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No. 66322-4-I

(King County Superior Court No. 10-2-13916-8 KNT)

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION ONE

WENDY BIRNBAUM,

Appellant,

v.

PIERCE COUNTY,

Respondent.

APPELLANT'S REPLY BRIEF

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Plaintiff and Appellant Wendy Birnbaum submits this brief in reply to Pierce County's response brief. To address the County's arguments, it is first helpful to consider both (1) the nature and substance of the Hearing Examiner's earlier 2006 decision in this matter, and (2) the statutes applicable to application processing and the County Code that applies these statutes within specific parameters. After that background, the County's specific arguments will be addressed.

ARGUMENT

A. Understanding the Hearing Examiner's 2006 decision.

Although the County's Hearing Examiner issued a final decision in 2010 (2010 Decision), the County focuses substantial attention on the Examiner's earlier 2006 decision (2006 Decision), but largely or completely ignores what this earlier decision actually says:

The request for a conditional use permit to allow establishment of a campground and associated recreational uses **is hereby returned to Pierce County Planning and Land Services and the Pierce County Environmental Official for further review as set forth above. *In the alternative, the applicant may consider this decision a final denial*** of the conditional use application for purposes of appeal. Upon completion of review of the above items and the preparation of a more detailed site plan, this matter may be rescheduled for hearing...

CP 32 (emphasis added). Thus, the 2006 Decision gave Birnbaum two very clear choices—two alternative choices. First, the decision returns or remands the application to the County Staff for further review based on

Birnbaum's preparation of a more detailed site plan. Second, and in the alternative, the Examiner provided Birnbaum the option of not providing more information and accepting the decision ("may consider this decision a final decision"). The Examiner did not declare the decision final. Rather, that was the effect **if Birnbaum did not prepare a more detailed site plan**. But Birnbaum chose to revise the site plan, resubmit, and get a new hearing. CP 5 (Complaint, p. 3, ¶ 12). The 2010 Decision confirms these facts. CP 52, 68 (Finding #2).

The County attempts to use the 2006 Decision to confuse the issues when the County's own Code addresses these precise circumstances. Specifically, the County offers its own Statement of Issues, including calling the 2006 Decision a "final denial," and claims that Birnbaum should be prevented from making a collateral attack challenging the 2006 Decision.¹ This contention ignores the express language of the 2006 Decision quoted above, as well as the County Code, which specifically recognizes that, as here, the Examiner might remand for consideration of more information and excludes that time from the 120 days of allowed total review time.

Beyond this, the record is clear that the County Staff and the Examiner did not treat the 2006 Examiner decision as final. Rather, County

¹ See also County Br., p. 8 (summary of argument ignoring part of 2006 Decision returning application to staff).

Staff reviewed and processed the revised site plan as part of the original application, and the Examiner in the 2010 Decision cites to the 2006 Decision and treats the case as part of the same, continuing application. CP 52, 68 (Finding #2).

Although primarily based on delay exceeding the County's own 120-day review standard, Birnbaum's Complaint also alleged that the County's demands for additional information were arbitrary. CP 6. As further discussed herein, Birnbaum's claim of arbitrary treatment is not based on the 2006 Decision, but on later County demands. In short, Birnbaum contends that the County cannot make arbitrary requests for more information and use that to stop the 120-day County review time clock. The County's focus on the 2006 Decision thus misses the point.

B. Background of Application Review Procedures.

Under state and county law, Pierce County through its staff was legally obligated to properly and timely process Birnbaum's permit application. The County's arguments completely ignore these obligations and as a result present a contorted vision of the process required by law.

1. Complete Application for Processing and Time Periods

Local land use application processing is governed by RCW Chapter 36.70B. This statute requires local governments planning under the Growth Management Act (GMA), including Pierce County, to "establish by

ordinance or resolution an integrated and consolidated project permit process.” RCW 36.70B.060. The first step in that process is for the applicant to file a complete “project permit application.”² It is then the County’s responsibility through its staff to make a “determination of completeness” within 28 days under RCW 36.70B.070(1):

Within twenty-eight days after receiving a project permit application, a local government planning pursuant to RCW 36.70A.040 [GMA] shall mail or provide in person a written determination to the applicant, stating either:

- (a) That the application is complete; or
- (b) That the application is incomplete and what is necessary to make the application complete.

However, if the County staff fails to make that determination within 28 days, then the application is “deemed complete.” RCW 36.70B.070(4)(a).³

This Court said about these requirements:

It is difficult to imagine how a statute could more explicitly state the time period within which a county is required to request and respond to an applicant’s submission of supplemental application materials.

Schultz v. Snohomish County, 101 Wn. App. 693, 701 (2000).⁴ The statute further describes “completeness” as when an application “meets the

² Birnbaum’s application for a conditional use permit qualified under the statute which defines “Project permit” or “project permit application” to include applications for “conditional uses.” RCW 36.70B.020(4).

³ If the response is that the application is incomplete and the applicant submits additional information, then the local government has 14 days to make a new determination. RCW 36.70B.070(4)(b).

⁴ This Court in that case noted the “considerable bearing” that the Regulatory Reform statutes had in that case involving an application processing time period.

procedural submission requirements” even though “additional information” may be necessary or project modifications occur. RCW 36.70B.070(2). RCW 36.70B further requires the County to establish “submission requirements” as follows:

The development regulations must, for each type of permit application, specify the contents of a completed project permit application necessary **for the complete compliance with the time periods and procedures.**

RCW 36.70B.080(1) (emphasis added). Thus, the County had the opportunity, and the statutory mandate, to establish the specific requirements for an application to be complete, and for those requirements to be met prior to the application time period beginning to run. The Birnbaum application was complete on February 23, 2005. CP 4 (Complaint), 50 (2010 Decision). There is no dispute about that date.⁵

2. The 120-Day Rule

The next statute to consider is the “120-day rule” statute, RCW 36.70B.080(1), which is discussed in Birnbaum’s opening brief at pages 13-15. The statute has four parts:

- (1) the County “must establish and implement time periods” for applications;
- (2) the County must “provide timely and predictable procedures” to determine whether an application should be approved;

⁵ The record does not reflect whether Birnbaum received a completeness determination or whether the application was deemed complete by operation of law, but the legal effect of having a “complete application” does not change.

- (3) the time period “should” not exceed 120 days; and,
- (4) an exception is authorized but only if the County “makes written findings” that a “specified amount of additional time” is needed to process a specific application or application type.

Id. In turn, the County Code establishes a maximum time period: “The Director or Examiner **shall issue a notice of final decision on a permit within 120 days, of County review time**, after the Department accepts a complete application.” PCC 18.100.010 (emphasis added). The County Code contains a caveat, namely that the 120 days count “County review time,” defined in the next provision in the County Code:

The 120-day time period established in Section 18.100.010 above shall not apply in the following situations:

- A. Any period during which the applicant has been requested by the Department to correct plans, perform required studies, or provide additional information. **This period of time shall be calculated from the date the Department or Examiner notifies the applicant of the need for additional information** until the Department or Examiner notifies the applicant that the additional information satisfies the request or 14 days after the last required submittal of the information, whichever is earlier;

PCC 18.100.020 (emphasis added).⁶ As explained above, this provision specifically contemplates that the Hearing Examiner might request additional information, as occurred here in 2006, and that the review time clock would stop (exclusion of time), but for no more than 14 days after Birnbaum

⁶ The Section goes on in B-F to also exclude time for an EIS, administrative appeals, “mutually agreed upon extension” in writing, large scale developments, during public area approvals. None of these items applies in this case. A copy of Pierce County Code, Chapter 18.100, is attached to the County’s Brief at Appendix page 20 (note that Chapter was adopted in 1996 by Ord. 96-19S § 1 (part)).

resubmitted—*i.e.*, no later than 14 days after December 6, 2008. CP 52 (2010 Decision stating date of resubmission).

RCW 36.70B.080(1) also provides an escape hatch authorizing the County to avoid the default time period by adopting written findings. The County Code implements this provision:

If the Director or Examiner is unable to issue a notice of final decision within the 120 days, as prescribed in 18.100.010 above, then a written notice of this fact shall be provided to the applicant together with a statement of reasons why the time limits have not been met and an estimated date for issuance of the notice of final decision. **The Department and/or County shall not be liable for damages under this Section if the notice of final decision is not issued within 120 days.**

PCC 18.100.030 (County Br., App'x at 20) (emphasis added). But the County never made any such findings under that section, and the Court should be careful not to afford the County the benefit of findings that were never made.⁷

C. Rebuttal: The County's Statement of the Case is unsupported.

2006 Decision. The County's Statement of the Case argues that the 2006 Decision concluded that Birnbaum's application was lacking information and was a final decision that Birnbaum should have appealed. County Br., pp. 2-3. But, as explained above, the 2006 Decision specifically "returned" the application to County Staff for further review upon submittal by Birnbaum of a revised site plan and Birnbaum took that

⁷ Moreover, the language of PCC 18.100.030 emphasized above makes it clear that the County would not be liable for damages if the findings in that section were made, but implies that the County can be liable in the absence of such findings, as is the case here.

express option—*i.e.*, the decision was not final. As was also discussed above, the County Code expressly contemplated this occurrence under the standard for calculating the 120-day review limit by simply making an Examiner request for more information a reason to stop the 120-day clock. PCC 18.100.020.

Petition for writ of mandate. The County next tries to downplay Birnbaum’s writ of mandate lawsuit, arguing that it was voluntarily dismissed with no action taken to prosecute it. County Br., pp. 3-4. Though not relevant, the facts do not support this statement. The lawsuit was not dismissed until April 2010—after the final Hearing Examiner Decision in March 2010. CP 50-87 (decision), 89-91 (dismissal). The lawsuit was pending for almost 18 months, and Pierce County was unable to force a dismissal of lawsuit. CP 37. The facts could show, hypothetically, that the Court kept continuing the case because the County represented that the application was moving forward.⁸ Regardless, Birnbaum did not waive any rights to seek damages. CP 45-46 (dismissal without prejudice).

Plan revisions. Next, the County asserts that Birnbaum submitted

⁸ Indeed, all of the County’s complaints concerning issues or documents purportedly raised for the first time on appeal are entirely meritless under *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750 (1995), which holds that an appellate court, in reviewing an order on a CR 12(b)(6) motion, “may consider a hypothetical situation asserted by the complaining party, not part of the formal record, *including facts alleged for the first time on appellate review* of a dismissal under the rule.” (Emphasis in original). *See also Berge v. Gorton*, 88 Wn.2d 756, 763 (1977) (“In considering a CR 12(b)(6) motion, this court may take judicial notice of matters of public record.”)

plan revisions just before and after the 2009 hearing implying, but not saying, that those facts support its position. County Br., p. 4. The 2010 Decision notes that the applicant proposed phasing revisions in December 2009, CP 72, and those minor changes did not cause any delay in the hearing. As the County is well aware, the post-hearing minor revisions clarified the buffer widths and landscape requirements, and the County agreed to those changes. CP 55 (Ex. 35), 73 (para. F). Hypothetically, the facts could show that normal post-hearing activities occurred with Birnbaum responding to issues raised at the hearing that do not affect completeness. RCW 36.70B.070(2). Importantly, the County never revisited its 2006 SEPA determination, a Mitigated Determination of Non-Significance, CP 73-74, thus demonstrating that the additional information submitted by Birnbaum—even the information required by the 2006 Decision—did not propose major changes. Further, the County always had the power to declare the need for more processing time, *see* RCW 36.70B.080(1) and PCC 18.100.030, but never did so.

D. Rebuttal: Pierce County’s Argument that Claim for Exceeding Time Period is Time Barred Must Fail

The County’s primary contention is that the “failure to act” claim is time barred and that Birnbaum should have filed the lawsuit years before. County Br., pp. 9-17. The County misreads the statute and confuses when a

claim *arises* with when a claim is *ripe* to pursue in court. The County never states precisely when the lawsuit should have been filed, except to say years before or in 2005, and that is the fundamental problem with the County’s argument—the County’s final decision is necessary to cut off the time period and ripen Birnbaum’s claim.

1. The Language of the Statute and County Code Base the Time Period on the County Making a Final Decision

The County places great emphasis on the words of the statute , but ignores both the words’ meaning and context, as well as its own Code. RCW 64.40 defines “act,” in part, to mean “the failure of an agency to act within time limits established by law in response to a property owner’s application for a permit.” RCW 64.40.010(6). That definition is focused on an agency’s inaction within legal time limits. The County reads this language in complete isolation to say that the failure to act does not require a final decision, but the statute doesn’t support this. The first part of the definition defines “act” to mean a *final* decision that imposes improper requirements, limitations, or conditions— *i.e.*, the statute does not apply to an *interim* decision that imposes improper requirements, but is later administratively reversed, such as that reviewed in *Brower*. 96 Wn. App. 559 (1999). The second part of the definition is still tied to some County “act,” and that is a decision that fails to comply with legal time periods.

The County Code supports the proposition that an delay claim under 64.40 requires a final decision to become ripe, imposing the legal time periods required by RCW 36.70B.080(1) and tying the time period calculation to the “notice of final decision on a permit” with total “county review time” not exceeding 120 days. PCC 18.100.010. The County Code “escape hatch” provision authorizing written findings to exceed the time limit also ties the damages to the “notice of final decision.” PCC 18.100.030. Thus, the statute and the County Code are tied to calculating the time period based on a final decision.

2. The County’s Reading of the Statute is Untenable

The County nonetheless asserts that Birnbaum should have filed this lawsuit “years before” or “in 2005” without any consideration of the meaning of such an interpretation of the statute. The County is saying that Birnbaum should have been responsible for keeping track of “County review time” and then filed a lawsuit for delay in 2005 as soon as 120 days lapsed. This of course makes no sense. In such an event, the County undoubtedly would have argued that the delay caused no damages because the project could not have been approved for a lack of adequate information in the same manner as found by this Court in *Schultz*, 101 Wn. App. 693 (no delay damages when project not approvable).

So, under the County’s approach, the time period ran in 2005 with

no damages possible, and then the County could take as long as it wanted to process the application and never be subject to damages because the chance to sue for damages had already passed. When Birnbaum submitted the revised site plan in December 2006, according to the County, it was too late to make a claim for delay damages even if the County took three years or thirteen years to make a final decision.

Of course, it was the County's responsibility to get the project approved within the 120-day time period, not Birnbaum's, and the County always had the option of making written findings that more time was needed, but never did. Otherwise, to the extent that Birnbaum was unsure about whether the time period had run, the County's argument would require a series of lawsuits, maybe one every 30 days, to attempt to catch the statute of limitations at the right time.

This is an untenable reading of the statute that the Legislature could not have intended. Under the County's reading, the County need only wait 120 days before providing some basic corrective information (*e.g.*, the site plan needs more detail), and then the County is free to take years to process the application with no threat of damages. The applicant would have to file one or more lawsuits to attempt to catch the 120-day time period just right and hope to have an approvable project. The premature lawsuit would litigate whether the application should be approved, thus preempting the

regular administrative process for doing so, and despite LUPA being the sole process to litigate the substantive propriety of a land use decision. Thus, the County's approach would promote duplicative litigation, or simply make such lawsuits impossible.

The purpose of RCW 64.40 was to provide a remedy, damages, for applicants against government delay. This Court should not accept an interpretation of the statute, such as the County's, that makes it impossible or nearly impossible for citizens to obtain the remedy provided by the Legislature. *See, e.g., Wright v. Engum*, 124 Wn.2d 343, 351 (1994) ("As a rule of statutory interpretation, courts construe statutes to avoid absurd or strained consequences.")

3. Lawsuit for Excess Time Period Delay is Not Ripe Until Issuance of Final Decision

The County claims that its interpretation of the statute is consistent with the "rule . . . that a cause of action 'accrues' at the time the act or omission occurs," quoting the case of *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 348 (1985). County Br., p. 13. But, the County clipped the important words from the quotation, namely that this rule applies to "an ordinary personal injury action" governed by the common law of torts. *White*, 103 Wn.2d at 348. The other case cited is also a personal injury case. County Br., p. 13 (citing *Milligan v. Thompson*, 90 Wn. App. 586

(1998)). Of course, this case is not a personal injury action; rather it is a claim for statutory damages under RCW 64.40. As stated by the Supreme Court, “RCW 64.40.020 is not merely a codification of preexisting common law tort remedies, but is a new cause of action not previously available.”

Wilson v. City of Seattle, 122 Wn. 2d 814, 823 (1993).

Instead, under RCW 64.40, a claim for making a decision in excess of the time periods required by law is not ripe until the agency makes a final decision on the application. As stated by this Court:

A claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, and the challenged action is final. **The action challenged here is not final. The County has not yet decided whether to grant the permit or whether a CUP is required.** Thus, one of the required elements for justiciability is not present.

Grandmaster Sheng-Yen Lu v. King County, 110 Wn. App. 92, 106 (2002)

(emphasis added; quotation and citation omitted). The same is true here.

Until the County takes final action on the application, a lawsuit for delay damages is not ripe. The claim for unlawful delay arises when the 120-day time limit expires—precisely when that occurred here requires further factual development—but the lawsuit is not ripe until the process is

complete with a final decision made.⁹ This approach is precisely how the Supreme Court described the situation in *Hayes v. City of Seattle*:

[An applicant would,] in order to avoid a potential bar of the statute of limitations, be forced to bring an action for damages before final action on their application had been taken by the administrative agency. That makes no sense because it would force applicants for permits **to file an action for damages before their cause of action was ripe.**

131 Wash. 2d 706, 716 (1997) (emphasis added). A delay lawsuit, to be ripe, must await completion of the process and the end of the delay.

4. County's Policy Arguments Are Flawed

The County also contends that public policy supports its interpretation of the statute. Specifically, the County argues that any other interpretation would allow the applicant to “pile up damages” by waiting five years to file suit. This is absurd. The County can take action on the application at any time to cut off such damages—the County completely controls the review time, not the applicant. The County adopted the “County review time” code provision and County Staff are obligated to know and follow the law. In addition, the County could have, but did not, make written findings that more time was needed under RCW 36.70B.080 or PCC 18.100.030. Incredibly, the County argues that public policy favors the County because “plaintiff has the option of filing a writ.” County Br., p.

⁹ See also RCW 64.40.010(4) (damages defined from when “cause of action arises”). Damages for exceeding processing deadlines are based on when the time period runs, the cause of action arises, and not based on when the lawsuit is ripe for court.

15. But, of course, the plaintiff in this case **did file a writ of mandate** action in October 2008 to attempt to move the case along. Clearly, the County was on notice of the potential of damages under RCW 64.40 when the writ of mandate action was filed including that claim. Also, prior to that, the facts in the record show that Birnbaum' agent submitted revised site plan in December 2006, and "requested that the project be re-scheduled for public hearing," but after the County first re-scheduled the hearing for May 31, 2007, then June 6, 2007, then it cancelled the hearing. CP 5-6; *accord* CP 52 (2010 Decision). Asserting now that Birnbaum was underhandedly "piling up damages" is absurd.

E. Rebuttal: Pierce County's Argument that the Arbitrary Demand Claim is Time Barred Must Fail

The County argues that Birnbaum's claim based on arbitrary demand for information should have been filed within 30 days of the 2006 Decision. County Br., pp. 17-21. The County argument misses the point because the Complaint is based on County requests for information **after the 2006 Decision**. CP 6 (requests from May 2007 to December 2009 "lacked any basis in law or sound engineering, environmental, or other scientific principles"). Again, part of the reason to challenge these later arbitrary demands is that they should not stop the County review time clock. If Birnbaum was also able to establish unique damages for responding to

such an arbitrary request, then she should be able to claim those as well.

But, the record on this motion to dismiss is woefully incomplete about the various demands for more information by the County. After Birnbaum submitted the revised site plan in December 2006, the record does not explain the back and forth between the County and Birnbaum, except to say that the County made unwarranted demands. The County set the matter for hearing five months after the resubmittal (May 2007), but the hearing was cancelled by the County. CP 52. The facts must be developed in order to know whether the County was making duplicative requests for information or seeking information that had no bearing on the application, thus causing arbitrary delay. These facts have nothing to do with the 2006 Examiner decision.¹⁰ None of the cases cited by the County are to the contrary. *See* County Br., pp. 18-19.¹¹

F. Rebuttal: Pierce County's Argument that Granting of Permit Bars Claim Under RCW 64.40 is Meritless

The County also argues that no 64.40 claim can be brought because

¹⁰ This point overlaps with the County's collateral attack and collateral estoppel arguments, so Birnbaum's arguments on those points are incorporated here.

¹¹ One case denied a 64.40 claim because the initial 64.40 claim was prior to a final decision (like *Callfas*), and the amended complaint was filed four years after the final court decision affording relief (unlike *Hayes*). *Westway Const., Inc. v. Benton County*, 136 Wn. App. 859 (2006). The County also cites *R/L Associates, Inc. v. City of Seattle*, 73 Wn. App. 390 (1994), but the reasoning of that case was rejected by the Supreme Court in *Hayes*, 131 Wn. 2d at 716. The County also cites *City of Seattle v. Blume*, 134 Wn. 2d 243 (1997), but that case merely holds that the 64.40 statute of limitation, 30 days, does not apply to tort claims.

Birnbaum ultimately obtained a permit approval. County Br., pp. 21-30. This is the major argument that is thoroughly discussed in Appellant's Opening Brief at pages 15-30. Appellant's Opening Brief thoroughly discusses *Mission Springs*, *Hayes*, and *Callfas*, Opening Br., pp. 15-18; the County responds by avoiding these cases and relying solely upon *Brower*.

The fundamental issue is whether, in general, a 64.40 claim can be maintained when the permit is ultimately approved. *Mission Springs*, *Hayes*, and *Callfas* hold that such an action can be maintained. Opening Br., pp. 15-18. *Brower* holds that in one specific situation such an action cannot be maintained—namely when an arbitrary decision claim is based on an interim staff decision that is subsequently overturned in a local administrative appeal. *Id.*, pp. 19-24 (distinguishing *Brower*).¹²

The County also argues that Birnbaum can show no harm from the County's failure to comply with time periods required by law. County Br., pp. 25-26. The County appears to be attempting to link this argument to *Brower*, which stated that the challenged decision was administratively remedied so there was no harm. County Br., p. 22. The Complaint alleges damages proximately caused by the County. CP 6. The case is here on a motion to dismiss so the facts are not developed on damages and the

¹² The County's assertion that one distinction of *Brower* raised now should be barred as claim of error (citing RAP 2.5(a)) not raised below is meritless, since explaining a distinction of a case is not a claim of error. See fn. 8, *supra*.

allegations in the complaint must be accepted as true. Ultimately, however, the tardiness of the decision and the resulting damages can only be determined by developing the factual record based on the rule in the County Code defining excluded time periods. Factual development is necessary to determine whether and/or by how much the “County review time” exceeded 120 days—whether the delay was 36 months, 18 months, 90 days or none. The potential damages here are obvious—the RV Park and Campground could have been operating that many months sooner and Birnbaum would seek non-speculative lost profits for that time period. CP 10-11 (damages claimed at trial court in Opp’n to Mot. to Dismiss); RCW 64.40.010(4); *Cox v. City of Lynnwood*, 72 Wn. App. 1 (1993) (non-speculative lost profits properly awarded as damages under 64.40).

The County also contends that this case is identical to *Brower* because the 2010 Decision constituted exhaustion of Birnbaum’s administrative remedies and the final decision afforded adequate relief. Appellant’s Opening Brief thoroughly analyzes this “adequate relief” argument throughout its discussion of *Brower*. Opening Br., pp. 18-30. In sum, this case is different than *Brower* because the 2010 Decision merely ended the delay, but provided no remedy for the excessive delay that already occurred, whereas the plaintiffs in *Brower* received significant relief at the local administrative level—reversal of the planning staff’s decision

later challenged in the lawsuit. Further, the County's arguments are belied by the Supreme Court's clear direction in *Hayes* that a 64.40 claim properly lies within 30 days of a final administrative action, including "**issuance or denial** of the sought after permit." 131 Wn.2d at 716 (emphasis added).

In short, the County's arguments that a permit approval bars any 64.40 claim cannot be sustained without gutting 64.40, or without contravening multiple precedents from this Court and the Supreme Court. The untenable result would be that only projects denied in an untimely manner **and that also** constituted an illegal decision could seek damages.

G. Rebuttal: Pierce County's Collateral Attack and Collateral Estoppel Arguments Are Flawed

The County contends that the collateral attack rule and collateral estoppel bars Birnbaum's claim that 2006 Decision was **unlawful**. County Br., pp. 31-39. But Birnbaum doesn't claim that the 2006 Decision was unlawful. Birnbaum's Opening Brief addressed these arguments. Opening Br., pp. 34-36. Regardless, even if Birnbaum attacked the 2006 Decision, that would only be a narrow issue within the broader scope of this lawsuit, not a reason to grant a CR 12(b)(6) motion and dismiss the entire Complaint that is also based on other facts that post-date the 2006 Decision. Because the County's arguments are intertwined, they are addressed together here.

The crux of the County's collateral attack rule argument is that:

“Here this complaint is an impermissible collateral attack on the unappealed 2006 land use decision and subject to dismissal on that ground.” County Br., p. 32. That is simply not correct; the Complaint is not a challenge to the 2006 Decision. Rather, the Complaint seeks damages for (1) delay in excess of legal time periods, and (2) arbitrary requests for information that post-date the 2006 Decision. Similarly, the County’s collateral estoppel argument contends: “Plaintiff was collaterally estopped from later litigating that decision [the 2006 Examiner Decision] as arbitrary, capricious or unlawful.” County Br., p. 37. If the only cause for delay was the 2006 Decision, then this case might be different. However, Birnbaum seeks damages because the County Staff, over the entirety of the review process, exceeded the 120 days of “County review time” allowed by its own Code—a Code that recognizes requests for information from the Examiner. PCC 18.100.020(A).

Birnbaum also alleges that County requests for information **after the 2006 Decision** were arbitrary. CP 6 (requests from May 2007 to December 2009 “lacked any basis in law or sound engineering, environmental, or other scientific principles”). If the County made arbitrary demands for information, then that should not stop the County review time clock, and might also establish damages for responding to such a request.

Thus, the County’s arguments are a straw man because Birnbaum’s

Complaint simply does not challenge the 2006 Decision, consistent with her decision not to do so at that time. The County's argument that challenges to the 2006 Decision must be made according to LUPA within 21 days is thus entirely irrelevant. Birnbaum is not challenging the 2006 Decision through challenge to a different permit as happened in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-411 (2005). Nor is Birnbaum challenging a permit decision under the guise of a damages action as in *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393 (2010) (lawsuit was a challenge to the temporary use agreement that was not challenged within 21 days under LUPA); *cf. Hayes*, 131 Wn.2d at 711-14.¹³ The County's arguments otherwise are simply an attempt to recast Birnbaum's claims to make them fit under *Habitat Watch* and *Mercer Island Citizens*, rather than addressing the claims actually alleged.

The County also egregiously misquotes the LUPA statute to attempt to support its point stating that LUPA's inapplicability to damages claims applies only to damages claims filed in the same complaint. County Br., p. 33. But the statute says no such thing. Rather, it says plainly that it "does not apply to . . . [c]laims provided by **any** law for monetary damages or compensation." RCW 36.70C.030(1)(c) (emphasis added). It then specifies

¹³ Of course, the plaintiffs in *Mercer Island Citizens* did not allege a damages claim under RCW 64.40 because they were neighbors and not permit applicants. As neighbors, those plaintiffs had no property interest that would support a Civil Rights Act claim.

that this rule applies even to damages claims brought in the “same complaint” with a LUPA claim. *Id.*

On the collateral estoppel argument, the County’s premise is that the only allegation of an arbitrary demand for information is the 2006 Decision. County Br., p. 35-36. None of the cases cited by the County hold that the failure to challenge one decision bars damages claims under RCW 64.40 based on separate arbitrary decisions or demands for information, especially arbitrary requests **that occur later in time**. *See* County Br., pp. 37-38.¹⁴

In summary, the issue here, in deciding a motion to dismiss, is whether Birnbaum has alleged or could allege any facts to support a claim. Admittedly a challenge to the validity of the 2006 Decision would not stand, but Birnbaum’s damage claims are based on other facts, namely the failure to timely process the application and other arbitrary demands for information by County Staff. The County’s arguments are meritless.

H. Attorney’s fees.

Pursuant to RAP 18.1, Birnbaum requests reasonable attorney’s fees and costs on review. This Court should reverse the trial court, and based on

¹⁴ Citing *Chelan County v. Nykreim*, 146 Wn.2d 904, 931-932 (2002) (court held that “LUPA precluded collateral attack of the land use decision” by way of declaratory relief); *Samuel’s Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn. 2d 440, 463 (2002) (court held that Ecology “cannot collaterally challenge the local government’s determination... by bringing independent enforcement actions” where it fails to file a LUPA petition to challenge a local permit decision on shoreline jurisdiction); *Skamania County v. Columbia River Gorge Comm’n*, 144 Wn. 2d 30 (2001); *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn. 2d 169 (2000).

that Birnbaum should be entitled to an award of reasonable costs and attorney fees in this Court pursuant to RCW 64.40.020(2). The Supreme Court ruled that appellate costs and reasonable attorney fees are appropriate on appeal under RCW 64.40.020 in *Mission Springs*, 134 Wn.2d at 972. Conversely, if the Court finds against Birnbaum, the Court should exercise its discretion under the statute's use of the word "may" and deny fees to the County because Birnbaum's appeal was not unreasonable or without foundation similar to Civil Rights Act litigation.¹⁵

CONCLUSION

The Court should take special care in reviewing this case. A number of cases discuss delay damages under RCW 64.40, and a few involve time periods. But, there are no cases discussing the 120-day processing requirements in RCW 36.70B.080, in part because the Legislature only allowed 120-day rule delay damages under RCW 64.40 in 2001, *see* Opening Br., pp. 14-15, which was after the decision in *Brower*. The concern is that the end result will make it entirely or practically impossible to seek delay damages for a violation of time periods. The statutes and cases should not be read in such a manner when 64.40 plainly calls for a damages remedy. The lack of prior case law also means that few cases

¹⁵ *See Cobb v. Snohomish County*, 64 Wn. App. 451, 460 (1991) (fees under 64.40 discretionary); *see also Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn. 2d 245, 289 (2000) (prevailing defendant entitled to fees under 42 U.S.C. § 1988 only if plaintiff's position unreasonable or without foundation).

make it this far—*i.e.*, this is an egregious case that will rarely be repeated. The County too, in its Code, provided the right to a decision within 120 days of “County review time,” and the Legislature tied that to the 64.40 damages remedy that must be enforced. The only way to practically litigate the 120-day rule under the County Code is to obtain a final decision that cuts off the County review time clock, and then go back to determine whether the County exceeded the 120 days. The claim for this type of **delay damages** may arise during the review of the application when the total County review time exceeds 120 days, but that claim **is not ripe** unless and until the application is finally approved. As stated in *Hayes*, the 30-day statute of limitations under RCW 64.40 cannot begin until the application is approved or denied, when the delay claim is ripe.

For the foregoing reasons, Birnbaum urges this court to reverse the trial court’s dismissal of her claim, remand this case for further proceedings, and award Birnbaum her attorney’s fees and costs.

RESPECTFULLY SUBMITTED this 29th day of August, 2011.

GROEN STEPHENS & KLINGE LLP

By:



Charles A. Klinge, WSBA No. 26093

Brian D. Amsbary, WSBA No. 36566

Attorneys for Wendy Birnbaum

DECLARATION OF SERVICE

I, Brian D. Amsbary, declare:

I am not a party in this action.

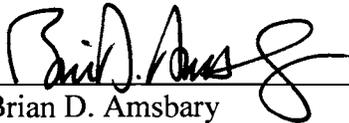
I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On August 29, 2011, I caused a true copy the foregoing document to be served on the following persons via the following means:

| | |
|---------------------------------|---|
| Daniel Hamilton | <input type="checkbox"/> Hand Delivery via Messenger |
| Jill Guernsey | <input checked="" type="checkbox"/> First Class U.S. Mail |
| Pierce County Prosecuting Att’y | <input type="checkbox"/> Federal Express Overnight |
| Civil Division | <input type="checkbox"/> E-Mail: |
| 955 Tacoma Ave S, #301 | <input type="checkbox"/> Other _____ |
| Tacoma, WA 98402-2160 | |

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 29th day of August, 2011, at Bellevue, Washington.



Brian D. Amsbary