

FILED

MAR 13 2012

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' OPENING BRIEF

Atty: Duana T. Koloušková, WSBA #27532
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NATURE OF THE CASE

Plaintiffs Manna Funding, LLC; Wild Horse Ranch, LLC; Peregrine Skies, LLC; Premier Property and Development Group, LLC; and Wild Rivers Crossing, LLC (“Manna”) have filed claims for damages under multiple authorities due to Kittitas County’s arbitrary, capricious, and unlawful twice denial of Manna’s rezone application. Despite the Superior Court’s clear remand instructions after a first unlawful denial, Kittitas County issued a second denial devoid of any substantive findings, conclusions or analysis, and in total disregard for the substantive evidence and analysis which justified the rezone under each and every rezone criterion. The County’s delays and virtually unreviewable decisions in light of the record resulted in cognizable damages to Manna. Manna requests that the County be held accountable for its three years of delay and two unlawful decisions before finally acceding, without explanation, to approve the rezone.

ASSIGNMENTS OF ERROR

1. The Superior Court erred in denying Manna’s summary judgment motion where the material facts not in dispute established that Kittitas County knew or should have known that its acts were arbitrary and capricious, and unlawful.

2. The Superior Court erred in granting the County's summary judgment motion where the material facts established that Manna had properly filed a cause of action under RCW 64.40.020.

3. The Superior Court erred in granting Kittitas County's summary judgment motion where the material facts established that Manna had timely filed a recognizable cause of action under 42 U.S.C. §1983.

4. The Superior Court erred in granting Kittitas County's summary judgment motion where the material facts established that Manna was entitled to relief under 42 U.S.C. §1983.

5. The Superior Court erred in granting Kittitas County's summary judgment motion where material facts are in dispute related to Manna's claims for tortious interference with business expectancy and tortious delay.

6. The Superior Court erred in failing to consider the facts in the light most favorable to the nonmoving party.

7. The Superior Court erred in awarding attorney's fees to Kittitas County without imposing a stay on such award pending this appeal.

8. The Superior Court erred in awarding attorney's fees to Kittitas County without requiring the County to distinguish fees related to RCW 64.40.020 versus other issues.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should Kittitas County be liable for damages and attorney's fees under RCW 64.40.020, 42 U.S.C. §1983 and tort claims?

2. Did the Superior Court erroneously grant Kittitas County's motion for summary judgment related to RCW 64.40.020, 42 U.S.C. §1983 and tort claims?

3. Did the Superior Court erroneously award attorney's fees to Kittitas County?

STATEMENT OF THE CASE

Manna originally submitted an application for a rezone from 'Forest and Range 20' ("FR-20") to "Rural 3" ("R-3") on October 2, 2006. *Clerk's Papers* ("CP") 615 (Certification of Record filed 09-24-2008); *Administrative Record* ("AR") AR 77.¹ Manna's property is comprised of approximately 100.31 acres, lying north of the City of Roslyn. CP 621; AR 83. In support of the rezone, Manna submitted an

¹ All references to the certified Administrative Record are made to the original County bates stamped page number and cited herein in using the abbreviation "AR"; the line of zero's are eliminated for simplicity. AR references are provided for additional means of reference.

initial description of how the proposal met the rezone criteria and followed up with a series of substantive submittals. *CP 622-623*; *AR 84-85*; *CP 725-729* ; *AR 187-191*; *CP 592-606*; *AR 54-66*. The rezone was compatible with existing development in the area and was consistent with a multitude of other similar rezone applications from FR-20 to R-3 which the County had already approved. Further, the proposed rezone was consistent with the County's Comprehensive Plan.

Despite the substantial evidence supporting the rezone, the Kittitas County Board of County Commissioners ("BOCC") denied the rezone application. *CP 1-18*; Resolution 2007-53 (copy attached to Land Use Petition, Declaratory Judgment and Complaint for Damages, filed June 5, 2007). Resolution 2007-53 made little sense in light of the record and reflected the BOCC's failure to review the record. Manna timely filed a Petition pursuant to the Land Use Petition Act, chapter 36.70C RCW ("LUPA") and Complaint for Damages under RCW 64.40.020. *CP 1-18*. Kittitas County never filed an Answer to Manna's Complaint for Damages under RCW 64.40.020.

Kittitas County Superior Court Judge Michael Cooper (since retired) reversed the County's rezone denial. *CP 523-534* (Memorandum Decision, November 30, 2007) ("2007 Decision"). Judge

Cooper found the BOCC had failed to review the record and state meaningful findings of fact. Judge Cooper remanded the rezone to the County to conduct “meaningful” hearings and for the BOCC to “conduct a meaningful closed record proceeding in which it discusses proposed findings to illuminate its decision-making before the entire public.” *CP 534*. Judge Cooper provided a very clear roadmap for how the County should review the rezone and what is necessary to create meaningful and substantive findings and conclusions. Judge Cooper admonished the County that “making a bald finding that the petitioners did not meet their burden of proof to demonstrate the rezone positively affected the health, safety, morals and general welfare of the county, without making findings of fact as to why the Board **concludes** it did not meet the burden does not help the court in its judicial review of the proceedings.” *CP 534*, footnote 18 (emphasis in original).

After various delays, the Planning Commission held another open record hearing per the Court’s remand order on March 11, 2008. *CP 792-909* (transcripts of County proceedings). Manna had submitted substantive written materials and testimony in support for the variance specifically addressing each rezone criterion as well as the public and staff comments. Manna’s Land Use Petition Prehearing Brief detailed

the County's process, the County's procedural pitfalls in its review, and the administrative hearings. *CP 912-1091*.

The Planning Commission recommended that the application met five of the seven rezone criteria. *CP 567-569; AR 29-31*. Of the two remaining criteria, the Planning Commission merely concluded that the rezone would "not change access to the property" and that "the applicant failed to meet the burden of proof for merit and value to Kittitas County." *CP 568; AR 30*. The recommendation regarding access had no basis in fact; to the contrary Manna had provided recorded easements reflecting access to the property. *CP 750; AR 212, CP912-1091* (easements in Exhibit A and Manna memo in Exhibit B, both of which Kittitas County had erroneously excluded from the AR). The Planning Commission did not explain why it opined the rezone would not have merit or value, despite Manna's previously submitted evidence to the contrary. The recommendation simply did not provide any findings or explanations for such conclusions. *CP 567-569; AR 29-31*.

The BOCC then held a single hearing on June 3, 2008. *CP 792-909*. Despite the Superior Court's instructions, the BOCC conducted virtually no deliberation. The total BOCC substantive discussion is just three paragraphs long, on pages 8-9 of the June 3, 2008 transcript.

CP 792-909. Commissioner McClain stated he that believed there was an access issue (despite the recorded easements conclusively establishing access), there were no changed circumstances to warrant a rezone, and there was not sufficient analysis of whether additional property was necessary. *CP 792-909, June 3, 2008 Transcript*, page 8, lines 17-25, page 9, lines 1-5. Commissioner Crankovich merely stated that he thought property was surrounded by commercial forest and urban forest (despite R-3 zoned land to the east and to the west of Manna's property, separated only by a comparatively minimal area of F&R zoned land). *CP 792-909, June 3, 2008 Transcript*, page 9, lines 7-13. Commissioner Huber did not make any substantive comment. *CP 792-909, June 3, 2008 Transcript*, pages 8-9. The BOCC summarily voted to deny the rezone. *CP 792-909, June 3, 2008 Transcript*, page 9. The BOCC signed Resolution 2008-104 without further comment. *CP 1444-1459*; (copy of Resolution 2008-104 attached to Land Use Petition, Declaratory Judgment and Complaint for Damages, filed July 8, 2008).

Once again, Kittitas County had failed to follow even its own procedures and again denied the rezone without any evidentiary or legal support. Resolution 2008-104 once again was virtually unreviewable in light of the facts in the record. In clear and direct violation of the

Superior Court's 2007 Decision, the BOCC (a) did not set forth what the BOCC reviewed in making findings used to deny the rezone, (b) did not base those findings on any actual evidence in the record, and (c) simply stated that rezone criteria were not met without setting forth any specific findings or explanation for such conclusions. Again, a detailed review of Resolution 2008-104 and its failings was set forth in Manna's Land Use Petition Prehearing Brief. *CP 912-1091*.

Once again, Manna filed a Land Use Petition and Claim for Damages under Chapter 64.40 RCW. *CP 1444-1459*. Kittitas County again was required by Court Rule 12 to submit an Answer to Manna's RCW 64.40.020 damages claim. Kittitas County again never filed an Answer and therefore once again failed to preserve any defense in law or fact from Manna's RCW 64.40.020 damages claim.

Kittitas County Superior Court Judge Michael Cooper again looked closely at the County's second denial. *CP 1157-1168* (Memorandum Decision, February 5, 2009) ("2009 Decision"). Judge Cooper found that the County had ignored the court's instructions to carefully review the record and base findings of fact on actual evidence. *CP 1167*. To the contrary, the court held that the County had no evidentiary basis, let alone substantial evidence, to deny the rezone under

rezone criterion. *CP 1166*. As a result of the County's blatant disregard of the law, total failure to have any support for its denial, and the contrasting evidence supporting the rezone, the court was "compelled to reverse the decision of the BOCC, vacate Resolution 2008-104, and remand this matter back to the BOCC with the instruction to approve the rezone from Forest and Range 20 to R-3." *CP 1167*.

Three years after Manna submitted its application, and two judicial remands later, the BOCC unceremoniously granted the rezone without any review or comment. *CP 1250-1284* (Ordinance 2009-01).

Manna subsequently filed a Notice of Claim pursuant to RCW 4.96.020. *CP 1219*. Manna was unable to reach a resolution with Kittitas County addressing the damages that Manna sustained from the County's two-time unlawful denials and three year delay.

Manna had no choice but to pursue its existing damages claims and amend its claims subsequent to Manna's completion of the Notice of Claim process. Kittitas County stipulated that Manna should have the right to amend its complaint and Manna accordingly filed an Amended Complaint. *CP 1215-1216; CP 1217-1226*. Once again, Kittitas County did not file an Answer.

The parties subsequently proceeded to file summary judgment motions, both scheduled for review at the same hearing. In the few weeks between the time motions were filed and the hearing date, Judge Cooper retired and the case was transferred to Superior Court Judge Scott R. Sparks. Judge Sparks heard oral argument and subsequently denied Manna's motion and granted Kittitas County's motion, dismissing all of Manna's damages claims. Despite the County's blatantly unlawful rezone denials and the 2007 and 2009 Decision showing that the County's denials were fraught with unlawful actions, Judge Sparks provided absolutely no analysis or explanation for why he summarily dismissed all of Manna's damages claims, or whether the basis for his decision was procedural or substantive.

ARGUMENT

A. Standards of Review.

When reviewing a summary judgment, this Court stands in the same position as the trial court, and reviews the motion(s) *de novo*. *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); *Steury v. Johnson*, 90 Wn. App. 401 P.2d 772 (1998). The burden is on the moving party to demonstrate there is no issue of material fact. The moving party is held to a strict standard. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992).

The Court considers all the facts submitted and view all the facts in the light most favorable to the nonmoving party. *Ruff*, 125 Wn.2d 697, 703. Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to prevail as a matter of law. C.R. 56(c); *Public Employees Mutual Ins. Co. v. Fitzgerald*, 65 Wn. App. 307, 828, P.2d 63 (1992); *Weyerhaeuser Co. v. Aetna, et al.*, 123 Wn.2d 891, 874 P.2d 142 (1994). A material fact is a fact upon which the outcome of the litigation depends, in whole or in part. *Ruff*, at 703. Summary judgment may not be granted unless, based on all the evidence, reasonable persons could reach but one conclusion. *Ruff*, 125 Wn.2d at 703-704.

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 delays and denials of Manna's rezone, twice and in the face of the Superior Court's express instruction, was arbitrary, capricious, unlawful and exceeded lawful authority. RCW 64.40.020 provides, in part:

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

was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

(2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.

A governmental decision is arbitrary and capricious if it is "willful and unreasoning action in disregard of facts and circumstances." *Washington Waste Systems v. Clark County*, 115 Wash.2d 74, 81, 794 P.2d 508 (1990) (citing *State v. Ford*, 110 Wash.2d 827, 830, 755 P.2d 806 (1988)); *Abbenhaus v. Yakima*, 89 Wash.2d 855, 858-59, 576 P.2d 888 (1978). Property owners have a common law right to use their property to the highest utility; zoning ordinances, being in derogation of that right, must be strictly construed in favor of property owners. *Cox v. City of*, 72 Wn. App. 1, 7, 863 P.2d 578 (1993) (citing *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956)).

Delaying or refusing to issue a decision or approve an application "violates the applicant's statutory and constitutional rights if he has either a vested right to the permit or has satisfied all relevant statutory and ordinance criteria and is thus entitled to it." *Callfas v. Dep't of Construction and Land Use of City of Seattle*, 129 Wn. App. 579, 593, 120 P.3d 110 (2006) (emphasis added). A decision that contains findings which are virtually unreviewable is equally arbitrary and

capricious. *Kenart & Associates v. Skagit County*, 37 Wn. App. 295, 303, 680 P.2d 439 (1984).

Manna was entitled to issuance of the rezone once it met all the adopted criteria. Kittitas County's choice to disregard the evidence and law, not once but twice, in the face of express instruction from this Court in order to deny Plaintiffs' rezone can only be characterized as "willful and unreasoning action in disregard of facts and circumstances." The acts themselves, Resolutions 2007-53 and 2008-104, and the attendant delays were arbitrary, capricious, and unlawful in violation of RCW 64.40.020.

The Superior Court twice admonished Kittitas 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." *CP 530* (emphasis added). Elsewhere:

... the BOCC made virtually no findings of fact 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.

The Superior Court concluded in its first decision that the County's rezone review process and decision were "fraught with errors." *CP 533.* The Superior Court clearly instructed the Board of County Commissioners of "the BOCC's failure to adequately review the record and make meaningful findings of fact from which conclusions could be drawn...." *CP 534.* The 2007 Decision could not have been more clear, containing detailed instructions on how the County should conduct the remand.

Kittitas County utterly ignored the court's instructions, performing its second review in a manner as replete with errors and free from evidentiary or legal support as its first review. On second review, the court repeatedly found the County's rezone denial was not supported by the evidence. *See e.g. CP 1164-1165.* The court therefore took the extreme step to not only remand the case a second time, but to also instruct the County to approve the rezone. *CP 1167.*

There are four major cases decided under RCW 64.40.020 wherein Courts found that a city or county had acted in violation of RCW 64.40.020. *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). Kittitas County's actions mirror the conduct that, in each of these cases, Courts found was arbitrary, capricious and unlawful under RCW 64.40.020. Manna is equally entitled to relief under RCW 64.40.020 in an amount to be later proven at trial.

- i. *Lutheran Day Care* was based on a particularly relevant fact pattern analogous to the instant case and set forth important parameters for RCW 64.40.020.

The *Lutheran Day Care* Court found Snohomish County's two-time denial of a conditional use permit to be arbitrary and capricious. Snohomish County denied two different versions of a conditional use permit (a discretionary permit somewhat similar to a site-specific rezone). The Superior Court found that those denials were erroneous and that "...there was no factual basis for the hearing examiner's conclusions, nor was 'there reference to standards, if any, that support the Examiner's decision.'" *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 97, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993). Ultimately, the Supreme Court held that the County's denials violated RCW 64.40.020.

Apart from a strikingly similar ruling from the instant superior court, *Lutheran Day Care* is significant in two ways. First, the Supreme Court ruled that RCW 64.40.020 does not require knowledge that its actions are arbitrary and capricious: “acting either arbitrarily and capriciously or unlawfully or in excess of lawful authority will create a cause of action.” *Lutheran Day Care*, 119 Wn.2d 91, 112.

Second, if a county or city’s action is found to be arbitrary and capricious, RCW 64.40.020 does not require a plaintiff to also show knowledge of unlawfulness. *Id.* The Supreme Court was clear that a Plaintiff is only required to show arbitrary and capricious conduct under RCW 64.40.020 for the County to be liable thereunder. *Lutheran Day Care*, at 116-117. Arbitrary and capricious conduct is, hopefully, rare. However, in *Lutheran Day Care* and in the instant case, the County actions meet the test of arbitrary and capricious, and therefore create liability on the part of each County.

Kittitas County’s actions were as arbitrary and capricious as Snohomish County’s actions in *Lutheran Day Care*. In each case, the respective county failed to provide any meaningful justification, explanation, rationale or evidence to support its denial. In each case, each county ignored the Superior Court’s order as to how the local

jurisdiction, whether that was Snohomish County or Kittitas County, should review the application upon remand. Each county made its respective decision based on parochial perceptions without any basis in evidence or law. When finally unable to avoid the Superior Court's mandates to act lawfully, each County simply granted the approval without comment. However, Kittitas County has acted even more egregiously than Snohomish County because Kittitas County clearly failed, whether intentionally or grossly negligently, to even heed this Court's express instructions as to how to review and issue a decision. Kittitas County should be held as responsible for its actions as the Supreme Court held Snohomish County.

- ii. Cox v. Lynnwood as well contains a relevant fact pattern of arbitrary, capricious and unlawful behavior leading to City liability for damages and attorney's fees.

The City of Lynnwood also knew or should have known a boundary line adjustment application complied with the applicable City regulations and that the City's denial "was unlawful or in excess of lawful authority at the time of the denial." *Cox v. City of Lynnwood*, 72 Wn. App. 1, 5-6, 863 P.2d 578 (1993). Lynnwood admitted it did not deny the boundary adjustment because the application was faulty; instead, Lynnwood denied the application as a matter of unwritten,

subjective opinion. Lynnwood simply did not like that Cox had legally found a way to achieve six lots through the boundary line adjustment and future short subdivision without undertaking a full subdivision. *Id.* at 4, 7.

... in denying the lot BLA Lynnwood was “motivated by a desire to prevent the land owners possible future subdivision of the property through a possible future application to short plat the property rather than any lawful reason to deny the lot boundary adjustment as such. The prospect that the land owner might sometime in the future apply for short subdivision is no reason to deny a lot boundary adjustment under the Lynnwood Municipal Code which provides no connection nor nexus between a lot boundary adjustment and any subsequent attempt to short plat property previously subject to a lot boundary adjustment. To deny the lot boundary adjustment for this reason was an irrational act which bore neither connection nor nexus to the lot boundary adjustment ordinance.”

Id. at 8-9.

Lynnwood’s reliance on ulterior motives and improper considerations to justify denial was arbitrary, capricious, and unlawful. Since Lynnwood knew or should have known its conduct was unlawful, Lynnwood was liable under RCW 64.40.020. *Id.* at 7-8, 12.

Similar to *Cox*, Kittitas County denied the rezone for reasons unrelated to the merits of the application itself. As in *Cox*, Kittitas County denied the rezone even though the rezone met all the regulatory criteria; instead, the County denied the rezone for unstated, subjective

and personal opinions. However, Kittitas County acted even more egregiously than Lynnwood by not only relying on ulterior motives and not explaining the basis for denying the application, but doing so twice, in total disregard of the superior court's instructions. Under *Cox*, Kittitas County's actions were arbitrary, capricious and unlawful.

- iii. *Hayes v. Seattle* found the City liable under RCW 64.40.020 where it failed to justify its decisions with meaningful findings and conclusions.

The Washington Supreme Court found that Seattle also acted in violation of RCW 64.40.020 when it improperly conditioned and delayed the issuance of a master use permit. *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997). The City Council conditioned approval of the master use permit on a substantially smaller project size in a 'conclusory manner' without explanation or supporting evidence. *Hayes*, 131 Wn.2d at 710. The superior court remanded the matter to the City with instructions to identify the adverse impacts and how the Council's conditions mitigate those. The City Council then reconsidered its decision, and without explanation, simply approved the original application without any size reduction. *Id.*

Nothing in the Council's decision to condition the grant of a master use permit on a reduction in the length of the proposed building describes the adverse impact of Hayes's proposal or explains how reducing the size of the project would mitigate any

such adverse impact. The decision simply reflects the Council's view that Hayes's project was too big, apparently on the theory that smaller is better.

Id. at 717.

The Court found that Seattle acted without regard to the surrounding facts and circumstances. *Hayes*, at 717-718. Acting without regard to the facts and evidence in the case was "arbitrary and capricious, such action being defined as a 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *Id.* at 718, citing *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. 6*, 118 Wash.2d 1, 14, 820 P.2d 497 (1991) (quoting *Abbenhaus v. City of Yakima*, 89 Wash.2d 855, 858-59, 576 P.2d 888 (1978)). The Court concluded that Hayes was entitled to recovery under RCW 64.40.020.

The Hayes Court held unequivocally that "conclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious...." *Hayes*, 131 Wn.2d at 717-718. The failure to properly support denial of an application with meaningful findings and conclusions is arbitrary and capricious action that warrants judicial relief. *Johnson v. City of Mt. Vernon*, 37 Wash. App. 214, 220-221, 679 P.2d 405 (1984); *Maranatha Mining, Inc. v. Pierce County*, 59 Wash. App. 795, 805, 801 P.2d 985 (1990); McQuillan, *The Law of Municipal*

Corporations, §25.280 (2008) (judicial relief against arbitrary and capricious acts “will be given against a zoning measure or its application;” this rule is applicable to classifications of property, i.e. zoning and rezone requests).

It was arbitrary and capricious for Kittitas County to have treated this Court’s 2007 Decision and Manna’s concerns about the review process in such a truncated and dismissive manner, just as it did during its first review. The County’s treatment of Manna’s rezone request in its second review was, for a second time, inexcusably vague and impermissibly subjective review with absolutely no meaningful guidance. Kittitas County’s actions warrant the same result as Seattle’s: “conclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious....” *Hayes*, at 717-718.

Manna’s allegations in the instant case involve essentially the same theory of liability as the Court found violated RCW 64.40.020 in *Hayes*. Both Seattle and Kittitas County issued decisions that had no rational basis in the underlying facts and evidence. Both Seattle and Kittitas County failed to provide any meaningful explanation for their decisions, or point to any evidence or legal support. As a result, Kittitas County acted as arbitrarily, capriciously and unlawfully as Seattle in

Hayes. Kittitas County should be equally held liable under RCW 64.40.020 for its actions.

- iv. *Mission Springs v. Spokane* reaffirmed the strength and ramifications of RCW 64.40.020 when a local jurisdiction acts arbitrarily, capriciously, and/or unlawfully.

The Washington Supreme Court ruled that the Spokane City Council violated RCW 64.40.020 by arbitrarily, capriciously and unlawfully withholding a ministerial land use permit for reasons extraneous to the satisfaction of lawful ordinance and/or statutory criteria. *Mission Springs, Inc. v. City of Spokane*, 34 Wash.2d 947, 954 P.2d 250 (1998). Since the right to use and enjoy land is a property right, such rights may not be denied by arbitrary and capricious action, which includes unreasonable delay in issuance of the permit. *Mission Springs, Inc. v. City of Spokane*, 134 Wash. 2d 947, 954 P.2d 250 (1998).

The issue before the Court was not simply how long the permit was withheld but “Was the delay lawful, or was it unlawful?” *Id.* at 959. In finding that Spokane acted arbitrarily, the Court again applied the standard of whether the action was “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.” *Mission Springs*, at 962, *citing Hayes*, 131 Wn.2d at 718.

Manna recognizes that a rezone is not a ‘ministerial’ action. However, the County Commissioners’ actions in being willful and unreasoning, and the County’s refusal to issue a decision with the legal safeguards expressly required by the Superior Court were as egregious as those taken by the Spokane City Council as to warrant the same result. In the instant case, it took not one order from this Court, but two separate orders before the County finally acknowledged the Court’s jurisdiction and the Court’s decisions. By that point, so much time had passed that the damages to Manna were substantial and the effects of the County’s delays are still felt by Manna today.

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

RCW 64.40.020 creates a cause of action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority. A county is an agency for purpose of this statute. RCW 64.40.010 (1); *Lutheran Day Care*, 119 Wn.2d 91, 117; *Mission Springs*, 134 Wn.2d 947, 962.

The County erroneously asserted in its summary judgment motion that RCW 64.40.020 should not apply to site-specific rezone decisions. The County’s argument is both inconsistent with the definitions in chapter 64.40 RCW and would create an illogical conflict

within the statutory processes that apply to review of land use matters, including site-specific rezones.

RCW 64.40.010 provides the following 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.** [Emphasis added).

(5) “Regulation” means **any ordinance, resolution, or other rule or regulation adopted pursuant to the authority provided by state law, which imposes or alters restrictions, limitations, or conditions on the use of real property.**

(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. ... “Act” shall not include lawful decisions of an agency which are designed to prevent a condition which would constitute a threat to the health, safety, welfare, or morals of residents in the area. (Emphasis added).

Kittitas County Resolutions 2007-53 and 2008-104 were unquestionably ‘acts’ under the statute: final decisions by the County which placed limitations upon the use of Manna’s real property. A site-specific rezone falls within the definition of a “permit” because it is a “governmental approval required by law” before an owner of a property interest may “put real property to use.” RCW 64.40.010 (2).

Quasi-judicial acts and decisions are subject to evaluation and liability under RCW 64.40.020. *Lutheran Day Care*, 119 Wn.2d 91,

103-105. The Court expressly concluded that “the legislature, in enacting RCW Ch. 64.40, did not intend local governments to be immunized from liability for the quasi-judicial acts of their land use officers.” *Id.* at 105. A site-specific rezone is a quasi-judicial decision. *Woods v. Kittitas County*, 162 Wn.2d 597, 608, 174 P.3d 25 (2007); *JJ Storedahl v. Clark County*, 143 Wash.App. 920, 932, 180 P.3d 848 (2008). A site-specific rezone is very different from an area-wide rezone, which is legislative in nature and subject to a very different review procedure under the Growth Management Act. *Woods*, 162 Wn.2d 597, 612. Under *Lutheran Day Care*, it is proper for a site-specific rezone, a quasi-judicial action, to be reviewed under RCW 64.40.020.

It is also appropriate to review the analogous definition of a land use decision under the Land Use Petition Act, which is virtually identical to the definition of a permit under RCW 64.40.010:

An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;... RCW 36.70C.020 (2)(a).

A site specific rezone is a “project permit application” and has uniformly been subject to the Land Use Petition Act (“LUPA”). *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wash.2d 169, 181-182, 4 P.3d 123 (2000); *Woods v. Kittitas County*, 162 Wn.2d 597, 608, 174 P.3d 25 (2007); *Henderson v. Kittitas County*, 124 Wn. App 747, 757 (2004), *review denied*, 154 Wn.2d 1028 (2005). As in the definition found under RCW 64.40.010, a rezone is subject to LUPA because it is also a “governmental approval required by law” before real property may be “used”. *Compare* RCW 36.70A.020 (2)(a); RCW 60.40.010 (2).

To hold that a site-specific rezone meets the definition under LUPA but not the virtually identical definition in chapter 64.40 RCW would defy the plain language of the various statutory definitions. The definition of a ‘permit’ under chapter 64.40 RCW broadly encompasses a range of governmental activity that affects the use of property. The term is not strictly or simplistically limited to building permits, grading permits and the like. Instead, courts have subjected a broad range of approvals and decisions that affect use of property to review under chapter 64.40 RCW. For example, a city may be liable under RCW 64.40.020 for its calculation of water connection fees if those are

found to be arbitrary, capricious or unlawful. *Landmark v. City of Roy*, 138 Wash.2d 561, 980 P.2d 1234 (1999).

It is entirely consistent with statutory definitions and case law that site-specific rezones are subject to review under RCW 64.40.020.

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

Manna filed a complaint for damages under RCW 64.40.020 after each of Kittitas County's acts that were arbitrary, capricious and unlawful. Both of those Complaints remained pending throughout this case (and the current Superior Court Cause number 07-2-00340-4 pertains to Manna's original Land Use Petition and Complaint for Damages). None-the-less, Kittitas County argued that Manna should have re-filed its cause of action for damages under RCW 64.40.020 a third time, after Kittitas County finally conceded its denials were unlawful and granted the rezone under Ordinance 2009-01. Kittitas County's arguments are not supported by the plain language of the statutes, case law, the law of this case, or simple logic.

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. Exhaustion pertains to all administrative remedies: 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) *citing to Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992). Exhaustion as a legal doctrine, and expressly under the plain language of RCW 64.40.030, pertains to administrative remedies, *not* judicial action: judicial action and review can only come after exhaustion is accomplished, if required. *Smoke*, 132 Wn.2d 214, 224 (exhaustion not required if administrative remedies cannot provide effective relief, for example).²

A plaintiff must exhaust administrative remedies related to “acts of an agency which are arbitrary, capricious, unlawful, or exceeded lawful authority...” RCW 64.40.020. Here, the two acts which arbitrary, capricious, unlawful, and exceeded lawful authority were Kittitas County Resolutions 2007-53 and 2008-104. As there was no further administrative review available, Manna met the exhaustion requirement.

Lutheran Day Care is instructive. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 125. Lutheran Day Care had timely appealed and filed a damages claim under chapter 64.40 RCW based on

² A court will also not require a plaintiff to exhaust all administrative remedies the court determines that further administrative action would be futile. *Friedman v. Pierce County*, 112 Wn.2d 68, 74, 768 P.2d 462 (1989).

Snohomish County's denial of a conditional use permit. The underlying Superior Court found that the County's denial was not warranted and ordered immediate issuance of the permit. Snohomish County did not appeal that order, but instead issued the permit.

The Washington State Supreme Court found that the County was liable under RCW 64.40.020 as having acted in a manner that was arbitrary, capricious and unlawful. *Lutheran Day Care*, 119 Wn.2d at 117. Lutheran Day Care never re-filed its claims under chapter 64.40 RCW after the County issued the condition use permit based on the Courts order. *Id.* at 97-98. The Supreme Court never found that Lutheran Day Care should have filed that claim a *second time* after the County granted the permit. That is because the action that the Court reviewed, and that which was arbitrary, capricious and unlawful, was the original permit *denial*, not the permit approval granted upon order of the Superior Court.

A string of cases following *Lutheran Day Care* have allowed review and recovery under RCW 64.40.020 where (a) the plaintiff filed the damages claim after the act found to create liability but before the city or county remedial act, (b) the plaintiff never re-filed the claim after the city or county remedial act, and (c) the damages case was heard

based on the original complaint and after the city or county's remedial action.

- In *Mission Springs*, the City's arbitrary, capricious and unlawful action took place on June 22, 1995. Mission Springs filed Complaint for Damages on July 3, 1995. The City took remedial action on August 14, 1995. Judicial review ensued without requirement that Mission Springs re-file RCW 64.40.020 damages claim. *Mission Springs*, 134 Wn.2d 947, 955-957.
- A later court confirmed the timing of the damages claim in *Mission Springs*: "The Spokane developer filed his action under RCW 64.40 well within 30 days of the City's 'act' of voting to delay the permit to which he was entitled." *Callfas*, 129 Wn. App. 579, 594.
- Isla Verde originally filed its claim under RCW 64.40.020 within 30 days of the act which the Supreme Court ultimately found unlawful in *Isla Verde Holdings Ltd. v. City of Camas (Isla Verde I)*, 146 Wn.2d 740, 49 P.3d (2002). Isla Verde never re-filed that claim after the City's remedial action. Judicial review of the RCW 64.40.020 claim finally was completed almost a decade later without any re-filing requirement. *Isla Verde Holdings Ltd. v. City of Camas (Isla Verde II)*, 147 Wn. App.

454, 196 P.3d 719 (2008) (review but no recovery after review on the merits).

- In *Cox*, the plaintiff was not required to re-file when the plaintiff originally filed within 30 days of the act found to violate RCW 64.40.020 even though the City did ultimately issue the approval before the damages case was heard. *See generally, Cox*, 72 Wn. App. 1.

Manna filed a cause of action under RCW 64.40.020 in conjunction with each Land Use Petition, i.e. within 30 days after the adoption of Resolutions 2007-53 and 2008-104. *CP 1-18; CP 1444-1459*. This timing complied with RCW 64.40.030: 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 after each of those acts. The County's ultimate approval of the rezone, Ordinance 2009-01, was the only County act not in violation of RCW 64.40.020.

Had Manna not filed a Land Use Petition and Complaint for Damages after each Resolution, Kittitas County would certainly have argued that Manna was time-barred from challenging either Resolution under RCW 64.40.020. Despite years of pending review, Kittitas County never challenged the timeliness of either Manna's 2007 or 2008

Complaints. Just as with *Lutheran Day Care*, *Mission Springs* et cetera, Manna should not have been required to re-file their chapter 64.40 RCW claim for a *third* time after the County finally actually *granted* the requested approval.

- i. Case law does not support Kittitas County's assertion that Manna should have filed a third complaint for damages under RCW 64.40.020 when Manna had an existing, timely filed and pending cause of action under RCW 64.40.020 before the Superior Court.

The case law on which the County relies does not over-rule, refute or otherwise challenge the findings in *Lutheran Day Care* or its progeny. Instead, those cases either confirm that Manna timely raised their chapter 64.40 RCW claims or are not determinative of the issue. Two cases raised by the County warrant particular review.

In its motion for summary judgment, Kittitas County improperly attempted to expand the effect of *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997). In *Hayes*, Seattle placed substantial restrictive conditions on Hayes' master use permit. Hayes appealed that decision, but did not file a damages claim. The underlying superior court ruled that the County's conditions were unsupported and remanded the case. *Hayes*, 131 Wn.2d 709-710. Seattle then removed the offending conditions without explanation and re-issued the permit. Only then did Hayes sue for damages under chapter 64.40 RCW and 42 U.S.C. §1983.

Hayes, at 710. In reviewing whether this later claim for damages was barred by *res judicata*, the Court explained that its decision would not have precluded Hayes from bringing a claim for damages with its original lawsuit challenging the permit condition. *Id.* at 714 (“we are not saying that the two separate actions could not have been joined for trial”).

Instead, the question in *Hayes* was whether Hayes’ original failure to file a damages claim within thirty days (as required by statute) of the improper condition was a fatal flaw, or if Hayes’ filing of such claim after the permit approval satisfied the timing conditions of RCW 64.40.030. The *Hayes* Court ruled that Hayes had complied with the time limits of chapter 64.40 RCW claim by filing that claim within thirty days after the subsequent permit approval. *Id.* at 716. Otherwise, the Court had no pending damages claim to review from the first lawsuit and Hayes would have had no recourse under chapter 64.40 RCW. However, the Court was careful to limit its decision to the specific facts in *Hayes*, i.e. where Hayes did not originally file a cause of action under chapter 64.40 RCW within thirty days of Seattle’s act that violated the statute. *Id.* at 716.

The *Hayes* Court did not overrule *Lutheran Day Care* or go so far as to rule that the *Hayes* would have been untimely if *Hayes* had filed the damages claim within 30 days after the act found to be arbitrary and capricious. The Court specifically explained that the exhaustion of administrative remedies requirement in RCW 64.40.030 does not encompass judicial review. Simply, *Hayes* left the door open for a plaintiff to file a chapter 64.40 RCW claim after a final approval performed subsequent to judicial review, that second City act was equally possible to challenge under chapter 64.40. The *Hayes* Court did not rule on the hypothetical scenario if *Hayes* had filed a chapter 64.40 RCW claim under its first lawsuit and within 30 days of Seattle's imposition of the offending condition, except to at least recognize in dicta that such claim could have been tried with the original challenge to the condition. *Id.* at 714.

Notably, the same Washington Supreme Court that issued *Mission Springs* only a year after *Hayes* had no issue with the timing of the damages claim in *Mission Springs*, despite expressly recognizing that timing of the *Mission Springs* complaint. *Mission Springs*, 134 Wn.2d 947, 955-957.

The County's reliance on *Smoke v. City of Seattle*, 132 Wn.2d 214, 937 P.2d 186 (1997) was equally misplaced. Contrary to the County's argument, *Smoke* supports Manna's position. *Smoke* applied for building permits from Seattle, which refused to issue 2 of 4 permits. *Smoke*, 132 Wn.2d 214, 219. *Smoke* filed a lawsuit challenging the City's refusal plus a complaint for damages under chapter 64.40 RCW and 42 U.S.C. §1983. The superior court heard summary judgment on the City's refusal to issue the permits; the City then changed its position and issued the permits. As in *Lutheran Day Care and Cox*, *Smoke* did not re-file the chapter 64.40 RCW damages claim (or the 42 U.S.C. §1983 claim). *Id.* at 219. The Court examined Seattle's administrative processes and found that *Smoke* had exhausted all administrative remedies. As part of that review, the Court included a useful discussion of exhaustion, recognizing that exhaustion pertains to administrative remedies (not extending into judicial review). *Smoke*, 223-224. As in *Smoke*, the Manna here exhausted all administrative remedies before filing their chapter 64.40 RCW claims.

In the instant case, while Kittitas County did finally grant the rezone under Ordinance 2009-01, the acts subject to RCW 64.40.020 for being arbitrary, capricious and unlawful and as defined under RCW

64.40.010(6) were Resolutions 2007-53 and 2008-104. Manna exhausted all administrative remedies for both Resolution 2007-53 and again Resolution 2008-104. Had Manna not filed an RCW 64.40.020 claim within thirty days of Resolutions 2007-53 and 2008-104, but instead waited until after Ordinance 2009-01 to file a chapter 64.40 RCW claim, Kittitas County certainly would have argued that Manna was too late because the challenged “acts” under chapter 64.40 RCW were Resolutions 2007-53 and 2008-104.

- ii. Kittitas County waived any argument that Manna had to file its RCW 64.40.020 a third time despite two such claims pending in Superior Court.

Kittitas County never filed an Answer to either lawsuit, filed in 2007 and 2008, under which the County might have asserted a defense that Manna’s chapter 64.40 claims were untimely. Kittitas County never otherwise objected or opposed the timing of Manna’s chapter 64.40 RCW claims during the intervening years despite ample opportunity. Manna maintained as active both its 2007 and 2008 Complaints based on RCW 64.40.020, each filed within 30 days of the County’s act.

Manna also later filed an Amended Complaint raising tort claims within three years of the County’s actions and after Manna completed the Notice of Claim prerequisite. Therein, Manna noted both pending RCW 64.40.020 claims and reasserted those along with the tort-based

claims for interference and delay. *CP 1217-1226*. Simultaneously, the parties filed a “Stipulated and Agreed Order Allowing Amendment of Complaint by Plaintiffs.” Therein, Kittitas County agreed that Manna “shall be granted the right to file their amended complaint.” *CP 1215-1216*. Kittitas County again did not file an Answer and in no other way refuted its agreement that Manna could amend the complaint.

Kittitas County has waived its right to assert any statute of limitations claims by (a) never Answering the original causes of action filed in 2007 and 2008, (b) never Answering the Amended Complaint and (c) to the contrary, waiving any defenses such as statute of limitations by Stipulating to the Amended Complaint without qualification.

E. Kittitas County’s Twice 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. Kittitas County’s actions in this case violated Manna’s rights and are subject to review under 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.

A plaintiff may bring claims for damages under RCW 64.40.020 and 42 U.S.C. §1983 in a one action. *Lutheran Day Care*, 119 Wn.2d 91; *Mission Springs*, 134 Wn.2d 947.

Improper delay or denial of a land use application is a violation of substantive due process under 42 U.S.C. §1983 “if the decision to deny the permit is ‘invidious or irrational’ or ‘arbitrary or capricious’.” *Lutheran Day Care*, 119 Wn.2d 91, 125 (citing *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 412, 780 P.2d 838 (1989)). A ruling that the decision was arbitrary and capricious, for purposes of RCW 64.40.020(1), equally satisfies the test for a violation of due process under 42 U.S.C. §1983. *Lutheran Day Care*, 119 Wn.2d at 116. However, a claim under 42 U.S.C. §1983 is not subject to the same exhaustion requirements as a RCW 64.40.020 claim. *Cox*, 72 Wn. App. 1 at 10.

A city or county’s improper delay in issuing an approval is also subject to review under 42 U.S.C. §1983. *Mission Springs*, 134 Wn.2d 947, 963. The fact that *Mission Springs* pertained to a ministerial permit is irrelevant. The question in *Mission Springs* is the same question posed in this case: was there a legal basis for the City of Spokane or Kittitas

County to delay issuing the final decision, whether that be a quasi-judicial rezone or a ministerial grading permit?

Kittitas County utterly ignored the Superior Court's clear first remand instructions. Instead, the County denied the rezone a second time, failing to provide the fair and balanced process that the court instructed, using an almost identical resolution as the first, devoid of any substantive findings, conclusions or analysis, and in total disregard for the substantive evidence and analysis Manna submitted justifying the rezone under each and every rezone criterion.

Even on the second go-around, the County and its Commissioners failed to articulate findings that had anything to do with the record or rezone process: For example: "In making a finding that there was no change in access the BOCC makes no other findings on which the base that rather conclusory finding. What the BOCC meant by 'change of access' is unclear from the evidence..." *CP 1163*.

The BOCC twice totally ignored necessary safeguards for a lawful decision:

The BOCC cannot just simply state that the proponent's burden of proof has not been met without otherwise making findings to support this conclusory finding. And the court's review of the record finds no other evidence to support the BOCC's finding.

CP 1164.

The County's failure to support its decision on the second review was arbitrary and capricious, invidious and irrational, and 'shocked the conscience' considering that the Superior Court had, in its prior decision, clearly instructed the County that it was not lawful to reach conclusions without supportive findings of fact: "remand this matter to the BOCC with explicit directions ... that the Board make detailed findings of fact based on upon its complete review of the record, and draw its conclusions based upon the detailed findings." *CP 534* (emphasis added).

To warrant judicial interference, the unreasonableness or unlawfulness of the administrative action must be clearly apparent, and must consist of willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case. Here, it took essentially two years to finally obtain the relief that Manna sought. While reviewing the actions or inactions of the County on the second appeal it was abundantly clear to the trial judge that the County had disregarded or elected not follow the County's own regulations or the directives of the Court, especially to the point of forcing the Court to order the County to grant the rezone. Despite the Superior Court's clear and well written first 2007 Decision, providing detailed instructions to

the County to satisfy its own standards and/or procedures, the County elected to ignore the directives of the trial court and engage in virtually the same behavior and actions or inactions following Manna's initial rezone application. Without any legitimate basis, there is simply no justifiable argument available to the County to avoid the imposition of liability.

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

Kittitas County asserted that Manna's claim under 42 U.S.C. §1983 is not ripe. A claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, and the challenged action is final. *Bellewood No. 1, LLC v. LOMA*, 124 Wn.App. 45, 97 P.3d 747 (2004).

State policy favors expeditious review of land use decisions so that legal uncertainties can be promptly resolved and land development not be unnecessarily delayed by litigation-based delay. *See, e.g., City of Federal Way v. King County*, 62 Wn.App. 530, 538, 815 P.2d 790 (1991), superseded by statute on other grounds; *see also, Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974). Application of the principle that the validity of an ordinance becomes "ripe" for review when the ordinance is adopted furthers this policy.

A judicable controversy is: "(1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves

interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.” *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 382-3, 940 P.2d 286 (1997), citing *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994).

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*).

Here, the question 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? This question is ripe for review.

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

Kittitas County also questioned 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.

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). A city or county has discretion whether to grant a rezone, variance, conditional use permit, or special use permit. *Kelly*, 157 Wn. App. at 425; see also *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). An applicant does not have a per-se right to such an approval, as opposed to a ministerial building permit, except if the applicant can satisfy the locally-established criteria. E.g. *T-Mobile USA*, 123 Wn. App. 19, 29 (variance not proper unless all specific criteria met). However, none of the foregoing entitles a county to act unlawfully or violate an applicant's rights when reviewing a site-specific rezone, variance, conditional use, or special use application.

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. 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.

Further, under LUPA, a site-specific rezone is considered a “project permit application. RCW 36.70A.020(2)(a); *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 179, 4 P.3d 123 (2000). It would defy logic for a site specific rezone to be considered a “project permit application” under Washington statutory law for purposes of judicial review, but not provide that applicant with the constitutional protections of 42 U.S.C. §1983.

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.

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

Manna has also raised damages claims under tortious interference with a business expectancy and tortious delay. Kittitas County asked for summary judgment on to whether Manna could make such claims.

Washington courts recognize tort-based claims for damages where a city or county issues a decision based on improper motives or using improper means, or unreasonably delays issuing a decision to which the applicant is entitled. *Westmark v. Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007); *Callfas*, 129 Wn. App. 579; *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).

A city or county may not arbitrarily delay a project or single out a particular project and use its processes to block that project. *Westmark*, 140 Wn. App. 540, 558 and 564. As the *Westmark* Court cited from *Pleas*:

[A] cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships.

Id. 558, citing *Pleas v. City of Seattle*, 112 Wash.2d 794, 803-04, 774 P.2d 1158 (1989).

There are five elements which Washington courts appear to use for both a claim of tortious interference with a business expectancy and tortious delay:

1. The existence of a valid contractual relationship or business expectancy;
2. That defendants had knowledge of that relationship;
3. An intentional interference inducing or causing a breach or termination of the relationship or expectancy;
4. That defendants interfered for an improper purpose or used improper means; and
5. Resultant damages.

Westmark, 140 Wn. App. 540, 557 (citations omitted).

All five elements have been met in this case:

1. The business expectancy was the rezone approval once Manna demonstrated it had met all the adopted criteria.

2. Kittitas County had full knowledge of the relationship with Manna by and through Manna's applications and the first Land Use Petition.

3. If not after Resolution 2007-53 (the County's first denial), then certainly after Resolution 2008-104 (the County's second denial in blatant violation of the Superior Court's remand instructions), Kittitas County had intentionally interfered with Manna's expectation of a lawful rezone decision.

4. Kittitas County had absolutely no legitimate or lawful purpose or interest in issuing an illegal decision, twice and despite clear judicial instruction. Kittitas County made virtually unreviewable decisions and failed to identify a single, rationale basis for either of its decisions that Manna or the Superior Court could even reasonably compare to the record. The County's second denial was without any merit or substance at all, despite the Superior Court's clear instructions stating step-by-step how the County should review and issue a decision on the rezone. The County's approach to the process and decisions were an improper means to restrict what Manna was entitled to: a lawful decision on the rezone, which should have been approval at the outset, in 2007 since Manna had met each rezone criterion. Once Manna met the rezone criteria, the County had a duty to not interfere with issuance of a lawful rezone decision, here an approval. The County's actions were based on improper purposes and used improper means.

5. Manna incurred damages based on the County's improper denials and delays. Manna has not had the opportunity to quantify these damages, which is an issue of fact not appropriate for a summary judgment ruling at this stage of the case. Simply, the parties have not yet completed discovery and a quantification of damages is premature. It is

proper for this Court to remand for further factual development related to the measurement and calculation of damages specific to this case. *Pleas*, 112 Wn.2d at 810.

G. Collateral Estoppel Applies With Respect to the Prior Land Use Petition Decisions.

Collateral estoppel provides finality and bars re-litigation of an issue in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, *Washington Practice, Civil Procedure* § 35.32, at 475 (1st ed. 2003). Collateral estoppel promotes judicial economy and serves to prevent inconvenience or harassment of parties. *Reninger v. Dep' t of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). Collateral estoppel may be applied to prevent re-litigation of issues that already litigated and finally determined in an earlier proceeding. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987).

In the instant case, the Superior Court found the County not only failed to provide any meaningful support or evidentiary basis for denying the rezone, the court found the County ignored the court's explicit instructions in the 2007 Decision regarding how the County was to review the rezone and make lawful findings and conclusions. *2009 Decision*, page 11. The County should not be allowed to use Manna's damages claims as a way to re-litigate the substance of the rezone itself.

H. Attorney's Fees.

RCW 64.40.020 (2) provides that the “prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney’s fees.”

The Superior Court heard a motion from Kittitas County for fees based on RCW 64.40.020 (2), subsequent to Manna’s filing of its appeal to this Court.³ The court granted the County’s motion for fees, despite (a) Manna’s filing of this appeal and request for a stay of the fee request, (b) the County’s failure to distinguish its fees based on arguments related to Chapter 64.40 versus the other causes of action at issue in the summary judgment process.

This Court has jurisdiction to review the fee award under RAP 2.4 (g). The Superior Court prematurely and improperly awarded fees to Kittitas County, and failed to require the County to limit its fees to those for work related to Chapter 64.40 RCW. The fee award was premature and erroneous. Manna request this Court to reverse this fee award and instead award fees to Manna on the basis of RCW 64.40.020 and 42 U.S.C. §1983.

³ At the time of Manna’s Designation of Clerks Papers, this motion had not been ruled upon. Manna will amend the Designation of Clerk’s Papers to add the pleadings and order in this regard and provide the Court and Kittitas County with the Clerk’s Paper references when the Superior Court has acted.

CONCLUSION

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

- (a) find the County's acts violated RCW 64.40.020;
- (b) either find that the County's acts violated 42 U.S.C. §1983 and constituted tortious interference with business expectancy and delay, or remand for further factual development related thereto;
- (c) deny the County's motion related to all damages causes of action; and
- (d) remand for further determination of damages and further factual development.

Dated this 12th day of March, 2012.

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