

FILED

APR 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 305392

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

MANNA FUNDING, LLC, a Washington limited liability company, et.
al.,

Plaintiffs/Appellants,

v.

KITTITAS COUNTY, a Washington municipal corporation,

Defendant/Respondent.

BRIEF OF RESPONDENT

Mark R. Johnsen, WSBA #11080
Of Karr Tuttle Campbell
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Kittitas County

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I. IDENTITY OF RESPONDENT

The Respondent is Kittitas County, the party that prevailed in the summary judgment motions before the trial court. Kittitas County is asking this Court to affirm the order of summary judgment and the award of attorneys' fees.

II. INTRODUCTION

Kittitas County respectfully asks this Court to affirm the decision of the trial court, dismissing the damages claims of the Appellants, who are collectively referred to herein as "Manna Funding." Although Manna Funding had prevailed in its appeal of the County's original denial of its rezone application, the trial court properly held that there was no basis for Manna Funding to recover damages against Kittitas County.

RCW 64.40 and 42 U.S.C. § 1983 each place strict requirements on a landowner who seeks to recover damages against a local government based on an erroneous land use decision. Manna Funding's claims against Kittitas County failed on multiple grounds, and were therefore properly dismissed. In addition, Manna's claim based on the theory of tortious interference with business expectancy was properly dismissed. The trial court also correctly awarded attorneys' fees to Kittitas County under RCW 64.40.020, as it was the prevailing party on the 64.40 claim.

Kittitas County respectfully asks this Court to affirm.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Kittitas County believes that the issues pertaining to the assignments of error may best be stated as follows:

- A. Whether the trial court correctly dismissed Manna Funding's claim under RCW 64.40 where (1) there was no "permit" which was denied by the County; (2) the claim was barred by limitations and failure to exhaust remedies; (3) the rezone denial was not arbitrary and capricious or knowingly unlawful; and (4) Manna Funding identified no damages compensable under the statute.
- B. Whether the substantive due process claim under 42 U.S.C. § 1983 was properly dismissed based on (1) absence of ripeness; (2) absence of a constitutionally protected "property interest"; and (3) absence of action by the County which was "shocking to the conscience."
- C. Whether the tortious interference claim was properly dismissed based on (1) the absence of a business relationship between Manna Funding and a third party; (2) the absence of intentional interference; and (3) the absence of the termination of any business relationship.
- D. Whether the trial court properly awarded attorneys' fees to Kittitas County as the prevailing party under RCW 64.40.020.

IV. COUNTER STATEMENT OF THE CASE

The appellants (collectively "Manna Funding") are five related limited liability companies that sought recovery of money damages based on the County's denial of their joint applications for a rezone of their adjacent properties. In October 2006, Manna Funding applied to Kittitas County for a rezone of the property from "Forest and Range 20" to "Rural 3." In effect, the rezone would increase the potential density by a factor of seven. County staff issued a Determination of Nonsignificance

following SEPA review. The Planning Commission held an open record public hearing on January 23, 2007. On February 27, 2007 the Commission adopted findings recommending that the rezone be denied. (CP 567-569).

The Board of County Commissioners (“BOCC”) scheduled a closed record hearing on April 30, 2007, and following that hearing voted to deny the rezone. The denial was based on concerns relating to access and steep slopes. The BOCC also felt that the rezone would be detrimental to the surrounding land uses, including the nearby Roslyn Urban Forestry zone. (CP 1276-1278).

Manna Funding filed an appeal under the Land Use Petition Act RCW 36.70C (“LUPA”), asking the trial court to reverse the rezone denials. (CP 1-18). Among the issues raised by Manna in the LUPA action was that the BOCC had incorrectly considered possible future development on the property. Manna stressed that it was seeking nothing more than a rezone, and that no specific development plans for the properties were proposed.

Following briefing of the parties and argument of counsel, the trial court remanded the matter back to the Planning Commission and the Board of County Commissioners. (CP 1252-1263). The court felt that the initial findings and conclusions were not clear and specific enough to allow the court to determine whether the rezone denial was properly supported in the record. In addition, there was an allegation that the

Planning Commission may have considered evidence which was omitted from the record. The matter was sent back for new hearings.

Following additional hearings before the Planning Commission and the Board of County Commissioners, the BOCC again voted to deny the rezone on June 17, 2008. The denial was based on the BOCC's determination that the applicants had not met their burden of proof in showing that the rezone had "merit and value for Kittitas County or its subarea;" and because there was no showing of a change in circumstances nor need for additional property in the proposed zone; and because the location of the property between the Commercial Forest zone to the north and the Urban Forest zone to the south would make an R3 zone detrimental to the existing uses on the surrounding properties. (CR 1278-1281).

The rezone denial was appealed by Manna Funding under LUPA. The trial court concluded in its decision dated February 5, 2009, that the findings and conclusions in support of the rezone denial were still not sufficiently clear, or not adequately supported in the record. Therefore, the court ordered that the County approve the rezone. (CP 1157-1168). The rezone approval was issued on February 18, 2009. (CP 1283-1284).

As a part of both LUPA petitions (June 2007 and July 2008) the plaintiffs had also asserted claims for damages under RCW 64.40; and under 42 U.S.C. § 1983. The damages claims were not pursued, however, for a period of 2-1/2 years after the rezones were approved. In August

2011, Manna Funding filed a First Amended Complaint which sought to revive the damages claims. Approximately one month later, the parties filed cross-motions for summary judgment.

The County's motion argued that the damages claims were subject to dismissal based on absence of standing; limitations; absence of ripeness; absence of a constitutionally protected property interest; and failure of Manna Funding to meet the required elements of its damages claims.

The County's motion was supported by admissions from the deposition of Tiffany Doty, the Managing Member of Manna Funding. (CP 1318-1331). In response to the County's motion, the only evidence presented by Manna Funding (other than the quasi-judicial and judicial orders below) was a one-page declaration from Tiffany Doty, which failed to meaningfully respond to the evidence presented by the County, and which failed to provide any competent evidence in support of Manna Funding's damages claims. (CP 1397-1398).

The cross-motions for summary judgment were heard by the Honorable Scott R. Sparks. The Court took the matter under advisement, and subsequently denied Manna Funding's motion and granted Kittitas County's motion, which effectively dismissed all of Manna's damages claims. The Court subsequently granted Kittitas County's motion for an award of attorneys' fees as the prevailing party under RCW 64.40.020. This appeal followed.

V. ARGUMENT

A. The RCW 64.40 Claim Was Properly Dismissed, Based on Multiple Grounds.

1. 64.40 Does Not Apply to Rezone Applications.

In the 1980s, the Washington legislature enacted a statute which provides an exception to the common law rule that counties and cities are ordinarily not liable for mistaken decisions on land use and building applications. The remedy provided by RCW 64.40, however, is a narrow one. By its terms, 64.40 allows recovery of damages only where a property owner has applied for a permit to develop his property and where that permit has been denied based on arbitrary and capricious grounds:

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. . . .

RCW 64.40.020(1) (Emphasis added).

In this case, Manna Funding did not apply for a permit or other approval to develop its property. (CP 1331). Instead, it applied only for a rezone. Indeed, in its submittals to Kittitas County and to this Court, Manna repeatedly represented that it had no specific development proposals in mind, but was asking only that the properties be assigned a different zoning classification. (CP 1322-1324, 1341-1355). Because this case does not involve an application for a development permit, RCW 64.40 does not grant standing to Manna Funding.

Manna Funding acknowledges that it never applied for a permit. But it nonetheless asks this Court to conclude that its rezone application should be considered a “permit application” under RCW 64.40. But the argument is not well grounded in the law. Zoning is distinguished from development. Zoning is a part of effective municipal planning. Shelton v. Bellevue, 73 Wn.2d 28, 35, 435 P.2d 949 (1968). A rezone is merely a change in the zoning classification of a previously zoned area. Durocher v. King County, 80 Wn.2d 139, 154, 492 P.2d 547 (1972). A rezone is not a development permit.

It is true that a rezone applied to specific property is treated as a quasi-judicial proceeding under the Growth Management Act and the Land Use Petition Act. But that does not transform a rezone request into an “application for a permit” under RCW 64.40. Manna Funding erroneously seeks to equate the definition of a “permit application” under RCW 64.40, with a “land use decision” under the Land Use Petition Act, RCW 36.70C. But the definitions in these two statutes are dramatically different. A “land use decision” under LUPA is defined very broadly and includes not only a decision on a permit but also an “interpretive decision regarding the application of zoning rules to property.” See, RCW 36.70C.020(2). There is no similar language in RCW 64.40. Rather, 64.40 defines “permit” narrowly as a governmental approval “required by law before an owner of a property interest may improve, sell, transfer or otherwise put real property to use.” RCW 64.40.010(2). The rezone

sought by Manna Funding was not an application required to develop the property. At most, it would affect some of the rules that would be applied if Manna should choose in the future to file an application for a permit to develop its property.

When a statute creates a cause of action not recognized at common law and expressly states who is entitled to bring the action, the statute must be read narrowly as to who may sue. Dernac v. Pacific Coast Coal Co., 110 Wash. 138, 142, 188 Pac. 15 (1920); U.S. v. Burlington Northern, Inc., 500 F.2d 637, 639 (9th Cir. [Wash.] 1974). RCW 64.40 grants standing only to a property owner who has filed an application for a development permit. Westway Construction, Inc. v. Benton County, 136 Wn. App. 859, 866, 151 P.3d 2004 (2006).

Standing is a jurisdictional question which should be resolved whenever possible at the outset of a lawsuit. Brewer v. Lewis, 989 F.2d 1021, 1025 (9th Cir. 1993). In this case, Manna Funding lacked standing to pursue a claim for damages under RCW 64.40, because it did not apply for a development permit. This is the first basis for dismissal of the 64.40 claim.

2. The 64.40 Claim is Barred Because Manna Funding Failed to File Within 30 Days After Exhaustion of All Administrative Remedies.

Even if Manna had standing to pursue a claim under RCW 64.40, the action would be barred because it was not filed within the narrow 30-day statutory window after all administrative remedies were exhausted.

RCW 64.40.030 provides that a claim under the statute may be commenced only within 30 days after the claimant has exhausted all administrative remedies:

Any action to assert claims under the provisions of this chapter shall be commenced only within 30 days after all administrative remedies have been exhausted.

(Emphasis added).

The Washington courts have construed the language of 64.40.030 strictly. If the statutory action is not filed within 30 days following the final administrative action of the county, dismissal is mandatory. An action filed prematurely must be dismissed based on failure to exhaust administrative remedies. As the Washington Supreme Court held in Smoke v. Seattle, 132 Wn.2d 214, 221-22, 937 P.2d 186 (1997), the statute carries an exhaustion requirement which is mandatory:

The Court of Appeals properly rejected plaintiff's assertion that 64.40 does not impose an exhaustion requirement but rather serves only as a limitation provision. On its face, RCW 64.40.030 unambiguously imposes exhaustion prerequisite to damages actions. The plain language "after all administrative remedies have been exhausted" expresses no meaning other than an exhaustion requirement.

In this case, Manna did not file its Complaint seeking recovery under 64.40 within 30 days after the rezone approval was issued in February of 2009. Instead, Manna filed its action under 64.40 prematurely, on June 5, 2007. (CP 1-18). This was before all administrative remedies had been exhausted. As admitted in the Amended Complaint, Manna Funding appealed the rezone denial to superior court,

where it was successful in having the BOCC's decision reversed. The rezone was approved on February 18, 2009. (CP 1219). The "30 day clock" began to run on that date. Yet Manna failed to file a lawsuit under 64.40 within 30 days following the rezone approval. Accordingly, the 64.40 claim was time barred, even if Manna had standing.

The ripeness requirement under 64.40 was applied as a bar by the 9th Circuit Court of Appeals in Macri v. King County, 126 F.3d 1125 (9th Cir. 1997), cert. den., 522 U.S. 1153. In Macri, a plat application was denied by the King County Council on June 27, 1992. That denial was appealed to Superior Court and, on January 7, 1994, the Superior Court ordered the County to issue the plat. The plat was issued on February 28, 1994. The owner filed an action for damages under RCW 64.40 on February 4, 1994 (three weeks before the plat was issued). Upon motion by King County, the RCW 64.40 action was dismissed. The 9th Circuit affirmed, holding that the plaintiffs had filed their 64.40 action prematurely, and not within the 30-day statutory window after exhaustion of administrative remedies:

Appellants are correct that, under these facts, their administrative remedies were not exhausted until February 28, 1994, when, pursuant to the Superior Court's Order on Appellant's Writ of Certiorari, the county council finally approved the preliminary plat application. See Hayes v. City of Seattle, 934 P.2d 1179, 1183-84 (1997). However, appellants filed their claim for damages under Wash. Rev. Code Ch. 64.40 on February 4, 1994, more than three weeks *before* the county council finally approved the preliminary plat application. Appellants' claim was therefore unripe under the plain language of

section 64.40.030, which explicitly states that actions must be “commenced only within 30 days *after* all administrative remedies have been exhausted.” . . . Consequently, Appellants’ claim under Ch. 64.40 was properly dismissed. . . .

126 F.3d at 1130 (Emphasis by 9th Circuit). The same result is mandated in this case.

In Hayes v. City of Seattle, 131 Wn.2d 706, 934 P.2d 1179 (1997) the Washington Supreme Court confirmed that where an administrative decision is appealed to Superior Court, and the appeal results in the lifting of a restriction, the 30 day period under 64.40 begins to run from the time the restriction is lifted:

While the Council’s action *would* have been final if Hayes had done nothing further, Hayes promptly commenced an action for judicial review specifically for the purpose of overturning what he claimed was arbitrary and capricious action by the Council . . . Because Hayes continued to pursue his efforts to obtain a master use permit from the Seattle City Council, albeit with aid from the King County Superior Court, it cannot be said that he had exhausted his administrative remedies at the time of the Council’s initial denial.

131 Wn.2d at 715-16. (Emphasis by Supreme Court).

Manna Funding apparently recognizes that there is no Washington case law supporting its argument that the thirty day exhaustion and limitations requirement of RCW 64.40 may be ignored. Therefore, it seeks to rely on cases where the statute of limitations and exhaustion were not even discussed by the parties, much less addressed by the court (i.e., Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 829 P.2d 746

(1992); and Cox v. City of Lynnwood, 72 Wn. App. 1, 863 P.2d 578 (1993)). Because the issues of exhaustion and limitations were not even addressed in those cases, they provide no authority on the exhaustion and limitations issues which were raised by Kittitas County in this case.

The case which is most closely on point on this question is the decision from Division III of the Court of Appeals in Westway Construction v. Benton County, *supra*, 136 Wn. App. 859. In that case, the court held that the plaintiffs' claims under RCW 64.40 were untimely, where the initial complaint was filed before the Superior Court had ordered the county to issue the disputed permit, and where the amended complaint was filed years after the permit was issued. Because there was no 64.40 complaint filed within the narrow 30 day window following permit approval, the trial court held that the 64.40 claim was untimely as a matter of law, and the Court of Appeals affirmed:

On July 26, 2000, the Court issued an order staying the mitigating conditions and permitting the rock crushing operation to go forward. *This date was when the administrative remedies were exhausted.* *See, Hayes*, 131 Wn.2d at 715; *Macri*, 126 F.3d at 1130. The initial complaint was filed July 7, 2000, prior to the exhaustion of remedies. It was not timely filed. *Macri*, 126 F.3d at 1130. The amended complaint filed July 9, 2004 was also untimely as the filing was past the 30 day requirement. Dismissal was proper.

136 Wn. App. at 866-67 (emphasis added).

Virtually identical facts are present in this case, and the trial court properly reached the same result. Judge Cooper ordered approval of the

rezone in early February 2009, and the rezone was in fact approved by the County on February 18, 2009. (CP 1219). The 30 day window began to run on that date. Manna's failure to file a lawsuit under 64.40 within 30 days following rezone approval was fatal to its claim.

Recognizing that its 64.40 claim is barred by exhaustion and limitations, Manna Funding argues that the County "waived" these defenses. This argument is groundless. The Land Use Petition Act does not require the local government to file an answer. (RCW 36.70C.080(6)). And Kittitas County was not required to do so when the LUPA action was filed in 2007. Moreover, after the Court ordered issuance of the rezone in February 2009, Manna Funding took *no steps* to pursue claims for damages until it filed an Amended Complaint in August 2011. The County had reasonably assumed that Manna Funding did not intend to pursue the damages claims after the rezone was issued. It was only when Manna Funding filed its Amended Complaint in August 2011 and at the same time reserved a hearing date for a summary judgment motion, that Kittitas County filed a Cross-Motion for Summary Judgment, seeking dismissal of the damages claims asserted in the Amended Complaint. There was no action by Kittitas County waiving any affirmative defense.¹

¹ The suggestion that Kittitas County waived its affirmative defenses by stipulating that plaintiff could amend its Complaint is preposterous. CR 15(a) provides that an amendment to a pleading shall be "freely given." As a professional courtesy, Kittitas County stipulated to the amendment, so the attorneys would not be required to travel to Ellensburg for a motion which would certainly have been granted. Kittitas County did not waive any of its affirmative defenses.

3. The BOCC's Decision Was Not Arbitrary and Capricious or Knowingly Unlawful.

Even if Manna Funding had timely filed its claims under RCW 64.40, it would not be entitled to recover because the decision by the BOCC was not “arbitrary and capricious” or “knowingly unlawful.” RCW 64.40.020. Before liability may be imposed under 64.40, the permit applicant must prove that a “final decision” of the municipality was “arbitrary and capricious” or knowingly unlawful:

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. . . .

RCW 64.40.020(1). The definitions of “act” and “agency,” make clear that liability may only arise from the “final decision” of the local government’s highest decisionmaker. 64.40.010(1)) and (6). Moreover, under the “unlawful action” test, the local government is subject to liability “only if the decision of the agency was made with knowledge of its unlawfulness. . . .” In Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 112, 829 P.2d 746 (1992) the Supreme Court confirmed that a merely unlawful action by an agency is not actionable under 64.40.

The BOCC’s decision does not meet the high standard for liability under RCW 64.40.020. A municipality’s land use action will not be found to be “arbitrary and capricious” unless it amounts to “willful and unreasoning action in disregard of facts and circumstances.” Skagit County v. Department of Ecology, 93 Wn.2d 742, 749, 613 P.2d 115

(1980). An incorrect legal decision or an error in judgment by a quasi-judicial decision maker does not give rise to liability under the arbitrary and capricious standard. Landowners v. King County, 64 Wn. App. 768, 772, 827 P.2d 1017 (1992). Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration. Kendall v. Douglas, Grant, Lincoln and Okanogan Counties Public Hosp. Dist. No. 6, 118 Wn.2d 1, 14, 820 P.2d 497 (1991). This is true even though the court may have reached the opposite conclusion. Buechel v. DOE, 125 Wn.2d 196, 202, 884 P.2d 910 (1994); Rios v. Dept. of Labor & Industries, 145 Wn.2d 483, 504, 39 P.3d 961 (2002).

It is important to note that, even though the trial court concluded that the BOCC had not adequately articulated substantial evidence in the record supporting rezone denial, the Court's decision cannot be used to meet the "arbitrary and capricious" or "knowingly unlawful" standards for a damages claim under 64.40:

In order to grant relief under this chapter [36.70C], it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. *A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.*

RCW 36.70C.130(2). (Emphasis added). The trial court's LUPA decision was based on the "substantial evidence" test, not on a determination of arbitrary and capricious action by the BOCC. And since there is no

showing that the Board's decision was arbitrary and capricious, or that it "knowingly" violated the law, recovery under 64.40 is foreclosed.

In support of its argument that Kittitas County should be held liable in damages, Manna Funding relies on cases with very different factual scenarios. For example, as Manna Funding concedes, the court in Cox v. Lynnwood, *supra*, based its award of damages on a finding that the denial of the boundary line adjustment by Lynnwood was undertaken based on ulterior motives. *Id.* at 8-9. Similarly, in Mission Springs v. City of Spokane, 134 Wash. 2d 947, 954 P.2d 250 (1998) the court found arbitrary and capricious action where the city council had deliberately ignored the explicit advice of its own attorney that it was acting illegally, and explicitly taunted and "dared" the applicant to sue the city. *Id.* at 956.

There are no such extraordinary circumstances in this case, and no showing that the Board of County Commissioners was motivated by anything other than its view that the requested rezone was not appropriate in view of the surrounding land uses and the absence of "changed circumstances" to warrant an intensification of density from RR-20 to R-3.

The BOCC reasonably felt that the R-3 density in this location was not compatible with the surrounding land uses and concluded that the applicants had not adequately established "changed circumstances." While the BOCC's decision may not have been articulated with precision, the decision was not arbitrary and capricious, and dismissal of the damages action was proper.

4. Manna Funding Did Not Suffer Compensable Damages.

Even if Manna Funding could overcome the standing and exhaustion obstacles, and even if it could establish “arbitrary and capricious” action, it could not recover under RCW 64.40 because it did not suffer compensable damages, as narrowly defined in 64.40.010. The definition of recoverable damages under the statute is as follows:

“Damages” means reasonable expenses and losses, other than speculative losses or profits, incurred between the time a cause of action arises and the time a holder of an interest in real property is granted relief as provided in RCW 64.40.020. Damages must be caused by an act, necessarily incurred, and actually suffered, realized or expended, but are not based on diminution in value of or damage to real property, or litigation expenses.

64.40.010(4).

Thus, the statute makes clear that there are several strict limitations on recovery of damages under the statute:

- ◆ The damages cannot be speculative losses or profits.
- ◆ Any damages must have been incurred between the denial and the ultimate issuance of the approval.
- ◆ Any damages must have been “necessarily incurred,” i.e., unavoidable.
- ◆ Damages must have been actually suffered, realized or expended during the defined period, i.e., not hypothetical or estimated losses.
- ◆ Recovery is not allowed for diminution in value of property.
- ◆ No recovery is allowed for litigation expenses.

In this case, Manna’s representative Tiffany Doty (managing member of each LLC) was unable to identify any non-speculative

expenses incurred as a result of the BOCC's decision, other than attorney's fees and reduction in property value. (CP 1397-1398). Nor did Manna produce documents (in response to discovery requests) showing any expenses caused by the rezone denial, other than litigation expenses. Yet litigation expenses are not recoverable under RCW 64.40.010(4).

The Court will recall that when Manna Funding applied for the rezone, it had no specific development project in mind. Indeed, Manna expressed strong objection when citizens or decision-makers suggested that development was imminent. (CP 1323-1324).

As Manna repeatedly represented, any future development of the property was unknown at the time of the rezone applications, and unknown at the time the rezone approvals were issued more than three years ago. Any alleged damages in the interim (which were not identified) would be in the nature of speculative losses or profits and were not "actually suffered or realized" during the period of the LUPA appeal.

In its Motion for Summary Judgment, Kittitas County addressed the narrow class of damages recoverable under 64.40, and pointed out that the plaintiffs had provided no evidence of damages falling within those narrow categories. In response, Manna presented *no evidence* of any damages resulting from the delay in obtaining the rezone, other than litigation expenses, which are expressly excluded. The absence of compensable damages was yet another basis for dismissal of the RCW

64.40 action. The trial court's dismissal of the 64.40 claim should be affirmed.

B. The Claim Under 42 U.S.C. § 1983 Was Properly Dismissed.

In addition to seeking recovery under RCW 64.40, Manna Funding also sought recovery under 42 U.S.C. § 1983, based on an alleged violation of its due process rights. But Manna failed to satisfy any of the criteria for recovery under Section 1983.

It should first be noted that in only the most exceptional cases will liability under § 1983 be found in the context of a land use decision. In land use disputes, the courts have been properly reluctant to invoke the federal constitution, because regulation of land use is ordinarily a purely local concern:

The authority cited by CEI, as well as other cases, all suggest that the conventional planning dispute – at least when not tainted with fundamental procedural irregularity, racial animus or the like – which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the constitution. . . . *Every* appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or “distorted” its legal authority in some manner, often for some allegedly perverse (from the developer’s point of view) reason. It is not enough simply to give these state law claims constitutional labels such as “due process” or “equal protection” in order to raise a substantial federal question under § 1983.

Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982), cert. denied, 459 U.S. 989.

In this case, the trial court correctly held that there was no merit to Manna's substantive due process claim under § 1983, because Mann had failed to satisfy the elements of ripeness and possession of a constitutionally protected "property interest." Moreover, there is nothing here which comes close to meeting the high standard for liability for a substantive due process claim under § 1983.

1. The Claim Under § 1983 Was Not Ripe.

In evaluating claims under 42 U.S.C. § 1983 in the land use arena, the courts have made clear that they will not recognize such claims unless and until the local government has had an opportunity to make a final determination as to the potential use that the plaintiff may make of his property:

The Supreme Court has recognized that land use planning is not an all or nothing proposition. The government is not required to permit a landowner to develop property to the full extent it may desire. . . . The property owner, therefore, has a high burden of proving that a final decision has been reached by the agency before it may seek compensation or injunctive relief in federal court on constitutional grounds.

Hoehne v. County of San Benito, 870 F.2d 529, 532-33 (9th Cir. 1989). In order to satisfy the ripeness requirement for a claim under § 1983, the plaintiff must have obtained a final decision on his development permit application. Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 657 (9th Cir. 2003), cert. dismissed, 543 U.S. 1041.

The rule was clearly spelled out by the U.S. Supreme Court in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108 (1985) where the plaintiff failed to seek a variance that might have allowed it to develop its property. The Supreme Court held the plaintiff could not pursue a claim under § 1983, because the claim was not ripe:

Respondent asserts that it should not be required to seek variances from the regulation because its suit is predicated upon 42 U.S.C. § 1983, and there is no requirement that the plaintiff exhaust administrative remedies before bringing a § 1983 action. [Citation omitted]. The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable.

105 S. Ct. at 3119, U.S. at 192. The same rule applies here. Manna did not even apply for subdivision of its 20-acre lots, nor apply for building or development permits, much less proceed through the full permitting and review process. A mere delay in obtaining a rezone does not create a ripe claim under 42 U.S.C. § 1983.

In its Opening Brief, Manna Funding cites a number of cases holding that there is no “exhaustion” requirement for a claim under Section 1983. But Manna is confusing the concept of exhaustion with the doctrine of “ripeness.” The state law claims cited by Manna Funding are largely irrelevant to the standards for determining whether a claim under 42 U.S.C. § 1983 is ripe. In the context of a land use permitting dispute, ripeness typically does not arise for a § 1983 claim unless and until the

landowner applies for a development permit which is wrongfully denied. Hamilton Bank, *supra*. Mere delay in obtaining a rezone does not create a ripe claim under § 1983. Summary judgment dismissing the § 1983 claim was proper, based in part on the absence of ripeness.

2. Manna Funding Possessed No Constitutionally Protected “Property Interest” Which Was Violated.

A second reason for dismissal of the due process claim under 42 U.S.C. § 1983 is the absence of a constitutionally protected “property interest” in the rezone at the time of Manna Funding’s application. A party seeking monetary recovery under Section 1983 based on a deprivation of due process must first establish that he possessed a constitutionally protected property interest in the approval which he sought, and then he must demonstrate that the government acted in an arbitrary or irrational manner in depriving him of that interest. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972); Crowley v. Courville, 76 F.3d 47, 52 (2nd Cir. 1996).

Such a property interest can only be present where an individual has a “reasonable expectation of entitlement created and defined by an independent source” such as federal or state law. Board of Regents v. Roth, *supra*. A mere subjective expectation on the part of an applicant does not constitute a “property interest” protected by the constitution. Clear Channel v. Seattle Monorail, 136 Wn. App. 781, 784, 150 P.3d 249 (2007). Generally, a first time applicant has no protected property interest

in a permit or approval. Media Group v. City of Beaumont, 506 F.2d 895, 903 (9th Cir. 2002).

The U.S. Supreme Court has emphasized that property interests arise only when the relevant state law provisions “truly make [the conferral of the benefit] mandatory.” Town of Castle Rock v. Gonzales, 545 U.S. 748, 760, 125 S. Ct. 2796 (2005). Thus, a party generally does not possess a vested right or a constitutionally protected property right in a rezone or a variance because at the time of application, the claimant is seeking a *change* in existing zoning rights. Hale v. Island County, 88 Wn. App. 764, 771, 946 P.2d 1192 (1997). Because a county exercises discretion in deciding whether to grant a rezone, a landowner possesses no constitutionally protected property interest in a rezone. Braun v. Ann Arbor Charter Township, 519 F.3d 564, 573 (6th Cir. 2008); Camastro v. City of Wheeling, 49 F. Supp. 2d 500, 506 (D.C. W. Va. 1998).

In this case, Manna Funding expressly acknowledged its understanding that the proposed rezones could have been either approved, or denied, based on the BOCC’s analysis of the criteria to support a rezone. (CP 1324-1325). Therefore, Manna could not have possessed a constitutionally protected property interest in the proposed rezone. The Board of County Commissioners was obligated to examine eight distinct criteria in determining whether a rezone was appropriate. These criteria include the following:

- a. The proposed amendment is compatible with the comprehensive plan; and
- b. The proposed amendment bears a substantial relation to the public health, safety or welfare; and
- c. The proposed amendment has merit and value for Kittitas County or a sub-area of the county; and
- d. The proposed amendment is appropriate because of changed circumstances or because of a need for additional property in the proposed zone or because the proposed zone is appropriate for reasonable development of the subject property; and
- e. The subject property is suitable for development in general conformance with zoning standards for the proposed zone; and
- f. The proposed amendment will not be materially detrimental to the use of properties in the immediate vicinity of the subject property; and
- g. The proposed changes in use of the subject property shall not adversely impact irrigation water deliveries to other properties.

KCC 17.98.020(7).

In light of the multiple elements which must be satisfied before a rezone is approved, the BOCC had discretion as to whether to approve or disapprove. The Washington Supreme Court has recently stressed the discretion which is granted to local governments in deciding whether to grant or deny an application for rezone. Phoenix Development v. City of Woodinville, 171 Wn.2d 820, 830-33, 256 P.3d 1150 (2011). This discretion negates any argument that Manna Funding possessed a

constitutionally protected property interest in the rezone (at least prior to the court's ruling in the LUPA action).

Because Manna possessed no constitutionally protected property interest in a rezone of its property, it had no standing to seek recovery for a due process violation under 42 U.S.C. § 1983.

3. A Substantive Due Process Violation Will Not Be Found Absent Conduct Which "Shocks the Conscience."

It is not clear in Manna Funding's Opening Brief what substantive right it is claiming was violated. It should first be noted that Section 1983 does not confer any new substantive rights. Rather, that statute provides a remedy where the plaintiff has shown a violation of a right embodied in the Constitution or federal laws. Collins v. Harker Heights, 505 U.S. 115, 112 S. Ct. 1061 (1992). The only such right that is discussed in Manna Funding's Opening Brief is the right to "substantive due process." (Opening Brief, pp. 38, 44). But one who seeks recovery under Section 1983 for a violation of substantive due process carries a very heavy burden indeed. Not surprisingly, Manna Funding makes scant reference to the standard which must be satisfied for liability under Section 1983 in a substantive due process claim.

To find a violation of substantive due process in the context of Section 1983, the court must find that the government's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Village of Euclid v.

Ambler Realty Co., 272 U.S. 365, 395, 47 S. Ct. 114, 121 (1926); Usury v. Turner Alcorn Mining Co., 428 U.S. 1, 15, 96 S. Ct. 2882, 2892 (1976). In recent years, the Supreme Court has clarified that this standard precludes liability unless the government's decision "shocks the conscience."

The determination of whether the government's decision was "arbitrary and irrational" is commonly made by the Court through summary judgment. As the Ninth Circuit Court of Appeals held in Halvorson v. Skagit County, 42 F.3d 1257 (9th Cir. 1994), there is a strong presumption that a rational basis existed for a municipality's land use decision:

Thus, in choosing to base their claim for compensation on an alleged violation of due process, the plaintiffs shoulder a heavy burden. In order to survive the County's summary judgment motion, the plaintiff must demonstrate the irrational nature of the County's actions by showing that the County "could have had no legitimate reason for its decision." Kawaoka, 17 F.3d at 1234. If it is "at least fairly debatable" that the County's conduct is rationally related to a legitimate governmental interest, there has been no violation of substantive due process.

42 F.3d at 1262. (Emphasis by Ninth Circuit). Where a municipality's land use action was at least *arguably* related to a valid governmental interest, summary dismissal of the substantive due process claim is appropriate. Id.; Dodd v. Hood River, 59 F.3d 852, 864 (9th Cir. 1995); Baumgardner v. Town of Ruston, *supra*, 712 F. Supp. 2d 1180 (W.D. WA 2010).

In this case, it is at least “fairly debatable” that the BOCC’s denial of the rezone was based on rational grounds. The fact that a court ultimately concluded that a rezone was warranted does not mean that the BOCC’s decision was “arbitrary and irrational.”

In Brown v. City of Seattle, 117 Wn. App. 781, 72 P.3d 764 (2003), the Washington Court of Appeals affirmed dismissal of a substantive due process claim against the City of Seattle as a matter of law, even though the Court concluded that the City’s interpretation of its land use code was legally incorrect:

The City’s interpretation of its land use code and its actions were not unreasonable. While we agree with the trial court that the City did not have the authority to regulate Brown’s use of the *Challenger*, that does not necessarily mean its actions were arbitrary and capricious. As the trial court found: “The City was attempting to apply the logic of the shoreline management regulations and its understandings of what lodging was and did not have a lack of reasoning or standards in mind when it issued the notice of violation.”

117 Wn. App. at 796-97. A similar result was appropriate here.

The U.S. Supreme Court and the Washington courts have signaled their unwillingness to find substantive due process violations in this context except in the most extreme circumstances by clarifying that the applicable standard of proof is the “shocks the conscience” standard. The Supreme Court announced the rule in County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708 (1998):

In a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it

may fairly be said to shock the contemporary conscience. . . . Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action.

523 U.S. at 847. The “shocks the conscience” standard has been held applicable in cases involving governmental decisions on land use permits. Licari v. Ferruzzi, 22 F.3d 344, 349 (1st Cir. 1994); Eichenlaub v. Township of Indiana, 385 F.3d 274 (3rd Cir. 2004); Mongeau v. City of Marlborough, 492 F.3d 14, 17 (1st Cir. 2007). The Ninth Circuit Court of Appeals characterized the standard in Shanks v. Dressel, 540 F.3d 1082 (9th Cir. 2008):

When executive action like a discrete permitting decision is at issue, only “egregious official conduct can be said to be arbitrary in the constitutional sense”: It must amount to an “abuse of power” lacking any “reasonable justification in the service of a legitimate governmental objective.” Lewis, 523 U.S. at 846.

540 F.3d at 1088. This standard has been endorsed by the Washington courts in substantive due process claims. Estate of Lee v. Spokane, 101 Wn. App. 158, 170, 2 P.3d 979 (2000); State v. Hoisington, 123 Wn. App. 138, 146, 94 P.3d 318 (2004).

While the BOCC (a board consisting of non-lawyers) may have made inartful or incomplete findings and conclusions supporting the rezone denial, this does not come close to meeting the “shocking to the conscience” standard required for liability under a substantive due process

analysis. The trial court properly dismissed Manna's claim under Section 1983. That decision should be affirmed.

C. The Tortious Interference Claim Was Properly Dismissed.

In addition to seeking relief under state and federal statutes, Manna Funding also argued that it should be entitled to recover damages based on the theory of "tortious interference with business expectancy." A claim for tortious interference requires the following elements: (1) a business relationship or expectancy; (2) knowledge by the defendant of the relationship; (3) intentional interference that results in termination of the relationship; (4) an improper purpose or motive; (5) resulting damages. Leingang v. Pierce County Medical Bureau, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). In this case, Manna Funding failed to satisfy any of the essential elements for such a claim, and therefore the tortious interference claim was properly dismissed.

1. There Was No Special Economic Relationship Between the Plaintiffs and a Third Party of Which the County Was Aware.

The first reason for dismissal of the tortious interference claim was the absence of a business relationship between Manna Funding and a third party of which Kittitas County had notice. In any claim seeking recovery based on a theory of tortious interference, this is the first element which must be shown. Scymanski v. Dufault, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971). The rule was recently confirmed by the Washington

Supreme Court in Shooting Park Association v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276 (2006):

To show a relationship between parties contemplating a contract, it follows that we must know the parties' identities. We are correct in concluding that PNSPA must show a specific relationship between it and identifiable third parties.

158 Wn.2d at 353, footnote 2. Accord, Fort Vancouver Plywood Co. v. U.S., 747 F.2d 547 (9th Cir. 1984).

As admitted by Manna's Manager Tiffany Doty , the request for rezone was undertaken before Manna had put forward any development proposal. Indeed, Manna repeatedly insisted that the requested rezones were unrelated to any development project. Ms. Doty testified that Manna had no agreement with any developer, and the County had no knowledge of any such business relationship. (CP 1327).

In considering the rezone application, the BOCC had no knowledge of any business relationship between Manna and a third party. Therefore, a critical element of a tortious interference claim was absent. Where the defendant did not have knowledge of the business relationship between the plaintiff and a third party, a tortious interference claim will not stand. Fisher v. Parkview Properties, 71 Wn. App. 468, 480, 859 P.2d 77 (1993).

2. There Was No Intentional Interference or Improper Means by Kittitas County.

The tortious interference claim also failed due to the absence of evidence of intentional interference and improper purpose or means. Liability will not be found unless the plaintiff shows that the defendant interfered with the relationship intentionally and for an improper purpose. Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d 314 (1992). Where the defendant acts not for the purpose of interfering with the business relationship but rather interferes in an incidental manner, no liability arises. Burke & Thomas, Inc. v. International Organization of Masters, 21 Wn. App. 313, 585 P.2d 152 (1978), aff'd, 92 Wn.2d 762. In other words, interference must be “purposefully improper.” Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997), cert. denied, 525 U.S. 812.

In this case, there is no evidence that Kittitas County intentionally interfered with any business relationship. Indeed, there is no evidence that the County was even aware of any relationship between Manna Funding and a third party. To the contrary, Manna Funding repeatedly stressed in its application materials that its only current goal was to have its property rezoned. Manna denied that there was any development project that was contemplated. (CP 1323-1324). There is certainly no basis for a claim that the BOCC acted out of an intent to interfere with a business relationship.

Moreover, there is no evidence that any “interference” was intentional, as opposed to incidental to the County’s exercise of its land use regulatory authority. When one is “merely asserting an arguable interpretation of existing law,” there is no tortious interference. Leingang, *supra*, 131 Wn.2d at 157. Here, the Board of County Commissioners was attempting to apply the 8-fold criteria for a rezone and concluded that it would not be compatible with the adjacent Roslyn Urban Forest, and that the rezone would not be of benefit to the people of Kittitas County, and that “changed circumstances” are not present. A county or city has considerable discretion in deciding whether a rezone is appropriate. Phoenix Development v. City of Woodinville, *supra*, 171 Wn.2d at 830-33. While the trial court concluded that the BOCC’s explanation of the grounds for denial was inartful and inadequate, there is nothing which indicates the BOCC was acting out of a desire to interfere with a business relationship between Manna Funding and a third party.

Further, the tortious interference claim was barred by the defense of “privilege.” It is settled that exercising in good faith one’s own legal interests cannot constitute improper interference. Leingang, 131 Wn.2d at 157. A local government’s exercise of its land use authority ordinarily cannot be a basis for a claim of tortious interference with a business expectancy. Bakay v. Yarnes and Clallam County, 431 F. Supp. 1103, 1113 (W.D. WA. 2006).

Because there is no competent evidence of intentional interference with Manna's relationship with a third party, and because there is no evidence of an improper motive, and because the County's decisions were a normal part of its exercise of its land use authority, the tortious interference cause of action was properly dismissed.

3. The BOCC's Decision Did Not Cause the Termination of a Contract With a Third Party.

As explained in Section 1 above, one of the principle elements of a tortious interference action is a showing that the plaintiff had an actual or pending relationship with an identifiable third party. In addition, the plaintiff must demonstrate that the tortious actions by the defendant caused a severance or termination of that relationship with the third party. Proof of breach or termination is an essential element of a tortious interference claim. Peterson v. County of Dakota, 479 F.3d 555, 559 (8th Cir. 2007); Leingang, supra, 131 Wn.2d at 157.

Here, as acknowledged by Ms. Doty, Manna Funding did not have a business relationship with any third party at the time of the alleged interference. Ms. Doty unambiguously testified that no relationship with a developer was terminated or severed because of the BOCC's denial of the rezone. (CP 1327-1328). This is yet another reason why the tortious interference claim was subject to dismissal.

D. The Trial Court Properly Awarded Attorneys' Fees Under RCW 64.40.020.

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 attorneys fees.” In its Opening Brief, Manna Funding does not dispute that Kittitas County was the prevailing party and therefore was entitled to recover attorneys fees. Instead, Manna argues (a) that an award of fees should have been stayed during the pendency of this appeal; and (b) that the County did not adequately distinguish fees attributable to the 64.40 claim versus other causes of action. These arguments are not well taken.

There was no legal basis for the court to defer an award of attorneys' fees or to defer Manna's obligation to pay until after a final resolution of the appeal. A judgment has full effect notwithstanding that the judgment may be on appeal. Riblet v. Ideal Cement Co., 57 Wn.2d 619, 358 P.2d 975 (1961). Manna cites no authority for the proposition that a trial court may not award statutory attorneys' fees until all appeals have been completed.

Moreover, it was not inappropriate for the trial court to award fees in the amount requested by Kittitas County. First, the fees awarded were quite modest, i.e., \$21,496.50. Further, courts commonly award statutory attorneys fees to successful litigants, even though it is not possible to precisely delineate the exact dollar figure attributable to other claims (for which fees are not statutorily authorized).

It was clear that the claim under RCW 64.40 was the principal basis of Manna Funding's damages lawsuit. Indeed, Manna's own Motion for Partial Summary Judgment was addressed entirely to RCW 64.40, and Kittitas County's response to that motion also dealt exclusively with the 64.40 claim. And although the County's cross-motion for summary judgment addressed the other theories mentioned in Manna Funding's Complaint, most of the same discovery, briefing and argument would have been required, even if only a claim under 64.40 was made.

In short, the modest attorneys' fees awarded by the trial court in favor of Kittitas County were appropriate and should not be disturbed on appeal.

VI. CONCLUSION

For all of the above reasons, Respondent Kittitas County respectfully asks the Court to affirm the decision of the trial court which is the subject of this appeal.

DATED this 4th day of April, 2012.

KARR TUTTLE CAMPBELL

By: 
Mark R. Johnsen, WSBA #11080
Attorneys for Defendant/Respondent
Kittitas County

DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

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

I am a citizen of the United States of America; State of Washington, employed at Karr Tuttle Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101. I am over the age of 18 years and am not a party to this action. I certify under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of Brief of Respondent was served to the following via manner::

Via Messenger

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DATED this 5th day of April 2012.

Nancy Randall

Nancy Randall

SUBSCRIBED TO AND SWORN before
me this 5 day of April, 2012

Patricia A. Steinfeld

Patricia A. Steinfeld
NOTARY PUBLIC in and for the State of
Washington, residing in KIRKLAND
My Commission Expires: 4/7/15

