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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 32191-6-III

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

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NAUMES, INC., an Oregon corporation,

Appellant,

v.

CITY OF CHELAN, a municipal corporation,

Respondent.

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BRIEF OF RESPONDENT CITY OF CHELAN

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... iii

I. INTRODUCTION AND SUMMARY OF ARGUMENT..... 1

II. COUNTER-STATEMENT OF THE ISSUES ON APPEAL..... 3

III. COUNTER-STATEMENT OF THE CASE..... 3

A. The Apple Blossom Center and background of the present dispute..... 3

B. Administrative interpretation and appeal of the City’s general binding site plan modification procedures..... 8

C. Administrative and judicial proceedings below..... 9

IV. ARGUMENT..... 15

A. Standard of review..... 15

B. Because Naumes did not appeal the court’s first order denying arbitrability, this appeal is moot and must be denied..... 15

C. The applicability of the City’s development regulations governing binding site plans is not a matter for private arbitration..... 22

D. Nothing in the development agreement supports Naumes’ argument that modification of the Apple Blossom Center general binding site plan is a matter for private arbitration..... 25

1. The development agreement does not supersede the City’s binding site plan procedures..... 28

|    |   |    |
|----|---|----|
| 2. | The development agreement’s arbitration clause does not encompass this dispute.....   | 30 |
| 3. | The development agreement’s arbitration clause should not be construed to be unenforceable and contrary to law.....         | 31 |
| 4. | Development agreements must in all cases be consistent with development regulations.....                                    | 33 |
| 5. | Binding site plans may only be modified in accordance with the City’s development regulations and applicable state law..... | 34 |
| V. | CONCLUSION.....   | 39 |

APPENDIX A (color image as filed with the trial court, CP 113)

## TABLE OF AUTHORITIES

### FEDERAL CASES

|  |        |
|--|--------|
| <i>Int'l Ass'n of Machinists &amp; Aerospace Workers, AFL-CIO v. Aloha Airlines, Inc.</i> ,<br>790 F.2d 727 (9 <sup>th</sup> Cir. 1986)..... | 18, 19 |
|--|--------|

### STATE CASES

|  |                |
|--|----------------|
| <i>Asche v. Bloomquist</i> ,<br>132 Wn. App. 784, 133 P.3d 475 (2006) .....  | 36             |
| <i>Camer v. Seattle Sch. Dist. No. 1</i> ,<br>52 Wn. App. 531, 762 P.2d 356 (1988) .....                             | 22             |
| <i>City of Tacoma v. Taxpayers of City of Tacoma</i> ,<br>108 Wn.2d 679, 743 P.2d 793 (1987) .....                   | 33             |
| <i>Herzog v. Foster &amp; Marshall, Inc.</i> ,<br>56 Wn. App. 437, 783 P.2d 1124 (1989) .....                        | 16, 17         |
| <i>Hill v. Garda CL Northwest, Inc.</i> ,<br>179 Wn.2d 47, 308 P.3d 635 (2013) .....                                 | 17             |
| <i>In re Marriage of Dicus</i> ,<br>110 Wn. App. 347, 40 P.3d 1185 (2002) .....                                      | 21             |
| <i>Pederson v. Potter</i> ,<br>103 Wn. App. 62, 11 P.3d 833 (2000) .....   | 18, 19, 21, 22 |
| <i>River House Dev., Inc. v. Integrus Architecture, P.S.</i> ,<br>167 Wn. App. 221, 272 P.3d 289 (2012) .....        | 15, 17         |
| <i>Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc.</i> ,<br>118 Wn. App. 617, 72 P.3d 788 (2003) ..... | 20, 21         |
| <i>Spokane v. J-R Distrib., Inc.</i> ,<br>90 Wn.2d 722, 585 P.2d 784 (1978) .....                                    | 33             |

|   |    |
|---|----|
| <i>Stein v. Geonerco, Inc.</i> ,<br>105 Wn. App. 41, 17 P.3d 1266 (2001) .....  | 17 |
| <i>Sundquist Homes, Inc. v. Snohomish County Public Utility<br/>Dist. No. 1</i> ,<br>140 Wn.2d 403, 997 P.2d 915 (2000) ..... | 33 |
| <i>Tacoma Narrows Constructors v. Nippon<br/>Steel-Kawada Bridge, Inc.</i> ,<br>138 Wn. App. 203, 156 P.3d 293 (2007) .....   | 30 |
| <i>Young v. Ferrellgas</i> ,<br>106 Wn. App. 524, 21 P.3d 334 (2001)...   | 32 |

**STATUTES**

|                          |           |
|--------------------------|-----------|
| RCW 7.04A.280(1)(a)..... | 17        |
| RCW 7.04A.280(2) .....   | 17        |
| Ch. 36.70A RCW .....     | 33, 34    |
| RCW 36.70A.140.....      | 32        |
| RCW. 36.70B.170 .....    | 33        |
| RCW 36.70B.170(1)....    | 34        |
| RCW 36.70C .....         | 12        |
| RCW 36.70C.010 .....     | 36        |
| RCW 36.70C.030(1) .....  | 36        |
| RCW 36.70C.080.....      | 15, 16    |
| Ch. 43.21C RCW .....     | 2, 35, 37 |
| RCW 58.17.010.....       | 25        |

RCW 58.17.035..... 22, 34

**REGULATIONS**

WAC 197-11-310..... 36

WAC 197-11-315..... 36

WAC 197-11-800..... 35

**COURT RULES**

CR 42(a)..... 14

RAP 2.2(a)(3)..... 13, 16

RAP 3.2(a)(3)..... 17

RAP 5.2(a)..... 17

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

This land use case presents a scenario where a developer has made two successive attempts to compel arbitration on a single subject: whether the developer can modify the conditions of approval for a general binding site plan. Here, the general binding site plan dates to 2003, and was approved by the City in conjunction with a development agreement containing an arbitration clause. The City disagrees that modification of the general binding site plan may be arbitrated under the development agreement. The City also disagrees that private arbitration can substitute for the developer's compliance with the City's regulations governing modifications of general binding site plans.

The developer has not pursued modification of the general binding site plan under available City procedures. Instead, the developer filed an application seeking approval of a specific binding site plan that conflicts with the general binding site plan. The City refused to modify the general binding site plan through the inconsistent specific binding site plan application.

The development agreement does not contain any terms addressing the manner by which the developer may modify the general binding site plan. In the absence of a specified procedure in the

development agreement, the City argues that the developer is required to fulfill the ordinary process for general binding site plan modification. This process requires, among other things: a general binding site plan modification application; consideration of the applicability of the State Environmental Policy Act, Ch. 43.21C RCW (“SEPA”); opportunities for public comment and participation; and a formal decision by the City’s hearing examiner. None of these processes can be implemented by private arbitration.

The developer misreads the development agreement in claiming that this matter is subject to arbitration. The opportunistic use of private arbitration to govern land use decisionmaking is anathema to Washington’s (and the City’s) tradition of informed decisionmaking through public processes.

The trial court found that the matter was not subject to arbitration in two successive rulings, one in each of the parallel lawsuits filed by the developer.

This Court should affirm the trial court. Doing so results in a decision that comports with the City’s development regulations, Washington law governing division of land, and the text of the development agreement. This result would not cause any unfairness to

the developer. The developer will still have the right under state and local law to pursue modification of the general binding site plan.

## **II. COUNTER-STATEMENT OF THE ISSUES ON APPEAL**

**A.** Whether the development agreement governs modification of the developer's general binding site plan?

**B.** Whether disputes regarding the manner of modifying the developer's general binding site plan are required to be arbitrated under the development agreement?

**C.** Whether the developer can construe a dispute with the City over modification of the general binding site plan as itself a matter arising under the development agreement and thereby supplant generally applicable state and local law governing modification of a general binding site plan?

**D.** Whether this appeal is barred by res judicata because a final order terminating the earlier of two actions seeking to compel arbitration was never appealed?

## **III. COUNTER-STATEMENT OF THE CASE**

**A. The Apple Blossom Center and background of the present dispute.**

The developer in this case is Naumes, Inc. ("Naumes").

Naumes is the owner of real property located near State Route 150 in

the City of Chelan, Washington (the “City”). CP 270. The 198-acre property is known as the Apple Blossom Center. CP 270, 181. The Apple Blossom Center is a planned development subject to a development agreement recorded on March 25, 2003. CP 270. The Apple Blossom Center was developed with a binding site plan. CP 271. The general binding site plan was adopted pursuant to applicable Chelan Municipal Code provisions (“CMC”). CP 33.

The approved general binding site plan includes a scale drawing that shows streets, roads, improvements, utilities, open spaces, and other features of the completed Apple Blossom Center project. CP 33, 71, 74. The planned development rezone and general binding site plan were approved by the Chelan City Council on April 24, 2003, in Ordinance No. 2003-1266. CP 326. The related development agreement was executed earlier, on October 31, 2002. CP 99.

Under the development agreement, development of the Apple Blossom Center was required to be consistent with the general binding site plan map. CP 82.

During the fall of 2012 Naumes entered into a purchase and sale agreement for lot 16 of the Apple Blossom Center. CP 250. In order to facilitate the sale, Naumes submitted a specific binding site plan

application for lot 16. CP 325. The application sought reconfiguration of a portion of a road (“Isenhart Road”) deviating from the layout approved in the general binding site plan. CP 331. In its opening brief, Naumes admits that the specific binding site plan did not provide for Isenhart Road “as shown on the approved General Binding Site Plan.” Br. 2. Naumes also admits that the effect of the reconfiguration of Isenhart Road would be to remove the road entirely from lot 16. CP 323. The lot could then be sold free of the road designation contained on the general binding site plan map. Naumes pressed upon the City the need to allow the modification because of the pending sale. CP 334

In response, the City maintained that it had no legal authority to approve a specific binding site plan at odds with the general binding site plan. CP 365-369. The City denied that City staff had the authority to administratively “approve a lot 16 SBSP<sup>1</sup> that either ignores the existence of the Isenhart Road Extension through the Apple Blossom Center BSP to a connection to the east edge of the Planned Development, or seeks to eliminate the Isenhart Road Extension, primarily relying on the application of CMC 28.24.060.” CP 369.

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<sup>1</sup> “SBSP” = “specific binding site plan”

The City reiterated that City staff could not administratively approve a specific binding site plan conflicting with a general binding site plan. CP 369. Naumes argued that a prior street vacation relating to Isenhart Road operated as a modification of the general binding site plan. CP 374. An annotated map showing the disputed segment of Isenhart Road and the vacated area of the road is provided at Appendix A to this brief. The street vacation ordinance related to a segment of Isenhart Road that connected with US 97A (labeled “Vacated Isenhart” on the annotated map). CP 115-118. The vacation ordinance noted the “substandard intersection of the Subject Street and State Route 97A...”<sup>2</sup> CP 115. The vacated segment of Isenhart Road is not the same as the segment of Isenhart Road depicted on the general binding site plan map. CP 75. The road segment depicted on the general binding site plan map connects with Apple Blossom Drive at a point south and east of the intersection with US 97A and has no direct connection with US 97A (labeled “Extended Isenhart Rd.” on the annotated map). The vacation ordinance had no effect on “Extended Isenhart Road.”

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<sup>2</sup> The ordinance errs in referring to “State Route 97A.” The correct designation is “US 97A.”

Naumes' brief repeatedly errs in claiming that the ordinance vacated Extended Isenhart Road. Br. 2, 6, 8, 11. Naumes admits that the portion of Isenhart Road at issue in this appeal is the "Extended Isenhart Road" segment. *Id.* Naumes' brief cites no source for the claim that the process of vacating Vacated Isenhart Road was intended to extinguish Extended Isenhart Road from the general binding site plan. Naumes' brief also cites no source for the claim that the City ever agreed to any modification of the street infrastructure actually depicted on the general binding site plan.

The City also rejected Naumes' claim regarding the effect of the vacation ordinance because, again, the process for modification of the Apple Blossom Center general binding site plan had not been fulfilled by Naumes. CP 375-376.

The City agreed that the original general binding site plan, including the segment of Isenhart Road, could potentially be modified. CP 326, 376. However, such modification could only be accomplished pursuant to the applicable City regulations found at CMC § 16.10.070. *Id.* In the City's view, the prior vacating of a segment of Isenhart Road did not follow the same process, and could not achieve the same result, as modification of the general binding site plan. CP 376. The City

Attorney observed that the law governing street vacations differed from that governing binding site plan modifications. *Id.* The City Attorney wrote to Naumes' lawyer that the street vacation standard "is a significantly lower standard than for the approval of a general binding site plan." *Id.*

**B. Administrative interpretation and appeal of the City's general binding site plan modification procedures.**

The parties reached an impasse by spring 2013. The City and Naumes agreed to submit the City's interpretation of the matter to the City's hearing examiner. CP 377. The City's ordinances allowed for Naumes to challenge the City's interpretation in the form of an administrative appeal. *Id.* Naumes filed a notice of appeal of the City's interpretation on April 26, 2013. CP 311-324. The relevant "interpretation" consisted of the correspondence of counsel relating to whether the Apple Blossom Center general binding site plan could be modified by either the earlier street vacation for Isenhart Road or pursuant to the specific binding site plan application for lot 16. CP 311.

Naumes asked the hearing examiner to find the entire matter subject to arbitration under the terms of the development agreement. CP 323. In the alternative, Naumes asked the hearing examiner to find

that the City erred in failing to approve the modification of lot 16 through the specific binding site plan application. *Id.*

**C. Administrative and judicial proceedings below.**

Prior to a decision by the hearing examiner on its administrative appeal, Naumes filed a lawsuit in Chelan County Superior Court on June 20, 2013, as cause no. 13-2-00619-1 (the “-619 lawsuit”). CP 248-258. In the -619 lawsuit, Naumes sued the City for declaratory judgment and breach of contract. CP 253-255. Naumes requested an order staying the appeal pending before the hearing examiner. CP 256. Naumes also requested an order “compelling arbitration and removing the matter from the hearing examiner.” *Id.* The following week, on June 26, 2013, Naumes filed a motion to compel arbitration (CP 257-258) in which it argued that the matter should be referred to arbitration for resolution. CP 269.

Naumes’ motion was heard on July 8, 2013. CP 245. The Honorable Lesley A. Allan denied the motion to compel arbitration. *Id.* Hearing minutes state as follows: “The city code was not subject to the development agreement, and it would be improper for the Court to send the city code to arbitration to be interpreted to determine the proper course of action under the city code.” *Id.* Contrary to Naumes’

opening brief, the trial court made no finding that Naumes' arbitration claims were denied because of ripeness problems. Br. 3, CP 240-241.

The following day, Naumes' administrative appeal commenced before the hearing examiner (July 9, 2013). CP 180. The hearing minutes indicate that Judge Allan was aware of this sequence: "The hearing before Mr. Kottkamp can go forward tomorrow. Once counsel have that interpretation, they can decide how to proceed if necessary." CP 245. Judge Allan stated that Mr. Kottkamp's decision could later be reviewed in superior court. *Id.*

The hearing examiner's decision was issued on July 23, 2013. CP 180-186. The hearing examiner defined the issue before him as "whether or not the Chelan Municipal Code permits the specific binding site plan...[a]pplication process to eliminate a road that was proposed and identified in the General Binding Site Plan..." CP 181.<sup>3</sup> The hearing examiner did not consider Naumes' allegations regarding the Isenhart Road vacation to be relevant to this issue: "[w]hat is relevant is what process is allowed within the Chelan Municipal Code

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<sup>3</sup> Finding of fact 10.

to amend a GBSP by eliminating a road that was generally depicted in that plan.” CP 184.<sup>4</sup>

Because the road segment was a “provision for approval” of the general binding site plan<sup>5</sup> the earlier vacation of that road segment was not itself a modification of the general binding site plan. *Id.*<sup>6</sup> The hearing examiner found that the Chelan Municipal Code did not authorize modification of a general binding site plan through a specific binding site plan process. *Id.*<sup>7</sup> The only mechanism available to Naumes to eliminate the Isenhart Road segment would be the same process in the code for approval of the original general binding site plan. CP 185.<sup>8</sup> It made no difference to this conclusion whether the applicable code was the former version found at CMC § 16.10.070 or the current code at CMC § 16.24.060. CP 185-186.<sup>9</sup>

The hearing examiner affirmed in all respects the City’s interpretation as reflected in the letter of the City Attorney dated April 16, 2013. *Id.*, CP 375-376.

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<sup>4</sup> Finding of fact 29.

<sup>5</sup> Finding of fact 34.

<sup>6</sup> Findings of fact 30, 31.

<sup>7</sup> Finding of fact 38.

<sup>8</sup> Finding of fact 45.

<sup>9</sup> Conclusions of law 4-6, 7.

Less than one week later, on July 29, 2013, an order was entered in the -619 lawsuit denying Naumes' motion to compel arbitration. CP 240-241.

Next, Naumes filed another lawsuit against the City relating to the Apple Blossom Center and the arbitrability of its desire to modify the general binding site plan. CP 3-19. The second lawsuit was filed on August 12, 2013, under Chelan County Superior Court cause no. 13-2-00793-7 (the "new lawsuit"). *Id.*

The new lawsuit raised several claims that were the same as the claims in the -619 lawsuit. CP 12-13, 14-15, 253-255. Naumes also added theories based on the Land Use Petition Act, Ch. 36.70C RCW ("LUPA"), promissory estoppel, and breach of oral covenant. CP 13-18. In its prayer for relief, Naumes requested that the new lawsuit be consolidated with the -619 lawsuit. CP 18-19. Naumes also requested that the dispute be referred to arbitration or, in the alternative, that the court accept review of the hearing examiner's decision under LUPA. CP 18-19.

The City answered and raised affirmative defenses. CP 193-202. The City recognized the serial nature of the allegations in the new lawsuit compared with those in the -619 lawsuit. The City asserted that

Naumes' claims were barred by the prior action, "including to the extent of entry of any existing or future final order or judgment in the same, in which case plaintiff's claims are barred by the doctrines of collateral estoppel and/or res judicata." CP 201.

The City opposed the motion to compel arbitration and also opposed a motion to consolidate the two lawsuits. The City argued that the order denying arbitrability in the -619 lawsuit was a final order under RAP 2.2(a)(3). CP 208. As such, the City argued, the court's ruling denying Naumes' motion to compel arbitration was appealable as a matter of right. *Id.* Because no appeal was filed, the order denying arbitration was final and not reviewable. *Id.*

The City argued that the issue of arbitrability had "been conclusively settled," but the City did not dispute that Naumes was entitled to judicial review of the hearing examiner's decision under LUPA. CP 51-53. The City proposed a LUPA scheduling order. CP 187-188.

The question of arbitrability was heard by the trial court on September 27, 2013. CP 192. The court<sup>10</sup> denied the motion to compel arbitration. *Id.* The court found that judicial review of the hearing

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<sup>10</sup> Again Judge Allan.

examiner's decision was available through LUPA as the exclusive means of appeal. *Id.* The court was not persuaded that the dispute regarding the binding site plan fell within the scope of the development agreement because questions of municipal code interpretation were not themselves a matter addressed in the development agreement. *Id.* The court did not rule on the motion to consolidate. *Id.*

A subsequent hearing to enter an order on the trial court's ruling denying arbitration, and other matters, occurred on December 17, 2013. The City argued that consolidation should be denied because the final decision in the -619 lawsuit meant that it was no longer "pending before the court" and therefore not available for consolidation. CR 42(a) (consolidation allowed "when actions involving a common question of law or fact are pending before the court..."). CP 206-210. At this hearing, the court denied Naumes' motion to consolidate the two actions. *Id.* The court granted a motion of the City to bifurcate Naumes' LUPA claims from its causes of action seeking damages. *Id.* The court also entered an order consistent with the ruling it made at the earlier hearing of September 27 denying Naumes' motion to compel arbitration. *Id.*, CP 442-443, 444-446, 447-449.

Naumes appealed from the court's order of December 17 denying the motion to compel arbitration and the motion for consolidation. CP 451-455. Naumes filed no appeal from the court's order of July 29, which denied Naumes' earlier motion to compel arbitration in the -619 lawsuit.

#### IV. ARGUMENT

##### A. **Standard of review.**

The City agrees with Naumes that the standard of review on a decision to deny arbitration is de novo. *River House Dev., Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 230, 272 P.3d 289 (2012).

The trial court's decision also denied Naumes' motion for consolidation. CP 454. Naumes has not assigned error to the court's ruling on consolidation.

##### B. **Because Naumes did not appeal the court's first order denying arbitrability, this appeal is moot and must be denied.**

At the time Naumes filed its notice of appeal, this matter was proceeding toward a hearing on Naumes' LUPA petition arising out of the hearing examiner's decision. The trial court had entered an order pursuant to RCW 36.70C.080. CP 442-443. The LUPA order

established a deadline for certification of the administrative record for review. The order also set deadlines for LUPA briefing. *Id.*

All of the other claims of Naumes, including Naumes' contentions regarding arbitrability and damages, were matters that were raised or that could have been raised in the -619 lawsuit. The hearing examiner decision had not been issued at the time that Naumes filed the -619 lawsuit. The LUPA cause of action existed once the hearing examiner issued his decision on July 23, 2013, which occurred *before* the trial court issued its decision denying arbitration and terminating the -619 lawsuit on July 29, 2013. CP 186, CP 240-241. Naumes' claims in this lawsuit are compromised by the effect of the court's prior ruling denying arbitration in the -619 lawsuit. CP 240-241. Again, there was no appeal taken from that order.

A ruling denying a motion to compel arbitration is appealable as of right under RAP 2.2(a)(3); *Herzog v. Foster & Marshall, Inc.*, 56 Wn. App. 437, 443, 783 P.2d 1124 (1989). There is a significant distinction in the law between an order refusing to compel arbitration, which is a final order, as opposed to an order compelling arbitration, which is not. *Herzog*, 56 Wn. App. at 444. There are "strong policy considerations [that] favor allowing an immediate appeal as of right

from such orders.” *Id.* at 445. The rule in *Herzog* has been followed in more recent decisions. *E.g., Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 54, 308 P.3d 635 (2013) (“[w]hen the trial court declines to compel arbitration, that decision is immediately appealable....”); *River House Dev.*, 167 Wn. App. at 229 (“[a]n order denying a motion to compel arbitration is appealable as a matter of right under RAP 2.2(a)(3).”); *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 44-45, 17 P.3d 1266 (2001) (“...we continue to follow *Herzog* and conclude that an order denying a motion to compel arbitration is appealable interlocutory.”).

As a “decision affecting a substantial right...that in effect...discontinues the action,” Naumes had an opportunity to appeal the court’s decision to deny arbitration for 30 days following entry of the order. RAP 3.2(a)(3); RAP 5.2(a).

This conclusion is supported by the special proceedings statutes governing arbitration. Pursuant to RCW § 7.04A.280(1)(a), a right of appeal exists for “an order denying a motion to compel arbitration.” Further, “an appeal under this section must be taken as from an order or a judgment in a civil action.” RCW § 7.04A.280(2).

Because the court's order of July 29 denying arbitration is final and now unreviewable, it possesses claim preclusive effect under res judicata. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000) (res judicata operative following final decision).

Although no Washington authority seems to address the specific res judicata effect of a final decision to deny arbitration, the matter was considered by the Ninth Circuit in *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Aloha Airlines, Inc.*, 790 F.2d 727, (9<sup>th</sup> Cir. 1986). In that case, a trial court denied a union's motion to compel arbitration of a labor dispute. *Machinists & Aerospace Workers*, 790 F.2d at 730. In a second complaint, the union again requested arbitration and joined causes of action for declaratory relief and damages. *Id.* The trial court dismissed the second action, including the claims for declaratory relief and damages, on the basis that the previous ruling was res judicata as to the second action. *Id.* The Ninth Circuit agreed that the arbitrability of the union's grievance was conclusively resolved in the first action and barred by res judicata from being re-litigated in a second action. *Id.* at 731. The union's other claims were not barred, however, because under the posture of that case they "could not have been raised in the prior action." *Id.*

Res judicata bars not only re-litigation of claims that were litigated, but also those that might have been litigated in a prior action. *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000), *review denied*, 143 Wn. 2d 1006 (2001). Unlike the position of the union in *Machinists & Aerospace Workers*, the only claim of Naumes in this action that perhaps could not have been raised in the prior action is the LUPA claim.

When Naumes filed its second lawsuit against the City (out of which the current appeal arose), it challenged the hearing examiner's decision upholding the City's interpretation of its municipal ordinances. Naumes could have amended its earlier lawsuit to include its LUPA claims relating to the hearing examiner's decision. Naumes' first lawsuit against the City was commenced on June 20, 2013. CP 256. The hearing examiner's decision was issued on July 23, 2013. CP 186.

But Naumes' LUPA claims were only viable briefly during the course of the first lawsuit (i.e., after the date of the hearing examiner's decision and prior to the Court's order denying arbitration on July 29). Application of res judicata to Naumes' LUPA claims may be unjust. Courts have sometimes allowed plaintiffs to assert truly new, independent claims even if those claims might have been joined in the

first action. *E.g., Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc.*, 118 Wn. App. 617, 627-32, 72 P.3d 788 (2003) (relating “claim” for res judicata purposes to commonality of factual basis of dispute).

The LUPA claim of Naumes arose just before the first lawsuit was dismissed. The LUPA claim related to the distinct action of the hearing examiner. For these reasons, the City does not argue that res judicata precludes the LUPA claim. But all of the other allegations of Naumes raised in this action, including allegations of breach of contract (the third cause of action), promissory estoppel (the fourth cause of action), and breach of oral covenant (the fifth cause of action) do not arise out of the hearing examiner’s decision at all. CP 14-18. Those causes of action arise instead out of events that are also recounted in Naumes’ complaint in the -619 lawsuit. CP 248-256. For instance, the allegations of breach of contract are almost verbatim. CP 14-15, CP 254-255. The allegations of promissory estoppel and breach of oral covenant also relate to the same historical facts of Naumes’ dealings with the City *prior to* its filing of the -619 lawsuit. CP 15-18.

The careful discussion in *Sound Built Homes* noted that “claim” for res judicata purposes is “coterminous with the transaction regardless

of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff.” *Sound Built Homes*, 118 Wn. App. at 630. *See also In re Marriage of Dicus*, 110 Wn. App. 347, 355-56, 40 P.3d 1185 (2002) (res judicata applies to every claim “which properly belonged to the subject of the litigation....”).

As between the two lawsuits (again excepting the LUPA claims): 1) there is perfect identity of persons/parties; 2) the causes of action relate to substantially the same evidence, involve infringement of the same alleged right, and arise out of the same transactional nucleus of facts; 3) each involves the same subject matter; and 4) each involves the same “quality” of persons. *Pederson*, 103 Wn. App. at 72-74. The trial court’s July 29 order in the -619 lawsuit was a final order. The elements of res judicata are met.

Naumes has never explained the basis for filing its second lawsuit instead of appealing the decision in the -619 lawsuit. Naumes’ opening brief to this Court is silent on this entire problem, even though the issue was raised below. CP 207-210. Naumes has never established any justification for relief from application of res judicata. Naumes had every opportunity to seek review of the court’s order

denying arbitration of July 29. The fundamental judicial policies behind res judicata apply. *See Pederson*, 103 Wn. App. at 71 (rule designed to prevent repetitive litigation); *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 534, 762 P.2d 356 (1988) (res judicata ensures finality of decisions).

**C. The applicability of the City’s development regulations governing binding site plans is not a matter for private arbitration.**

Setting aside Naumes’ failure to appeal the court’s prior order denying arbitration, the underlying argument of Naumes is wrong. Naumes requests modification of the general binding site plan through private arbitration. Naumes claims that arbitration is the “right dispute resolution tool for the job.” Br. 23. But this would avoid public review processes required by the Chelan Municipal Code. Arbitrating Naumes’ proposed modification to the Apple Blossom Center general binding site plan is inimical to Washington’s tradition of public participation in land use decisionmaking.

Cities are authorized to adopt by ordinance procedures for the division of land by binding site plan. RCW § 58.17.035. A binding site plan is an alternative to the procedures otherwise required for subdivision approval. *Id.* The City adopted procedures consistent with

RCW § 58.17.035 by ordinances codified at Title 16 CMC. Under the Chelan Municipal Code, binding site plans are to be processed in accordance with Ch. 16.24 CMC.<sup>11</sup> The process of review and approval of a specific binding site plan may not be used to modify the provisions of an approved general binding site plan other than to divide lots for sale or lease within areas designated in the general binding site plan. CMC § 16.24.060.

In analyzing the applicability of CMC § 16.24.060, the hearing examiner found it “clear and unequivocal [sic] that the approval of an SBSP ‘**shall not**’ be used to modify the provisions of an approved GBSP except under limited circumstances not relevant to this decision.” CP 25<sup>12</sup> (emphasis in original). The hearing examiner found that construction of Isenhart Road, as specified on the general binding site plan, was a “‘provision for approval’ of the general binding site plan as contemplated by CMC § 16.10.070.” CP 24.<sup>13</sup> Any modification to the general binding site plan that would result in the removal of Isenhart Road could only be accomplished by using the

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<sup>11</sup> Ch. 16.10 CMC was the prior version. Naumes does not argue in its opening brief that there is any material difference between current Ch. 16.24 compared with former Ch. 16.10. This brief cites to the current regulations.

<sup>12</sup> Conclusion of law 7.

<sup>13</sup> Finding of fact 34.

approval process provided under the CMC for the original general binding site plan. CMC § 16.10.070. CP 35, 36.

This distinction is important. The process for approving a specific binding site plan entails only a determination of consistency with the conditions of the general binding site plan. CMC § 16.24.060(B). This decision is made by the City's administrative official. *Id.* There is no public notice of application or public comment and hearing process. *See* CMC § 16.24.010 (specific binding site plan approval is "Type IIB project permit"); CMC § 19.18.010 (Type IIB project permits have no public notice of application or hearing requirement, unless appealed). Because there is no public comment process, in most cases only the applicant will be provided notice of the final decision. CMC § 19.18.090(B).

By contrast, a general binding site plan may be modified only in accordance with the original general binding site plan application process. CMC § 16.24.080. General binding site plans may be approved only after a public notice of application, a public comment opportunity, a public hearing before the hearing examiner, and a final decision by the hearing examiner. *See* CMC § 16.24.010 (general binding site plan approval is "Type IVA project permit"); CMC §

19.18.010 (Type IVA project permits require public notice of application, public comment period, and public hearing before the hearing examiner).

Private arbitration cannot substitute for the public participation required by the CMC for general binding site plan modifications. This is no less true for Naumes' desire to remove a segment of Isenhart Road from the Apple Blossom Center general binding site plan.

Naumes has never explained how private arbitration satisfies the legislature's finding that the process by which land is divided "is a matter of state concern and should be administered in a uniform manner by cities, towns, and counties throughout the state." RCW § 58.17.010. Naumes has never cited -- in any of its briefs either below or here -- any precedent for allowing arbitration of public land use decisions like site plans, subdivisions, or environmental review.

**D. Nothing in the development agreement supports Naumes' argument that modification of the Apple Blossom Center general binding site plan is a matter for private arbitration.**

After Naumes commenced its administrative appeal, Naumes filed the -619 lawsuit against the City. In that lawsuit, Naumes moved to compel arbitration regarding its request "to alter certain street infrastructure within the development from that as originally set forth

in the general binding site plan for the development.” CP 260.

Naumes argued that the development agreement was “basically the ‘umbrella’ covering the multiple aspects of the development of the Apple Blossom Center in Chelan, Washington.” *Id.* According to Naumes, the development agreement’s arbitration clause applied to “any matter set out in this agreement.” CP 267. Naumes insisted that its dispute with the City was arbitrable. CP 268. These arguments were rejected by the trial court’s July 29 ruling. CP 240-241.

In the new lawsuit, Naumes filed a nearly verbatim brief in support of its motion to compel arbitration. CP 38-50. Naumes’ arguments to compel arbitration in this case may be compared with Naumes’ arguments from the earlier case. CP 38-50, CP 228-238.

In both cases, Naumes argued that because its dispute with the City “related” to the development of Apple Blossom Center it, therefore, was “a ‘matter set out’ in the development agreement.” CP 48, CP 268. Naumes did not, however, in either trial court motion, cite any specific clause of the development agreement that governs the modification of the Apple Blossom Center general binding site plan. Naumes has cited no such provision in its opening brief here. Naumes has never cited any provision of the development agreement that would

alter the applicability of the Chelan Municipal Code to the binding site plan modification process.

Naumes lacks a source in the development agreement to support its arguments. Naumes ignores a key term of the development agreement that refutes its arguments. The development agreement states at “Recital F” that “Naumes and the City desire that the future development of the Property be consistent with land use and development regulations of the City now existing or hereafter adopted.” CP 81.

The development agreement required Naumes to build streets and roads at Naumes’ expense. CP 86-87. These roads were then to be dedicated to the City. *Id.* The development agreement’s text discussing road building and ownership makes no provision for modifications of the designated roads. There being no such provision, the development agreement left the matter to application of the City’s development regulations. Neither the development regulations themselves, nor any sort of functionally equivalent contractual arrangement, are a matter “set out in the development agreement.” Naumes’ argument to the contrary is that “[t]he Development Agreement governs the development of the Apple Blossom Center

Development and therefore, this dispute is a ‘matter set out’ in the Development Agreement.” Br. 20. Naumes’ argument is really only a tautology, though. Naumes’ argument provides no explanation outside of its own assumptions.

According to the development agreement, “[d]evelopment of the Property *shall be consistent* with a Binding Site Plan which has been considered by the City in conjunction with this Agreement and a Binding Site Plan Map in the form attached hereto as Exhibit ‘B’, which *shall confirm* lot size and configuration, *street infrastructure*, open space and common areas.” CP 82, 83 (emphasis added).

**1. The development agreement does not supersede the City’s binding site plan procedures.**

The development agreement does not contain any provision addressing the manner in which the general binding site plan for the Apple Blossom Center may be modified. Nor does the development agreement contain any provision discussing how approved general or specific binding site plans may be modified generally. The City cannot by contract modify requirements imposed by applicable development regulations and by state law. Creating terms for the modification of the general binding site plan was never the intended purpose of the development agreement. The purpose of the development agreement

was to guide the parties' relationship during the construction of the project under the existing general binding site plan.

The City cannot administratively approve a specific binding site plan that is inconsistent with a general binding site plan. CMC § 16.24.060. Naumes essentially argues that it may force arbitration of whether it is required to comply with the City's development regulations, as the City interprets them and as affirmed by the hearing examiner. Naumes cites no authority for this position.

If the City's interpretation of its development regulations is incorrect, then Naumes has the remedy of pursuing LUPA review. Naumes has already invoked LUPA review in this action. The present appeal disrupted the LUPA review.

Eliminating the Isenhart Road segment from the general binding site plan would be a significant change. The City's development regulations do not permit a general binding site plan to be modified by the street vacation process or the specific binding site plan process. *See* CMC 16.24.060(A); CMC 16.24.080.

In short, Naumes wishes to modify the general binding site plan. However, Naumes may not do so in a manner that is not permitted by the City's development regulations. Nor may Naumes

declare the entire matter subject to arbitration, because this is also not permitted by the City's development regulations.

**2. The development agreement's arbitration clause does not encompass this dispute.**

The question whether and what the parties have agreed to arbitrate is for the courts to decide unless otherwise stipulated by the parties. *Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, 138 Wn. App. 203, 213, 156 P.3d 293 (2007). Arbitration clauses are generously construed in favor of arbitrability unless it can be said with assurance that an arbitration clause does not cover the dispute at issue. *Tacoma Narrows*, 138 Wn. App. at 215.

Here, the arbitration clause applies to "any matter set out in this Agreement." CP 96. The development agreement covers various issues that relate to and are predicated on the *existing* general binding site plan. The separate matter of whether and how Naumes may modify the existing general binding site plan and establish a new general binding site plan is a matter governed by the City's codes. This matter, being regulated by local codes, is not discussed in the development agreement. The process for modifying a general binding site plan is not a "matter set out" in the development agreement.

Naumes' argument goes too far in claiming that the City's position would render the arbitration clause meaningless. Br. 24. Arbitrable disputes that actually relate to the terms of the development agreement are certainly possible and could include, for example, disputes regarding: cost-sharing for water infrastructure (§ 6 - CP 84); implementation of the waste water collection and treatment system (§ 7 - CP 85); street and parking standards (§§ 9, 15 - CP 86-88); and an array of design standards on things like setbacks, site screening, and landscaping. (§ 15 - CP 90 - 96).

None of the topics identified by Naumes as the basis of the current dispute is a subject of -- or even discussed in -- the development agreement. Br. 2. The development agreement does not discuss whether Naumes may vacate a portion of Isenhart Road. *Id.* It does not discuss the process required of Naumes in the event Naumes is not required to build the road segment. *Id.*

**3. The development agreement's arbitration clause should not be construed to be unenforceable and contrary to law.**

If the arbitration clause allowed an arbitrator to decide the process for modifying a general binding site plan, the clause would be unenforceable. Washington has a strong policy in favor of public

participation in the land development process. *E.g.*, RCW 36.70A.140 (municipalities required to identify procedures for “early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans.”).

This policy is manifest in the City’s development regulations, which require several forms of public participation for general binding site plan approval. *See, supra*, section IV(C). Courts will void arbitration clauses that conflict with important public policy considerations. *E.g.*, *Young v. Ferrellgas*, 106 Wn. App. 524, 21 P.3d 334 (2001) (conflict between public policy favoring arbitration and public policy in favor of allowing tort actions for wrongful discharge resolved in favor of allowing tort action to proceed).

Even if the arbitration clause could be read to apply to this matter, the Court should not allow an arbitration clause to deprive the general public of an opportunity to comment on the proposed modification of the Apple Blossom Center general binding site plan.

**4. Development agreements must in all cases be consistent with development regulations.**

Naumes' argument for arbitration implies that a city may by contract exceed the authority granted it by the legislature. This theory misapprehends the role and authority of municipal corporations.

As a municipality, the City is a creature of statute. It possesses only those powers conferred on it by the constitution and statutes. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 686, 743 P.2d 793 (1987); *see also Sundquist Homes, Inc. v. Snohomish County Public Utility Dist. No. 1*, 140 Wn.2d 403, 410, 997 P.2d 915 (2000) (“Municipal authorities cannot exercise powers except those expressly granted, or those necessarily implied from granted powers.”).

The Washington legislature has granted municipalities authority to enter into development agreements. That grant of authority is found at RCW § 36.70B.170. The City's authority to enter into a development agreement is defined and limited by statute. *Tacoma*, 108 Wn.2d at 686, 743 P.2d at 796 (citing *Spokane v. J-R Distrib., Inc.*, 90 Wn.2d 722, 585 P.2d 784 (1978)).

RCW § 36.70B.170 limits the authority of municipalities to enter into development agreements in important respects. Development agreements must be “consistent with applicable development

regulations adopted by a local government planning under chapter 36.70A RCW.” RCW § 36.70B.170(1). The City has no authority to enter into a development agreement that is not consistent with applicable local development regulations.

The City’s code confirms this limitation: “A development agreement shall be consistent with applicable development regulations adopted by the city under Chapter 36.70A RCW.” CMC § 19.38.020(B).

This limitation is also expressed in the development agreement at Recital F (“...future development of the Property [will] be consistent with land use and development regulations of the City now existing or hereafter adopted.”). CP 81.

**5. Binding site plans may only be modified in accordance with the City’s development regulations and applicable state law.**

The City has enacted local development regulations that pertain to binding site plans pursuant to authority granted in RCW § 58.17.035. The City’s development regulations establish a two-step process by which a binding site plan is approved.

In the first step, the general scope and design of a proposed site plan is approved according to a general binding site plan. CMC §

16.24.010. The final decision on an application for a general binding site plan is made by the City's hearing examiner after an open record public hearing. CMC § 16.24.010; CMC § 19.18.010. In the second step, the sale or lease of lots within the general binding site plan may be allowed following specific binding site plan approval. CMC § 16.24.010. The final decision on applications for specific binding site plans is made by the City's code administrator. CMC § 16.24.010; CMC § 19.18.010.

The City's development regulations establish a process for modifying approved general and specific binding site plans. An approved general binding site plan cannot properly be modified as a result of a specific binding site plan application. CMC § 16.24.060. A modification to an approved general binding site plan may only be accomplished in accordance with "the approval process set out in this chapter [CMC 16.24] for the original general" binding site plan. CMC § 16.24.080.

An application to modify an approved general binding site plan is also likely to be subject to review under SEPA. There is no categorical exemption from SEPA for binding site plan modifications. Ch. 43.21C RCW; WAC 197-11-800. Applicable SEPA regulations

require an environmental checklist and a threshold determination for any non-exempt action in order to determine whether a proposed action will have probable significant adverse environmental impacts. WAC 197-11-310; WAC 197-11-315.

A decision on an application to modify an approved binding site plan is subject to judicial appeal. CMC § 19.18.010. A LUPA action “shall be the exclusive means of judicial review of land use decisions.” RCW 36.70C.030(1); *see also Ashe v. Bloomquist*, 132 Wn. App. 784, 790, 133 P.3d 475 (2006) (“LUPA is the exclusive means of judicial review of land use decisions.”). By establishing a uniform, expedited appeal process and uniform criteria for review, LUPA promotes “consistent, predictable, and timely judicial review.” RCW § 36.70C.010.

Naumes’ argument for arbitrability would evade the land use and environmental review process applicable under City code (and Washington law). Naumes asserts that it is “entitled to use the prior street vacation process and, presently, the Specific BSP process, to eliminate Extended Isenhart Road....” Br. 20-21. Naumes claims that its dispute with the City is sufficient justification to invoke private arbitration. But this position is directly at odds with the City’s

development regulations and SEPA. *See* CMC §§ 16.24.060 and .080; RCW 43.21C.

The concept of using anything less than a proper process for general binding site plan modification has practical consequences for this development. Naumes' request to eliminate Extended Isenhart Road, together with the already-accomplished vacation of Vacated Isenhart Road (CP 115-118) would result in no connection between the Apple Blossom Center and Isenhart Road at all. The connection between the Apple Blossom Center and Isenhart Road was integral to the original binding site plan application because this was the only means of access to and from the development and Isenhart Road to the east. This relationship was noted by the Hearing Examiner. CP 22.<sup>14</sup> The importance of connectivity of street infrastructure was expressly stated in the development agreement. CP 86. Connectivity is a key goal of the City's road development standards, adopted at Ch. 25.05 CMC. *See, e.g.,* Street Standards, Section Five ("...street layout...shall provide for the continuation of major streets which serve property contiguous to the development....").

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<sup>14</sup> Finding of fact 16.

The effect of a decision finding that arbitration of this dispute could override local development regulations would have serious future consequences. The presence or absence of the contested segment of Isenhart Road is itself a substantial topic. But it is also possible to imagine future disagreements regarding the Apple Blossom Center. Arbitration in this case could imply that future land use decisions must also occur outside the normal channels of Washington land use decisionmaking and environmental review. This could frustrate the orderly public review of land use at the Apple Blossom Center in unpredictable ways for literally years to come. And because Naumes presumably means that arbitration in this case would be binding, there could be no judicial review by LUPA of an arbitrator's decision.

The City's development regulations prescribe a public process for modifying an approved general binding site plan. The SEPA review process also contemplates public review and participation. These public review requirements are not met by private arbitration. There is no way that an arbitrator may conduct an open record public hearing, act as a SEPA responsible official, or meaningfully evaluate the public impact of general binding site plan modifications.

**V. CONCLUSION**

For the foregoing reasons the trial court's order to deny arbitration should be affirmed. The Court should remand to the trial court for entry of an order dismissing, with prejudice, the non-LUPA claims of Naumes. The LUPA claims of Naumes should proceed to trial.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of April, 2014.

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# Appendix A

(Color image as filed with the trial court,  
CP 113)

# Aerial Map of the Subject Property

(Color Coded for Illustrative Purposes)

