, the County issued a number of civil infractions for various violations of the Thurston County Code, including citations for unlawful storage of junk vehicles and unlawful storage of mobile homes. *Id.*

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<sup>1</sup> A Motion to Supplement the Record pursuant to RAP 9.10 was filed contemporaneously with this Brief. The original Clerk's Papers transmitted to this Court by the Superior Court Clerk were paginated 1 through 51. In Order to preserve the Court's briefing schedule and facilitate responsive briefing, a copy of the Clerk's Papers with which the Motion sought to supplement the record was attached to the Motion and served on opposing counsel. The attachments were paginated 101 through 219 to avoid confusion with the previously designated Papers. Thus any reference in this Brief to the Clerk's Papers with a three-digit page number is referenced subject to the Court's Order on the previously filed Motion.

Throughout the time he has owned the property, Burnell has made repeated attempts to develop it. At every turn he has met with nothing but resistance from the County. The County has made no secret of its refusal to consider Mr. Burnell's applications. The record reveals, for example, that in a January 2000 meeting with Mr. Burnell and land use planner Robert Patrick county officials told Messrs. Burnell and Patrick that "the county would not process an application for any such subdivision unless Mr. Burnell resolved what staff deemed violations on the property to their satisfaction." CP at 206. At a meeting in July 2001, County officials again told Messrs. Burnell and Patrick that "the County would not even begin to process any application for a subdivision until its concerns with the vehicles on the property were dealt with to the County's satisfaction." *Id.*

After those meetings with Messrs. Burnell and Patrick, in 2001 the County began the process of changing the zoning of Mr. Burnell's property. The change was a downzone from R 4-8/1 to R 1/5. CP 120. On the same day the County took final action adopting the zoning change, Burnell filed a plat application with the County seeking to subdivide his property. *Id.* The County determined that his application was incomplete, and sent a letter to Burnell indicating that "any proposed development on

your property will be reviewed against the R 1/5 zoning standards.” CP 123. The County informed Mr. Burnell in the same letter that “compliance actions regarding unlawful use of the property will be resumed.” *Id.*

Before the County undertook its zoning change, Burnell had made repeated efforts to submit applications to develop his property. Mr. Burnell has pled that the County has engaged in a pattern of conduct which has repeatedly denied him the right to reasonably and lawfully develop his property. CP 210. The core of Appellants allegation is that the County refused to accept and process land use applications from Burnell in an attempt to convert the property to a use which accorded with the County’s preferred use. Eventually, after years of delay and flat-out refusal to accept and process applications from Appellant, the County legislative authority changed the zoning on the property which, in conjunction with the land use staff’s actions, guaranteed the County’s preferred outcome.

In March 2003, after the zoning change, the County filed a Complaint for Injunction, Declaratory Judgment, and Damages, naming Burnell as Defendant. The Complaint was assigned Thurston County Superior Court Cause No. 03-2-00586-7 (“Nuisance Action”). The

Complaint essentially asserted that Burnell was maintaining a public nuisance on his property and sought an order allowing the County to abate that nuisance. In *answering that case*, importantly not stating a counterclaim, Burnell averred that the salvage operation on the property was a lawful nonconforming use. The court hearing the matter eventually granted the County summary judgment and issued an order allowing the County to enter onto the property and remove vehicles and mobile homes at Burnell's expense. CP 157. Burnell appealed that Order to this Court under Cause No. 30808-8-II.

In that appeal, Burnell challenged the Superior Court's personal jurisdiction (due to an issue with service) and this Court remanded to the Superior Court for further hearing on that matter. In reviewing the substantive issues related to the granting of summary judgment, this Court found, in an unpublished decision, that the record before the court "does not show a genuine issue of material fact as Burnell does not show that he had a legal, nonconforming use with any competent evidence." CP at 180. This Court did not err. The evidence in that case did not establish a legal, nonconforming use. The central issue raised in this case, however, is that the County's actions over more than a decade violated Burnell's due

process and equal protection rights inevitably leading to his use of the property becoming illegal.

This Court's Mandate terminating review in Cause No. 30808-8-II was filed May 28, 2010, and on July 13, 2010, the County filed its Motion for Summary Judgment in the instant case arguing that it was entitled to summary judgment by operation of the doctrines of issue and/or claim preclusion as a result of the final order which followed issuance of the Mandate in 3808-8-II.

In short, the County successfully argued to the trial court that Burnell's (ultimately unsuccessful) defense of the County's own Complaint for Injunction Declaratory Judgment, and Damages bars Mr. Burnell's affirmative claims in this case which he subsequently filed against the County. The County even pointed out to the court below that "[Burnell] did not specifically assert 42 U.S.C. § 1983 in defense of [the] initial action." CP 108. Despite this, the County still argued that Burnell's defense of the prior case triggered application of both the preclusion doctrines. In other words, the County seems to argue that any time a County takes a civil enforcement action against an individual, the doctrines of res judicata and collateral estoppel forever bar the individual

from asserting an independent claim against the County for civil rights violations at any time prior to the case brought by the County.

Unfortunately, the order granting the County summary judgment does not specifically identify which of the County's arguments the trial court found persuasive. Appellant therefore addresses each of the arguments advanced by the County in the following section.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW – SUMMARY JUDGMENT**

This court reviews summary judgment *de novo* and makes the same inquiry as the trial court; summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue about any material fact and, assuming facts most favorable to the nonmoving party, establish that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 665 P.2d 1030 (1982). The Court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 530, 503 P.2d 108 (1972); *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142,

500 P.2d 88 (1972). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Morris v. McNicol*, 83 Wn.2d 491, 494–95, 519 P.2d 7 (1974).

**B. ANY APPLICATION OF RES JUDICATA WAS ERROR.**

The County’s Motion for Summary Judgment below asserted that it was entitled to judgment as a matter of law by application of the doctrines of res judicata and collateral estoppel and—apparently in the alternative—because Burnell had “failed to establish a factual case as a matter of law.” CP 110. The Superior Court’s Order in this case states that “...the Court finds that no genuine issue of material fact exists as to any of Plaintiff’s claims as set forth in Plaintiff’s Complaint for Damages, and that Defendant Thurston County is entitled to Summary Judgment as a matter of law.” CP 50-51. It is not immediately clear, therefore, whether the Court relied upon the issue and claim preclusion arguments of the County or whether it relied upon an inquiry into the issues of material fact and application of relevant law. Thus Appellant will address both alternatives in turn, beginning with the applicability of the issue and claim preclusion doctrines.

Under the doctrine of *res judicata*, or claim preclusion, “a prior judgment will bar litigation of a subsequent claim if the prior judgment has ‘a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.’ ” *In re Election Contest Filed by Coday*, 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006) (alteration in original) (quoting *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995)), *cert. denied*, 127 S.Ct. 444, 166 L.Ed.2d 309 (2006)).

The County cannot establish an identity of subject matter or causes of action in this case and its Nuisance Action, as is necessary for *res judicata* to apply.

**1. No identity of subject matter.**

The County asserts that there is identity of subject matter between this case and the Nuisance Action it initiated because the “underlying subject matter in both actions is the use of the four parcels owned by Burnell.” CP 108. It is certainly true that both the County’s case and this case surround actions related to Burnell’s real property. But, as Division I has observed, “the same subject matter is not necessarily implicated in

cases involving the same facts.” *In re Estate of Williams*, 153 Wn.App. 1047, 2009 WL 5092865, 11 (Div. 1, 2009). Indeed, the County’s Nuisance Action alleged that Burnell was using his land improperly, and this case argues that the County has denied Burnell equal protection by consistently treating him in an arbitrary, capricious, and disparate manner with respect to his land use applications. In its case, the County asserted that Burnell was not complying with the County’s adopted land use regulations and laws. This case, on the other hand, asserts that the County unlawfully denied Burnell equal protection and due process. Put another way, the County has a final order in its Nuisance Action which holds that Burnell was not in compliance with Thurston County’s code. Even assuming, *arguendo*, Burnell had conceded noncompliance in the County’s Nuisance Action, that would not have defeated his claims as stated in the Complaint in this case because the unlawful treatment of Burnell is a separate question from whether his property was or is maintained in a manner consistent with the County Code.

In considering whether there was identity of subject matter between two cases involving the same parties, the Supreme Court observed that “defenses asserted by defendants do not change the fact that the subject matter in both actions is the alleged deprivation of

constitutional rights...” *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983). Here we have the opposite situation, but the language nicely frames the relevant question for analysis: are the subject matter of this case and the subject matter of the County’s Nuisance Action both an “alleged deprivation of constitutional rights?” The answer is no. The subject matter of this case certainly is, but the County’s Nuisance Action was not; it did not allege a deprivation of constitutional rights. Therefore, there is no identity of subject matter and *res judicata* does not bar the instant case.

## **2. No identity of cause of action.**

While identity of causes of action “cannot be determined precisely by mechanistic application of a simple test,” *Abramson v. University of Hawaii*, 594 F.2d 202, 206 (9th Cir.1979), the following criteria have been considered:

- (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4) whether the two suits arise out of the same transactional nucleus of facts.

*Rains* at 664, citing *Constantini v. Trans World Airlines*, 681 F.2d 1199,

1201-02 (9th Cir.1982), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982) (quoting *Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir.1980)). See *Curtiss v. Crooks*, 190 Wash. 43, 53-54, 66 P.2d 1140 (1937); *Meder v. CCME Corp.*, 7 Wash.App. 801, 806, 502 P.2d 1252 (1972).

In this case, the Order of Abatement the County got in its Nuisance Action would not be affected by the determination in this case that the County violated Burnell's civil rights by flat out refusing to process his land use applications. In fact it may well be that Burnell cannot challenge the County's zoning or land use regulations because he is time-bared or failed to exhaust other administrative remedies. While Burnell does not concede this point, Appellant assumes *arguendo* that the abatement by the County was perfectly legal. That does not insulate the County from a § 1983 action for its disparate, arbitrary, and capricious treatment of Burnell's applications to the County to do something with his property and the County's violation of his due process and equal protection rights with respect to those applications. Appellant's case neither asserts nor depends upon a lack of due process in the Abatement Action.

Beyond that, there is no common nucleus of fact. The Abatement Action alleged that Burnell was in violation of the County's code for storage of vehicles, mobile homes, and other materials. The relevant facts in that suit were whether the vehicles existed and were located where the County said they were. Burnell never contested their existence or location. The facts in this case surround the question of what happened in the offices of the County's Development Services Office, not on Burnell's land.

The two suits do not arise out of the same transactional nucleus of facts and *res judicata* does not, therefore, bar the instant case

While there is identity of persons and their quality between the Nuisance Action filed by the County and the instant case, there is neither identity of cause of action or subject matter. As a result, the doctrine of *res judicata* did not entitle the County to summary judgment below, and to the extent the Court's decision below was based upon application of this doctrine, the Court erred.

**C. ANY APPLICATION OF COLLATERAL ESTOPPEL WAS ERROR.**

Any argument about *res judicata* is sure to be followed by argument about the applicability of collateral estoppel, the distinction between the two being often somewhat blurry.

Application of the doctrine of collateral estoppel, or issue preclusion, requires “(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action.” *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.App. 1, 25, 154 P.3d 936 (2007), opinion adopted by *City of Arlington v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 193 P.3d 1077 (2009).

In this case, to prevail on its Motion for Summary Judgment, the County had to establish that “the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding.” *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957

(2004). The County has utterly failed to satisfy this requirement. As discussed above, the County even pointed out to the court below that “[Burnell] did not specifically assert 42 U.S.C. 1983 in defense of [the] initial action.” CP 108. If the Federal civil rights law is pled and argued in Burnell’s case and the County acknowledges it wasn’t pled in Burnell’s defense of the County’s Nuisance Action, then there is no way we have identical issues and no way issue preclusion bars the instant suit. Even if, as the County contends the arguments made by Burnell in defending were the same as the arguments in this case, the trial court did not consider those arguments in the context of an affirmative claim. A trial court can only rule upon questions presented to it, and is not assumed to have considered arguments not raised by either the court or the parties.

In fact, a review of the Complaint and, in particular, the Final Order in the County’s Nuisance Case reveals there is not a single mention in either of 42 U.S.C § 1983 or Burnell’s constitutional rights. If the Complaint has no mention of the issues raised in this case and the Final Order has no mention of those issues, then it is impossible for the County to establish that this case addresses identical issues as its Nuisance Action and that there was a final judgment on the merits of a constitutional claim.

Because Burnell’s civil rights claims raised in the instant case are

not identical (or even, really, related) to the nuisance claims asserted by the County in its case, and because the final order in the County's case doesn't address any constitutional issues at all, the doctrine of collateral estoppel did not entitle the County to summary judgment below, and to the extent the Court's decision below was based upon application of this doctrine, the Court erred.

**D. THE COUNTY WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER ANY OTHER THEORY ARGUED TO THE COURT BELOW.**

**1. The County does not have qualified immunity.**

The Complaint in this case alleges, *inter alia*, various civil rights violations. The specific allegations are arbitrary, capricious, and disparate treatment of Burnell and enforcement as a means of retaliation. CP 217. The County argued to the Court below that it was entitled to summary judgment because the failure to obtain permits was wholly Burnell's fault and because it had qualified immunity.

As related *supra*, the record before the Court reveals that in a January 2000 meeting with Mr. Burnell and land use planner Robert Patrick, County officials told Messrs. Burnell and Patrick that "the county would not process an application for any such subdivision unless Mr.

Burnell resolved what staff deemed violations on the property to their satisfaction.” CP at 207-208. At a subsequent meeting in July 2001, County officials again told Messrs. Burnell and Patrick that “the County would not even begin to process any application for a subdivision until its concerns with the vehicles on the property were dealt with to the County’s satisfaction.” *Id.* This directly contradicts the County’s assertion to the trial court that failure of Mr. Burnell to obtain permits was “wholly his fault.” CP 110. At a minimum it is evidence from a disinterested third party establishing a genuine issue of material fact. Importantly, Burnell’s opposition to the County’s Motion for Summary Judgment below specifically called the court’s attention to this evidence. CP 44.

The County also argued to the trial court that it has qualified immunity from Burnell’s civil rights claims. The County’s argument on this issue in its Memorandum to the trial court verged on the absurd. While it is certainly true that a public *employee* is entitled to qualified immunity,<sup>2</sup> the Complaint in this case names no individual employee. The County compounded its error below by going on for several pages in its Memorandum in Support about the reasonableness of its individual

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<sup>2</sup> See, e.g., the case cited by the County in support of the proposition below: *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992).

employees' actions and their subjective beliefs, which are both irrelevant, even if the question of qualified immunity had been. See CP 110-112.

As the case relied upon by the County clearly states “[l]ocal government bodies are not immune from a § 1983 suit merely because the alleged violation involves a discretionary decision or a governmental function.” *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 25, 829 P.2d 765 (1992). And it seems highly unlikely that a County in Washington is not fully aware that a municipality has no immunity from liability under 42 U.S.C. § 1983 flowing from its constitutional violations and that it may not assert the good faith of its officers as a defense to such liability. See *Owen v. Independence*, 445 U.S. 622, 100 S.Ct. 1398 (1980).

Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. *Owen*, at 652. The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. *Owen*, 445 U.S. at 652.

In sum, the arguments related to immunity advanced by the County were wholly without merit. As a result, to the extent the trial court's decision below was based upon application of this doctrine, the court erred.

**2. The Appellant did not fail to exhaust any prerequisite administrative remedies.**

The County argued to the court below that Burnell's takings claim under §1983 failed because he failed to exhaust administrative remedies in that he "never appealed the land use decision under LUPA or any other means that converted the zoning in which his properties lie..." CP 112. As an initial matter, Appellant would note that a LUPA appeal is a judicial, rather than administrative remedy. More to the point, what the Complaint alleges is that the takings violation arose from the County's "refusal to process applications for lawful uses, for improperly processing such applications when they were processed, and for intentionally refusing to process applications until the use applied for became unlawful." CP at 218. This does not attack the County's change in zoning. Rather it alleges that the County refused to process applications under then-current provisions of law, and there is hardly an administrative remedy available

to Appellant when the allegation is that the County refused to do anything.

Recourse to the courts is the only available remedy.

Beyond this, the County's assertion to the trial court that for a takings claim to prevail, a Plaintiff "must show that the property has no viable economic use" is a misstatement of the law. *See* CP 112. Again, the case relied upon by the County in support of this errant proposition clearly states:

A regulation effects a taking of private property if "it 'does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land.'" *Keystone*, 480 U.S. at 485, 107 S.Ct. at 1241 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)); *Nollan*, 483 U.S. at 834, 107 S.Ct. at 3147. In *Presbytery*, the court expounded on the precise application of this test.

First, if the regulation does not "substantially advance [ ] legitimate state interests", then it automatically constitutes a taking. *Presbytery*, 114 Wash.2d at 333, 787 P.2d 907; *see Nollan*, 483 U.S. at 834-35, 107 S.Ct. at 3147.

*Sintra*, at 16-17 (internal citations and ellipses *sic*).

The County's legal arguments related to Burnell's exhaustion of administrative remedies are without merit. As a result, to the extent the Court's decision below was based upon application of this doctrine, the Court erred.

**E. THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE.**

The County's Motion for Summary Judgment largely relied upon arguments seeking to establish that issue and claim preclusion entitled the County to judgment as a matter of law. To the extent that the County sought to establish that there are no genuine issues of material fact at play in this case, it relied exclusively upon a Declaration from Thurston County Planning and Environmental Section Manager Mike Kain, executed August 5, 2004. CP 119-121. The Declaration avers, basically, a number of uncontested and largely irrelevant facts and that Mr. Kain believes that he and his employees at the County acted lawfully at all times in their dealings with Mr. Burnell.

Burnell also submitted declarations from himself and disinterested third parties which directly contradict the factual assertions made by Mr. Kain. CP 202-208, Declarations of John Burnell and Robert Patrick . Beyond this, the factual assertions in Mr. Kain's Declaration relate only to the zoning change made by the County which, again, is only tangentially relevant to the facts underlying the claims made by Burnell. The other "assertions" are largely conclusions of law. For example, ¶ 6 "Burnell ultimately failed to perfect the application..." (perfection of land

use application is a question of law, *Kelly v. County of Chelan*, 157 Wn.App. 417, 423, 237 P.3d 346 (2010); ¶ 7, “At all times I believe that I, and the employees that I supervise acted lawfully...” (an obvious conclusion of law); and ¶ 8, “Burnell has never provided all information necessary to complete his application(s) in order for him to vest...” (vesting absolutely a question of law, *Kelly*).

While it is certainly true that a “nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value,” *Meyer v. University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986), neither is it the case that a moving party may rely simply upon conclusory statements from an interested party in an attempt to demonstrate no issues of material fact exist.

“A material fact is one upon which the outcome of the litigation depends, in whole or in part.” *Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The burden of showing that there is no issue of material fact falls upon the party moving for summary judgment; all reasonable inferences must be resolved against the moving party, and the motion should be granted only if reasonable people could reach but one conclusion. *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99,

108, 751 P.2d 282 (1988). If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion. *Graves v. P.J. Taggares Co.*, 94 Wash.2d 298, 302, 616 P.2d 1223 (1980). “Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact.” *Hash by Hash v. Children's Orthopedic Hosp. and Medical Center*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

The Declaration relied upon by the County is not sufficient to carry the County’s burden as the moving party with respect to the arguments made by the County regarding issues already discussed or the issue of Burnell’s conversion claim. Specifically with respect to the conversion claim, evidence, (a letter from the County) of the basis for the claim was adduced in response to the County’s First Motion for Summary Judgment which was denied by the court. The County cannot meet its burden for summary judgment on the second go by simply filing a Declaration denying any funds are due. Such an assertion is not sufficient

to meet the County's burden when there is contradictory documentary evidence already in the record.

In a light most favorable to the County, the Declaration upon which its Motion is based states uncontested facts (dates of applications by Burnell, extensions granted Burnell, changes in zoning through legislative action), states that the County is entitled to have done everything it did, and avers that county officials acted in good faith and treated Mr. Burnell well. Even if all the actual facts asserted in the Declaration are taken as true, it does not entitle the County to judgment as a matter of law. And it bears reiterating that the Court is not supposed to look at the facts and inferences in the light most favorable to the County.

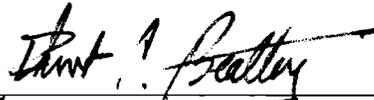
Despite the fact the County failed to meet its burden, Burnell actually did direct the trial court to facts in the record which "set forth specific facts which sufficiently rebut the [County's] contentions and disclose the existence of a genuine issue as to a material fact." *Meyer*, 105 Wn.2d at 852. If nothing else, the unrebutted Declaration of Mr. Patrick alleges facts which viewed in the most favorable light do establish disparate treatment and a denial of due process.

## V. CONCLUSION

For the foregoing reasons, and each of them, the trial court erred in granting the County summary judgment because the Appellant has come forward with evidence setting forth facts showing that there is a genuine issue of material fact. Beyond this, the County is simply not entitled to judgment as a matter of law upon the record. Appellant requests the Court vacate the Order granting summary judgment to the County and remand this matter to the Superior Court for trial.

Dated this 19<sup>th</sup> day of April, 2011 and

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 19<sup>th</sup> day of April 2011 he caused the foregoing **Corrected Appellant's Brief** to be served on the below-identified parties by regular U.S. Mail, postage prepaid

Rick Peters, DPA  
c/o I Division - Glenn Building  
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Olympia, WA 98502

Dated: 19 April 2011.



Robert A. Beatley

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DIVISION I