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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

No. 305392

Kittitas County Superior Court #07-2-00340-4
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

MANNA FUNDING, LLC., a Washington Limited Liability
Company, et al.,

Plaintiffs/Appellants,

vs.

KITTITAS COUNTY, a Washington municipal corporation,
Defendant/Respondent.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

NATURE OF THE CASE 1

ARGUMENT 1

 A. Allocation of Burdens in the Underlying Summary Judgment Motions. 1

 B. Kittitas County Is Liable for Damages Because its Acts Violated RCW 64.40.020. 2

 C. A Site-Specific Rezone is an Act Subject to RCW 64.40.020..... 6

 D. Manna’s Filing of the 64.40 Damages Claim was Timely..... 9

 i. The *Westway* discussion of exhaustion was dicta. 11

 ii. *Hayes*..... 13

 ii. Two more recent cases decided since *Westway* are pertinent. 15

 iii. The County’s reliance on federal caselaw is not determinative..... 17

 E. A Determination of Damages Under RCW 64.40.020 Should be Remanded for Trial..... 18

 F. Kittitas County’s Two-time Denial of the Site-Specific Rezone, and the Attendant Delays, Violated Manna’s Rights Under 42 U.S.C. §1983..... 19

 i. Kittitas County’s rezone denial when Manna had met all rezone criteria violated Manna’s right to substantive due process under 42 U.S.C. §1983. 19

 ii. Manna’s 42 U.S.C. §1983 Claim is Ripe. 21

 iii. Manna’s 42 U.S.C. §1983 Claim Involves a Constitutionally Protected Property Interest..... 22

 G. Claims for Tortious Interference and Delay are Available to Manna..... 23

CONCLUSION 24

TABLE OF AUTHORITIES

Other Authorities

42 U.S.C. §1983 2, 19, 21, 22, 23

Statutes

RCW 36.70B.020 8
RCW 36.70C 14, 17
RCW 64.40.010 7, 8, 9
RCW 64.40.020 1, 2, 6, 7, 8, 9, 10, 11, 12, 15, 16, 18
RCW 64.40.030 9, 10, 12, 13, 18

Cases

City of Medina v. T-Mobile USA, 123 Wn. App. 19, 95 P.3d 377 (2004) 22
City of Seattle v. Blume, 134 Wn.2d 243, 947 P.2d 223 (1997) 23
Cougar Mountain Assocs. V. King County, 111 Wn.2d 742, 757, 765 P.2d 264
(1988) 22
Cox v. City of Lynnwood, 72 Wn. App. 1, 863 P.2d 578 (1993) 3
Crown Point Development v. City of Sun Valley, 506 F.3d 851 (9th Circuit,
2007) 17
Hayes v. City of Seattle, 131 Wn.2d 706, 934 P.2d 1179 (1997) 3, 5, 10, 13, 14, 17
Henderson v. Kittitas County, 124 Wn. App. 747, 757 (2004), review denied, 154
Wn.2d 1028 (2005) 3, 8
Isla Verde International Holdings Ltd. V City of Camas (Isla Verde II), 147 Wn.
App. 454, 196 P.3d 719 (2008) 15, 16
Isla Verde International Holdings Ltd. v. City of Camas (Isla Verde I), 146 Wn.2d
740, 49 P.3d (2002) 16
Kelly v. County of Chelan, 157 Wn. App. 417, 237 P.3d 346 (2010) 22
Macri v. King County, 126 F.3d 1125 (9th Circuit, 1997) 17, 18
Orion Corp. v. State, 103 Wn.2d 441, 456-457, 693 P.2d 1369 (1985) 14
Pleas v. City of Seattle, 112 Wn.2d 794, 805 P.2d 1158 (1989) 24
Saben v. Skagit County, 136 Wn. App. 869, 152 P.3d 1034 (2007) 3, 15
Smoke v. City of Seattle, 132 Wn.2d 214, 224, 937 P.2d 186 (1997) .. 9, 12, 13, 17

Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995).....	22
Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash.2d 169, 181-182, 4 P.3d 123 (2000).....	8
Westmark v. Burien, 140 Wn. App. 540, 166 P.3d 813 (2007).....	23
Westway Construction Inc. v. Benton County, 136 Wn. App.859, 866, 151 P.3d 1005 (2007).....	11, 12, 13, 14, 15
Wilson v. City of Seattle, 122 Wn.2d 814, 863 P.2d 1336 (1993)	23
Woods v. Kittitas County, 162 Wn.2d 597, 610, 174 P.3d 25 (2007)	7, 8, 20
Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990).....	21
<i>Lutheran Day Care v. Snohomish County,</i> 119 Wn.2d 91, 829 P.2d 746 (1992)	3, 5, 21
<i>Mission Springs, Inc. v. City of Spokane,</i> 34 Wash.2d 947, 954 P.2d 250 (1998)	3

NATURE OF THE CASE

Kittitas County makes very little effort to defend its rezoning denials and delays in a substantive manner. Instead, the County relies primarily on procedural arguments for why the Court should not review the County's actions thereunder. Those arguments are without merit and should not insulate the County from substantive review. The underlying record and applicable case law show that both of the County's rezoning denials were blatantly in disregard of the law and judicial order; those decisions were arbitrary, capricious and unlawful. Plaintiffs, collectively referred to herein as "Manna," are entitled to proceed with trial court review of its damages.

ARGUMENT

A. Allocation of Burdens in the Underlying Summary Judgment Motions.

Manna brought a summary judgment motion under RCW 64.40.020 on the basis that Kittitas County's two sequential denials of the site-specific rezoning, neither of which had any basis in fact or law and were virtually unreviewable, were arbitrary, capricious, unlawful or exceeded the County's lawful authority. Instead of a serious, substantive defense against the merits of Manna's RCW 64.40.020 claim, the County attempts avoid review by putting up sequential procedural arguments.

The County filed a motion for summary judgment asserting a number of procedural challenges to Manna's causes of action under RCW 64.40.020, 42 USC § 1983, and tort claims. Kittitas County bore the burden to demonstrate there was no issue of material fact and was entitled to summary judgment under the law under each of its procedural arguments.

The burdens upon appeal of the summary judgment motions are identical: while Manna bears the burden related to its substantive motion under RCW 64.40.020, the County bears the burden of proof related to its procedural challenges.

B. Kittitas County Is Liable for Damages Because its Acts Violated RCW 64.40.020.

Kittitas County knew or reasonably should have known that its two, sequential denials of Manna's rezone, containing virtually unreviewable findings and conclusions with no basis whatsoever in the evidence, issued in the face of the Superior Court's express instruction, were arbitrary, capricious, unlawful and exceeded lawful authority. RCW 64.40.020.

Despite the County's protests, there is ample precedent to conclude that the County's acts in denying the rezone without factual support, legal support, and in egregious violation of established case law

and express Superior Court instructions, were arbitrary, capricious, unlawful, and without lawful authority. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992); *Cox v. City of Lynnwood*, 72 Wn. App. 1, 863 P.2d 578 (1993); *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997); *Mission Springs, Inc. v. City of Spokane*, 34 Wash.2d 947, 954 P.2d 250 (1998); *Saben v. Skagit County*, 136 Wn. App. 869, 152 P.3d 1034 (2007). The County's actions were as arbitrary, capricious and unlawful and as egregious, if not more so, than the central cases addressed in Manna's Opening Brief.

The County attempts to re-write history in defending its denials. Superior Court Judge Cooper twice admonished the County that its Resolutions were completely unfounded. For example, the Court ruled in no uncertain terms: "Nothing in the record that the court reviewed provided evidence on which those findings could be made, whether they be by the Planning Commission or by BOCC [Board of County Commissioners]." *CP 530* (2007 Decision; emphasis added).

... the BOCC made virtually no findings of fact based on the record based on the record that was created for it by the Planning Commission to allow the court to adequately review the BOCC decision. Moreover, it is clear to the court that the BOCC either doesn't understand the import of *Henderson v. Kittitas County, supra*, or chose to ignore the fact that implementation of the policies of the comprehensive plan, as found by the Planning Commission itself, could have justified the rezone application

requirement that it meet the public health, safety, morals, or general welfare requirement of the rezone, in direct contradiction to the BOCC finding of fact 6.

CP 533 (2007 Decision; emphasis added).

The County's rezone review process and decision were "fraught with errors." *Id.* Judge Cooper clearly instructed the County as to "the BOCC's failure to adequately review the record and make meaningful findings of fact from which conclusions could be drawn..." *CP 534*. The judge's 2007 Decision could not have been more clear and was complete with detailed instructions in footnotes 18 and 19 on how the County should conduct its remand.

The County flagrantly ignored the Superior Court's instructions. The County's second review was as replete with errors and free from evidentiary or legal support as its first review. On second review, Judge Cooper repeatedly found the County's rezone denial in every respect lacked any support whatsoever in actual evidence or even logic. See e.g., *CP 1164-1165* (2009 Decision). The Court therefore took the extreme step to not just remand the case again, but to instruct the County to approve the rezone as there was no legal or evidentiary basis to support denial. *CP 1167* (2009 Decision).

The County does not try to defend itself under the analogous decisions of *Lutheran Day Care* or *Hayes*, both of which are particularly relevant since each involved a discretionary approval on the part of the city or county, just as in Manna's site-specific rezone. The reasons behind each Court's conclusions are echoed in the instant case.

The County wishes to gloss over its actions by merely responding that that the BOCC 'decision' (failing to recognize there were two denials) "may not have been articulated with precision." *Brief of Respondent*, page 16. The County's minimization of its actions defied the 2007 Decision, wherein the Superior Court twice ruled that the County had no evidentiary, legal or rational basis at all to deny the rezones. The County unlawfully based both rezone denials on parochial perceptions with no basis in evidence. The County totally disregarded the Court's clear instructions both on how to (a) fairly process and hear the rezone application and (b) write a defensible decision. The County provided absolutely no meaningful or fact-based rationale for either denial.

Ironically, the County argues that its conduct was not as egregious as that in *Mission Springs*, 34 Wash.2d 947. At least in *Mission Springs*, Spokane did not have to be told twice by a court that its

decisions had no merit and were without evidence or meaningful analysis. At least the Spokane City Council conducted meaningful debate and deliberation on the record which that court could review. In the instant case, the BOCC hardly even commented at all on Manna's application, instead simply voting to deny with no explanation or deliberation. *See e.g., CP 792-909.* In *Mission Springs*, that applicant understood what Spokane's basis for its decision was, even though the decision was unlawful. In comparison, Kittitas County's twice denial of Manna's application was never based on a single finding or conclusion that was borne out by any evidence in the record, legal support or even simple logic when reviewing the application materials and property's physical features.

C. A Site-Specific Rezone is an Act Subject to RCW 64.40.020.

The County bears the burden under its motion for summary judgment challenging whether a quasi-judicial, site specific rezone should be subject to review under RCW 64.40.020. The County's arguments are not supported by the plain language of the statute or other legal authorities. The County's attempt to limit the application of RCW 64.40.020 is simply not borne out by statutory definitions.

(2) "Permit" means **any governmental approval required by law before an owner of a property interest may improve, sell, transfer, or otherwise put real property to use.**

(6) “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....

RCW 64.40.010 (emphasis added).

Notably, the County does not dispute that Resolutions 2007-53 and 2008-104 were ‘acts’ under the statute: final decisions by the County which placed limitations upon the use of Manna’s real property. RCW 64.40.010 (2). Even though the County concedes that its acts in denying the rezone were subject to RCW 64.40.020, the County illogically wishes the Court to conclude the site-specific rezone itself is not. The County’s position is illogical and not borne out by the plain language of the statutory definitions.

A quasi-judicial, site specific rezone falls squarely within the definition of a ‘permit’: it is a “governmental approval required by law” before an owner of a property interest may “put real property to use.” As the Washington Supreme Court clearly already stated in discussing the nature of site-specific rezones: “A site specific rezone is a project permit, RCW 36.70B.020 (4), and, thus, a land use decision.” *Woods v. Kittitas County*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007).

The term 'permit' is defined elsewhere in other Washington statutes in a consistent manner, all including site specific rezones either expressly or with their scope. The Local Project Review act defines a project permit application to include "site specific rezones." RCW 36.70B.020 (4).

The Land Use Petition Act contains a virtually identical definition of 'land use decision' compared to the definition of a permit under RCW 64.40.010. LUPA does not call out 'site specific rezones' in its definition of a land use decision, but Washington courts have consistently subjected site-specific rezones to LUPA review. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 181-182, 4 P.3d 123 (2000); *Woods*, 162 Wn.2d 597, 608; *Henderson v. Kittitas County*, 124 Wn. App. 747, 757 (2004), *review denied*, 154 Wn.2d 1028 (2005). Even the County did not dispute that these site-specific rezones were subject to LUPA review.

These LUPA cases reviewing site specific rezones did not consider rezones to be "interpretive decisions" but instead actual project permits. *See e.g., Woods*, 162 Wn.2d 597, 610; *See also* RCW 36.70B.020 (4).

The County's assertion that statutes should be read narrowly is irrelevant to this issue. The plain language of RCW 64.40.010 encompasses a site-specific rezone in the definition of a permit.

D. Manna's Filing of the 64.40 Damages Claim was Timely.

The County also brought its motion for summary judgment to challenge whether Manna should have re-filed its cause of action under RCW 64.40.020 for a third time, after the County finally conceded its prior two denials were unlawful and granted the rezone. Once again, the burden was, and is, on the County as the moving party. The County's arguments again are not supported by the plain language of the statutes or the law.

A cause of action for damages under chapter 64.40 RCW must be commenced "only within thirty days after all administrative remedies have been exhausted." RCW 64.40.030. The County cannot avoid the plain language in cases such as *Smoke*, which recognized exhaustion addresses administrative remedies, not judicial review: if an administrative remedy can alleviate harmful consequences of a governmental action, a plaintiff must first pursue those before judicial action. *Smoke v. City of Seattle*, 132 Wn.2d 214, 224, 937 P.2d 186 (1997).

The statute's plain language requires exhaustion of administrative remedies after the agency act violating RCW 64.40.020 took place. The statute does not require a plaintiff to obtain a judgment overturning the city or county decision as an element of exhaustion or other prerequisite to filing a complaint. Nothing in the statute requires an applicant/plaintiff to wait for the outcome of judicial review and agency action correcting the arbitrary, capricious or unlawful act.

The County's attempt to write in an additional requirement to the statute is illogical and is not borne out under the caselaw. No court has ever ruled that a judgment overturning the city or county decision is a prerequisite under RCW 64.40.030. Instead, every case on point has either addressed the issue in an ancillary fashion or used exhaustion as a means to save a plaintiffs claim. See e.g. *Hayes*, 131 Wn.2d 706.

Under RCW 64.40.030, the 30-day clock began to run on May 15, 2007, when the Board of County Commissioners, i.e. the higher administrative level of the County, signed Resolution 2007-53. Manna filed its claim for damages on June 5, 2007. *CP 1-18*. After the Superior Court found County had failed to conduct a meaningful review process or issue a meaningful decision and remanded the application to the County, the County adopted Resolution 2008-104, again in violation of

RCW 64.40.020. Once again, a the 30-day clock began to run on June 17, 2008, the date the County signed Resolution 2008-104. Manna filed a second claim for damages within 30-days as required by the statute, on July 8, 2008. *CP 1444-1459*.

Manna's claims were timely filed when it filed its cause of action under chapter 64.40 RCW within thirty days of each site-specific rezone denial. Conversely, the County's ultimate grant of the rezone under Ordinance 2009-01, only after being expressly ordered to do so by this Court upon a *second* review, was the only action by the County that was not in violation of RCW 64.40.020. The County's final "acts" under RCW 64.40.020 that were arbitrary, capricious and unlawful were Resolutions 2007-53 and 2008-104, not Ordinance 2009-01, that finally granted the rezone which had Manna shown the County should have granted two years previously. Resolutions 2007-53 and 2008-104 were final County actions, not subject to any further administrative review or appeal: there was no remedy left for Manna to exhaust.

i. The *Westway* discussion of exhaustion was dicta.

The County's reliance on *dicta* in *Westway* is misplaced. The County makes it clear it feels this Court should weigh *dicta* in *Westway* more heavily because this Division III was the issuing Court. However, the County's strained reading of what is essentially *dicta*, should not

support an interpretation of RCW 64.40.030 that is directly contradictory to the statute's express language.

The *Westway* Court ruled that Westway did not have standing to bring a claim under RCW 64.40.020. *Westway Construction Inc. v. Benton County*, 136 Wn. App.859, 866, 151 P.3d 1005 (2007). Lack of standing conclusively terminated the Court's review.

However, the Court continued on to comment on the parties' remaining arguments related to chapter 64.40 RCW. *Id.* 866-867. As the Court's decision regarding standing terminated the Court's review, the Court's analysis of chapter 64.40 RCW should be considered *dicta*.

The Court acknowledged that the issuance of a final, appealable order establishes the time for exhaustion. *Id.* at 866, citing to *Smoke*, 132 Wn.2d 214. However, the *Westway* Court did not actually follow *Smoke*: the *Smoke* Court did not require *Smoke* to re-file its chapter 64.40 RCW cause of action, which *Smoke* had filed within thirty days of the city action alleged to violate RCW 64.40.020, i.e. before the City's subsequent, corrective action. Instead, the *Smoke* Court found that *Smoke* had exhausted all administrative remedies, reviewed the City's original act denying the permit and found the City liable under RCW 64.40.020. *Smoke*, 132 Wn.2d 214.

Smoke contains a lengthy discussion of what exhaustion means and how it is applied under RCW 64.40.030. *Smoke*, 132 Wn.2d at 223-224. In undertaking a detailed examination of exhaustion, the *Smoke* Court did not require that *Smoke* should have re-filed its chapter 64.40 RCW cause of action a second time, after the City had issued the permits when ordered to do so by the Court. *Smoke* and the other authorities cited by Manna in its Opening Brief stand in the way of the County's argument and inappropriate attempt to expand *Westway*.

ii. *Hayes*.

With full respect to this Court, the *Hayes* case was not considered in its entirety under *Westway*. *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997). As a result, the County wishes to mis-apply *Hayes*. In fact, *Hayes* supports Manna on this issue.

In *Hayes*, the Court used RCW 64.40.030 as a way to save the Hayes's ability to challenge Seattle's actions as arbitrary and capricious, giving the Hayes a second opportunity to file its claim under chapter 64.40 RCW. *Hayes*, 131 Wn.2d 706, 716. The *Hayes* Court was clear: "we are not saying an action in superior court for judicial review is an administrative remedy that must be exhausted prior to commencing an action to recover damages pursuant to RCW 64.40" *Id* (emphasis added). The *Hayes* Court expressly limited its decision to the facts of

that case, i.e. Hayes' failure in the first place to file a chapter 64.40 RCW claim with its appeal of the unlawful City decision. The *Hayes* Court clearly explained that that Hayes could have joined a damages claim with the earlier writ challenging the City's decision itself (the process used prior to the Land Use Petition Act, chapter 36.70C RCW): "In concluding that Hayes's [later-filed] action for damages is not barred by res judicata, we are not saying that the two separate actions could not have been joined for trial." *Hayes*, at 714 (emphasis added).

No Washington State Court has dismissed a case because a plaintiff filed its chapter 64.40 RCW claim in a timely fashion after the offending action of the city or county but not for a second (or in this case, third) time after the corrective action required by judicial order. The *Hayes* Court stands for exactly the reverse as discussed above and in Manna's Opening Brief: a plaintiff can join both causes of action in one case, just as Manna did here. *Hayes*, at 714.

Finally, exhaustion is also not absolute: a court may and should not require exhaustion where fairness or practicality has a greater weight. *Orion Corp. v. State*, 103 Wn.2d 441, 456-457, 693 P.2d 1369 (1985) (citations omitted). Therefore, even if this Court were to find that the *Westway* Court's analysis has merit under the instant facts, it would be

would be patently unfair, unnecessarily repetitious and without any meaning to require Manna to re-file its chapter 64.40 RCW claim a third time after the County finally granted the rezone, i.e. finally complied with the law. The County has never identified any prejudice or harm in this respect. To the contrary, Manna has been consistently forthcoming about its claims and timely filed such twice after each County act that was arbitrary and capricious.

- ii. Two more recent cases decided since *Westway* are pertinent.

Since *Westway*, Washington courts have issued two more recent decisions reaching the merits of whether a city or county action was arbitrary, capricious and/or unlawful under RCW 64.40.020. *Saben v. Skagit County*, 136 Wn. App. 869, 152 P.3d 1034 (2007); *Isla Verde International Holdings Ltd. V City of Camas (Isla Verde II)*, 147 Wn. App. 454, 196 P.3d 719 (2008). Both *Saben* and *Isla Verde II* involved a similar filing process as in the instant case and both courts reached the merits of the chapter 64.40 RCW claims.

In a turbulent case involving multiple judicial review opportunities decided after *Westway*, a plaintiff was not required to re-file its chapter 64.40 RCW claims when Skagit County granted the permits as a result of judicial order. *Saben*, 136 Wn. App. 869. Instead,

Court allowed Saben to pursue its chapter 64.40 RCW damages claims originally filed with the Land Use Petition challenging the County's original actions. *Saben*, 136 Wn. App. 869, 874. The Court found Skagit County liable under RCW 64.40.020. *Saben*, at 878.

Likewise, under the most recent ruling that Manna has found involving relevant circumstances, once again a plaintiff was not required to re-file its chapter 64.40 RCW claim after the City of Camas took corrective action. *Isla Verde International Holdings Ltd. V City of Camas (Isla Verde II)*, 147 Wn. App. 454, 196 P.3d 719 (2008). Therein, Camas issued the decision with unlawful conditions in 1995. Isla Verde appealed under the Land Use Petition Act, and filed a claim for damages under chapter 64.40 RCW. The Washington Supreme Court ultimately struck the conditions as unlawful six years later. *Isla Verde International Holdings Ltd. v. City of Camas (Isla Verde I)*, 146 Wn.2d 740, 49 P.3d (2002). The Supreme Court then remanded for further proceedings on damages. Approximately a decade later after Isla Verde had filed that chapter 64.40 RCW cause of action, Isla Verde moved for summary judgment for a determination of liability under chapter 64.40 RCW. *Isla Verde II*, 147 Wn. App. 454, 460. Isla Verde was not required to re-file its chapter 64.40 RCW claims a second time, after

judicial decision finding the original decision unlawful under chapter RCW 36.70C, even though several years had passed.

- iii. The County's reliance on federal caselaw is not determinative.

The County also relies on a federal decision interpreting state law with inapposite facts and an incorrect statement of the law. *Macri v. King County*, 126 F.3d 1125 (9th Circuit, 1997), *as amended and cert. denied*, 522 U.S. 1153. *Macri* has also been called into question more recently by the 9th Circuit with respect to its substantive due process comments. *See e.g., Crown Point Development v. City of Sun Valley*, 506 F.3d 851 (9th Circuit, 2007). It is not unnecessary to resort to federal law to address a state statute where there is ample state court review. Further, *Macri's* fact pattern is very distinct from the instant case. Therein, *Macri* did not file a chapter 64.40 RCW claim within 30-days after the County Council denied *Macri's* subdivision application. Instead, after the Court ruled that the denial was unlawful, *Macri* filed a chapter 64.40 RCW claim three weeks *before* the County's approval and more than 2 years after the offending denial. *Macri*, at 1130.

Finally, in direct contradiction to *Hayes* and *Smoke*, and statutory plain language, the *Macri* Court improperly included judicial review as an element of exhaustion. *Id.*

Macri simply is not determinative in this case and should not be relied on as good law or an interpretation of state law. The plain language of RCW 64.40.030, and as applied by Washington State courts, provides that the exhaustion requirement pertains to “administrative remedies”, not judicial review. RCW 64.40.030. *Macri* does not govern or provide relevant authority.

E. A Determination of Damages Under RCW 64.40.020 Should be Remanded for Trial.

Contrary to the County’s comments, Manna did respond related to the County’s assertions related to what damages Manna had incurred. *CP 1368-1396* (briefing and second Declaration of Doty). However, as Manna noted previously, the County used portions of Ms. Doty’s deposition in a manner entirely out of context. Absent the County’s single deposition, there was absolutely no discovery performed as of the time of the summary judgment motions. Manna requests this Court to reject the County’s attempt to avoid damages by raising out of context arguments prior to any discovery at all should be rejected. Alternatively, Manna requests that this issue be remanded for express review and determination by the Superior Court as no such review by the Court was actually conducted.

The County must do more to prevail on a matter of fact in summary judgment than simply raise an issue and argue it should prevail because discovery had not yet begun. Clearly Manna incurred a number of “reasonable expenses and losses” between the time the County unlawfully denied the rezone in 2007 and finally granted the rezone when it was given no option but to do so or be in violation of a direct court order. Even just the administrative record itself reflects substantial work by Manna’s consultants and discussion of impacts on Manna of the County’s unlawful denials. Manna requests the opportunity to conduct discovery and proceed forward with its claims.

F. Kittitas County’s Two-time Denial of the Site-Specific Rezone, and the Attendant Delays, Violated Manna’s Rights Under 42 U.S.C. §1983.

A county cannot deprive a plaintiff of a protected property right without due process of law. Manna had a right to due process of law in Kittitas County’s review of the rezone application, and to approval of the rezone if Manna could satisfy the rezone criteria. 42 U.S.C. §1983.

- i. Kittitas County’s rezone denial when Manna had met all rezone criteria violated Manna’s right to substantive due process under 42 U.S.C. §1983.

Manna recognizes that a property owner in general does not have a legal right to any particular rezone. However, Manna does have a right to a fair decision on its rezone application. The County has adopted

clear and express rezone criteria and these very rezone criteria have been interpreted and applied to Kittitas County rezones by Washington Courts. *See e.g. Woods* 162 Wn.2d 597. The County cannot claim ignorance of how to apply its own rezone criteria.

Manna had a right to a rational and lawful decision. Once Manna had demonstrated compliance with the adopted rezone criteria, Manna had a right to approval of the rezone. The fact that the criteria involve discretionary review does not equate to authorizing the County to act arbitrarily, to ignore express judicial instructions as to both how to review the application and how to reach a decision. A discretionary review process does not authorize the County to ignore its adopted standards and ignore uncontroverted evidence in the record.

The County's action was not in any way arguably or rationally related to a legitimate government interest. The County denied the rezone twice in total disregard of the evidence and with a total failure to actually apply the rezone criteria. These denials, and the attendant delays until the County had no choice but to approve the rezone or be in contempt of court, violated Manna's substantive due process rights to both a rational decision and approval since Manna amply demonstrated compliance with the County's own rezone criteria.

ii. Manna's 42 U.S.C. §1983 Claim is Ripe.

The County's allegation that Manna's claims are not ripe cannot withstand scrutiny. As even the County admits, in order to be ripe, a plaintiff must have obtained a final decision on the application. A cause of action under 42 U.S.C. §1983 is immediately ripe "because the harm occurs at the time of the violation as does the cause of action." *Mission Springs*, 134 Wn.2d at 964-965 (citing *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990); *additional citations omitted*).

The County wishes to convert the question of whether Manna's claims are ripe into one of whether Manna can ever bring a cause of action under 42 U.S.C. §1983 where a city or county denies a site specific rezone application. That is a different question, separately argued by both parties and which should be decided in favor of Manna.

The question of ripeness is whether the County's twice failure to issue the rezone when Manna had satisfied all rezone criteria resulted in a deprivation of Manna's property right? The County did not merely delay a rezone decision, but in fact affirmatively denied Manna's rezone twice, without any lawful authority what-so-ever. This question is ripe for review.

iii. Manna's 42 U.S.C. §1983 Claim Involves a Constitutionally Protected Property Interest.

Kittitas County also directly brought its summary judgment motion on the question of whether a site-specific rezone decision should be subject to review under 42 U.S.C. §1983. Manna's interest in obtaining a valid and lawful decision in the rezone application is a protected "property interest" 42 U.S.C. §1983.

A site-specific rezone is simply no different than a variance, condition use, or special use for purposes of review under 42 U.S.C. §1983. Site-specific, quasi-judicial rezones (as opposed to area-wide, legislative rezones) are land use decisions similar to variances, conditional use permits and special use permits, any of which an applicant is not entitled to unless the applicant can show it has met all the locally-adopted criteria. *See e.g. Kelly v. County of Chelan*, 157 Wn. App. 417, 237 P.3d 346 (2010); *citing to Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); *Cougar Mountain Assocs. V. King County*, 111 Wn.2d 742, 757, 765 P.2d 264 (1988); *City of Medina v. T-Mobile USA*, 123 Wn. App. 19, 95 P.3d 377 (2004) (reviewed a variance and special use permit, reciting variance criteria substantially similar to site-specific rezone criteria such as those in this case). In all circumstances, subsequent permits (e.g.

subdivision or building permit) are necessary before any physical activity can take place on the ground. Even so, a site-specific rezone, variance, conditional use, or special use each make it possible for an applicant to proceed with development that otherwise would not be allowed.

The Washington State Supreme Court has ruled that there is no reason to treat denial of a conditional use differently from a building permit in reviewing whether there has been a violation of substantive due process under 42 U.S.C. §1983. *See e.g. Lutheran Day Care*, 119 Wn.2d at 125. As explained above, there is equally no reason to treat a site-specific rezone denial differently from a conditional use denial under 42 U.S.C. §1983. Applicants for these types of approvals should all be afforded the same substantive due process protections.

G. Claims for Tortious Interference and Delay are Available to Manna.

In its briefing related to tortious interference with a business expectancy and tortious delay, the County totally ignores the most applicable caselaw on this issue, namely: *Westmark v. Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007); *City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997); *Wilson v. City of Seattle*, 122 Wn.2d 814, 863 P.2d 1336 (1993); *Pleas v. City of Seattle*, 112 Wn.2d 794, 805 P.2d 1158

(1989). In all these cases, the city or county was either found to have tortiously delayed or interfered by virtue of the city or county's unlawful decision or actions, or the court found there was a cause of action available that could proceed to trial. The County totally ignores this caselaw. *Pleas* in particular addressed an arbitrary and capricious rezone action taken by the City of Seattle and found tortious interference by the City. *Pleas*, 112 Wn.2d 794.

As was recognized in the list of foregoing cases, and as discussed in Manna's opening brief, Manna has a cognizable claim that the Superior Court improperly summarily dismissed. The Superior Court's decision in favor of the County's motion for summary judgment on this cause of action was improper and in disregard for the foregoing, well-established caselaw.

CONCLUSION

To the extent Manna did not reply further on any issue, for example, appeal of the attorney's fees award under chapter 64.40 RCW, Manna hereby rests on its Opening Brief for brevity.

Based on the foregoing analysis, Manna respectfully requests this Court to reverse the Superior Court's decisions on Manna's and Kittitas

County's motions for summary judgment. Manna respectfully requests this Court to provide the relief set forth in Manna's Opening Brief.

Dated this 7th day of May, 2012.

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No. 305392

Kittitas County Superior Court #07-2-00340-4
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

MANNA FUNDING, LLC., a Washington Limited Liability
Company, et al.,

Plaintiffs/Appellants,

vs.

KITTITAS COUNTY, a Washington municipal corporation,

Defendants/Respondents.

AFFIDAVIT OF SERVICE

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STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America; over the age of 18 years, am a legal assistant with the firm of Johns Monroe Mitsunaga Koloušková PLLC, not a party to the above-entitled action and competent to be a witness therein.

On this date, I caused to be served true and correct copies of the 1) Appellant's Reply Brief; 2) Second Supplemental Designation of Clerk's Papers; and 3) Declaration of Service upon all counsel and parties of record at the address and in the manner listed below.

Mark R. Johnson, WSBA #11080
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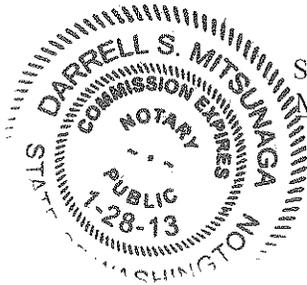
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Via Email and
U.S. First Class Mail

Dated this 7th day of May, 2012.


EVANNA L. CHARLOT



SIGNED AND SWORN to (or affirmed) before me on
May 7, 2012, by Evanna L. Charlot.


Darrell S. Mitsunaga
Notary Public Residing at Sammamish, WA.
My Appointment Expires: 1-28-13