NO. 44404-6-II

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

WOODS VIEW II, LLC and DARLENE PIPER,

Appellants,

v.

KITSAP COUNTY,

Respondent,

BRIEF OF RESPONDENT

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and

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I. INTRODUCTION

This case arises from the efforts of Appellant Woods View II, LLC ("Woods View") to develop real property in Kitsap County, and Kitsap County's actions and statements in relation to that proposed development. The project failed in 2009 due to the collapsing real estate market and Woods View's concomitant inability to obtain development financing for the project.

Woods View and its former managing member, Darlene Piper ("Piper") sued Kitsap County, contending that the County should not have expressed its concern that the proposed development could be in conflict with the Growth Management Act ("GMA"), RCW 36.70A. Woods View contended that Kitsap County did not have the right to express those legal concerns to the Washington Department of Health and others.

Woods View and Piper first filed a lawsuit arising from this dispute in Pierce County Superior Court in December 2009, asserting a variety of federal and state law claims. The case was removed to federal court. All of the federal claims were dismissed in June 2011 by U.S. District Court Judge Benjamin H. Settle in case number 3:10-cd-05114, 2011 U.S. Dist. LEXIS 67717 (W.D. WA. 2011). Judge Settle also dismissed the state law claims, but without prejudice to the plaintiffs' refiling of those claims in state court. Judge Settle's dismissal of all federal claims was affirmed by the Ninth Circuit Court of Appeals on June 13, 2012, 2012 U.S. App. LEXIS 11978 (9th Cir. 2012).

Woods View and Piper filed a lawsuit reasserting state law claims against Kitsap County in July 2011. Those claims were ultimately dismissed by Pierce County Superior Court Judge Susan Serko on December 12, 2012. This appeal followed.

Kitsap County respectfully asks this Court to affirm summary judgment in favor of the County.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Kitsap County believes that the issues pertaining to the assignment of errors can best be stated as follows:

A. Whether the former managing member of a limited liability company lacks standing to assert claims arising from a county's action on the company's development application, where the former manager did not own the subject property and did not seek any decision or action from the County on her own behalf.

B. Whether Woods View's claim based on permit delay was subject to dismissal based on limitations and collateral estoppel.

C. Whether Woods View's claims arising from Kitsap County permit actions were barred by its failure to appeal such decisions under the Land Use Petition Act ("LUPA"), RCW 36.70C.

D. Whether Woods View's negligence claim was also barred by the Public Duty Doctrine.

E. Whether Woods View's claims arising from Kitsap County's communications with other public entities were barred by *Noerr-Pennington* immunity.

F. Whether Woods View's tortious interference claim was barred by collateral estoppel and the absence of the elements for such a claim.

G. Whether the takings claim was barred by res judicata, collateral estoppel and the absence of the elements of inverse condemnation.

H. Whether all claims were barred by the absence of proximate causation.

III. COUNTER STATEMENT OF THE CASE

A. Factual Background.

Plaintiff Woods View II, LLC ("Woods View") was until 2010 the owner of 19.8 acres of land in the Manchester area of rural Kitsap County. The property includes a large number of tiny "legacy lots" which were platted around 1909. Each such lot is approximately 40 feet wide and 100 feet deep, i.e., about $1/10^{th}$ of an acre. (CP 3).

Kitsap County zoning regulations in this rural area restrict development to a density of approximately one unit per five (5) acres. Kitsap County has historically recognized the existence of legacy lots. However, an owner of land not served by sewer must ordinarily combine

several small lots to create a buildable lot of sufficient size to accommodate an on-site septic system.

In 2006, Woods View proposed a residential development which contemplated building 78 single family homes on the 19.8 acre Woods View site (nearly 20 times the density of the surrounding zone). Woods View proposed to avoid the usual lot size restrictions for on-site septic by using a Large On-Site Sewer System ("LOSS"). A LOSS does not involve a separate septic system for each residence, but rather utilizes a shared off-site waste treatment system and drainfield. (CP 3). The Washington Department of Health ("DOH") regulates the design, construction, management and operation of a LOSS with the capacity necessary to serve the Woods View development. Woods View felt that by utilizing a LOSS, it could squeeze "urban" or "suburban" density onto its rural parcel. (CP 62-63).

In April 2006, Woods View applied to Kitsap County for a Site Development Activity Permit ("SDAP") for the project. (CP 4). Shortly thereafter, Woods View submitted an application for county approval under the State Environmental Policy Act ("SEPA"). (CP 4). Because Kitsap County is not the agency responsible for approving or disapproving a LOSS system, Woods View submitted an application for approval of the proposed LOSS directly to DOH in 2006.

DOH regulations require an applicant for a LOSS to submit a "Management Plan" which identifies an entity to act as manager of the

system. In early fall 2006, Woods View proposed that Karcher Creek Sewer District act as manager of the proposed LOSS. (CP 5). Kitsap County sent a letter to the state in October 2006 expressing the County's concern that a dense development utilizing a LOSS outside of an Urban Growth Area (UGA) could run afoul of the Growth Management Act's prohibition on public sewer systems in the rural areas of the County. (RCW 36.70A.110(4); RCW 57.16.010). Kitsap County expressed similar concerns to Karcher Creek, as a part of the County's statutorily mandated role to review and approve the proposed merger of Karcher Creek and another district. (CP 151-154). Based on the evident illegality of a public entity serving as operator, Woods View made the business judgment in October 2006 that Karcher Creek would not serve as operator of the LOSS. Woods View advised both DOH and Kitsap County of its decision. (CP 1478-1479).

Kitsap County issued a Mitigated Determination of Nonsignificance under SEPA for the Woods View project on or about January 4, 2007. (CP 4). Kitsap County issued a decision approving the SDAP on November 26, 2007. The project was strongly opposed by a neighborhood group, however, and the neighbors filed an appeal of Kitsap County's SDAP approval. The Kitsap County Hearing Examiner heard the appeal and issued approval to Woods View on June 9, 2008. (CP 4). The neighbors appealed the Examiner's approval to the Kitsap County BOCC, and then to superior court, each of which upheld the Examiner's

approval.[1] The final approval by superior court came in May, 2009. (CP 1352-54).

In the meantime, on or about March 19, 2008, Richard Benson of DOH approved Woods View's application for a LOSS, on the condition that ownership of the property served by the LOSS remains under single ownership. (CP 10-11). Woods View consented to this condition, and recorded a "Covenant to Retain Single Ownership," in March 2008. (CP 142-144).

Much later, however, after the County's SDAP permit was upheld by superior court, Woods View concluded that it could not obtain development financing for the project if it kept ownership of the Woods View subdivision with a single entity. (CP 1406). Due to a variety of factors, including weakness in the regional housing market and bank failures, Woods View lost its original financing for the project. (CP 1413-1415; 1404). In the spring of 2009 Woods View made contact with a potential private development lender, the Legacy Group ("Legacy"). In its early discussion with Woods View, Legacy understood that the project would be a straightforward residential real estate development, with individually owned lots. Legacy later learned from DOH that Woods View's approved LOSS was conditioned on ownership of all lots in a

[1] Woods View did not appeal any aspect or condition of the County's permit decisions.

single entity. Legacy was unwilling to finance the project under those conditions. (CP 122-23).

It was during its negotiations with Legacy that Woods View changed course and applied to DOH for a modified LOSS permit -- with individual lot ownership. On August 31, 2009, Woods View submitted the amended LOSS application, which asked DOH to waive the requirement of single ownership of the properties to be served by the LOSS. Mr. Benson of DOH asked for additional information from Woods View in November 2009, including proof of an agreement with a guarantor. The guarantor agreement was provided to DOH on November 6, 2009. (CP 78-79;1421-1422). By that time, the original loan on the property was already in default. (CP 1421).

Upon learning that Woods View was attempting to modify its septic proposal, Kitsap County employees sent emails to DOH in September 2009, expressing the view that the modified LOSS proposal appeared to violate the GMA's prohibition of Urban Capital Facilities in Rural areas. DOH had heard and rejected this view expressed by Kitsap County much earlier, in early 2008. DOH and the Attorney General's office disagreed with Kitsap County's legal position, and the County's emails in September 2009 did not affect the timing or result of DOH's LOSS decision. (CP 94-99). DOH took Woods View's application under advisement, but did not render a decision on the amended LOSS

application until nearly a year later, on August 24, 2010. (CP 92-93). By then, the project had collapsed.

Meanwhile, in the late summer and early fall of 2009, as a part of its due diligence, the Legacy Group spoke to a number of individuals to help it decide whether it would be a lender for the Woods View project. Legacy had several discussions with DOH concerning whether the modified LOSS application was likely to be approved. Legacy also had numerous discussions with Woods View's manager, Darlene Piper, who expressed optimism that the modified LOSS proposal would be approved. The Legacy Group also made a phone call to Kitsap County to get a sense of the County's view on the proposed modification. The County employees said that the approval of the LOSS was up to DOH, and refused to speculate as to what would happen if approval of the proposed modified LOSS were issued by the state. (CP 124; CP 86-87).

Legacy continued to stress to Woods View that it would not make a development loan to Woods View unless and until approval of the modified LOSS came from DOH. (CP 1447-1448). Indeed, Legacy had determined that it would not make a loan until Woods View had applied for and received building permits. (CP 1445-1451). DOH's approval of the modified LOSS (with individual homeowners sharing in the ownership of the LOSS) did not issue until August 24, 2010. (CP 14). By that time, the original development lender had already commenced foreclosure proceedings against Woods View. (CP 80-81). The property was

acquired by the lender, First Citizens Bank, on or about October 1, 2010. Woods View never applied to Kitsap County for building permits.

B. Procedural History.

In December 2009 Woods View and Ms. Piper filed a lawsuit against Kitsap County and several of its officials in Pierce County Superior Court. (Case No. 09-2-16487-3). The lawsuit sought recovery based on a variety of state and federal claims. Kitsap County removed the lawsuit to federal court. The defendants later filed a motion for summary judgment. On June 22, 2011, U.S. District Court Judge Benjamin Settle dismissed with prejudice all of the federal claims, including claims for violation of procedural due process, substantive due process and constitutional "takings." Judge Settle elected not to exercise supplemental jurisdiction over the state law claims, and therefore dismissed those claims, but without prejudice to the plaintiffs to refile in state court. (CP 1455-1471). Judge Settle's dismissal of all federal claims was affirmed by the Ninth Circuit in June, 2012. (CP 1473-1476).

Woods View refiled a lawsuit in Pierce County Superior Court on July 18, 2011, reasserting its state law claims (negligence, tortious interference and takings) against Kitsap County. The County brought a summary judgment motion in August 2011 as to all of the remaining state law claims. (CP 27-59). The Honorable Rosanne Buckner denied the motion, but without addressing the legal defenses raised in the County's

motion. Shortly thereafter, the case was reassigned to Judge Susan K. Serko.

As the January 20, 2013 trial date approached, the County filed a motion for leave to renew its summary judgment motion, based in part on new evidence which had been disclosed as well as new caselaw which further supported the County's positions. The Court granted the County's request and the parties were asked to submit extensive briefing and oral argument in connection with the County's summary judgment motion. All of the plaintiffs' state law claims were addressed in the parties' briefs to Judge Serko. (CP 1369-1389; 1493-1551; 1872-1942).

On December 12, 2012 Judge Serko granted Kitsap County's motion for summary judgment. (CP 1990-1991). This appeal by Woods View and Ms. Piper followed.[2]

IV. ARGUMENT

A. Summary of Argument.

Woods View has no basis to attack the formal permit decisions issued by Kitsap County, as all of the County's decisions were in favor of Woods View (the SDAP was approved and the SEPA review resulted in a Mitigated Determination of Nonsignificance (MDNS)). Moreover, any challenge to the County's permit actions, conditions or procedures would

[2] Kitsap County formally filed a Cross Notice of Appeal herein, but only to preserve all of the arguments it had presented to Judge Buckner in the first summary judgment motion. Kitsap County does not seek relief other than affirmance of summary judgment.

be barred by the plaintiffs' failure to file a timely challenge to any permit action under the Land Use Petition Act (LUPA), RCW 36.70C.

Thus, the only potentially viable claims in this case were those alleging that Kitsap County's employees should be liable in tort for their communications with other public and private entities. Specifically, Woods View alleged that Kitsap County's discussions with and letters to the Karcher Creek Sewer District and the DOH were improper. In addition, Woods View alleged that the County tortiously interfered with its relationship with The Legacy Group, based on a single telephone discussion in September 2009, in which Legacy enquired as to the status of Woods View's modified LOSS proposal pending before DOH.

Based on Judge Settle's earlier rulings and settled Washington caselaw, the remaining state law claims were properly dismissed by Judge Serko. Judge Settle had already determined that plaintiff Darlene Piper had no standing. While his decision was focused on the federal claims, the same analysis applied to bar Ms. Piper's state law claims. Judge Settle also held that Kitsap County's stated position regarding potential GMA noncompliance was rational, and that the County did not violate any due process rights of Woods View, or "take" its property.

Plaintiffs' remaining state law claims were grounded in theories of negligence, tortious interference with business expectancy, and a "taking" under the Washington state constitution. Those claims were properly dismissed, based on multiple defenses, including the following:

- Most or all of the claims are barred by collateral estoppel and/or res judicata.

- Plaintiff Darlene Piper has no standing.

- Claims for delays in permit approvals are barred by limitations and collateral estoppel.

- Woods View may not challenge the County's permitting actions because it failed to challenge any such actions under LUPA.

- The claims arising from communications between County employees and other public entities are barred by immunity.

- The negligence claim is also barred by the Public Duty Doctrine.

- The claim for tortious interference is also barred by collateral estoppel, and by privilege, and by the absence of competent evidence of intentional interference.

- The takings claim is barred by collateral estoppel, and by the absence of the elements of inverse condemnation

- All claims are barred by the absence of proximate causation.

The above legal defenses are addressed in greater detail below.

B. Plaintiff Darlene Piper Lacks Standing.

Judge Settle held that Darlene Piper, the former managing member and guarantor of Wood View II, LLC, had no standing to pursue her federal claims against Kitsap County. As Judge Settle pointed out, the same analysis applies to Piper's state law claims:

> Similarly, under Washington law, the guarantor of a contract has no standing to affirmatively pursue redress for a breach of the contract. Miller v. United States Bank, N.A., 865 P.2d 536 (1994).

(CP 1461). The Ninth Circuit Court of Appeals affirmed Judge Settle's ruling. (CP 1473-1474)[3]. Ms. Piper's state law claims were properly dismissed by Judge Serko.

The facts bearing on the issue of standing are not in dispute. Darlene Piper is the former Managing Member of Woods View II, LLC, and she provided capital to that limited liability company. She did not, however, individually apply for any permits, and the real property was owned by Woods View throughout the permitting process. (CP 4; CP 1391-1392). Ms. Piper did not enter into any personal relationship with Kitsap County separate from the applications submitted by Woods View. Therefore, as Judge Settle and Judge Serko correctly ruled, Ms. Piper had no standing to bring a lawsuit based on Kitsap County's handling of Wood's View's development applications.

Before a court will entertain a civil action for damages, the plaintiff must establish the requisite standing to sue. Whitmore v. Arkansas, 495 U.S. 149, 154, 110 S. Ct. 1717 (1990). Standing is an issue of law for the court to resolve. Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1454 (9th Cir. 1995).

The principles of standing apply in the context of actions by shareholders or officers of corporations. Corporations and limited liability companies are distinct legal entities, separate from their shareholders or

[3] Woods View II, LLC v. Kitsap County, 484 Fed.Appx. 160, 2012 WL 2129390 (9th Cir. 2012).

members. Gustafson v. Gustafson, 47 Wn. App. 272, 276, 784 P.2d 949 (1987); Abrahim & Sons, Enterprises v. Equilon Enterprises, LLC, 292 F.3d 958, 962 (9th Cir. 2002). Generally, a shareholder has no standing to sue for wrongs done to a corporation, because the corporation is a separate legal entity. Even if a shareholder or member owns all or most of the stock of the company, but suffers damages only indirectly, she cannot sue as an individual. Erlich v. Glasner, 418 F.2d 226 (9th Cir. 1969); EMI Ltd. v. Bennett, 738 F.2d 994, 997 (9th Cir. 1984); Sound Infiniti, Inc. v. Snyder, 145 Wn. App. 333, 352, 186 P.3d 1107 (2008), aff'd, 169 Wn.2d 199. Further, the fact that a shareholder may have been a guarantor of a corporate debt does not create standing. Sparling v. Hoffman Construction Co., 864 F.2d 635, 640 (9th Cir. 1988).

The above principles have been applied in the context of a lawsuit against a municipality for land use decisions affecting the value of a corporation's property. In U.S. v. Stonehill, 83 F.3d 1156, 1160-61 (9th Cir. 1996), cert. denied, 519 U.S. 992, the court held that an action against a town for allegedly depressing the value of corporate real property through illegal zoning procedures belonged solely to the corporation, and shareholders' claims were dismissed.

As noted above, the U.S. District Court and the Ninth Circuit Court of Appeals already held that Darlene Piper had no standing. Although these rulings were focused on the federal claims, Judge Settle concluded the same defense was available to state law claims. (CP 1460-62). Just as

the federal law claims asserted by Darlene Piper were dismissed based on absence of standing, so, too, Ms. Piper's state law claims were subject to dismissal on the same grounds.

C. Claims Based on Delay in Permit Approval are Barred by Limitations and Collateral Estoppel.

The statute of limitations is a bar to all of Woods View's claims arising from alleged delay by the County in processing Woods View's SDAP application, and issuing SEPA approval. The limitations defense is supported by a recent decision of this Court in Birnbaum v. Pierce County, 167 Wn. App. 728, 274 P.3d 1070 (2012).

In the Complaint, Woods View alleges that the County was statutorily obligated to make a decision on the SDAP application within 78 days following May 5, 2006, i.e., by July 22, 2006. (May 5, 2006 is the date the County deemed Wood View's SDAP application complete). The Complaint further alleges that the County was statutorily obligated to make a decision on SEPA review by July 1, 2006. (CP 4). Woods View contends that delay in permit approval gives rise to claims for tortious interference with business expectancy and negligence.

Kitsap County submits that the only actionable remedy for such a delay claim would have been under RCW 64.40, a statute which provides a specific remedy for failure of a local government to process a land use permit application within statutory time limits. See, Birnbaum, supra. But even if a tort claim could theoretically arise from the County's alleged

failure to comply with the statutory permit review timeline, any such claim is barred by limitations.

In Birnbaum, the plaintiff sued Pierce County for a delay of several years in issuing a permit for a recreational vehicle park. The suit was brought under RCW 64.40.020(1). The trial court dismissed the action based on limitations and the Court of Appeals affirmed, stressing that a cause of action for delay in processing a permit application *accrues* as soon as the statutory processing time period is exceeded:

> Here, Birnbaum herself argues that there is no adequate administrative remedy for failure to timely process a permit. Thus, the limitations period began when the 120 day time limit was exceeded.

167 Wn. App. at 734. Because Birnbaum did not file her claim for delay within the statutory limitations period after accrual of her claim, the Court of Appeals affirmed dismissal.

In this case, if the allegations of Woods View's own Complaint are to be believed, the County was required to issue a decision on the SDAP application and the SEPA threshold decision on or before July 22, 2006. (CP 4). Any claim based on a delay in meeting that statutory timeline accrued on that date. To the extent a claim for tortious interference or negligence can arise from such a delay, the claim has a three year statute of limitations which expired on July 22, 2009. Yet no lawsuit was filed until December 2009, after the limitations period had expired. Therefore, summary dismissal of the delay claim was appropriate.

In its Opening Brief, Woods View makes a strained argument to avoid the statute of limitations by contradicting the unambiguous representations of its own Complaint, and briefing in the trial court. As noted above, the Complaint represents that Kitsap County was obligated to make a decision on the SDAP Application by July 22, 2006 and that it was obligated to make a decision on SEPA review by July 1, 2006. (CP 4). No motion to amend the Complaint was ever filed in this case. Instead, Woods View submitted a revised "timeline" of permit events to the Court *after* the Court had conducted its summary judgment hearing and *after* the date for submitting supplemental briefs had passed. (CP 1939-1942).

Without acting to amend its Complaint, Woods View set forth new alleged facts that are irreconcilable with the Complaint's principal theory that the County should have approved the permits not later than July 2006.[4] The incongruity is confirmed in Woods Views' Opening Brief, where it still argues that one of the County's acts of delay was to suspend permit processing while waiting for a response to former County Administrator Cris Gear's October 13, 2006 letter to Governor Gregoire, while at the same time positing that the "78-day counter" was "stopped" anyway from early August 2006 until early December 2006 due to County requests for information from the developer. Opening Brief, at 23, 26-27.

[4] Indeed, the new "revised" facts were directly contradicted by plaintiffs' Opposition to Kitsap County's Third Motion, which had been submitted to the trial court less than a month earlier! (CP 177-178).

There is no question that Woods View was aware of the 78-day statutory time period for processing of the SDAP. Ms. Piper is an experienced attorney practicing in Kitsap County. Moreover, Woods View hired litigator William Broughton in the fall of 2006 seeking to compel the County to issue the SDAP approval. Mr. Broughton sent a letter to Kitsap County dated November 15, 2006. That letter references a conversation between Woods View and the County in early October 2006, in which Woods View had already complained about the delay in issuing the SDAP and SEPA approval. (CP 1481-83).

Significantly, Broughton's letter establishes not only that Woods View was aware of the 78-day statutory time period, but that Woods View understood it had a potential claim against the County under RCW 64.40.020 and a claim for tortious interference based on the delay and the County's legal opinion regarding the proposed LOSS:

> In my opinion, your actions constitute tortious interference and violate the common law of the state of Washington, violate RCW 64.40.020, violate applicable federal civil rights acts, and violate the Federal and State constitution.
>
> * * *
>
> Please consider this letter as notice of the substantial damage claim my client intends to file.

(CP 1483). As the Washington courts have consistently held, a cause of action accrues when the plaintiff has a right to seek recovery in the courts. Malnar v. Carlson, 128 Wn. 521, 529, 910 P.2d 455 (1996). It is immaterial to the accrual of the claim that all damages may not have been

sustained at that time. Streifel v. Hansch, 40 Wn. App. 233, 237, 698 P.2d 570 (1985). The Broughton letter establishes that Woods View believed that the statutory timeline had been exceeded in July 2006, and that Woods View had a potential cause of action against Kitsap County under RCW 64.40 and for tortious interference. Plaintiffs' failure to file their claim within three years after the 78-day time period lapsed is a bar to recovery. Birnbaum, supra, at 734.

Woods View makes a final effort to avoid the statute of limitations by arguing that its permit delay claim should be treated as a "continuing tort." (Opening Brief, p. 28). But the continuing tort doctrine has been limited by the Washington courts to trespass and nuisance involving physical damage to real property. The theory conforms to the Restatement (Second) of Torts § 158, comment m, which defines a continuing trespass as "an unprivileged remaining on land in another's possession." The Washington courts have recognized the doctrine of continuing tort in the narrow context of an ongoing trespass or nuisance on another's property:

> Assuming that a defendant has caused actual and substantial damage to a plaintiff's property, the trespass continues until the intruding substance is removed.

Bradley v. American Smelting, 104 Wn.2d 677, 693, 709 P.3d 782 (1985). The continuing tort doctrine has been recognized by the Washington courts for more than 100 years. All the relevant caselaw involves physical damage to real property. See, e.g., Will v. Frontier Contractors, Inc., 121

Wn. App. 119, 124, 89 P.3d 242 (2004), rev. denied, 153 Wn.2d 1008. The continuing tort theory does not apply in a permitting dispute.

Additionally, Woods View's "permit delay" claim is also barred by the collateral estoppel effect of the Ninth Circuit's decision. That decision expressly rejected the plaintiffs' contention that the County could be liable for delays in issuing SDAP and SEPA approval, because any such delay arose from the County's pursuit of a legitimate governmental interest in seeking compliance with state law:

> Finally, because it is at least fairly debatable that appellees' delay in issuing the SDAP and SEPA approvals were rationally related to a legitimate governmental interest in ensuring that local development complied with state law, Woods View cannot meet the "exceedingly high burden" for establishing a substantive due process claim.

(CP 1476). In view of the decisions already handed down by the U.S. District Court and the Ninth Circuit, the "permit delay" claim is barred by collateral estoppel, precludes relitigation of issues already decided by another court. Estoppel applies even if the second litigation is presented in a different claim or cause of action. In Re Marriage of Mudgett, 41 Wn. App. 337, 342, 704 P.2d 169 (1985). A federal district court judgment may have preclusive effect in a subsequent state court adjudication. Nielson v. Spanaway General Medical Clinic, 135 Wn.2d 255, 264, 956 P.2d 312 (1998).

Woods View argues that collateral estoppel should not apply, because its tort claims are based on the "more probable than not" standard.

(Opening Brief, p. 36). But Woods View is confusing the issue. A substantive due process claim and a tort claim are each based on a "more probable than not" burden of proof. This is not a case where the first action involved a *criminal* standard of proof ("beyond a reasonable doubt") and the second action was a civil claim.

The important factor here is that both the federal substantive due process claim and the state law tortious interference claim require intentionally improper conduct by the defendant. County of Sacramento v. Lewis, 523 U.S. 833, 848-49, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (§ 1983 liability for a violation of substantive due process requires government actor either to intentionally cause harm or to act in a deliberately indifferent way that "shocks the conscience"); Birkenwald Distribution Co. v. Heublein, Inc., 55 Wn. App. 1, 11, 776 P.2d 721 (1989) (Liability for tortious interference is not possible unless the defendant's interference was "purposefully improper"). In other words, the defendant must have intentionally set out to damage the plaintiff's relationships. Here, the Ninth Circuit found that there was a legitimate governmental interest in ensuring that local development complied with state law. This was the very legal opinion espoused by Ms. Kneip when she communicated to other agencies. It would be logically inconsistent for the Ninth Circuit to conclude that Ms. Kneip's legal opinion articulated a legitimate governmental interest, absent a preclusive effect upon use of Ms. Kneip's intentional delivery of that opinion to satisfy the element of a

tort claim. Moreover, Washington law provides that tortious interference does not arise where one is merely asserting an arguable interpretation of existing law. Leingang v. Pierce County Medical, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). It would be contradictory for a jury to be allowed to find that the delay in issuing a permit was tortious and actionable, when the Ninth Circuit specifically held that the delay was at least arguably related to a legitimate governmental interest in ensuring compliance with state law.

The claims arising from permit delay were properly dismissed, based on limitations and collateral estoppel.

D. Any Claims Arising From the County's Actions on Permits are Barred by Plaintiffs' Failure to Pursue Remedies Under LUPA.

The only decisions issued by Kitsap County relative to Woods View's land use applications were issued *in favor of* Woods View. Specifically, SDAP approval was issued by Kitsap County, and a Mitigated Determination of Nonsignificance was issued with respect to SEPA review. (CP 1394; 1400-1401). Thus, there is no basis for Woods View to challenge the quasi judicial decisions issued by the County. Moreover, to the extent Woods View was unhappy with any of the County's land use decisions or permit conditions (including the 2007 Director's Interpretation), it was required to file an appeal under the Land Use Petition Act (LUPA) within 21 days following such action. RCW 36.70C.040(3). No such challenge was ever filed by Woods View.

LUPA is the exclusive remedy for review of most land use decisions. RCW 36.70C.030. If a land use decision or action is not timely challenged under LUPA, the decision will be viewed as valid, and cannot be challenged in a collateral action. Wenatchee Sportsmen v. Chelan County, 141 Wn.2d 169, 181-82, 4 P.3d 123 (2000); Nykreim v. Chelan County, 146 Wn.2d 904, 925-26, 52 P.3d 1 (2002). The rule applies to virtually all land use actions, not just formal decisions. Nykreim.

The "exclusive remedy" provisions of LUPA apply to conditions which are placed on a permit by a local agency. Thus, even if an applicant obtains the requested permit approval, he still must file a LUPA appeal if he intends to challenge the propriety of any conditions placed on issuance of the permit. In James v. Kitsap County, 154 Wn.2d 574, 115 P.3d 286 (2005) several real estate developers contended that the County's imposition of impact fees as a condition on the issuance of their building permits was illegal. The developers objected to the permit conditions but did not challenge them through timely LUPA appeals within the 21 day appeal timeline. Instead, they accepted the benefits of the permit approvals and subsequently filed a lawsuit seeking monetary recovery, relying on the three year statute of limitations under RCW 4.16.080.

The trial court in James agreed with the developers' position and damages were awarded but the Supreme Court reversed, stressing that a party may not challenge a condition placed on issuance of a permit without satisfying the strict procedural requirements of LUPA. The Court

rejected the developers' argument that conditions placed on permits are not "land use decisions" subject to LUPA. 154 Wn.2d at 583-85. The Court held that the failure to meet the procedural requirements of LUPA mandated dismissal of the developers' actions for damages:

> We find that conditions imposed on the issuance of permits are inextricable from land use decisions and are subject to the procedural requirements of LUPA.

Id. at 590. Accord, Isla Verde v. City of Camas, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

Woods View has argued before that the exclusive remedy provisions of LUPA should not be a bar to its claims, because it is not challenging the issuance of the SDAP but rather the procedural manner in which the permit application was treated by Kitsap County. That argument does not change the result. RCW 36.70C.130(1)(a) specifically provides that LUPA is available to challenge a local government's permit actions based on an assertion that it "engaged in unlawful procedure or failed to follow a prescribed process. . . ." Habitat Watch v. Skagit County, 155 Wn.2d 397, 407, 120 P.3d 56 (2005). Indeed, unlawful process or procedure is the *first* standard referenced in the statute. Similarly, LUPA applies to "interpretive decisions" regarding the application of zoning and land use laws. RCW 36.70C.020(1)(b); Asche v. Bloomquist, 132 Wn. App. 784, 791, 433 P.3d 475 (2006), rev. den., 159 Wn.2d 1005.

Thus, Woods View could have appealed the substantive conditions of the SDAP as well as the procedures and/or interpretations employed by Kitsap County, but it elected not to. Absent a LUPA appeal, the permit conditions, interpretations and procedures must be deemed valid, and Woods View is precluded from attacking the County's permit actions in this collateral action, as a matter of law. Habitat Watch, supra, 155 Wn.2d at 407.

LUPA's "exclusive remedy" rule applies even if the subsequent lawsuit includes claims for damages. If the damages action depends on a showing that the local government acted improperly in connection with a permit decision, failure to comply with LUPA is a bar to recovery. James v. Kitsap County, supra; Mercer Island Citizens v. Tent City, 156 Wn. App. 393, 404-405, 232 P.3d 1163 (2010).

Because Woods View did not timely challenge the County's permit actions through a LUPA appeal, it was barred from doing so in a collateral damages action. Thus, the only potential claims for damages available to Woods View were those based on communications between Kitsap County and public and private entities. As explained below, those claims are also barred by a variety of defenses.

E. The Noerr-Pennington Doctrine Provides Immunity for Communications with Public Agencies.

Recognizing that its claims relating to Kitsap County's processing of its permits are barred by the exclusive remedy provisions of LUPA, as

well as the collateral estoppel effect of the federal court rulings, Woods View has placed its primary focus on a theory that the County should be liable in tort for its communications with DOH and the Karcher Creek Sewer District. But Kitsap County is immune from liability for its communications with DOH and other governmental entities under the *Noerr-Pennington* immunity doctrine, a common law principle which affords immunity from liability to parties that petition a government agency in a legislative or administrative context. Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1059 (9th Cir. 1998). Although the doctrine originally rose in the context of antitrust claims, the courts have held that it provides immunity against both federal and state liability claims, including claims for tortious interference. Oregon Natural Resources Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991); Pacific Gas & Electric v. Bear Stearns & Co., 270 Cal. Rptr. 1, 12, 791 P.2d 587, 598 (Cal. 1990); Sierra Club v. Butz, 349 F. Supp. 934, 938-039 (N.D. CA 1972).

Contrary to the assertion in Woods View's Opening Brief, the Washington courts have adopted the *Noerr-Pennington* immunity doctrine. Thus, in Lange v. The Nature Conservancy, 24 Wn. App. 416, 601 P.2d 963 (1979), rev. den., 93 Wn.2d 1013 the Washington Court of Appeals held that the conservancy (TNC) was immune from liability for petitioning San Juan County to include the plaintiff's property in an "inventory of natural areas on private lands." In support of its ruling, the

Court relied on and cited the Noerr Motor Freight decision out of which the *Noerr-Pennington* immunity rule arose:

> The Langes also charged TNC with attempting to create a captive market in which to acquire the subject property by limiting the property's uses. Thus, they argue, a cause of action exists under RCW 19.86 for monopolization and unfair competition. Beyond the fact, as discussed above, that no restrictions on the use of the subject property had resulted from compilation or publication of the inventory, it is well established that an individual, and thus TNC, has a First Amendment right to influence government action. See Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L.Ed.2d 464, 81 S. Ct. 523 (1961); Sierra Club v. Butz, 349 F.Supp. 934 (N.D. Cal. 1972).

24 Wn. App. at 422. Other Washington courts have similarly applied *Noerr-Pennington* immunity as a bar to liability claims. De La O v. Town of Mattawa, 2009 U.S. Dist. LEXIS 7978, p. 15 (E.D. WA. 2009); Kottle v. Northwest Kidney Center, supra, 146 F.3d at 1059.

In response to the County's summary judgment motion, Woods View argued (a) that *Noerr-Pennington* immunity may not be asserted by a local government; and (b) that the County's statements regarding the legality of Woods View's LOSS proposal should be viewed as a "sham," not protected by immunity. Neither argument stands up to scrutiny.

Recent decisions of the Ninth Circuit Court of Appeals refute the assertion that local governments may not avail themselves of *Noerr-Pennington* immunity. See, Manistee Town Center v. City of Glendale, 227 F.3d 1090, 1093-94 (9th Cir. 2000); Sanghvi v. City of Claremont, 328 F.3d 532, 542-43 (9th Cir. 2003), cert. denied, 540 U.S. 1125.

Indeed, *Noerr-Pennington* immunity has been applied to immunize local governments, even where their lobbying efforts relative to land use permits were much more aggressive and expansive than anything Kitsap County undertook in this case. For example, in Manistee Town Center, supra, a developer (Manistee) purchased a shopping mall and sought to lease it to Maricopa County. The City of Glendale wanted Manistee Town Center to be a "power center," occupied by private businesses. Thus, the City actively opposed Manistee's efforts to lease space to Maricopa County. This opposition took the form of council members writing letters to residents, urging them to oppose any noncommercial use of the mall, as well as directly lobbying government officials at Maricopa County. Notwithstanding this aggressive action opposing the developer's project, the lawsuit against the City of Glendale was dismissed based on *Noerr-Pennington* immunity. The Ninth Circuit Court of Appeals affirmed, and also rejected the developer's contention that the city's lobbying efforts amounted to "sham litigation." 227 F.3d at 1095.

Noerr-Pennington immunity applies not only to Kitsap County's communications with DOH, but also to its communications with Karcher Creek Sewer District, with whom Woods View was in discussions in 2006 to act as the public entity manager of the proposed LOSS system. In Sanghvi v. City of Claremont, supra, the city and its officials openly opposed the expansion of Sanghvi's development project and denied Sanghvi a connection to public sewers. The officials actively lobbied

other public officials, including state legislators and members of the County Board of Supervisors. Furthermore, the city actually filed a lawsuit against the Sanghvis *and against the Los Angeles Regional Water Quality Control Board*, which had allowed the Sanghvi's facility to operate with a septic tank during the initial years of its expansion. 328 F.3d at 543. Notwithstanding these extreme facts, the Ninth Circuit not only affirmed the application of *Noerr-Pennington* immunity, but rejected any suggestion that the City's active lobbying efforts fell within the narrow "sham litigation" exception to the general rule of immunity.

Needless to say, Kitsap County's discussions with DOH and Karcher Creek were not nearly as aggressive and persistent as those of government officials in Manistee or in Sanghvi. Kitsap County never filed litigation against anyone, but merely expressed its views about the potential illegality of a dense development with an urban sewer system in the rural areas of the County (outside of an Urban Growth Area). Kitsap County's communications are certainly protected by *Noerr-Pennington* immunity.

Furthermore, the decision in the companion federal action precludes any finding by the trier of fact that the County's expressions of concern regarding the legality of the Plaintiffs' proposed LOSS system could constitute a "sham." In a small number of cases, the courts have declined to apply *Noerr-Pennington* immunity, based on a showing that the defendant's actions in suing the plaintiff or otherwise opposing

plaintiff's proposal constituted "sham litigation." However, the courts have made clear that this exception is limited to extraordinary circumstances. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 111 S.Ct. 1344 (1991). The "sham" exception requires the plaintiff to show (1) that the defendant engaged in "objectively baseless" activity; and (2) that the defendant's intent was merely to vex and harass a competitor, rather than to put forward an arguable legal position. Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61, 113 S.Ct. 1920 (1993).

Here, Judge Settle and the Ninth Circuit already held that the County's position relative to the potential illegality of the proposed LOSS was "at least fairly debatable." It would be inconsistent and a violation of collateral estoppel to allow a determination in this case that the County's presentation of an arguable legal position constituted "sham litigation." Therefore, the general rule of immunity under *Noerr-Pennington* applies.

A second, limited basis for application of the "sham" exception is where the defendant has engaged in fraud in the context of a judicial proceeding. Kottle v. Northwest Kidney Centers, supra, 146 F.3d at 1060-62 (9th Cir. 1998). But the "sham litigation" exception will be applied based on fraud only where the alleged misrepresentation by the defendant was (a) an intentionally false statement of existing fact in the context of litigation; and (b) where the statement was material and was relied upon by the court in making its decision. Id. Here, there was no such statement

by Kitsap County made in the course of a judicial proceeding. The statements of which Woods View complains were merely comments offered to DOH in the context of its administrative review of the LOSS proposal. Further, fraud requires a false statement of *existing fact*. Adams v. King County, 164 Wn.2d 640, 192 P.3d 891 (2008). An expression of opinion as to a legal issue cannot constitute fraud. Bonded Adjustment Company v. Anderson, 186 Wn. 226, 233, 57 P.2d 1046 (1936). The statements of which Woods View complains were expressions of legal opinion by Kitsap County (as to whether a LOSS in a Rural zone may violate the GMA). Such statements cannot constitute fraud, and surely cannot give rise to the narrow "sham" exception to *Noerr-Pennington* immunity.

Further, a showing of fraud requires that the alleged misrepresentation is material and that it induced the other party to act in reliance. Ross v. Kirner, 162 Wn.2d 493, 499-500, 172 P.3d 701 (2007). Here, DOH officials testified that they paid no attention to the County's September 2009 emails regarding the potential illegality of the modified LOSS proposal because DOH had already determined that it disagreed with the County's legal position. (CP 1438-1441). Moreover, the final decision maker for DOH, Mandouh El-Aarag, testified that he *was not even aware* of Kitsap County's comments, so his decision could not have been affected by those comments. (CP 1434-1438). Further, it is

undisputed that DOH *approved* the modified LOSS proposal, disregarding the legal argument presented by Kitsap County.

If the government decision was not dependent on the alleged misrepresented information, the misrepresentation was not material. Cheminor Drugs Ltd. v. Ethyl Corp, 168 F.3d 119, 124 (3rd Cir. 1999). To give rise to the "sham" exception, the allegedly false statement must "actually alter the outcome of the litigation." Mercatus Group, LLC v. Lake Forest Hospital, 641 F.3d 834, 843 (7th Cir. 2011); Kottle, supra, 146 F.3d at 1060. Each element of fraud must be proved by "clear, cogent and convincing evidence." Stiley v. Block, 131 Wn.2d 486, 505, 925 P.3d 194 (1994). The elements of fraud are absent here.[5]

In short, the general rule of immunity under *Noerr-Pennington* applies to all claims arising from Kitsap County's statements to DOH and other public entities. The Ninth Circuit Court of Appeals has determined that there was an arguable ("fairly debatable") legal basis supporting the County's position on the legality of the LOSS proposal. That determination is binding on the parties, and precludes a finding that the County engaged in sham litigation. Nor can Woods View avoid *Noerr-Pennington* immunity based on fraud when there is no evidence (or even allegation) that the County engaged in actionable fraud. Therefore, the "sham litigation" exception cannot apply, and the general rule of

[5] Indeed, plaintiffs have never even asserted a fraud claim against Kitsap County.

immunity under the *Noerr-Pennington* doctrine is applicable. All claims arising from the County's communications with DOH and Karcher Creek were subject to dismissal based on immunity.

F. The Negligence Claims are Also Barred by the Public Duty Doctrine.

Woods View argues that it is entitled to recover for Kitsap County's alleged negligence in evaluating Woods View's permit applications. (CP 18). Specifically, Woods View contended that the Kitsap County employees who made statements about the applicable proceedings pertaining to the LOSS application were negligent in their interpretation of state and local law. (CP 14). But any such negligence claim is certainly barred by the Public Duty Doctrine.

The Public Duty Doctrine provides that a governmental entity cannot be liable in tort unless it has breached a duty owed to the particular injured person or entity, as distinct from breaching an obligation to the public in general. Honcoop v. State, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988). This rule generally precludes negligence claims against municipalities in connection with regulating private development. Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). The processing and issuance of building and land use permits is a traditional public duty, which ordinarily cannot give rise to tort liability. Id, 111 Wn.2d at 165. If Kitsap County made an error in its analysis of applicable

land use codes and the GMA, that could not constitute a breach of duty owed to Woods View.

There are a handful of narrow exceptions to the general public duty rule of non-liability. None of those exceptions applies under the facts of this case. Woods View argued below that the "failure to enforce" exception to the Public Duty Doctrine should apply. The argument suggests a misunderstanding of the exception. The "failure to enforce" exception is narrowly construed. Atherton Condominium Ass'n v. Blume Development Co., 115 Wn.2d 506, 531, 799 P.2d 250 (1990). In the context of permits, the exception applies only where 1) a building official has *mistakenly approved* a project with actual knowledge of a code violation by the applicant which created an "inherently hazardous and dangerous condition," and 2) the municipality had a specific mandatory *enforcement* obligation which was breached. Smith v. Kelso, 112 Wn. App. 277, 282, 48 P.3d 372 (2002), rev. denied, 148 Wn.2d 1012; Zimbelman v. Chaussee Corp., 55 Wn. App. 278, 777 P.2d 32 (1989), rev. denied, 114 Wn.2d 1007 (1990). "Actual knowledge of inherently dangerous and hazard conditions created by the contractor is required" for this exception to apply. Pepper v. J.J. Welcome Construction, 73 Wn. App. 523, 534, 871 P.2d 601 (1994). The "failure to enforce" exception has **never** been held applicable to an alleged delay in issuing a permit.

Woods View's reliance on the "special relationship" exception is similarly misplaced. That exception applies only where the plaintiff made

a *specific* inquiry of a government official as to code compliance; and where the governmental official responded with a mistaken "express assurance" of code compliance, on which the plaintiff relied to his detriment:

> A special relationship arises where (1) there is a direct contact between the public official and the plaintiff, (2) the official, in response to a specific inquiry, provides express assurances that a building or structure is in compliance with the building code, and (3) the plaintiff justifiably relies on the representations of the official.

Taylor v. Stevens County, 111 Wn.2d at 171. Woods View meets none of the elements of this exception, other than "direct contact." Woods View does not identify any "specific inquiry" it made as to code compliance. Nor does it identify any mistaken "express assurance" of code compliance by the County. A governmental duty cannot be based on issuance of a permit, or silence, or "implied assurances." Williams v. Thurston County, 100 Wn. App. 330, 334-35, 997 P.2d 377 (2000); Fishburn v. Land Services Dept., 161 Wn. App. 452, 470-71, 250 P.3d 146 (2011).

Further, the "special relationship" exception cannot apply because there was no detrimental reliance by Woods View upon any "express assurance" of code compliance. Indeed, what Woods View alleges in this case is not that the County mistakenly *approved* its project, but rather that it negligently delayed its decision-making, or negligently concluded that a public entity could not act as an operator or guarantor of a LOSS system.

No court has ever held the special relationship exception applicable to such a claim.

There being no facts establishing an exception to the Public Duty Doctrine, the general rule of non-liability applies, barring Woods View's negligence claim as a matter of law.

G. There is no Basis for a Tortious Interference Claim.

In addition to its negligence claim, Woods View alleged that Kitsap County intentionally interfered with its business expectancy. But that theory is clearly not available to Woods View, in view of the undisputed facts of this case, and the prior rulings by Judge Settle and the Ninth Circuit.

A claim for tortious interference requires: (1) a business relationship or expectancy; (2) knowledge by the defendant of the relationship; (3) intentional interference that results in termination of the relationship; (4) an improper purpose or means; (5) resultant damages. Leingang v. Pierce County Medical Bureau, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Liability will not be found unless the plaintiff shows that the defendant interfered with the relationship intentionally and for an improper purpose. Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d 314 (1992). When the defendant acts not for the purpose of interfering with the business relationship but rather interferes in an incidental manner, no liability arises. Burke & Thomas, Inc. v. International Organization of Masters, 21 Wn. App. 313, 585 P.2d

152 (1978), aff'd, 92 Wn.2d 762. In other words, interference must be "purposefully improper." Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997), cert. denied, 525 U.S. 812.

There is no competent evidence that Kitsap County intentionally interfered with Woods View's potential relationship with the Legacy Group. Plaintiffs contend that the County's September 2009 telephone discussion with Legacy (which was initiated by Legacy, not the County) constituted tortious interference. Woods View alleges that County officials said that DOH would not approve the modified LOSS proposal and/or that further hearings might be necessary. Yet the Declaration of Legacy representative Brent Eley refutes the assertions of intentional interference. Eley states that when asked by Legacy whether permits could be issued for a LOSS system involving individual lot ownership, the employees confirmed that DOH was the agency considering the modified LOSS proposal, and that the County did not know what DOH was going to do. Mr. Eley states that the County employees were *noncommital* as to whether Woods View's modified proposal would ultimately be approved. (CP 124).

Plaintiffs have falsely asserted that the County told the Legacy Group that there would be further hearings following a decision by the Department of Health on the modified LOSS proposal. This is inaccurate. As Brent Eley's first and second declarations make clear, at most the County employees were non-committal and said *they did not know*

whether there would be a need for further hearings because they did not know what DOH was going to do. (CP 124; CP 86-87).

Moreover, any statement by County employees that there might be further hearings following a decision by DOH on the modified LOSS approval would have been accurate. As Darlene Piper acknowledged, neighbors opposed to the project appealed at virtually every opportunity; and especially targeted the DOH LOSS application process. (CP 1393-94; CP 1417-18). Neighbors had already appealed the decision of the Hearing Examiner, as well as the decision of the Board of County Commissioners on the SDAP approval. (CP 1403-1404). They had also sent a flood of objections to DOH, urging rejection of the LOSS proposal. (CP 1431-1433). In September 2009, when County officials sent their last communications to DOH regarding the LOSS application process, it was entirely plausible – indeed likely -- that the neighbors would have also challenged a decision by DOH if it approved Woods View's modified LOSS proposal. Similarly, if DOH had *denied* Woods View's modified LOSS application, it would be reasonable to assume that Woods View would have appealed that denial. Thus, a statement in September 2009 that there could be further hearings following a DOH decision on the modified LOSS proposal was a true statement, and certainly could not form the basis of a claim for tortious interference. Where a statement is true, it cannot constitute tortious interference:

> There is of course no liability for interference with a contract . . . on the part of one who merely gives truthful information to another. . . . This is true even though the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking his contract or refusing to deal with another. . . .

Restatement (Second) of Torts § 772, com. B (1979); Thompson v. Paul, 402 F.Supp.2d 1010, 1117 (D. Ariz. 2005). Mr. Eley's declaration expressly refutes plaintiffs' allegation that the County intentionally interfered with Legacy's relationship with Woods View":

> At the same time, we did not feel as though the County actors tried to discourage our consideration of loaning to Woods View II LLC and did not perceive the County as trying to inject itself into our business relationship with Woods View II LLC or Ms. Piper. I do not recall any County actor stating that the 78 lots would never be allowed to be sold as individually owned lots.

(CP 124-125).

In short, there is simply no basis for a tortious interference claim arising from Kitsap County's contacts with the Legacy Group. It should be remembered that it was the Legacy Group which approached Kitsap County as a part of its normal due diligence process; the County did not initiate the communication. Moreover, the comments from County employees were noncommittal, rather than the definitively negative remarks alleged in the Complaint.

In any event, a discussion regarding the potential outcome of a pending legal matter does not constitute tortious interference. In Schmerer v. Darcy, 80 Wn. App. 499, 910 P.2d 498 (1996), the Washington Court of

Appeals held that a statement by a party asserting his ownership of disputed property and expressing uncertainty as to what he was going to do with it, did not constitute tortious interference, as a matter of law:

> The exchange of correspondence is nothing more than inquiries by an interested party in the outcome of the suit by the Darcys v. Ms. Schmerer. . . . Finally, the affidavit of the Darcys' lawyers merely references a statement by Mr. Schmerer that he believed the house was his and he had not decided what he was going to do with it. **Simply put, that is not interference with a contract.** Restatement 2nd Torts § 773 (exercising in good faith one's legal interest is not improper interference).

80 Wn. App. at 506. (Emphasis added).

The comments by Kitsap County officials were non-committal. But even if they had opined that the modified LOSS application was unlikely to be approved, that would not be actionable. As noted earlier, when one is "merely asserting an arguable interpretation of existing law," there is no tortious interference. Leingang, supra, 131 Wn.2d at 157.

In this case, Judge Settle's summary judgment ruling effectively foreclosed a tortious interference cause of action. Judge Settle held that Kitsap County's position that the GMA prevents a public entity from operating or guaranteeing a LOSS outside an urban area was "rational" and at the very least "fairly debatable":

> Defendants have adequately established on at least a fairly debatable basis that they acted in a manner that was rationally related to the governmental interest in public health as it relates to permitting a LOSS in an urban growth area in a manner required by the comprehensive plan in effect.

(CP 114). Because the County was asserting an arguable interpretation of existing law, it cannot be liable for tortious interference. Leingang, supra. Woods View is barred by collateral estoppel from challenging Judge Settle's order in this case.

Moreover, the tortious interference claim is barred by "privilege." Exercising in good faith one's own legal interests cannot constitute improper interference. Id. A local government's exercise of its land use authority ordinarily cannot be a basis for a claim of tortious interference with a business expectancy. Bakay v. Yarnes and Clallam County, 431 F. Supp.2d 1103, 1113 (W.D. WA 2006); Kane v. City of Bainbridge Island, 2011 U.S. Dist. LEXIS 138848 (W.D. WA 2011). The rule is clearly set forth in the Second Restatement of Torts:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a perspective contractual relationship with another does not interfere improperly with the other's relations if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Restatement (Second) of Torts § 773. As Woods View acknowledges in its Opening Brief, Kitsap County had genuine concerns that permitting the dense development and urban facilities proposed by Woods View could violate the GMA and the County's Comprehensive Plan. (Brief, p. 19). The County had previously been sanctioned by the Growth Board for allowing urban density in rural areas. (CP 150-151). In expressing its

concerns that the GMA prohibited the kind of LOSS system proposed by Woods View, Kitsap County was protected from liability for tortious interference, under the doctrine of privilege. The County was entitled to express its opinion as a part of exercising its own legal interest in ensuring lawful land use in the County. Communicating such a position cannot be tortious interference, as a matter of law.

H. The Takings Claim Was Properly Dismissed on Multiple Legal Grounds.

1. The Takings Claim Was Extensively Briefed and Analyzed in the Trial Court.

Contrary to the assertions in Woods Views' Opening Brief, Kitsap County asked for summary dismissal of the takings claim, as well as the other remaining state law claims. The County first sought dismissal of the takings claim in state court in its Motion for Summary Judgment filed August 12, 2011. (CP 50-54; 1345-1347). It again raised and addressed the numerous defenses to a takings claim – upon the request of Judge Serko -- in its Supplemental Brief in Support of Summary Judgment, dated November 14, 2012. (CP 1902-1903).

For its part, Woods View addressed the takings claim in Plaintiffs' Opposition to Kitsap County's Motion for Summary Judgment filed September 30, 2011 (CP 227-229), as well as Plaintiffs' Supplemental Brief filed November 19, 2012. (CP 1931-1934). To suggest that the takings claim was not raised and addressed by the trial court is untrue.

2. The Takings Claim is Barred by Res Judicata.

Judge Settle ruled that Woods View's "takings" claim was groundless. His order dismissed the takings claim as a matter of law. (CP 115-116). Because that claim had already been litigated and rejected in federal court, Woods View was barred from pursuing it in state court, based on the doctrine of res judicata. In general, res judicata prevents a court from deciding a claim in a second lawsuit which has been decided to the contrary from the first lawsuit. Hilltop Terrace Ass'n v. Island County, 126 Wn.2d 22, 30, 891 P.2d 29 (1995).

There is no substantive difference between the U.S. Constitution and the Washington State Constitution with regard to liability for inverse condemnation arising from land use regulations. Therefore, it would be a violation of res judicata for Woods View to seek a different ruling on its takings claim in superior court.

3. No Court Has Ever Held That a Local Agency's Communication With a State Decision Maker Could Give Rise to a Constitutional Takings.

Even if res judicata were not a bar, there were no grounds for Woods View to prevail on a takings claim. As explained in greater detail in Section I, infra, there was no denial of a Woods View permit application by Kitsap County. To the contrary. Kitsap County issued approvals on the SDAP and issued a mitigated determination of non-significance (MDNS) in 2007. The project was unable to proceed until Woods View obtained the approval of the modified LOSS from DOH,

which did not issue until 2010. Because DOH was the agency responsible for reviewing and issuing LOSS approval, there is no conceivable way that *Kitsap County* could be liable in inverse condemnation for the LOSS process or decision.

Where a city or county is insufficiently involved in the conduct allegedly causing the landowner's damages, there can be no recovery in inverse condemnation. Pande Cameron & Co. of Seattle, Inc. v. Central Puget Sound Regional Transit Authority, 610 F.Supp.2d 1288, 1310 (W.D. WA 2009), affirmed, 2010 U.S. App. LEXIS 7802 (9th Cir. 2010). There appears to be no case nationwide in which a governmental entity has been held liable in inverse condemnation based on sending comments to a *different* governmental entity that was deciding a land use issue.

4. Denial of or Delay in Issuing a Permit Does Not Give Rise to a Takings Claim.

Yet another reason for dismissal of the takings claim is the settled principle that mere delay or denial of a land use permit does not ordinarily fall within the rubric of a constitutional takings analysis. In Mission Springs v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998), a landowner alleged that the city had arbitrarily refused to process his grading permit and then unlawfully withheld the permit. The Washington Supreme Court ultimately held that the owner's due process rights had been violated, but rejected the plaintiff's argument that a taking had occurred:

> The talisman of a taking is government action which forces some private persons alone to shoulder affirmative public burdens 'which, in all fairness and justice, should be borne by the public as a whole.' (Citations omitted). The conduct here does not suggest that appropriative governmental action of which the 5th Amendment taking clause speaks but rather rings of deprivation of property through arbitrary interference with that process.

134 Wn.2d at 964.

As noted above, it was the Washington Department of Health (DOH) that was the decision maker on the LOSS permit. But even if Kitsap County had wrongfully delayed or denied a permit, that would not give rise to a takings claim.

5. The Woods View Property Was Not Denied All Economic Value.

Yet another basis for dismissal of the takings claim is the undisputed fact that the Woods View property was not deprived of all economically viable use. Indeed, County regulations allowed Woods View to consolidate lots in such a way that a large number of homes could have been built even *without* the unconventional and controversial LOSS septic system. (CP 3, 62-63). Because Woods View was not denied all economically viable use of the property, a takings analysis is simply inapplicable.

The Washington Court of Appeals had occasion to address a takings claim in the context of a land use decision which required an owner to consolidate substandard ancient lots. The court held as a matter of law that an ordinance restricting development of substandard lots did

not constitute a regulatory taking absent a showing that the ordinance denied the owner all economically viable use of the property. Tekoa Construction, Inc. v. City of Seattle, 56 Wn. App. 28, 36, 781 P.2d 1324 (1989), rev. denied, 114 Wn.2d 1005. A takings claim requires proof that the regulatory scheme is so onerous as to render the property completely without economically viable use. Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Board, 113 Wn. App. 615, 631, 53 P.3d 1011 (2002), rev. denied, 148 Wn.2d 1017.

Moreover, a mere temporary prohibition on development does not rise to the level of a taking. Tahoe-Sierra Presidential Council, Inc. v. Tahoe Regulatory Planning Agency, 535 U.S. 302, 322-23 (2002) (cited with approval in Manke Lumber, supra at 113 Wn. App. 631).

Indeed, an "as applied" regulatory taking claim is not ripe until the initial government decision maker has arrived at a definite position, conclusively determining whether the property owner was denied all reasonable benefits or use of its property. Only after a court has concluded that a permit application for any use would be futile is an "as applied" regulatory takings claim ripe for review. Peste v. Mason County, 133 Wn. App. 456, 473, 136 P.3d 140 (2006), rev. denied, 159 Wn.2d 1013. Woods View cannot establish that a taking has occurred.

I. All of Plaintiff's Claims are Barred by the Absence of Causation.

In addition to all of the other legal defenses discussed above, Woods View's claims were subject to dismissal based on the absence of

proximate causation. Regardless of the theory of recovery, liability for damages will not be imposed absent proof that the defendant's actions were a proximate ("but for") cause of the plaintiff's damages. Gaines v. Pierce County, 66 Wn. App 715, 723, 834 P.2d 631 (1992). In this case, neither the County's communication with Legacy nor its communications with DOH were a proximate cause of Woods View's losses because Woods View could not begin construction – or even obtain construction financing -- until it received DOH's approval of the LOSS, which did not come until August 2010, when the property was in foreclosure.

Woods View has admitted that it could not move forward with its development project until it received approval for its LOSS system from the state of Washington. (CP 1405-1406). As Ms. Piper testified, the initial SDAP approval from Kitsap County occurred in November 2007, at which time Woods View had not yet obtained from DOH approval for its *original* LOSS proposal, which came in March 2008. (CP 1402-1403). Importantly, when Woods View obtained that first LOSS approval, it was contingent upon having a covenant in place mandating single ownership of all of the lots in the subdivision. (Id.; CP 1485-86).

The record also shows that the SDAP approval by the County was appealed by neighbors, and final approval from Superior Court did not come until May 2009. (CP 1352-1354). But Woods View then made a business decision in the summer of 2009 to abandon the "single ownership" LOSS model, and to apply for a new *modified* LOSS approval

from DOH, which would allow lots to be individually owned. (CP 1406). The necessary documents which DOH required before it could even begin review of that modified LOSS proposal were not received until November 2009, at which time bank loans to Woods View were already in default. (CP 1423). And DOH did not approve that modified LOSS proposal until August 2010, when the property was in foreclosure. (CP 1492).

Based on these undisputed facts, any delay by the County in processing the SDAP permit in 2006 and 2007 could not have been a proximate cause of Woods View's inability to develop the property, because no development could take place until the septic system was approved by the state (DOH). The potential construction loan from the Legacy Group was contingent on DOH's approval of the LOSS ownership/management change, as Woods View has admitted. That approval by DOH of the modified LOSS application occurred in August 2010, nearly *three years* after the County's 2007 SDAP approval. Under these circumstances, proximate causation is simply not present. There can be no recovery against a local government for delay damages during the period of time when the project was held up by a state agency. North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008).

Nor can plaintiffs seriously argue that the short email comments by Kitsap County to DOH in September 2009 were the cause of the state's delay in approving the modified LOSS proposal. As DOH official Richard Benson and Assistant AG Dorothy Jaffe have testified, the only

communications from Kitsap County between March 2008 and August 2010 (when LOSS approval finally issued from DOH) were three short emails in September 2009, expressing concern about potential non-compliance with the GMA. And it is also clear from testimony of the state officials that DOH *paid no attention* to the County's argument in those emails, which the state had already rejected by early 2008. Indeed, Ms. Jaffee testified unequivocally that the short emails sent by the County to DOH in September 2009 did not alter or affect the state's action on the modified LOSS application. (CP 1438-1441). The DOH decision maker on the modified LOSS proposal (Mamdouh El-Aarag) testified that *he was not even aware* that Kitsap County had voiced concerns. (CP 1434-1438).

Based on the above undisputed facts, Woods View is unable to establish that any act or statement by Kitsap County was the cause of its inability to develop the property, because no development could occur until it received approval of the septic system from DOH. Because that approval did not come until nearly three years after the County's permit approval, the element of causation is absent, as a matter of law.

The deposition testimony of Legacy principal Brent Eley further breaks the chain of causation between the County's actions and Woods View's failure. In his deposition, Mr. Eley testified unambiguously (a) that Legacy never made a loan commitment to Woods View, before or after its discussion with Kitsap County; and (b) that irrespective of the content or tone of the conversation between Legacy and Kitsap County,

Legacy had firmly decided that it would make no loan for the project (1) until DOH approved the modified LOSS application (with individual lot ownership); and (2) until Woods View had applied for and received approval of building permits. (CP 1445-1448). Mr. Eley confirmed that these preconditions were mandatory, irrespective of whether the County's comments were wildly enthusiastic, or discouraging. (CP 1450-1451).

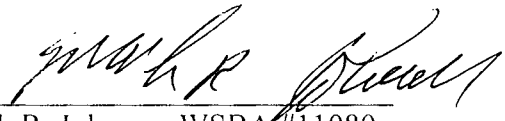
Because the approval from DOH did not come until August 2010 (after the property had been foreclosed upon and Ms. Piper had been discharged in bankruptcy) and because Woods View never applied for building permits to Kitsap County, the plaintiffs' claims against the County are barred by the absence of proximate causation.

V. CONCLUSION

For all the reasons outlined above, the trial court's summary judgment order should be affirmed.

DATED this 4th day of October, 2013.

KARR TUTTLE CAMPBELL

By: 

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AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

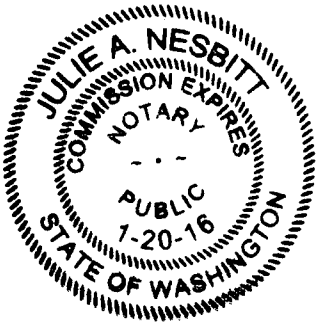
The undersigned, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America; State of Washington, employed at Karr Tuttle Campbell, 701 Fifth Avenue, Suite 3300, Seattle, WA 98104. I am over the age of 18 years and am not a party to this action. I certify under penalty of perjury under the laws of the State of Washington that on October 7, 2013, a true copy of Brief of Respondents was served to the following by Legal Messenger:

Guy W. Beckett
Berry & Beckett, PLLP
1708 Bellevue Avenue
Seattle, WA 98122

Nancy Randall

Nancy Randall



SUBSCRIBED TO AND SWORN before me this 4th day of October, 2013

Julie Nesbitt

Julie Nesbitt
NOTARY PUBLIC in and for the State of Washington, residing in Mukilteo
My Commission Expires: 1-20-16

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WOODS VIEW II, LLC, a Washington limited liability company, et al.,

Plaintiffs,

v.

KITSAP COUNTY, a Washington municipality, et al.,

Defendants.

CASE NO. C10-5114BHS

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DECLINING JURISDICTION OVER REMAINING STATE LAW CLAIMS, AND DENYING AS MOOT PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND TO COMPEL PRODUCTION

This matter comes before the Court on Defendants' motion for summary judgment as to all claims (Dkt. 24), Plaintiffs' motion for partial summary judgment (Dkt. 35), and Plaintiffs' motion to compel (Dkt. 58). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby grants Defendants' motion in part, denies Plaintiffs' motion, and declines supplemental jurisdiction over Plaintiffs' remaining state law claims.

I. PROCEDURAL HISTORY

On March 10, 2011, Defendants moved for summary judgment. Dkt. 24. On April 15, 2011, Plaintiffs filed their amended response in opposition to the motion. Dkt. 38. On April, 22, 2011, Defendants replied.

On April 7, 2011, Plaintiffs filed a motion for partial summary judgment to dismiss Defendants' Anti-SLAPP counterclaim and affirmative defense. Dkt. 35. On April 26, 2011, Defendants responded in opposition to the motion. Dkt. 56. On May 12, 2011, Plaintiffs replied. Dkt. 70.

On April 28, 2011, Plaintiffs filed a motion to compel production of documents. Dkt. 58. On May 4, 2011, Defendants responded in opposition. Dkt. 63. On May 12, 2011, Plaintiffs replied. Dkt. 69.

II. FACTUAL BACKGROUND

This action arises out of Plaintiffs' challenge to events that led up to its residential development going into foreclosure. *See generally* Amended Complaint (Dkt. 1-3). Plaintiff Woods View II, LLC ("Woods View") owned several "legacy lots" in Kitsap County, which were platted, 40 feet wide by 100 feet deep, in or about 1909. *Id.* ¶ 8. Woods View and/or Darlene A. Piper ("Piper") acquired legal title to these contiguous legacy lots with an aggregate property size of 19.76 acres (the "Site"). *Id.* ¶ 9. The Site "is titled solely in Woods View" and Woods View is the "sole owner of the [Site]." *Id.* ¶ 17.

Woods View designed and proposed a residential development for 78 single-family homes that it would construct on the Site. *Id.* ¶ 10. The Washington Department of Health ("DOH") regulations in place at all relevant times, however, prevented Woods View from relying on individual septic systems for each of the proposed 78 residences. *Id.* Instead, in cases such as this (small lots, many homes), the DOH may authorize the use of a Large Onsite Sewage System ("LOSS"). *Id.*[1] Woods View determined that a LOSS was the means by which it could provide septic to its development and still obtain approval for its proposed development at the Site. *See id.*

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[1] "A LOSS . . . does not require a single septic system for each residence, but instead utilizes a shared waste treatment system and drainfield." Complaint ¶ 10.

On or about April 3, 2006, Woods View applied to Kitsap County for a Site Development Activity Permit ("SDAP") for its proposed Site. *Id.* ¶ 12. All required materials for SDAP approval were submitted on or before May 5, 2006. *Id.* Kitsap County provided preliminary approval of the SDAP on or before November 26, 2007; it made a final decision on June 9, 2008. *Id.*

On or about April 14, 2006, Woods View applied to Kitsap County for State Environmental Protection Act ("SEPA") approval. *Id.* ¶ 13. Plaintiffs allege that Defendants Chris Gears ("Gears") and/or Larry Keeton ("Keeton") delayed the application process. *Id.* Kitsap County also issued a "Mitigated Determination of Non-Significance" on January 4, 2007. *Id.*

When a developer intends to utilize a LOSS, DOH requires a management plan that describes what entity will maintain the LOSS. *Id.* ¶ 14 (citing WAC 246-272-B-08001). When, as here, lots are individually owned, the applicable code provides that a public entity may serve as the primary management entity or as a third party trust when a private management entity is used to maintain the LOSS. *Id.* Initially, Woods View agreed with Karcher Creek Sewer District ("Karcher Creek") that it, as a public entity, would maage the LOSS. *Id.*

Woods View alleges that

> On October 13, 2006, in furtherance of Kitsap County's plan to attempt to prevent the proposed development, Gears wrote a letter to several Washington State officials, including Governor Christine Gregoire, the Director of the Washington Department of Ecology, and the Washington Secretary of Health. In the letter Gears informed these officials that the LOSS system proposed for the Woods View site would "require approval from either the State Department of Ecology or Department of Health." Gears further informed these officials that Kitsap County was concerned that approval of the LOSS system proposed for the Woods View site would "allow the development of urban densities outside an urban growth area"; that "[w]hile [Kitsap] County has no authority to approve the proposed wastewater system, . . . if this waste water system is approved [Kitsap] County will be obligated to issue building permits as a ministerial act"; that "this creates problems for Kitsap County"; and that "the use of new wastewater systems that allow development on small nonconforming lots in

> the rural areas aggravates the situation." Upon information and belief, Gears believed that the State officials to whom he had addressed this letter would assist Kitsap County in preventing the development of the Woods View site as proposed by Woods View II. Gears and/or Keeton directed Kitsap County Department of Community Development staff not to process Woods View II's SDAP and SEPA applications until the State officials to whom he had addressed his letter responded to his concerns expressed in it.
>
> 16. Kitsap County believed that if Woods View II had no public entity to serve as the primary management entity for the LOSS proposed for the Woods View site, it would be unable to obtain approval of the LOSS from the Sate of Washington, [DOH], and the proposed development at the site would be prevented. Accordingly, in October and November 2006, Kitsap County employees, upon information and belief[,] including Gears, Keeton, and [Shelley] Kneip communicated with [Karcher Creek] for the purpose of attempting to persuade it to withdraw from its agreement to serve as the entity that would monitor, maintain, and be responsible for the LOSS for the Woods View site. As a result of these communications, Karcher Creek . . . withdrew its agreement to provide management services for the LOSS to the Woods View site.
>
> ***
>
> 18. On July 25, 2007, Keeton, as Director of the Kitsap County Department of Community Development, issued a "Director's Interpretation" of Kitsap County Ordinance 090-1998, which establishes the circumstances under which connections to public sanitary sewer systems are allowed outside of designated urban growth areas . . . . The Woods View site is located outside of a designated Urban Growth Area. In Keeton's "Interpretation," he ruled that a LOSS operated by a public entity constituted a public sewer, and thus would not be permitted in areas not designated as Urban Growth Areas. However, Keeton's "Interpretation" further states that a LOSS privately owned, operated, and maintained would not be considered a public sewer.

Id. ¶¶ 15, 16, 18.

In 2009, Woods View negotiated a new agreement with a new public entity to maintain its proposed LOSS. *Id.* ¶ 20. Woods View requested that the DOH approve the LOSS based on its new management agreement. *Id.* Woods View alleges that, after becoming aware of the new agreement, Kitsap County, through statements made by Keeton and Kneip, communicated with the DOH to inform them that such an agreement would not be permitted in Kitsap County. *Id.*

Woods View contends that it would have been able to sell finished lots no later than 2007 had it not been prevented from doing so by the acts described above. Due to the financial circumstances it found itself in, Woods View sought a lender that would

"provide development and construction financing for the proposed development"; these efforts were successful. *Id.* ¶ 23. However, Woods View contends that the lending arrangement collapsed because Kitsap County, through Shelley Kneip ("Kneip"), communicated with the lender and informed it that the Woods View would never be permitted to sell individual building lots.

Based on the foregoing, Plaintiffs seek damages under the following causes of action: (1) tortious interference with a contract and/or business expectancy; (2) negligence; (3) outrage; (4) violation of the Fifth Amendment, substantive due process; (5) violation of the Fifth Amendment, procedural due process; and (6) violation of the Fifth Amendment, taking. *Id.* ¶¶ 26-36. Plaintiffs also seek declaratory and injunctive relief, punitive damages, and attorneys fees. *Id.* ¶¶ 37-39.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477

APPENDIX NO. 1
Decision of U.S. District Court Judge Benjamin Settle,
June, 2011, U.S. District Court Case No. C-10-5114
BHS (CP 1455-1471)

U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

B. Standing

As a preliminary matter, Defendants argue that Piper lacks standing to pursue the causes of action alleged and that those claims are solely Woods View's as an LLC. Dkt. 24 at 8. Although Plaintiffs contend that Piper may have owned the Site that Woods View later acquired, Plaintiffs also assert that the Site "is titled solely [to] Woods View" and Woods View is the "sole owner of the [Site]." Complaint ¶ 17. The only other fact asserted by Woods View on this point is that Piper supplied funds and personally guaranteed loans for the purchase and development of Woods View. *Id.* at 21.

A plaintiff must have standing to sue. *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990). Whether a plaintiff has standing is a question of law for the Court to decide. *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1454 (9th Cir. 1995). Corporations and limited liability companies ("LLC") are distinct legal entities, i.e., separate from their

shareholders or members. *Abrahim & Sons, Enterprises v. Equilon Enterprises, LLC*, 292 F.3d 958, 962 (9th Cir. 2002).

A "shareholder does not have standing to redress an injury to the corporation." *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593, 595 (9th Cir. 1983); *United States v. Stonehill*, 83 F.3d 1156, 1160 (9th Cir. 1996) ("Well-established principles of corporate law prevent a shareholder from bringing an individual direct cause of action for an injury done to the corporation or its property by a third party."). For example, the Ninth Circuit has held that even the sole shareholder and personal guarantor of a corporation has no standing to pursue antitrust claims on the corporation's behalf. *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439 (9th Cir. 1979). Similarly, a shareholder or corporate guarantor cannot bring a RICO (Racketeering Influenced & Corrupt Organizations Act) claim to recover for acts that diminish the value of the corporation. *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1998). Similarly, under Washington law, the guarantor of a contract has no standing to affirmatively pursue redress for a breach of the contract. *Miller v. United States Bank, N.A.*, 865 P.2d 536 (1994).

To establish standing, Piper would have to allege a direct injury that is independent of Woods View's injury. *Shell Petroleum*, 709 F.2d at 595; *In re Real Marketing Svcs., LLC*, 309 B.R. 783, 789 (S.D. Cal. 2004). Piper has arguably shown, at least on the pleadings, that she suffered personal economic loss as a result of Defendants' alleged wrongdoing. This is insufficient, however, because her personal loss derives from her membership in the LLC. *Shell Petroleum*, 709 F.2d at 595; *Real Marketing*, 309 B.R. at 789; *see also Sparling*, 864 F.2d at 640; *Sabey v. Howard Johnson & Co.*, 5 P.3d 730, 735 (2000). Instead of a derivative loss, Piper must allege that she suffered an injury distinct from those of any other LLC member, or that there was a special relationship between herself and the Defendants. *Sparling*, 864 F.2d at 640.

However, Plaintiffs have not supplied competent evidence that any of Piper's alleged injuries either derive independently of Woods View's harm or that Piper was owed any special duty by Defendants. Guaranteeing loans for Woods View that results in separate action against Piper is insufficient to constitute an independent harm; such events would not occur but for the harm allegedly caused to Woods View.

Plaintiffs have failed to provide adequate case law to permit this Court to rule contrary to the aforementioned cases. Therefore, like the court in *Real Marketing*, this Court concludes that Piper's claims are derivative of her interest in Woods View. *See* 309 B.R. at 789 (dismissing breach of contract claim), 791 (dismissing fraud and misrepresentation claims), 792 (dismissing tortious interference with contract claim). In short, Piper's claims fail because she lacks standing to pursue them; the complaint reveals that the only Plaintiff with standing to assert the claims before the Court is Woods View.[2]

The Court rules herein on Piper's failure to establish standing so far is it pertains to the federal claims alleged by her and Woods View.

C. Defendants' Motion for Summary Judgment, Federal Claims

With the foregoing in mind, the Court turns now to Woods View's federal § 1983 claims.

1. Ripeness

Defendants argue that Woods View's § 1983 claims are not ripe. Dkt. 24 at 19. The Supreme Court has established what is needed for a § 1983 claim to be ripe in the land use context:

> The Supreme Court has recognized that land-use planning is not an all-or-nothing proposition. A government entity is not required to permit a landowner to develop property to the full extent it may desire. Denial of the intensive development desired by a landowner does not preclude less intensive, but still valuable development. The local agencies charged with

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[2]Because Piper lacks standing, only one Plaintiff remains: Woods View. The Court will no longer refer to "Plaintiffs' claims" and will instead refer to "Woods View's claims."

> administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other. The property owner, therefore, has a high burden of proving that a final decision has been reached by the agency before it may seek compensatory or injunctive relief in federal court on federal constitutional grounds.

Hoehne v. County of San Benito, 870 F.2d 529, 533 (9th Cir. 1989) (citations and quotations omitted). And, to prove that a final decision was indeed reached, the facts of the case must be clear, complete, and unambiguous. *Id.*

Specifically related to ripeness of "takings" claims, the Supreme Court requires the ability to review a final and determinative ruling before it will find a takings claim ripe:

> [T]he nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. As Justice Holmes emphasized throughout his opinion for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 416, "this is a question of degree-and therefore cannot be disposed of by general propositions."

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1980). The Supreme Court reaffirmed *MacDonald* in 1985:

> As in Hodel, Agins, and Penn Central, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191 (1985) (citations omitted).

Woods View argues that the defense of ripeness should fail because, although its permit applications were approved, Defendants knew that they were delaying the process unduly in an effort to bleed the project dry until it failed. *See* Dkt. 38 at 24-25.

However, Woods View points to no proceedings in which it challenged any of the regulations at issue to obtain a final determination of its rights. It supplies no authority for the proposition that the requirement of a final determination hearing may be avoided and survive a ripeness issue when the party successfully obtains the permit sought after some amount of time but believes that the permitting authority has intentionally slighted them in the process.

Because Woods View never sought final review and determination of their rights as required for their federal constitutional claims to be ripe before this Court, their claims are not ripe. Woods View has also not established by competent evidence that the record, as it pertains to ripeness, is clear, complete, and unambiguous. Therefore, the Court grants summary judgment on this basis, which dispenses with Woods View's § 1983 claims - it asserts no other federal claims.

Even if the Court found Woods View's § 1983 claims to be ripe, its due process and takings claims fail nonetheless. The Court turns now to those claims.

2. Substantive Due Process

To sustain a federal substantive due process claim, a plaintiff must prove that the government's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *E.g., Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (citations omitted). The Ninth Circuit has articulated the heavy burden that must be met by a plaintiff like Woods View on such a substantive due process claim:

> [T]he protection from governmental action provided by substantive due process has most often been reserved for the vindication of fundamental rights. *See Albright v. Oliver*, 510 U.S. 266 (1994) ("The protections of

> substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that it was improper to analyze an excessive force claim under substantive due process where a specific constitutional provision was applicable). "[T]he [Supreme] Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). Accordingly, where, as here, the plaintiffs rely on substantive due process to challenge governmental action that does not impinge on fundamental rights, "we do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir. 1994).

Halverson v. Skagit County, 42 F.3d 1257, 1262 (1994). Like the plaintiff in *Halverson*, Woods View, "in choosing to base their claim for compensation on an alleged violation of substantive due process, . . . shoulder[s] a heavy burden." *Id.*

In order to survive Defendants' motion for summary judgment, Woods View must demonstrate the irrational nature of the County's actions by showing that the County "could have had no legitimate reason for its decision." If it is "at least fairly debatable" that the County's conduct is rationally related to a legitimate governmental interest, there has been no violation of substantive due process. *Id.* (citations omitted). "Federal judicial interference with a local government zoning decision is proper only where the government body could have no legitimate reason for its decision." *Dodd v. Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)). Specifically applicable here, courts, in analyzing a substantive due process claim in the context of land use permitting, apply the "shocks-the-conscience" standard. *E.g., Mongeau v. City of Marlborough*, 492 F.3d 14 (1st Cir. 2007); *Torromeo v. Town of Fremont, New Hampshire*, 438 F.3d 113 (1st Cir. 2006).

In *Mongeau*, a developer claimed a deprivation of property without substantive due process. Plaintiff Mongeau alleged that Stephen Reid, the City's Commissioner of Inspectional Services, denied him a building permit and interfered in the zoning process

for improper reasons. The court held that the shocks-the-conscience standard applied to the substantive due process claim, and that the city official's conduct in opposing the developer's building permit did not shock the conscience. The court stated:

> If Mongeau believes that the City or Reid has wrongly charged or demanded too much for his building permit, he may find recourse in other laws, but not in the substantive component of the Due Process Clause of the Fourteenth Amendment. Such conduct, without more, cannot be said to transgress "some basic and fundamental principle . . . [such] that 'the constitutional line has been crossed'" and our conscience is shocked.

Mongeau, 492 F.3d at 20.

In *Torromeo*, 438 F.3d at 118, the court held that the town's unjustified delay in issuing previously approved building permits after enacting a growth control ordinance did not shock the conscience, and thus did not deprive the plaintiff of property without substantive due process, even though the town did not follow procedures mandated by state law in enacting the ordinance. The court reasoned:

> This Court has repeatedly held that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. The doctrine of substantive due process does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest. Although we have the left door [sic] slightly ajar for federal relief in truly horrendous situations, the threshold for establishing the requisite abuse of government power is a high one indeed.

Id., at 118. *Accord SFW Arecibo Ltd. v. Rodríguez*, 415 F.3d 135, 141 (1st Cir. 2005).

Here, Woods View obtained the permits it sought, though it asserts the delay in obtaining the permits was undue, arbitrary, and capricious. However, Woods View has not supplied competent evidence that this is one of the truly horrendous situations in which the courts have left the door slightly ajar to remedy. Woods View has not supplied competent evidence that one would be unable to fairly debate whether Defendants acted in a manner that was rationally related to a legitimate governmental interest. In contrast,

Defendants have adequately established on at least a fairly debatable basis that they acted in a manner that was rationally related to the governmental interest in public health as it relates to permitting a LOSS in an urban growth area in a manner required by the comprehensive plan in effect.

In short, Woods View cannot establish a federal substantive due process claim because the claim is not ripe. And it fails because Woods View has not supplied competent evidence that shocks the conscience regarding the events at issue herein, which is required to succeed in their substantive due process claim.

Therefore, the Court grants summary judgment on this issue in favor of Defendants.

3. Procedural Due Process

Woods View also asserts a claim for violation of procedural due process. The fundamental requirement of federal procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *SEC v. McCarthy*, 322 F.3d 650, 659 (9th Cir. 2003) (citing *Mathews*, 424 U.S. 333). To succeed on a deprivation of procedural due process claim, an individual must show: (1) he possessed a protected interest to which due process protections were applicable; and (2) he was not afforded an appropriate level of process. *Shanks v. Dressel*, 540 F.3d 1082, 1090 (9th Cir. 2008).

It is undisputed that Woods View took part in numerous hearings regarding its development, specifically regarding the LOSS. It is undisputed that the permits were conditionally granted. It is also undisputed that Woods View did not seek additional hearings to contest any issues it had with the granted permits or the permitting process to which it was a part.

Woods View has failed to articulate how it was deprived of a meaningful opportunity to be heard. Woods View does not provide any authority that would exempt it

from needing to seek administrative review regarding the alleged improper actions of Defendants. *See* Dkt. 38 at 25-30 (failing to establish that Woods View took advantage of or was denied meaningful review opportunities sought, nor providing authority on which to be found exempt from such requirement). Woods View simply argues that its permit applications were improperly and inordinately time delayed by the alleged intermeddling of Defendants.

In short, Woods View cannot establish a federal procedural due process claim because the claim is not ripe. Moreover, even if the claim was ripe, the Court finds that Woods View's contentions do not support a procedural due process claim. The fact that Woods View may have suffered damages due to a perceived delay in the permitting process does not, per se, provide it with a federal procedural due process claim. Simply stated, Woods View did not avail itself of the requisite, available administrative review procedures that would permit it to now bring its procedural due process claim before this Court.

Therefore, Woods View's procedural due process claim fails as a matter of law.

4. Taking

Under the federal constitution, the federal government may "take" private property, requiring just compensation, either by physical invasion or by regulation. *American Pelagic Fishing Co., L.P. v. U.S.*, 379 F.3d 1363 (Fed. Cir.), *cert. denied*, 545 U.S. 1139 (2004). *Norman v. U.S.*, 63 Fed. Cl. 231 (2003), *aff'd*, 429 F.3d 1081, *cert. denied*, 547 U.S. 1147 (2003). In other words, in federal takings jurisprudence, takings are generally physical or regulatory. *See id.*

Woods View asserts that it is not alleging a regulatory taking (Dkt. 38 at 21) regarding overly broad or otherwise unconstitutional land use regulations. It is also not alleging that a physical taking occurred. Instead, it is alleging that a temporary taking

occurred because Defendants caused an inordinate delay in the approval of its LOSS permit, which was approved within a year of application.

However, it has not cited adequate authority to support its position. To begin with, Woods View contends it is making a regulatory taking claim in the form of an alleged "temporary taking," which it bases on extraordinary delay in the permit process. Dkt. 38 at 22. A regulatory taking is one in which the regulation denies an owner of land all economic viable use of that land. *See Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978).

Woods View has not supplied any authority for the proposition that it is not subject to the requirement of showing sufficient economic loss to sustain such a regulatory taking claim. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (*Tahoe-Sierra*) (holding that a 32-month temporary restriction does not constitute a taking because the property owner would regain the use of that property after the moratorium and it did not deprive the owner of all economic use of that property); *Buckles v. King County*, 191 F.3d 1127, 1140 (regulatory takings claims fail when an owner cannot establish that a regulation denied the owner all economic use of the land and the regulation advances legitimate government interest).

Again, Woods View cannot establish a federal takings claim because the claim is not ripe. It also fails because it has not established with competent evidence that a physical or regulatory taking occurred here because Woods View did not suffer any taking like a permanent, physical occupation of the property, nor was it denied all economically viable use of the property. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 (2002).

Therefore, the Court grants summary judgment in favor of Defendants on this issue.

D. Jurisdiction

In addition to its § 1983 claims, Woods View alleges state law causes of action for negligence, tortious interference with a contract/business expectancy, and outrage.

This action was removed to federal court on the basis of federal question jurisdiction pursuant to Woods View's 42 U.S.C. § 1983 claims. Dkt. 1. The complaint asserts no basis for diversity jurisdiction. As such, all state law claims can only be before this Court pursuant to supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). The district court may decline to exercise supplemental jurisdiction over a state law claim if the district court has dismissed all claims over which it has original jurisdiction. *Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1000 n. 2 (9th Cir. 1997). Given that the Court has dismissed the federal cause of action giving rise to this Court's original jurisdiction, and Plaintiffs' remaining state law claims raise land use issues more appropriately determined by the state courts, the Court declines to exercise supplemental jurisdiction over the remaining state law claims. *See West Coast, Inc. v. Snohomish County*, 33 F. Supp. 2d 924 (W.D. Wash. 1999).

Because the Court finds that Woods View has failed to raise a genuine issue of fact supporting its 42 U.S.C. § 1983 claims for violation of substantive, procedural due process, and right against unconstitutional "takings," the Court declines jurisdiction over Woods View's state law claims.

E. Woods View's Motion to Compel and for Partial Summary Judgment

Because the Court grants summary judgment in favor of Defendants as discussed herein and declines to exercise supplemental jurisdiction over the remaining state law claims, Woods View's motions for partial summary judgment and to compel are denied as moot.

IV. ORDER

Therefore, it is hereby **ORDERED** that

(1) Defendants' motion for summary judgment is **GRANTED in part** as discussed herein;

(2) The Court **DECLINES** supplemental jurisdiction over Wood View's remaining state law claims.

(3) The Court **DISMISSES** Woods View's state law claims **without prejudice;**

(4) The Court **DENIES as moot** Woods View's motion for partial summary judgment and its motion to compel as discussed herein; and

(5) There being no other matters in this case, the case is **TERMINATED.**

DATED this 22nd day of June, 2011.

BENJAMIN H. SETTLE
United States District Judge

APPENDIX NO. 2
Memorandum Decision by Ninth Circuit, June 13, 2012,
Case No. 11-35605 (CP 1473-1476)

FILED

JUN 13 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WOODS VIEW II, LLC; et al., Plaintiffs - Appellants, v. KITSAP COUNTY; et al., Defendants - Appellees.	No. 11-35605 D.C. No. 3:10-cv-05114-BHS MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted June 5, 2012
Seattle, Washington

Before: SILVERMAN and MURGUIA, Circuit Judges, and HALL, District Judge.**

Woods View II, LLC ("Woods View") and Darlene A. Piper appeal the district court's grant of summary judgment in favor of Kitsap County, Washington,

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Janet C. Hall, District Judge for the District of Connecticut, sitting by designation.

and three County officials ("Appellees") on 42 U.S.C. § 1983 claims arising from the failure of a proposed real estate development. The district court found that Piper, the sole member of Woods View and guarantor of its debts, lacked standing to bring individual claims against Appellees. The court further found that Woods View's claims were not ripe. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm, in part on alternate grounds.

Like the district court, we find that Piper's personal financial losses are derivative of Woods View's own losses. Piper was not injured directly and independently of the limited liability company and therefore lacks standing to pursue individual claims against Appellees. *See RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1057 (9th Cir. 2002).

As to the ripeness of Woods View's claims, the district court concluded that Woods View could not meet its burden of proving that a final decision had been reached on its permit applications, because the applications were ultimately approved and Woods View did not appeal the agencies' decisions. We disagree. When takings or due process claims are based on a permitting authority's unreasonable delay or failure to act within mandated time periods, a permit approval constitutes a final decision for ripeness purposes. *See Norco Constr., Inc. v. King Cnty.*, 801 F.2d 1143, 1145-46 (9th Cir. 1986).

However, we find that Woods View's takings claim is not ripe, because Woods View has not demonstrated that it pursued and was denied just compensation in Washington state court prior to filing its federal takings claim. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985).

Further, while we find that Woods View's procedural and substantive due process claims are ripe, we agree with the district court's alternative findings that the claims fail on the merits. Woods View alleges that its due process rights were violated by Appellees' interference with its application for a Large On-Site Sewage System operating permit ("LOSS permit") from the Washington Department of Health ("DOH") and by Appellees' failure to issue a decision on its Site Development Activity Permit ("SDAP") and State Environmental Policy Act ("SEPA") applications within the 78-day period provided by county law. Neither allegation can support a procedural or substantive due process claim.

First, Appellees' alleged interference with Woods View's LOSS permit application cannot give rise to a due process claim, because Woods View did not have a legitimate claim of entitlement to a LOSS permit. Nor did it have a legitimate claim of entitlement to a decision on its LOSS permit application within a particular period of time. In the absence of a cognizable property interest, due

process is not violated. *See Shanks v. Dressel*, 540 F.3d 1082, 1090-91 (9th Cir. 2008).

While Woods View did have a legitimate claim of entitlement to a decision on its SDAP and SEPA applications within 78 days, meaningful post-deprivation remedies were available to address Appellees' failure to act by the statutory deadline. *See Norco Constr., Inc. v. King Cnty.*, 649 P.2d 103, 104-07 (Wash. 1982). Such post-deprivation remedies were sufficient to satisfy procedural due process. *See Parratt v. Taylor*, 451 U.S. 527, 539 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

Finally, because it is at least fairly debatable that Appellees' delays in issuing the SDAP and SEPA approvals were rationally related to a legitimate governmental interest in ensuring that local development complied with state law, Woods View cannot meet the "exceedingly high burden" for establishing a substantive due process claim. *Shanks*, 540 F.3d at 1088-89.

AFFIRMED.

APPENDIX NO. 3
Letter from Maytown litigation attorney William Broughton,
November 15, 2006 (CP 1481-1483)

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WILLIAM H. BROUGHTON
DALYNNE SINGLETON

MARTIN E. McQUAID
Of Counsel

November 15, 2006

COPY

Chris Gears
County Administrator
Kitsap County Board of Commissioners
614 Division Street, MS-4
Port Orchard, WA 98366

Re: *Darlene Piper/Woods View, LLC*

Dear Mr. Gears:

I represent Darlene Piper and Woods View, LLC, which is the owner of a property encompassed within the proposed "Woods View Residential Development", pending under SDAP Application No. 06-35350. I am in receipt of a copy of a letter dated October 13, 2006 you forwarded to various State officials. I have been advised that you or someone on your behalf has advised the Department of Community Development to defer processing my client's permits until the State responds to your letter.

In your letter, you correctly point out that all of my client's lots are lawfully "vested lots". Kitsap County has made the land use/zoning determination for these vested lots in KCC 17.455.020, enacted in 1999 when the county's Comprehensive Plan was adopted. The vested lots issue was again addressed by the County. My client submitted the SDAP Application on April 14, 2006, and Kitsap County determined the application was complete on May 5, 2006. This means Kitsap County was and is obligated to process the Application in accordance with all applicable development regulations in affect as of that date.

KCC 21.04.110 obligates Kitsap County to issue a final decision on the Application within 78 days of the "complete application" date. In early October (and prior to the date of your letter), I phoned responsible officials in DCD, who advised me they had all the information necessary to issue a DNS and SDAP approval. Accordingly, Kitsap County has no basis to claim the 78 day period should be extended.

In your letter to the State, you claim the sewage system constitutes a "public sewer system" and you imply, at least that the development of this system, will violate the Growth Management Act. In my opinion, your claims are wrong.

Before addressing the applicable law, let me outline the proposed sewage system. My client intends to install a "Loss Filtrate Subsurface Wastewater Drip System". WAC 246-272B defines this "LOSS" system as "an integrated arrangement of components for a residence . . . not connected to a public sewer system . . ." The system will be designed and constructed at the sole expense of my client. It is not being connected to any public sewer system. The applicable health regulation requires that it be properly maintained. Initially, my client considered entering into a maintenance agreement with the Karcher Creek Sewer District. Under that proposal, Karcher Creek would maintain the system for a fee. The fee would be assessed only to the Woods View homeowners. Karcher Creek would not own the system. Instead, the system would be owned by the Woods View homeowners and their Homeowner's Association. Karcher Creek would not have the authority to extend or expand the system or provide connections to others.

As you apparently are unaware, my client has not concluded a maintenance agreement with Karcher Creek and at this point does not intend to do so. The applicable health regulations require the system be properly maintained, but there is no requirement that a governmental sewage system operator do so. In fact, WAC 246-272B-08001 specifically authorizes a private entity to provide maintenance services. My client will insure the system is properly maintained.

Let me now turn to the applicable regulations that govern the subject permit. As your letter appropriately points out, Kitsap County has no authority to approve, deny or regulate the subject sewer system.

In your letter, you claim that under RCW 57.16.010(6), a public sewer district is prohibited from providing services outside UGAs. To address your claim, I'll assume my client or the Woods View Homeowner's Association ultimately contracts with Karcher Creek for maintenance services.

Not only does RCW 57.16.010(6) not contain the prohibition you claim, under RCW 57.08.005(5), which was most recently amended by the Legislature in 2004, the Legislature has specifically authorized public sewer districts, such as Karcher Creek, to provide the very type of maintenance authority that was contemplated by my client's initial proposal.

In your letter to the State, you attempt to link the Department of Health definition of a "public sewer system" with applicable prohibitions under the Growth Management Act. There is no link.

Under RCW 36.70A.110(4), the Legislature has declared that it is generally inappropriate to extend or expand "urban governmental services" in rural areas.

My client is not extending or expanding an urban governmental service. My client is developing a privately owned on-site sewage system. While the technology has improved, it is akin to a conventional on-site septic system with a community drain field that has uniformly been approved in this County.

With this background, I now wish to address the more troubling aspects of your letter and instructions to DCD. It is clear that your letter seeks the intervention of the State to impose a currently unadopted regulation that Kitsap County wants to use to deprive my client of her lawfully vested property rights.

In my opinion, your actions constitute tortious interference and violate the common law of the State of Washington, violate RCW 64.40.020, violate applicable Federal civil rights acts, and violate the Federal and State Constitutions. Consequently, Kitsap County and the officials responsible, who participated in the preparation of the letter and transmittal of, are liable for not only all resultant damages, but punitive damages as well.

Please consider this letter as notice of the substantial damage claim my client intends to file.

Very truly yours,

Bill Broughton

William H. Broughton

cc: client