

NO. 36066-7-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

ISLA VERDE INTERNATIONAL HOLDINGS, LTD.,
a foreign corporation and
CONNAUGHT INTERNATIONAL HOLDINGS, LTD.,
a foreign corporation,

Respondents,

ORIGINAL

v.

CITY OF CAMAS, WASHINGTON,
a municipal corporation of the State of Washington,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 FEB -4 PM 1:56
STATE OF WASHINGTON
BY DEPUTY

On Appeal from Clark County Superior Court
Cause No. 95 2 03438 5

REPLY BRIEF OF APPELLANT

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February 1, 2008

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A. Introduction

The respondents¹ concede by not arguing otherwise that it was error for the superior court to grant summary judgment in Isla Verde’s favor on the “knowingly unlawful” element of RCW 64.40.020(1), for the reasons given in the court’s Memorandum Decision, which stated:

Prior to appealing to the Superior Court, petitioner did not object to the 30% dedication. It was during the original proceedings that this issue was raised and it formed the basis of Judge Lodge’s ruling.² Thus the issue of validity of the City’s actions on this subject did not arise until the Superior Court proceedings.

...
Once this issue was raised, the City had the option of withdrawing the condition or appealing the Superior Court’s decision. The City elected to appeal not only the Superior Court but also that of the Court of Appeals. Clearly, at this juncture, the City should have known that the ordinance as applied was invalid. The wealth of reported case law in existence at this time supports this conclusion. Thus I find that the City’s actions in defending the ordinance after the issue was raised, invokes the ramifications of RCW 64.40.

CP 389.

Instead, Isla Verde argues there are alternative grounds for affirming. But Isla Verde fails to completely or accurately state the factual circumstances of the appellate decisions on which its claim of “knowing unlawfulness” is based. Moreover, Isla Verde overstates the Supreme Court’s earlier decision in this case, and gives no proper credit to the many

¹ Hereafter, the respondents will be referred to as “Isla Verde.”

² Judge Lodge was the superior court judge who issued the order invalidating the two contested conditions on the Dove Hill subdivision in 1998.

issues of fact demonstrated by the City's Response and Cross-Motion for Summary Judgment. The Court of Appeals should reject Isla Verde's arguments and reverse the Clark County Superior Court's Order Granting Summary Judgment (CP 391), and its related Order Denying Reconsideration. CP 417.

B. The Supreme Court's Ruling in This Case Does Not Establish Unlawfulness under RCW 64.40.

The Brief of Respondent conflates the issue of whether the City's open space preservation condition was invalid due to a lack of substantial evidence with the requirement that liability under RCW 64.40 must be based on an act that was "unlawful" as that term is defined in RCW 64.40.020(1). An "act" that can result in liability under RCW 64.40, is

...unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

RCW 64.40.020(1). Emphasis added.

Isla Verde is wrong to argue that the Washington Supreme Court ruled that the City's open space preservation condition was unlawful as that term is used in RCW 64.40.020(1). In *Isla Verde International v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2003), the Supreme Court considered two issues relating to the open space preservation condition. First, the Court addressed: "...whether the set aside constitutes a tax, fee or charge within the

meaning of the statute (RCW 82.02.020).” 146 Wn.2d at 757. The Court ruled: “[w]e conclude that the open space set aside condition is an in kind indirect ‘tax, fee, or charge’ on new development.” *Id.* at 759.

The Court then considered: “...whether the 30 percent set aside is unlawful under RCW 82.02.020 or whether it falls within an exception.” *Id.* Reviewing the evidence of impact in the administrative record, the Court acknowledged that “Isla Verde's property has steep slopes” (*id.* at 761), “there may be some negative impact on environmentally sensitive areas” (*id.* at 762), and “it is arguable that there will be some impact on wildlife habitat, and certainly clearing wooded land to build houses will affect the wooded nature of the site” *Id.* The Court nevertheless concluded: “[n]one of the evidence to which the City refers shows any relation between a 30 percent open space requirement and impacts or effects of Isla Verde's proposed development.” *Id.* Therefore, the Court held: “...the 30 percent open space set aside condition for approval of Isla Verde's plat application violates RCW 82.02.020 and is therefore invalid.” *Id.* at 765.

Clearly, despite Isla Verde's many contentions to the contrary, the Washington Supreme Court did not hold that the open space preservation condition was “unlawful” as that term must be construed for purposes of a RCW 64.40 claim. Instead, the Court simply found a deficiency in the evidence of an impact that the Court recognized did exist with the conversion

of wooded land to a housing subdivision, and the relationship between that impact and the 30 percent preservation requirement.

Accordingly, in the 2006 motion for summary judgment on the issue of whether the City's open space preservation condition was "knowingly unlawful" under RCW 64.40.020(1), Isla Verde was obligated to show more than that the Supreme Court ruled that the open space condition was invalid for lack of sufficient evidence. Isla Verde was obligated to show by evidence or by established law that there was no genuine issue as to any material fact on the "knowingly unlawful" issue. CR 56(c).

In its motion for summary judgment, Isla Verde relied solely on case law for its argument that the decision requiring the open space condition was "knowingly unlawful" under RCW 64.40.020. CP 17. That motion included irrelevant case law handed down after the City of Camas approved the Dove Hill subdivision with the pertinent open space preservation condition in July, 1995. CP 22. Isla Verde submitted no other evidence supporting the "knowingly unlawful" element of its RCW 64.40 claim.

Even in response to the City's cross-motion for summary judgment (CP 64), Isla Verde submitted no evidence of actual or constructive knowledge by the City that the open space preservation condition would be invalid for lack of supporting evidence. CP 337, Petitioners' (Isla Verde's) Opposition to Respondent's (City's) Motion for Summary Judgment.

Moreover, Isla Verde did not object to or move to strike the evidence submitted by the City in opposition to its motion for summary judgment. Where a party fails to object or fails to move to strike evidence in a summary judgment proceeding, the party is deemed to have waived any deficiency in that evidence. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). Therefore, the Declaration of Roger D. Knapp in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment, and the exhibits thereto (CP 86, *et seq.*), cannot now be deemed deficient, as Isla Verde attempts to argue in the Brief of Respondents, at 15.

Even more telling as evidence of a broad lack of knowledge of unlawfulness in this case are the letters and statements of Isla Verde's attorney to the City at the administrative level. CP 94, CP 103, CP 105, & CP 308. They said nothing about the need for the City to present evidence in support of the open space condition. Thus, the assertion that the City should have known that the open space condition could be invalid for lack of sufficient evidence was a point that escaped even Isla Verde's attorney. In fact, as the superior court acknowledged, Isla Verde's position on the open space requirement allowed the City to "...assume that the set off of 30% was voluntary." CP 389.

It is not sufficient to say, as Isla Verde argues in the Brief of

Respondents at 25, that it was the City's duty to prove that the open space requirement was "reasonably necessary as a direct result" of the Dove Hill subdivision. Failure of that procedural duty does not prove knowledge of unlawfulness. In fact, the evidentiary deficiency tends to prove a lack of knowledge of a need for evidence, particularly since evidence of the reasons for the City's 30 per cent open space preservation ordinance did exist in the Vancouver View Zoning study, as explained in the Roger D. Knapp declaration, CP 91-93, and CP 108.

Neither the Supreme Court's earlier ruling in this case nor any evidence supported Isla Verde's motion for summary judgment. Instead, the undisputed evidence supported a lack of knowledge on the City's part. The superior court had this evidence in the City's opposition to Isla Verde's motion for summary judgment, but gave it no apparent consideration. The resulting judgment was error.

C. Case Law as of July, 1995 Did Not Impart Knowledge of Unlawfulness to the City of Camas.

Isla Verde avoids any acknowledgment of the actual facts of the appellate cases on which it relied as its only support for its claim of "knowing unlawfulness" on the City's part. The plain truth is that as of 1995, when the Dove Hill plat was approved, no Washington decision held that an ordinance-based condition on plat approval which did not impose a monetary cost on

the developer or did not require it to dedicate land to public use, was nevertheless equivalent to a “tax, fee, or charge” on the subdivision of land.

Isla Verde relies heavily on *San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1987), for its contention that the City’s open space condition was imposed with actual or constructive knowledge of its unlawfulness under RCW 64.40.020(1). *See* Brief of Respondent at 4, 10, 18, & 19. However, *San Telmo* involved a challenge to a Seattle ordinance,

[r]equiring a developer [who seeks to convert low income housing to another use] either to construct low income housing or ‘contribute’ to a fund for such housing [which] gives the developer the option of paying a tax in kind or in money.

108 Wn.2d at 24. There, the “contribution” would have “require[d] San Telmo to either build a new, comparable housing project, or contribute approximately \$1.5 million to the low income housing fund.” *Id.* Obviously, either choice available to a developer under the Seattle ordinance required the payment of money in return for the right to convert low income housing to another use.

The open space condition at issue in this case would not have involved any payment of money by Isla Verde. CP 93. And not only has Isla Verde never submitted any evidence of a monetary cost associated with the open space condition, but the undisputed evidence of record in the summary judgment proceedings below is that the condition “did not impose a cost on

the developer because the area of the open space would not be deducted from the overall subdivision area for allowable density purposes.” CP 93 (Declaration of Roger D. Knapp in Opposition to Plaintiffs’ Motion for Summary Judgment and in Support of Defendant’s Motion for Summary Judgment). Therefore, the present case is not comparable to *San Telmo* for “knowledge of unlawfulness” purposes.

Similar to Isla Verde’s misplaced reliance on *San Telmo*, its citation of *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 795 P.2d 712 (1990), does not support the “knowing unlawfulness” element of RCW 64.40.020(1). In *Southwick*, the development conditions at issue required:

(1) Construction of street improvements, including street widening, paving, curb, gutter, sidewalk, and street lights; ... (3) installation of a street light at the driveway access to a road; ... (5) submission of plans, prepared by a registered professional engineer, for the street improvements and the water line extension to the Public Works Department; (8) installation of fire sprinklers in the proposed structure; (9) provision of 1,500 to 2,250 gallons per minute of water to the structure; (10) installation of fire alarm system in the proposed structure with central station monitoring; ...

58 Wn. App. at 888. The Court of Appeals plainly acknowledged that the above-listed “conditions will require the expenditure of money”. 58 Wn. App. at 890.

The *Southwick* court concluded that the conditions imposed by the City of Lacey were not taxes on development prohibited by RCW 82.02.020. *Id.* Then, turning to the issue of whether the conditions were a “fee or

charge,” also disallowed by RCW 82.02.020, the Court of Appeals explained why they could not be so construed, saying:

A fee, like a tax, is a fixed charge, automatically applied to a designated activity. A charge is an obligation or a price. Arguably, it could include the conditions imposed on various land use and development permits. However, we decline to construe the term so broadly. To do so, would be inconsistent with the broad authority granted to local government in land use matters. The basis for this authority is Const. Art. 11, § 11, which provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." So long as the subject matter is local and the legislation is reasonable, this grant of authority is as broad as the Legislature's authority.

58 Wn. App. at 891 (footnote and citation omitted, emphasis added).

Therefore, the *Southwick* decision stands for the proposition that “conditions imposed on various land use and development permits” (*id.*), would not be construed as a “charge,” as that term is used in RCW 82.02.020. This informed municipalities such as the City of Camas of exactly the opposite of what Isla Verde contends here.

Isla Verde takes too much from the *Southwick* court’s reference to “payments-in-kind” as equivalent to a tax on development prohibited by RCW 82.02.020. *See Southwick*, 58 Wn. App. at 890. The *Southwick* Court cited *San Telmo Assocs. v. City of Seattle*, *supra*, for that comment. *Id.* Therefore, the Court’s reference was to a decision holding that a condition on development which required “a developer either to construct low income

housing or ‘contribute’ [\$1.5 million] to a fund for such housing, gives the developer the option of paying a tax in kind or in money.” *Id.*, citing *San Telmo*, 108 Wn.2d at 24. In relation to the open space condition in this case, Isla Verde was not required to pay anything to the City or anyone else, whether in money or in kind. Isla Verde’s argument that *Southwick, Inc. v. City of Lacey, supra.*, supports establishment of the knowledge element of RCW 64.40.020(1), in this case is wrong.

Isla Verde’s reliance on *Cobb v. Snohomish County*, 64 Wn. App. 451, 829 P.2d 169 (1991), is similarly unreasonable. *Cobb* concerned the application of a county ordinance requiring developers whose projects would be served by roads with existing deficiencies to make monetary payments to contribute to the improvement of those roads. 64 Wn. App. at 454. Again, requiring a monetary payment distinguishes *Cobb* from this case, where no payment in money or in kind was required of Isla Verde.

Next, Isla Verde offers *View Ridge Park Assocs. v. Mountlake Terrace*, 67 Wn. App. 588, 839 P.2d 343 (1992), in support of its obligation to prove the knowledge element of RCW 64.40.020(1). In *View Ridge Park Assocs.*, a city ordinance required developers to either construct on-site recreational facilities in multi-family developments, or make “...a monetary expenditure calculated based upon a percentage of the cost of constructing [proposed] dwelling units”. 67 Wn. App. at 598. There, the required

expenditure exceeded \$24,000. *Id.*, at 594. Obviously, the construction of recreational facilities would also cost money.

The *View Ridge Park Assocs.*, court also found that “[b]ecause the recreational facility ordinance facially requires a monetary expenditure calculated based upon a percentage of the cost of constructing the dwelling units, we believe the ordinance indirectly imposes a fee or charge.” *Id.*, at 598. Not surprisingly, the Court ruled that “the ordinance is invalid unless it satisfies one of the exceptions set forth in RCW 82.02.020.” *Id.* However, the Court also concluded, without requiring any site-specific evidence, that the monetary expenditure was “reasonably necessary as a direct result of the proposed development or plat”. RCW 82.02.020. The Court did so by holding that the ordinance of the City of Mountlake Terrace provided the necessary proof of a development impact which justified finding a “direct result” between the development and the mitigation requirement. The Court explained:

As to the meaning of the [direct impact that] “has been identified” as a consequence of proposed development language, the 1990 amendments to RCW 82.02.020 only recognize mitigations that have been adopted pursuant to the City's SEPA powers, or at least only those that are codified, as opposed to those being raised for the first time at the City Council meeting at which the rezone is debated. Here, the ordinance was on the books and could easily be construed as a measure taken “to mitigate a direct impact that has been identified as a consequence of a proposed development”

67 Wn. App. at 599.

Notably too, the *Viewridge Assocs.* Court relied on *Cobb v. Snohomish Cy., supra*, and *Southwick, Inc. v. Lacey, supra*, for its analysis of the validity of the construction requirement/mitigation fee ordinance at issue there. 67 Wn. App. at 595-96.

Viewridge Assocs., could not have imparted the knowledge to the City of Camas necessary to support Isla Verde's obligation of proof here because it approved an ordinance and its application which had an actual cost-imposing construction or monetary fee-in-lieu-of-construction requirement, without requiring site-specific evidence of impact, relationship, or need.

Next, Isla Verde relies on *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994). The *Trimen* decision actually supports the position of the City of Camas here because it upheld an ordinance which conditioned subdivision plat approval upon the dedication or reservation of land for recreational open space or payment of a fee in lieu of such a dedication or reservation. 124 Wn.2d at 264. Specifically, the King County condition at issue required payment of a fee in lieu of the land dedication alternative. *Id.*, at 268-69. As for the requirement of RCW 82.02.020 that such a fee must be "reasonably necessary as a direct result" of the development in question, the Court recognized that "...King County did not conduct a site-specific study". *Id.*, at 274. The Court nevertheless found that "the record indicates that the ordinance's requirement-to either dedicate land

for open space or pay a fee in lieu of dedication-was reasonably necessary as a direct result of Trimen's development" (*id.*), because:

King County conducted a comprehensive assessment of park needs in a 1985 report titled, *Interim Assessment of King County Park Needs*. The report indicated that there was a deficit of approximately 107 park acres in the Northshore area serving the Winchester Hills I and II subdivisions. Based on adopted County standards, the report stated that over 300 acres of additional park land will be required in this area by the year 2000 to provide for the projected increase in population. Trimen's proposed subdivisions, with an expected occupancy average of 3 people per each of 112 potential residential units, created a need for an additional 2.52 acres of park land. The dedication or reservation of open space requirement of KCC 19.38, calculated at a reduced, negotiated figure of 5 percent, would have resulted in 2.096 acres of park and open space land.

Id. As a result, the Court concluded "...that the fees imposed in lieu of dedication were reasonably necessary as a direct result of Trimen's proposed development." *Id.*³

The *Trimen* decision does not say that King County's *Park Needs* report was submitted into the administrative record for the approval of Trimen's developments. Given that Trimen paid the required fees without protest and only later sought a refund by challenging the underlying ordinance, it is apparent that King County was able to introduce that report into evidence later, just as the City of Camas has done here with the

³ "'Dedication' is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted." RCW 58.17.020(3).

Vancouver View Zoning report (CP 108), and without any objection from Isla Verde. This was not an improper “end run” as Isla Verde argues. Brief of Respondents at 16.

The City of Camas’s Vancouver View Zoning report found 20 percent of the study area consisted of unstable slopes and greater-than-40% slopes that were not necessarily unstable. CP 109. Over the same area, 30.5 percent of the land contained slopes of between 15% and 45%, “and forested areas which are most likely to contain significant wildlife habitat areas.” CP 109. That study and report provided the basis for the City’s 30 percent open space ordinance, CMC 18.62.020. CP 91. “The 30% requirement mirrored the degree to which those characteristics existed, and was adopted to encourage preservation of some of such lands on each subdivision site.” CP 91. Therefore, the Vancouver View Zoning report provided evidence similar to that found sufficient in *Trimen Dev. Co. v. King County, supra*.

There are clear similarities in the evidence found acceptable in *Trimen* to uphold an ordinance that required an actual fee in lieu of providing recreational property as a condition of development approval, and the evidence supporting the City of Camas’s open space preservation condition on Isla Verde’s Dove Hill plat. Therefore, the *Trimen* decision does not support Isla Verde’s contention that the City had knowledge that the open space condition would be deemed invalid.

Isla Verde also relies on *Henderson Homes v. City of Bothell*, 124 Wn.2d 261, 877 P.2d 187 (1994), for its “knowingly unlawful” argument. In *Henderson Homes*, the condition at issue was an actual \$400 per lot park impact mitigation fee imposed according to a policy and procedure of the City of Bothell that compelled developers to enter into fee payment agreements which were devoid of underlying facts showing impacts or park needs. *Id.*, 124 Wn.2d at 244. In fact, the superior court in *Henderson* found that Bothell’s policy was not supported by a “formula nor ascertainable standards so that a determination of the impact of a project on the park system could be made.” *Id.*

Again, *Henderson Homes* addressed an actual monetary fee, and this distinguishes it from the cost-free nature of the open space condition at issue here. CP 93. *Henderson* did not impart knowledge to the City of Camas that its open space condition would be invalid.

Last, Isla Verde relies on *Castle Homes & Dev. Inc. v. City of Brier*, 76 Wn. App. 95, 882 P.2d 1172 (1994), for its argument that the City of Camas knew its open space condition was “knowingly unlawful.” But again, *Castle Homes* involved an actual \$3,000 per lot fee, not a cost-free condition. In *Castle*, a developer and the City negotiated a per-lot traffic impact mitigation fee as an alternative to a Declaration of Environmental Significance under the State Environmental Policy Act (RCW 43.21C). *Id.*,

76 Wn. App. at 99. The City then permitted the developer to challenge the impact fee before a hearing examiner. Despite evidence indicating that the developer's subdivision would have minimal impact on the streets of the City of Brier, the hearing examiner upheld the \$3,000 per lot mitigation fee, and the superior court affirmed. *Id.*, at 102-03.

On appeal in *Castle Homes*, the Court applied the "direct impact" requirement of RCW 82.02.020 to the mitigation fee, and found:

[a] review of the record clearly points out that the fees being charged to mitigate traffic woes were being based on a cumulative impact of all the new subdivisions, not the specific impact of the Castle Crest II development.

76 Wn. App. at 106. The salient point is that *Castle Homes* concerned an actual monetary fee imposed without satisfying RCW 82.02.020.

In this case, the superior court cited *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992), in support of its decision granting summary judgment. CP 389. While *Isla Verde* no longer cites *Robinson* (as it did in support of its now-abandoned argument that the City ought to be liable for appealing the superior court's original 1998 ruling (*see* CP 26)), that decision does not support the summary judgment decision of the superior court. *Robinson* is the progeny of *San Telmo Assocs. v. City of Seattle*, *supra*, 108 Wn.2d 20 (1987). Thus, it involved an actual monetary fee on development approval in violation of RCW 82.02.020.

In *Robinson*, the Supreme Court denied qualified immunity on federal claims to officials who had continued to enforce a revised version of a tenant relocation assistance ordinance (the “HPO”) that had been declared invalid in 1983. The revised ordinance itself was declared invalid in *San Telmo Assocs., supra. Robinson*, 119 Wn.2d at 41-42, & 67-68. Despite the two invalidations of the HPO, and an injunction against its enforcement, the City of Seattle continued to enforce the ordinance against other applicants for conversion of low income housing, including the *Robinson* plaintiffs. 119 Wn.2d at 44-45. It was this enforcement during a period when the HPO was enjoined and had been repeatedly declared invalid that led the Supreme Court to conclude that the City was not entitled to qualified immunity because the unlawfulness of the HPO had been “clearly established” before the *Robinson* plaintiffs were charged the fees which were legally invalid.

The facts of *Robinson* are far from those in this action, where the City appealed the superior court’s first decision, and prevailed in the two higher courts on the more substantial of the two issues appealed. See Brief of Appellant herein, at 1-2, & 5-6. *Robinson v. City of Seattle*, does not support the superior court’s summary judgment ruling.

In conclusion for this section, the knowledge that could have been gained from the cases on which Isla Verde relies is that exactions which fit the terms of RCW 82.02.020 must be based on evidence that they are

reasonably necessary as a direct result of the development in question. Those terms are: “tax, fee, or charge, either direct or indirect,” and “dedications of land or easements within the proposed development or plat”. But at the time of the City of Camas’s 1995 decision conditioning approval of the Dove Hill plat on preservation of 30 percent of its area as open space, and prior to the Supreme Court’s decision in this case, no Washington appellate court had held that a cost-free, non-dedication, non-easement condition was equivalent to a tax, fee, charge, dedication or easement. Therefore, the cases on which Isla Verde relies did not impart knowledge to the City of Camas that its open space condition in this case would be invalid. Therefore, Isla Verde failed to establish that there is no genuine issue as to the material fact of “knowing unlawfulness” under RCW 64.40.020(1). Accordingly, its motion for summary judgment was erroneously granted by the superior court.

D. The Supreme Court did not Hold that the Rule it Announced was Clearly Established When the City Adopted the Open Space Condition for Isla Verde’s Subdivision.

Isla Verde argues (Brief of Respondents at 19), that the Supreme Court “held” in its previous review of this case that the equivalency of a no-cost, no-dedication, no-easement condition on development had been previously established. This is flatly wrong.

Nowhere in *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) did the Supreme Court rule that the

equivalency of an open space condition such as that involved here had been previously established. Instead, the Court analogized from several cases to conclude that the open space condition in this case was equivalent to a dedication or easement, and that dedications and easements are properly to be considered a “tax, fee, or charge” on development, requiring “strict compliance” with RCW 82.02.020. 146 Wn.2d at 757-58. The Court reached this conclusion despite recognizing that the City would not own the open space, nor would an easement be granted to anyone. *See* 146 Wn.2d at 758, n. 13 (“[t]he open space area within this development will be owned and maintained by the homeowner's association.”). Necessarily, a homeowners association is comprised of the private owners of subdivision lots, not the City or the public. *See* RCW 64.38.010(1).⁴

Moreover, RCW 58.17.020(3) defines “dedication” as follows:

"Dedication" is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted.

Nothing about the open space condition applicable to Isla Verde's Dove Hill subdivision called for “general and public uses” of the open space. *See Isla*

⁴ “‘Homeowners' association’ or ‘association’ means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member.”

Verde, 146 Wn.2d at 757-58.

The Supreme Court's decision that ownership of the open space by the owners of the lots in the Dove Hill subdivision was equivalent to a dedication, and that was equivalent to a tax, fee, or charge, was newly made law concerning a previously undetermined issue. It was not held to be "clearly established," and in fact it was a new ruling of the Court.

E. The "Clearly Established" Rule Applicable to Federal Qualified Immunity does not Support Summary Judgment in Favor of Isla Verde.

Isla Verde analogizes to the rule of qualified immunity for claims of constitutional violations under 42 U.S.C. §1983. Under that rule, public officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The plaintiff shoulders the burden of proving that the rights claimed are "clearly established." *See Davis v. Scherer*, 468 U.S. 183, 197, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). The Supreme Court has made it clear that qualified immunity provides far-reaching protection to government officers. Indeed, "if officers of reasonable competence could disagree on th[e] issue [whether a chosen course of action is constitutional], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *see also Knox v.*

Southwest Airlines, 124 F.3d 1103, 1107 (9th Cir. 1997) ("This test allows ample room for reasonable error on the part of the [government official].").

Based upon an accurate analysis of the cases on which Isla Verde solely relies, as provided above, it has failed to show under its analogy to the qualified immunity rule that the law of the State was clearly established as of July 1995, holding that a no-cost, no-dedication, no-easement condition on subdivision approval was equivalent to a "tax, fee, or charge, direct or indirect". RCW 82.02.020. Accordingly, Isla Verde's motion for summary judgment should have been denied.

F. Isla Verde Failed to Exhaust Administrative Remedies.

The City primarily stands on its discussion of Isla Verde's failure to exhaust administrative remedies as set forth in the Brief of Appellant at 14-21. Isla Verde fashions an opposing argument only by arguing that the City's position is one of contending that Isla Verde did not follow a procedure for an additional administrative hearing about the open space condition. Brief of Respondents at 23. Instead, the City's clear contention is that Isla Verde failed to raise the issue of evidentiary sufficiency in any form at the administrative level. That is a failure to exhaust under *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997) ("prior to judicial review of an administrative action, the appropriate issues must first be raised before the agency."); *see also Griffin v. Thurston County*,

137 Wn. App. 609, 154 P.3d 296 (2007), and cases cited therein.

G. The City did not Waive its Failure to Exhaust Defense.

Isla Verde revives an argument it failed to make to the superior court, but raised for the first time in its Answer to the City's Motion for Discretionary Review. The argument contends that the City waived its failure to exhaust defense by entering into an agreement with counsel for Isla Verde to dispense with a hearing before the City Council after the Council had adopted the open space condition and thereby changed the earlier recommendation of the City Planning Commission.

That argument was addressed by the City in its Reply to Isla Verde's Answer to the Motion for Discretionary review (at 8-9). That Reply also provided the actual transcript pages from the City Council's meeting, as an appendix. The same transcript pages are provided as Appendix A hereto. That transcript shows that the agreement involved Isla Verde's waiver of an additional hearing opportunity before the City Council. The City's corresponding agreement was narrowly related to that waiver, and constituted an agreement not to raise "the issue that they have failed to exhaust the administrative remedies for not having that hearing..." (Appendix A.)

The City's arguments about Isla Verde's failure to raise the lack of evidence issue at the administrative level have never contended that they failed to pursue some alternative or additional administrative hearing. It has

always been that Isla Verde failed to raise the particular issue on which they now rely to claim that the City's open space condition was knowingly unlawful. Isla Verde's arguments at the administrative level about "arbitrary fees or duplicative fees" (CP 101, & CP 308-09), did not give notice of a claim that there was a lack of evidence supporting the open space set-aside condition under RCW 82.02.020.

Isla Verde's argument that the City failed to raise its exhaustion defense to the RCW 64.40 claim is also wrong. Isla Verde's Petition for Review (CP 3), did not raise a RCW 64.40 claim as to the open space condition, thus there was no reason to assert a failure to exhaust defense to such a non-existent claim. This is plainly shown from how Isla Verde did state its claims in the Petition for Review, at CP 5:

8. The secondary access condition is arbitrary and capricious and unlawful under Chapter 64.40 RCW because it is not imposed uniformly throughout the City of Camas nor in similar circumstances and because it is violative of state and federal constitutional guarantees.

9. Respondent's requirement that 30% of Petitioners' land be set aside for open space violates Petitioners due process rights and takes Petitioners' property without just compensation.

10. Respondent's requirement that 30% of Petitioner's land be set aside for open space in addition to a requirement that a park and open space impact fees be paid, without credit or offset, is duplicative, arbitrary and capricious and violative of Chapter 82.02 RCW and state and federal constitutional guarantees.

Obviously, while Isla Verde did state a claim under RCW 64.40 as to the secondary access condition, which the Court of Appeals and Supreme

Court later held was a valid condition, a RCW 64.40 claim was completely omitted in relation to Isla Verde's allegation of error in adopting the open space condition. Thus, the facial allegations of the Petition did not support a failure to exhaust defense. It was only after the case was remanded in 2002, and Isla Verde moved for summary judgment in 2006 under RCW 64.40 that the defense was pertinent, and at that time, the City immediately raised it. *See* CP 67, CP 69-73, & CP 74-76.⁵

H. Isla Verde Failed to Establish Damages.

Primarily, the City stands on its arguments in the Brief of Appellant at 29-33. But Isla Verde's argument that its attorney's argumentative assertion that it had "opportunity costs" as damages bears mention. Aside from the fact that argumentative assertions made in a brief are not evidence that can suffice in summary judgment proceedings (*Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988)), an "opportunity cost" is:

the added cost of using resources (as for production or speculative investment) that is the difference between the actual value resulting from such use and that of an alternative (as another use of the same resources or an investment of equal risk but greater return).

Merriam-Webster, On-line Dictionary, 2008.

⁵ Even more importantly, as the City pointed out to the superior court to no avail, and in the Brief of Appellant at 21, Isla Verde simply did not plead a RCW 64.40 claim in relation to the open space condition, and this case should be dismissed in its entirety. *See* CP 67, & CP 69-73.

In land development, profits based on the difference between costs and sales sooner versus later are the alternatives that arise from something that consumes time, such as the judicial appeal undertaken by Isla Verde with its Petition for Review. The value of a later sale compared to an earlier sale is speculative. RCW 64.40.010(4) disallows damages for “speculative losses or profits, incurred between the time a cause of action accrues and the time a holder of an interest in real property is granted relief as provided in RCW 64.40.020.” Therefore, Isla Verde’s attorney’s argumentative assertion is doubly deficient. Isla Verde has not established that it has any compensable damages. For this additional reason, the motion for summary judgment should not have been granted.

I. Conclusion.

For the reasons given above, and in the Brief of Appellant, the superior court’s decisions granting summary judgment to Isla Verde and denying the City’s motion for reconsideration should be reversed and this case remanded with instructions to consider the City’s cross-motion for summary judgment on the existing record.

Respectfully submitted this 1st day of February, 2008.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.



W. Dale Kamerrer, WSBA № 8218
Attorney for the City of Camas, Washington

APPENDIX A

MAYOR:

Yes. If you want to change the facts and findings, you can, prior to adoption.

KNAPP:

One other thing. That the our ordinance and state law require that if you are not going to follow the recommendation of the Planning Commission, i.e., if they vote to approve it and you vote to deny it or vice-a-versa, that you're required to hold a public hearing before you adopt your findings and decision. Otherwise, we always consider subdivision proposals at a public meeting and there was no hearing per se that's conducted. I brought that to the attention of the applicant's attorney and said, you know, we haven't complied with this particular requirement, do you want to go forward with us having another public hearing, or do you want to just get on with it. And they said they would prefer to get on with it. They waived their right to that public hearing in writing, and I've got it in the file. In exchange for that they've asked that we, and this will go up on appeal, and I think you all know that, that we are precluded from raising the issue that they have failed to exhaust the administrative remedies for not having that hearing and my recommendation would be that if you're inclined to accept their waiver, that you also do so by giving up that

particular defense, which wouldn't probably have much merit anyway.

WOMAN: Do we need to pass a motion? So all we're being asked tonight --

KNAPP: Well, I'm going to ask, depending on what you do with the findings and what not, I'll ask you to make a motion on that issue also.

MAYOR: Okay, discussion on the findings? Anyone?

GUARD: Mr. Mayor, I, unfortunately again, was not available on the 5th when this one was brought up. I was, actually ran into a member of the audience after your meeting was over and learned of your deliberations and decisions at that point and quite frankly couldn't believe that this had been outright denied. I, while I don't consider myself necessarily a friend of developers and developments going in, and often times find myself trying to be more restrictive in some of the areas as certainly as it relates to health and safety, I don't believe that voting for outright denial of the development itself was warranted. I would have been a whole lot more comfortable had the Council just adopted the findings and conditions as put forth by the Planning Commission and required that second access go through and those other areas that related to public safety and

NO. 36066-7-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

ISLA VERDE INTERNATIONAL HOLDINGS, LTD.,
a foreign corporation and
CONNAUGHT INTERNATIONAL HOLDINGS, LTD.,
a foreign corporation,

Respondents,

ORIGINAL

v.

CITY OF CAMAS, WASHINGTON,
a municipal corporation of the State of Washington,

Appellant.

On Appeal from Clark County Superior Court
Cause No. 95 2 03438 5

DECLARATION OF FILING & SERVICE

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February 1, 2008

PURSUANT TO RCW 9A.72.085, Toni Allen declares as follows:

On Friday, February 1, 2008, I caused to be filed with the Clerk of Court, Court of Appeals, Div. II, 950 Broadway, Suite 300, M.S TB-06, Tacoma, WA 98402-4454, via ABC Legal Messenger, to arrive no later than Monday, February 4, 2008, true and correct originals and/or copies of the Reply Brief of Appellant and this Declaration of Filing & Service. On this same date, I caused to be served on respondents via United Parcel Service, Overnight Mail, from Tumwater, Washington to arrive no later than Monday, February 4, 2008: LeAnne Bremer and Joseph Vance, Miller Nash LLP, 500 E. Broadway, Suite 400, Vancouver, WA 98666-0694.

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

DATED this 1st day of February, 2008 at Tumwater, Washington.


Toni Allen