68739-0

68739-0

NO. 68739-5-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

KHUSHDEV MANGAT and HARBHAJEN MANGAT,
Appellants,

vs.

SNOHOMISH COUNTY, LUIGI GALLO,
JOHANNES DANKERS and MARTHA DANKERS
Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

This appeal concerns exhaustion of administrative remedies, collateral estoppel, and timing for bringing a dispute concerning project review and final land use decision. This lawsuit was brought by former applicants, who were substituted by the Snohomish County's Planning and Development Services ("PDS").[1] After the substitution, the Snohomish County Hearing Examiner reviewed and approved the preliminary plat for the project. The Appellants/Plaintiffs/Applicants Khushdev and Harbhajen Mangats ("Mangats") prayed for damages claims under Ch. 64.40 RCW; sought appellate review of an administrative land use decision, petitioning under LUPA; and, applied for Writs of Mandamus and Prohibition. These causes of action were dismissed below in two separate proceedings.

[1] Another lawsuit was brought which related to damages for taking, and declaratory and injunctive relief to stop the Hearing Examiner from reviewing the Project. This matter is on appeal from grant of summary judgment and concerns the nature of the rights to a land use application, pre-approval.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Trial Court erred in finding Defendants are entitled to dismissal of Mangats' LUPA Petition together with that Petition for Writs of Mandamus and Prohibition on the grounds set forth in Snohomish County's Motion to Dismiss.

2. The Trial Court erred in dismissing Mangats' LUPA Petition together with that Petition for Writs of Mandamus and Prohibition

3. The Trial Court erred in denying Mangats' Motion for Partial Summary Judgment.

4. The Trial Court erred in finding that Mangats' claim was barred by the statute of limitations set forth in RCW 64.40.030.

5. The Trial Court erred in finding that the statute of limitations set forth in RCW 64.40.030 commenced to run on or about June 15, 2008.

6. The Trial Court erred in finding that the County's delay cannot be said to have been the proximate cause of the damages claimed by the Mangats.

7. The Trial Court erred in finding that its conclusions of law are dispositive of Plaintiffs claim for damages under RCW 64.40.020.

8. The Trial Court erred in finding it appropriate to dismiss all remaining matters.

9. The Trial Court erred in dismissing the Mangats' matter.

B. Issues Pertaining to Assignments of Error

1. Whether Plaintiffs LUPA Petition, together with that Petition for Writs of Mandamus and Prohibition, are barred by the doctrine of collateral estoppel?

2. Whether Plaintiffs lack standing to bring LUPA Petition where the Mangats were the original applicant for Trombley Heights, aggrieved by the decision, and exhausted all of their administrative remedies?

3. Whether relief to amend the Petition and Complaint should have been granted?

4. Whether the Respondents were entitled to partial dismissal of the Petition as a matter of law?

4. Under RCW 64.40.030, are administrative remedies exhausted for a failure to act within time limits established by law where at that time the agency may yet relieve the applicant's harm through administrative process and no written notice of exceeding its 120 day countable deadline?

5. Whether the Mangats Ch. 64.40 RCW claims exist solely as a claim for delay where the complaint also asserts the County's actions and inactions in processing Applications for Trombley Heights were arbitrary, capricious, unlawful, and/or exceeded lawful authority?

6. Under RCW 64.40.010-.020, does an agency's action to approve a preliminary plat without consent of the original applicant or past the expiration date of the application constitute an arbitrary, capricious, unlawful, or act in excess lawful authority?

7. Whether there was a genuine issue of material fact of proximate cause of the Mangats damages for delay?

8. Whether *sua sponte* dismissal of Mangats' Ch. 64.40 RCW claims was appropriate?

III. STATEMENT OF THE CASE

A. Statement of Facts

i. Contract To Purchase And Land Use Application For Trombley Heights

On March 13, 2007, the Mangats, entered into a real estate contract to purchase certain real property from Respondents Luigi Gallo, and Johannes and Martha Dankers ("Gallo and Dankers"). CP 182, 184. The terms and conditions of the land purchase contract required the Mangats to prepare and submit a completed subdivision application to Snohomish County, and close the sale by May 15, 2008. CP 188-89. Contract terms also required Gallo and Dankers cooperate in signing any applications or other documents required by the County in obtaining the preliminary approval of the application. CP 184-85, 188-89.

On or about, September 24, 2007, the Mangats, through their representative, Gene Miller, submitted to Snohomish County Planning Services ("PDS"), a Master Permit Application ("Application"), and supplemental materials, for a subdivision project known as "Trombley Heights." CP 88-91 (Application), CP 184-85, 194. PDS did not send a written determination of completeness. CP 194. The Mangats' application was deemed complete and vested 28 days later, on October 22, 2007. CP 111 (¶5), 192, 194; Appendix I (SCC 30.70.040(2)). The Mangats incurred substantial costs associated with submission of their application, including application fees, extensions and consulting costs. CP 184-85.

ii. Snohomish County's Time To Process Project Permit Applications

Snohomish County Code ("SCC") states: "Notice of final decision on a project permit application shall issue within 120 days from when the permit application is determined to be complete, unless otherwise provided by this section or state law." CP 111-112, 192-93; Appendix I (SCC 30.70.110(1)). The 120 day clock does not include "[a]ny period during which the county asks the applicant to correct plans, perform required studies, or provide additional required information." CP 111, 192-93; Appendix I (SCC 30.70.110(2)(a)). Further:

> The county shall notify the applicant in writing if a notice of final decision on the project has not been made within the time limits specified in this section. The notice shall

> include a statement of reasons why the time limits have not been met and an estimated date of issuance of a notice of final decision.

CP 192-93; Appendix I (SCC 30.70.110(5)). PDS acknowledged that it did not set the matter for hearing Plaintiffs' subdivision application within the 120 day countable timeline. *See* CP 23.

iii. County's Sends Three Review Letters, And Consequential "Uncountable" Time For Appointments And County Staff

The countable clock stops and starts, in part, on issuance of review letters. *See* Appendix I (SCC 30.70.110); *c.f.*, CP 192-94 (¶¶ 3-5). On December 21, 2007, 65 days after the determined date of application completeness, PDS sent a review letter to the Mangats requesting additional information. CP 120-125, 194 (¶ 7). PDS required the Mangats to wait 30-days before submitting additional information while it performed a drainage waiver request. CP 194 (¶ 8). PDS then delayed another 21-days for an appointment with PDS staff before the Mangats were allowed to formally respond. *Id.* On April 4, 2008, the Mangats formally submitted additional information to PDS. *Id.*

On July 29, 2008, PDS sent a second review letter to the Mangats, seeking additional information. CP 135-139 ("The project has been reassigned to me. PDS is very late in providing a review for your April 3, 2008, resubmittal. On behalf of PDS, I apologize!!!!"), 194 (¶ 9). The

Mangats were required to wait 21-days for an appointment with PDS before being permitted to formally submit respond with additional information, which they did on March 17, 2009. CP 194 (¶ 10). PDS sent a third review letter to the Mangats on May 5, 2009, which contained previously addressed or submitted information, or which PDS was not entitled to require. CP 145-147, 194 (¶ 11). Between approximately May 8, 2009, and June 26, 2009, the Mangats requested PDS make a determination as to what issues had yet to be resolved. CP 194 (¶ 12).

iv. Summary of Countable Days

Based on the chronology most favorable to Respondent Snohomish County ("the County"), processing the Mangats' application took 195 "countable days" between completeness and the third review letter. CP 115 (Ed Caine "199 days") 194-195; Appendix I (SCC 30.70.110(1)). Furthermore, about, June 19, 2008, the County exceeded 120-days and PDS did not issue notice of a final determination on the Mangats' application. *Id.* Other than the vague comment of being "very late" the County did not send notice of exceeding 120 days to the Mangats. *See generally*, CP 110-154. The County further concedes that a contract purchaser at that time could fairly anticipate his application would be processed by the County within a year and a half. CP 240.

Table 1

Event	Date Most Favorable to County	Days running on original 120-day Clock	Total days on Clock
Application Submitted	9-24-07	---	---
Application deemed complete (vested) & 120-day clock starts	10-22-07	Day 1	
First review letter	12-19-07	57 days run, then, Clock stops.	Day 57
Supplemental Submittal	4-4-08	Clock does not run	
14 days later (clock starts again)	4-18-08	Clock starts again	Day 58
Deadline to Issue Final Notice of Decision or Notice of Delay	6-19-08	62 days – clock continues	Day 120
Second review letter	7-29-08	102 days run, then Clock stops	Day 160
Supplemental Submittal	3-17-09	Clock does not run	
14 days later (clock starts)	3-31-09	Clock starts again	Day 161
Third review letter	5-5-09	35 days run, then Clock stops	Day 195

CP 118.

v. Extensions and Default of Agreement

While the application was being processed, the Mangats incurred additional fees associated with extending the Agreement closing date with Gallo and Dankers. CP 185.

Table 2: Extensions with Dankers

Date	Event	Closing Dates
3-13-07	Contract to purchase land	5-15-08
2-14-08	Addendum/Amendment To Purchase and Sales Agreement	5-15-08
	First election to extend	7-30-08
	Second election to extend	10-30-08
10-13-08	Addendum/Amendment To Purchase and Sales Agreement	10-30-08
	Extension	2-28-09
	Option to Extend	7-30-09
6-16-09	Addendum/Amendment To Purchase and Sales Agreement	12-15-09
12-16-09	Default	

See CP 250-52.

Additionally, the Mangats were unable to reach agreement on any further extensions and defaulted on the contract to purchase on or about Dec. 15, 2009. CP 185.

vi. Post Default Dispute Related To Rights To The Application

On or about, February of 2010, Ed Caine, PDS's project manager for Trombley Heights, authorized the underlying landowners, Gallo and

Dankers, to be the "applicants" and allowed them to resubmit the application. CP 81-82 (under new codes owners would qualify for 22-lot subdivision rather than 30-lot subdivision). This had the effect of Gallo and Dankers enjoying the application completion date. *Compare* CP 145 *with* CP 155 (Applicant), CP 218-219. Mangats brought an action, which alleged declaratory, injunctive relief and "taking" damages for PDS's substitution of applicants. CP 288-294 (copy of complaint in other matter); *c.f.*, CP 296-300 (Judge R. Leach's Order denying Declaratory Relief), 302-306 (Order of Judge Kurtz).[2] At that time, Trombley Heights was scheduled for decision by the Hearing Examiner. *Id.*

vii. Conflict Extends To County's Preliminary Plat Approval

After motions to restrain the Hearing Examiner were vacated (CP, 108-109, 296-300), Snohomish County heard and then subsequently approved the subdivision application. CP 505-525. The Mangats appealed[3] to the Snohomish County Council, and after exhausting administrative relief (CP 531-544) filed this Land Use Appeal, Writs of Mandamus and Prohibition, and Ch. 64.40 RCW claims for the Snohomish County's approval of the preliminary plat in favor of Gallo and Dankers along with

[2] Note: at the time of preparing this brief, the Mangats moved to consolidate appeals.

[3] *See* Appendix 1 (SCC 30.72.070).

a claim for damages under Ch. 64.40 RCW for actions during the application processing. CP 486-504.

viii. Content of Petition and Complaint

Mangats' Land Use Petition; Claim For Damages; Petition for Writ of Mandamus (Petition and Complaint) in Snohomish County Superior Court, brought the following causes of action:

> 0.1. Pursuant to Chapter 36.70C RCW, the Land Use Petition Act ("LUPA") of the State of Washington [***][against County, Gallo and Dankers].
>
> 0.2. Pursuant to Chapter 64.40 RCW, Plaintiffs bring an action for damages against SNOHOHOMISH COUNTY.
>
> 0.3. Reserved
>
> 0.4. Pursuant to RCW 7.16.060, an action in application of a writ of mandamus seeking extraordinary relief to compel the SNOHOMISH COUNTY to action
>
> 0.5. Alternatively, pursuant to RCW 7.16.160, an action in application of a writ of prohibition seeking extraordinary relief to arrest SNOHOMISH COUNTY from acting.

CP 486-487.

B. Statement of Proceedings Below

i. General Procedural History

On May 17, 2011, the Snohomish County Hearing Examiner approved the Trombley Heights application. CP 520-524. The Mangats

timely filed an appeal of the Hearing Examiner's decision to the Snohomish County Council, on May 31, 2011, which Gallo and Dankers moved to have summarily dismissed on June 3, 2011. CP 506-07. The motion to dismiss was granted by the Snohomish County Council on June 15, 2011. *Id.* The Mangats filed their Petition and Complaint on July 5, 2011. CP 486. On September 13, 2011, the County moved for partial dismissal of all claims except those related to Ch. 64.40, and Gallo and Dankers joined on October 7, 2011. CP 326-334, 462-476; *see also*, CP 335-349 (Plaintiffs' Response). On October 19, 2011, the Court granted the motion to dismiss and dismissed all claims except for those arising under RCW 64.40. CP 5-7. The Mangats then moved for partial summary judgment on their RCW 64.40 delay claim reserving the question of damages for said delay. CP 159-180. Mangats motion made no mention of other RCW 64.40 complaints. *Id.* At April 10, 2012, hearing on the motion, Judge Bowden ordered, *sua sponte*, to dismiss all remaining claims. CP 8-10. On May 9, 2012, the Mangats appealed. CP 3-10.

ii. Procedural History by Cause of Action

LUPA (Ch. 36.70C RCW). Under paragraph 3.3, the Mangats stated they have standing, in part, to seek judicial review pursuant to RCW 36.70C.060 (2) and Ch. 4.12 RCW. CP 489. The Mangats' Petition and Complaint then asserted 7 errors. CP 492-500. On October 19, 2011, the

Court granted the County's CR 12(b)(6) Motion and dismissed these claims. *See* CP at 6.

Application for Extraordinary Writs. Under paragraphs 8.1 to 9.4, the Mangats applied for extraordinary writs for withholding condemnation proceedings or taking property rights without exercising lawful authority. CP 501-502. On October 19, 2011, the Court granted the County's 12(b)(6) Motion and dismissed these claims. *See* CP at 6

Damages Against Snohomish County. (Ch. 64.40 RCW). Paragraph 6.4 of the Complaint state that the Mangats claim "that the County's violation of applicable time limits caused the Mangats such damage as will be proved at trial." CP 500. Paragraph 6.5 states "The County's actions and inactions in processing Applications for Trombley Heights were arbitrary, capricious, unlawful, and/or exceeded lawful authority." *Id.* Further, paragraph 6.6 states that the "Mangats have exhausted all administrative remedies." CP 501. When considering the other causes of action the County expressly did not move to dismiss RCW 64.40 on September 13, 2011, favoring instead bifurcation of the actions. *See* CP 469 at Note 1; *see also*, CP 6.

The Mangats then moved for partial summary judgment on failure of the County to timely process the application within 120 days, which proximately caused them harm to be proven at trial. CP 159-180. After

the April 10, 2012, hearing on these claims, Judge Bowden's ordered *sua sponte* all remaining claims be dismissed. CP 8. The order was filed on April 12, 2012. CP 8-9.

IV. ARGUMENT

A. Standard of Review

The standard of review is *de novo*. The authority of the trial judge, or application of court rule or law to the facts, is a question of law to be reviewed *de novo*. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001); *In re Marriage of Barrett-Smith*, 110 Wn. App. 87, 90, 38 P.3d 1030 (2002).

The standard of review for summary judgment is also *de novo*. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006); *Hisle v. Todd Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). On review of summary judgment, appellate courts perform the same inquiry as the trial court. *Id.* Therein, summary judgment is appropriate only if:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). "The reviewing court considers the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Right-Price Recreation, L.L.C v. Connells Prairie Community*

Council, 146 Wn.2d 370, 381, 46 P.3d 789 (2002), *cert. denied*, 124 S.Ct. 1147, 157 L.Ed.2d 1043 (2004).

Additionally, review of a motion made pursuant to CR 12(b)(6) is a question of law, and is also reviewed *de novo*. *Fondren v. Klickitat County*, 79 Wn. App. 850, 905 P.2d 928 (1995). Therein, appellate courts perform the same inquiry as the trial court and the factual contentions of complaint dismissed under subdivision (b)(6) must be accepted as true for purposes of review. *See Stanard v. Bolin*, 88 Wn.2d 614, 565 P.2d 94 (1977).

Mangats argue that judicial review of all matters on appeal be *de novo* (e.g., spontaneous dismissal of Mangat's complaint & order granting motion to dismiss). Further, when considering assignment of error 3 (*supra.*) which seeks summary judgment in favor of Mangats, the standard is to enter into the same inquiry as the trial court and view the facts in the light most favorable to the County. When considering assignments of error 1-2, which relate to a motion to dismiss, the standard is to accept the factual contentions of complaint as true for purposes of review.

B. "Failure to Comply With Time Limits" Claim Was Timely and Did Not Run Because No Notice Of Delay Issued and Administrative Process Pursued Could Have Relieved Mangats.

The basic principle is that administrative remedies must be exhausted before review can be sought." *Harrington v. Spokane County*,

128 Wn. App. 202, 209-210, 114 P.2d 1233 (2005) ("It discourages litigants from ignoring administrative procedures by resort to the courts"); *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992); *see also*, *Smoke v. City of Seattle*, 132 Wn.2d 214, 222 (1997) ("No exhaustion requirement arises, however, without the issuance of a final, appealable order")(*citing*, *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 634, 733 P.2d 182 (1987)). Doubts as to the finality, e.g., a specific communication, are resolved in favor of the citizen. *See Valley View*, 107 Wn.2d at 634.

However, a panel of this Court of Appeals recently decided the *Birnbaum* matter on statute of limitations for failure to comply with time limits, therein states:

> The statutory language is unambiguous. An act occurs when there is either a final decision or a failure to act within established time limits. RCW 64.40.010(6). Every claim under chapter 64.40 RCW is subject to the 30 day statute of limitations in RCW 64.40.030. *Callfas v. Dep't of Constr. & Land Use*, 129 Wn. App. 579, 593, 120 P.3d 110 (2005). The 30 day limitations period begins when all available administrative remedies are exhausted. RCW 64.40.030. *But, no exhaustion is required if there is no adequate administrative remedy*. *Smoke v. City of Seattle*, 132 Wn.2d 214, 224-25, 937 P.2d 186 (1997).

Birnbaum v. Pierce County, 167 Wn. App. 728, 733-734, 274 P.3d 1070 (2012) (emphasis supplied). The plain language of the statute is: "[a]ny action to assert claims under the provisions of this chapter shall be

commenced only within thirty days after all administrative remedies have been exhausted." RCW 64.40.030 (emphasis supplied to denote the legislature did not insert the term "adequate" into the definition). Thus the "adequacy" requirement interpreted in *Birnbaum* is derived not from the plain language of the statute itself, as might be easily misconstrued, but from the *Smoke* decision itself. *See generally*, *Smoke*, 132 Wn.2d 214.

Additionally, doctrine of exhaustion favors written decisions and clear administrative process: "the doctrine of exhaustion applies in cases where a claim is originally cognizable by an agency which has *clearly defined mechanisms for resolving complaints by aggrieved parties and the administrative remedies can provide the relief sought*." *Id.* at 223-24 (emphasis supplied)(*citing*, *State v. Tacoma-Pierce County Multiple Listing Serv.*, 95 Wn.2d 280, 284, 622 P.2d 1190 (1980); *Retail Store Employees Union v. Washington Surveying & Rating Bureau*, 87 Wn.2d 887, 906-07, 909, 558 P.2d 215 (1976); *Kreager v. Washington State Univ.*, 76 Wn. App. 661, 664, 886 P.2d 1136 (1994); *Beard v. King County*, 76 Wn. App. 863, 870, 889 P.2d 501 (1995)).

> A letter from an agency will constitute a final order if the letter clearly "fixes a legal relationship as a consummation of the administrative process." Such a letter must be so written as to be clearly understandable as a final determination of rights [***] *[D]oubts as to the finality of such communications must be resolved in favor of the citizen.*

Smoke, 132 Wn.2d at 222 (emphasis supplied)(*citing*, *Valley View Indus. Park,* 107 Wn.2d at 634). Exhaustion is excused either when the process is not as obvious, or the remedy sought is not available from the administrative process. *See Smoke*, 132 Wn.2d at 225-26 (cases excusing exhaustion requirement); *Orion Corp. v. State*, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985)(the futility exception is idea that courts will not require vain and useless acts). This gives the agency an opportunity to rectify its error. *See Smoke,* 132 Wn.2d at 226 (*citing Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 30, 785 P.2d 447 (1990)).

The delay damage claims in this matter are distinguishable from the outcome in *Birnbaum* because: (1) the County did not issue a notice of delay pursuant to its own regulations; and, (2) the Mangat's followed the Type II administrative process of challenging the Trombley Heights Project, which could have rectified their harms. *Birnbaum*, 167 Wn. App. at 733-34. Because they acted thirty days after appealing the Hearing Examiner's decision to grant the permit to the County Counsel the Mangats brought a timely claim from exhaustion of their appeal before the Snohomish County Council. Finally, if not distinguishable from the outcome of *Birnbaum* (i.e., the rule is: "the 30 day limitations period

begins [***] when the 120 day time limit was exceeded") then this Court's decision should be overruled. *See id.* at 734.

Additionally, while Mangats' motion for partial summary judgment was based on a pure violation of the 120-day requirement (*see* CP 169, 179) their claims for delay, as stated in the complaint, are also based on "arbitrary delay". *See Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998) (refusal to process an application is acting without lawful authority in unreasoning and willful disregard of the permit applicant's lawful entitlements); *Callfas,* 129 Wn. App. at 596.

1. County Did Not Issue Notice Of Delay Thus Administrative Process Existed and Had Not Been Exhausted.

The administrative process must provide a "clearly defined" process for the resolution of complaints. *Smoke*, 132 Wn.2d at 227 (*citing Tacoma-Pierce*, 95 Wn.2d at 284). Further, where required, written findings fix or consummate the "legal relationship" providing adequate exhaustion of remedies. *See id.*

The County argued below that no process exists for resolution of a delay claim. *See* CP 35 ("There is no administrative remedy or right to appeal to challenge a failure to act or process an application timely"); *see also*, CP 114 (Ed Caine's Declaration) ("The 120 day bench mark was

reached on June 15, 2008, at which time *the applicant could have* requested that the County proceed with setting the application on for hearing for a final decision by the Hearing Examiner; however, the application would have been denied at that time had they done so because the subdivision plan was still not in compliance with County Code for purposes of approval."[emphasis supplied]).

However, the County's position below misstates the SCC with respect to a Type II application process and demonstrates PDS is not following its own code. There is an adequate process for noticing delay which was not followed, and PDS, not the applicant, is responsible for sending the application for review to the hearing examiner.

The process for noticing delay is stated in SCC 30.70.110(5), therein:

> The county *shall* notify the applicant in writing if a notice of final decision on the project has not been made within the time limits specified in this section. The notice shall include a statement of reasons why the time limits have not been met and an estimated date of issuance of a notice of final decision.

Appendix I (emphasis supplied); *see also, Valley View*, 107 Wn.2d at 634 ("doubts as to the finality [***] must be resolved in favor of the citizen"). Here the County had a duty to issue a notice of delay and reasons for it existed. *Id.* But no written notice was given which would satisfy the test of

Valley View[4], therefore the County denied the Mangats notice of 120-days passing, and/or provided no reasons for its delay. *Id.* It is PDS, not the Mangats, who should bear the risk of noticing that delay. *Id.*

Secondly, it is a fabrication that "the applicant could have requested that the County proceed with setting the application." CP 114. PDS, not the applicant, has the duty to kick start the Type 2 decision process. "Type 2 decisions are made by the hearing examiner *based on a report from the department and information received at an open record hearing*." Appendix I (SCC 30.72.025)(emphasis supplied). Specifically, under SCC 30.72.040:

> Following expiration of required comment periods on the notice of application, and to complete project review, *the department shall* coordinate and assemble the reviews of other county departments and governmental agencies having an interest in the application. The department *shall* prepare a report describing how the application meets or fails to meet the applicable decision criteria. The report *shall* include recommended conditions, if appropriate, and a recommendation to the hearing examiner on the action to be taken on the application.
>
> (2) The report *shall* be filed with the hearing examiner and made available for public review and copying at least seven days before the open record hearing.

[4] One could argue that the letter contained in CP 135-139 ("PDS is very late"), but such was not provided on the 120th countable date, nor did it indicate how many countable days had transpired, the reasons why the county was late in reviewing the Mangats' application, or the anticipated review completion date, or that such could not be anticipated.

> (3) *the department shall* transfer the file to the hearing examiner's office concurrently with transmittal of the report.

Appendix I (emphasis supplied). SCC 30.72.040 constitutes conditions precedent to the hearing examiner's review. *See* Appendix I. According to the defined process, it is PDS, not the Mangats, which prepares and files the report by the 120-day mark (or issues written notice of delay and reasons for such delay) and transfers the file. *Id.*

Finally, it is speculation that the permit would be outright denied if submitted at the 120 days. *See* CP 114. The hearing examiner, not PDS determines a Type 2 application. Specifically:

> (1) A decision on the Type 2 application shall be issued within 15 calendar days of the conclusion of a hearing, and not later than 120 days after determination of completeness pursuant to SCC 30.70.110, unless the appellant agrees in writing to extend the time period or the time period has been extended under some other authority.
>
> [***]
>
> (3) The hearing examiner *may grant, grant in part, return to the applicable department and application for modification, deny without prejudice, deny, or grant with conditions or modifications as the hearing examiner finds appropriate based on the applicable decision criteria.*

Appendix I (SCC 30.72.060)(emphasis supplied). The hearing examiner is free to consider additional evidence at hearing, disagree with the department's report that a permit be denied, or impose appropriate conditions or modifications. E.g., disagreements over traffic studies and its

compliance with the code may be resolved by the delineated process, public comment, and final decision by the decision maker. *See* CP 113.

In summary, it is PDS's duty to notify the applicant that it will be late, and provide the reasons for being late, and make the decision to timely forward the application to the hearing examiner. Without this notice of delay, the applicant cannot determine whether the County's reasons for taking so long are valid or even when the 120-days have been exceeded so as to decide to bring damages and/or writ of mandamus to compel action. Without PDS's prepared report, recommendation, and the file, the hearing examiner cannot make a Type II decision. For these reasons the decision to dismiss the Mangat's Ch. 64.40 RCW claims should be reversed and remanded.

2. Mangats Pursued an Administrative Process Which Could Have Rectified Their Damages.

For purposes of requiring exhaustion, a process which will not give the litigant "complete relief," may still be adequate for purposes of requiring exhaustion. *See Dioxin/Organochlorine Ctr. v. Department of Ecology*, 119 Wn.2d 761, 777, 837 P.2d 1007 (1992); *Valley View*, 107 Wn.2d at 634 ("doubts as to the finality [***] must be resolved in favor of the citizen").

Snohomish County Code and Ordinances provide the method for calculating the number of elapsed days, and enumerates a series of periods to be excluded from the calculation. *See* Appendix I (SCC 30.70.110 (2)). It specifies the project permit applications to which the time periods are not applicable. *Id.* (SCC 30.70.110(3)). In the event the County does not make a final decision within the time limits, the code requires the County to provide the applicant with written notice, including the reasons the time limits have not been met, and an estimated date the final decision will be issued. *Id.* (SCC 30.70.110 (5)).

> Type 2 decisions are made by the hearing examiner based on a report from the department and information received at an open record hearing. The hearing examiner's decision on a Type 2 application is a final decision subject to appeal to the county council [***].

Appendix I (SCC 30.72.025) (emphasis supplied); *see also*, Appendix I (SCC 30.72.0.30-.040) (requires notice, public hearing, report of department and transfer of file); (SCC 30.72.070) (appeal to the County Council by any aggrieved party of record)).

> A letter from an agency will constitute a final order if the letter clearly "fixes a legal relationship as a consummation of the administrative process." Such a letter must be so written as to be clearly understandable as a final determination of rights . . . . [D]oubts as to the finality of such communications must be resolved in favor of the citizen.

Smoke, 132 Wn.2d at 222.

Here, the Mangats' application was transferred to Gallo and Dankers by PDS. Under one theory of the case, this constituted a taking without process or just compensation by the County; however, under another theory of the case, this was caused by the County's failure to timely process the application, and resulted in extensions and default on the contract to purchase with Gallo and Dankers, thus depriving the Mangats of the benefit of the project's approval or denial

The Mangats pursued every administrative remedy made available to them when the County changed the applicant status, by communicating with PDS, enjoining administrative hearing, seeking to clarify their status as applicants (which the Hearing Examiner had power to modify)(Appendix I), and objecting to the Hearing Examiner and appealing to the Snohomish County Council for deciding they were not the permit applicants.

Had the Mangats not provided the County an opportunity to rectify their error, their claims would have been subject to the prospect of dismissal as unripe for failure to exhaust all administrative remedies. Further, if there is any doubt as to exhaustion it should be resolved in the applicants favor. Here it is unfair to give the County permission to flout its own rules. Such would mean applicants bear the risk of the clock for both countable and uncountable time, especially where PDS can propound

further delay for e.g., by making formal appointments with officials, and not allowing submissions. Also, requesting additional information is entirely at the discretion of PDS. While PDS is required to act within the standards set forth by the code, it can choose when to make certain requirements an issue, and structure the process in order to maximize delay rather than promote efficiency.

In summary, the Mangats request PDS be held to the County's own processes and standards that it codified and set forth, which the legislature intended they be liable for failing to perform; with the question of what damages being reserved for trial. For these reasons the decision to dismiss the Mangat's failure to comply with time limits should be reversed and remanded.

3. Mangats Brought Petitions and Complaint Timely From Exhaustion of The Administrative Process.

Here, it is undisputed the petition and complaint were filed within 21-days of a final appealable order of the County, i.e., final decision of the Snohomish County Council. CP 486, 506-07. For these reasons the decision to dismiss the Mangats' Ch. 64.40 RCW claims should be reversed and matter remanded to trial court for further proceedings.

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4. With Respect, To The Extent *Birnbaum* Applies Here To Limit Action, It Should Be Overruled.

"[C]ourts must have and exert the capacity to change a rule of law when reason so requires." *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (*citing*, *In re Stranger Creek & Tributaries*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)) These considerations require a clear showing that an established rule is incorrect and harmful before it is abandoned. *Id.* For example, in *Stranger Creek*, a long standing precedent was deemed harmful where it would have destroyed the public benefit in the best use of the State's trust lands. *Stranger Creek*, 77 Wn.2d at 657.

Here, the decision in *Birnbaum* may be interpreted to conflate a Courts privilege of excusing citizens from exhaustion where continuing would not result in remedy <u>*with*</u> requiring suit when no clear process for administrative remedy exists. *Compare, Stevedoring Serv. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 43, 914 P.2d 737 (1996) (Plaintiff did not fail to exhaust administrative remedies where no authority); *with*, *Birnbaum v. Pierce County*, 167 Wn. App. at 734, note 1 ("The 30 day limitations period begins [***] when the 120 day time limit was exceeded"). In effect the doctrine of exhaustion has been made a sword instead of a shield.

Mangats argue that doubts as to administrative cognizable claim should not be conflated with allowing a suitor excuse from exhaustion. *See*

Orion Corp., 103 Wn.2d at 458. Our Supreme Court has ***excused*** exhaustion where there was doubt as to whether the agency was empowered to grant effective relief. *See Citizens for Clean Air*, 114 Wn.2d at 31 (emphasis supplied). A court may relieve a person from exhaustion where an agency is competent to adjudicate the issue presented. *See McCarthy v. Madigan*, 503 U.S. 140, 149-51, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992).

In *Smoke*, "[t]he ordinance itself indicates that once the permitting decision has been made there are no other administrative remedies available". *Smoke,* 132 Wn.2d at 227. It was not the absence of process, but the "clearly defined" process for the resolution of complaints. *See id.* (*citing Tacoma-Pierce*, 95 Wn.2d at 284). This coincides with Local Project Review Act, which authorizes development regulations, with the emphasis on "timely and predictable procedures to determine whether a completed project permit application meets the requirements of those development regulations." RCW 30.70B.080. But excusing exhaustion when no prudent remedy is available is not the same as allowing the applicant to exhaust some process, if the logic of *Birnbaum* is not distinguished or dismantled, then it would subvert the sound policies behind the Local Project Review Act and intent of the legislature in providing damage actions for violations of permitting process by

encouraging County Ordinances to utilize vague language and unpredictable procedures in project review. Further, the process would lead to duplicative proceedings with inconsistent results by creating parallel proceedings (e.g., claim for damages while permit approval is pending).

While certainly not mandatory authority, Mangats encourage review of the persuasive logic of the U.S. Dist. Court in *MIR Enters.* as to when there is an adequate trigger for a delay claim under RCW 64.40.030. CP 254-260; *see MIR Enters., LLC v. City of Brier*, 2010 U.S. Dist. LEXIS 120713, 20-23 (W.D. Wash., Nov. 15, 2010)[5]; *see*, *Little & Lund,*

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[5] Therein:

> As a practical matter, requiring permit seekers to file a RCW 64.40.020 claim for damages as soon as an application remains pending for more than ninety days would result in litigation (or a series of litigations if the delay is extensive) running parallel to an ongoing administrative process. Such parallel proceedings are both inefficient and impractical. The agency action being challenged would be unresolved and subject to change even as the judiciary is attempting to evaluate its lawfulness, and the extent and nature of plaintiff's damages would not be established until the administrative process had finally run its course. The Washington Supreme Court has taken pains to avoid such difficulties when applying RCW 64.40. In *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997), the City issued a permit with significant limitations, which the applicant challenged in a judicial action before the King County Superior Court. As in this case, the conditions were struck and the City issued an appropriate permit. When the applicant filed an action for damages under RCW 64.40 within thirty days of the City's final act, the Supreme Court deemed the claim timely:
>
> If we adopted the position advanced by Seattle and approved the reasoning set forth in *R/L Associates*, [*Inc v. City of Seattle*, 72 Wn. App. 386, 390 (1994),] persons in Hayes's position would, in order to

Inc. v. Max J. Kuney Co., 115 Wn.2d 211, 215, 796 P.2d 1263 (1990) (Federal decisions provide Washington Courts persuasive authority); *see also*, *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997). In sum, reason and sound policy necessitates that the logic of *Birnbaum* be distinguished or overruled.

C. Mangats Had Proximate Cause for Delay Damages

RCW 64.40.020 states

> (1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action 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.

Appendix I. The Legislature defined act to mean two separate things first: "a final decision by an agency which places requirements, limitations, or

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> avoid a potential bar of the statute of limitations, be forced to bring an action for damages before final action on their application had been taken by the administrative agency. That makes no sense because it would force applicants for permits to file an action for damages before their cause of action was ripe.
>
> Requiring final agency action and the exhaustion of administrative remedies before judicial review can be obtained is consistent with the statutory provisions and avoids judicial consideration of unripe claims.

MIR Enters., LLC v. City of Brier, 2010 U.S. Dist. LEXIS 120713, 21-22 (W.D. Wash., Nov. 15, 2010).

conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed." RCW 64.40.010(6). Act "also means the failure of an agency to act within time limits established by law in response to a property owner's application for a permit [***]." *Id.* Simply exceeding 120 days is actionable under the delay and both *Mission Springs, Inc. and Callfas* the case law also recognize "arbitrary delay" claim under RCW 64.40. *See Mission Springs, Inc.*, 134 Wn.2d at 962; *Callfas,* 129 Wn. App. at 596. The limiting factor is "Damages," which means

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

RCW 64.40.010. Here Mangats have proximate cause for their damages for both (1) exceeding 120 days and for (2) arbitrarily withholding certain processes.

1. Proximate Cause for Exceeding 120 Days.

Simply put, if a jurisdiction fails to make a decision on a permit application "within time limits set by law," herein 120 days, then a property owner has a claim for reasonable expenses and losses due to the

delay. Here the Mangats claim their losses and reasonable expenses for seeking their extensions. Such extensions may not have been sought had the County complied with its procedures and issued a notice of final decision at day 120. For all the reasons stated above, Mangats motion for partial summary judgment should have been granted, or, in the alternative, the issue of proximate cause reserved for trial. Thus the *sua sponte* order to dismiss should be reversed and matter remanded with instructions.

2. Proximate Cause for Arbitrary Delay Caused By Refusal of Process.

Mangats first note that in their designation of Clerks Papers, docket no. 24 in court below was not delivered to the Court. *See* Designation of Clerks Papers filed herein. Such document contains declaration of Gene Miller. The Mangats attorneys requested the Clerk below supplement or append the documents to the Clerk's Papers with that document.

> Development regulations adopted pursuant to RCW 36.70A.040 must establish and implement time periods for local government actions for each type of project permit application and provide timely and predictable procedures to determine whether a completed project permit application n6 meets the requirements of those development regulations. The time periods for local government actions for each type of complete project permit application or project type should not exceed one hundred twenty day.

RCW 36.70B.080(1); *see also*, Appendix I.

Refusal to process the application according to their own code (Appendix I), i.e., issue a written notice of delay and/or notice of decision may also constitute arbitrary delay by the County. Here again, the Mangats were prejudiced through their losses and reasonable expenses for seeking their extensions. In each case, the County's own code was not followed by PDS, thus failing to perfect Mangat's rights to seek review until final action to approve the application in favor of Gallo and Dankers as applicants.

Further, Mangats presented the declaration of Gene Miller to show that delay tactics, bifurcated review process, and other requests generally and in the Mangats case are used to stall or delay the permitting process.[6] This presents a genuine issue of fact as to the nature of the County's requests for information and the state of the application for approval. Again, it is speculation that the preliminary plat approval would have been outright denied.

For the reasons stated above, the Mangats motion for partial summary judgment should have been granted, or, in the alternative, the issue of proximate cause reserved for trial, thus the *sua sponte* order to dismiss should be reversed and matter remanded with instructions.

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[6] Again this document shall be supplied in the Supplemental Clerks Papers which the Clerk failed to file the docket item with the Court.

D. Mangats Also Assert Timely "Final Decision" RCW 64.40 Claim

The Mangat's complaint also asserts the County's actions and inactions in processing Applications for Trombley Heights were arbitrary, capricious, unlawful, and/or exceeded lawful authority. See CP 500. Such claims for damages may arise even if the Mangats did not have Standing under LUPA. Rather than having all claims dismissed *sue sponte* the Mangats should be afforded opportunity to present these claims against the County. For these reasons the order dismissing all claims should be reversed and matter remanded to trial court for further proceedings.

E. The Mangats Were Not Collateral Estopped Because A Type II Decision Is Not Identical Or Final And Application of The Doctrine Could Result In Injustice.

Collateral estoppel is a prudential doctrine which promotes the policy of ending disputes by preventing the relitigation of an issue or determinative fact after the party estopped has had a full and fair opportunity to present a case. *See In re Marriage of Mudgett*, 41 Wn. App. 337, 342, 704 P.2d 169 (1985); *Seattle-First Nat'l Bank v. Cannon*, 26 Wn. App. 922, 927, 615 P.2d 1316 (1980). In order for collateral estoppel to apply, the following questions must be answered affirmatively:

> (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with

> a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Rains v. State, 100 Wn.2d 660, 665, 674 P.2d 165 (1983); *Lucas v. Velikanje*, 2 Wn. App. 888, 894, 471 P.2d 103 (1970). The burden of proof is on the party asserting estoppel. *Alaska Marine Trucking v. Carnation Co.*, 30 Wn. App. 144, 633 P.2d 105 (1981), *cert. denied*, 456 U.S. 964 (1982).

A "land use decision" is defined as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." *Id.* (*citing*, RCW 36.70C.020(1)). In order to have standing to bring a land use petition under LUPA, the petitioner must have exhausted his or her administrative remedies to the extent required by law. *Id.* (citing RCW 36.70C.060(2)(d)). SCC 30.72.070 - Appeal of Type 2 decision - states:

> (1) All Type 2 hearing examiner decisions may be appealed to the county council except for shoreline substantial development permits and permit rescissions, shoreline conditional use permits, and shoreline variances, which may be appealed to the state shorelines hearings board pursuant to SCC 30.44.250 and RCW 90.58.180.
>
> (2) An appeal to the county council may be filed by any aggrieved party of record. Where the reconsideration process of SCC 30.72.065 has been invoked, no appeal may be filed until the reconsideration petition has been disposed of by the hearing examiner. An aggrieved party need not file a petition for reconsideration but may file an appeal directly to the county council. If a petition for

> reconsideration is filed, issues subsequently raised by that party on appeal to the county council shall be limited to those issues raised in the petition for reconsideration.
>
> (3) Any aggrieved party of record may appeal a decision on reconsideration.
>
> (4) Appeals shall be addressed to the county council and shall be filed in writing with the department within 14 days following the date of the hearing examiner's decision.
>
> (5) A filing fee of $500 shall be submitted with each appeal filed; provided that the fee shall not be charged to a department of the county. The filing fee shall be refunded in any case where an appeal is summarily dismissed in whole without hearing under SCC 30.72.075.

Appendix I. Different procedural remedies exist to remedy arbitrary and capricious governmental action:

> Among other possible remedies are the Writ of Mandamus, RCW 7.16.160 to compel a decision on the MUP application, *Norco Constr. Co. v. King County*, 97 Wn.2d 680, 682, 649 P.2d 103 (1982), and a constitutional writ of certiorari, *see Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 221-22, 643 P.2d 426 (1982), to remedy arbitrary and capricious governmental action.

Callfas, 129 Wn. App. at 596-597. However, LUPA explicitly replaced the writ of certiorari for appealing land use decisions, and it became the "exclusive means of judicial review of land use decisions" with certain enumerated exceptions. *James v. Kitsap County*, 154 Wn.2d 574, 583, 115 P.3d 286 (2005). Judicial review under LUPA is commenced by filing a petition in superior court within 21-days of the issuance of the land use decision. *Id.* (citing RCW 36.70C.040(3)). A land use petition is barred unless it is timely filed and served. *Id.* (*citing* RCW 36.70C.040(2)).

At the time the Mangats initiated their first suit to stop approval of Trombley Heights and adjudicate their takings; the decision of the County was not yet ripe for review; and further finding such a suit estopped may lead to injustice for the Mangats due to the exclusivity of means for review under LUPA. Because it was not (1) identical or final or (2) injustice may occur, this court should reverse the order below and remand this matter to Superior Court for further proceedings.

1. It Is Not Identical Or Final Because The Decision Was Not Ripe For Review.

Mangats argue that County did not meet its burden in asserting estoppel. *See Alaska Marine Trucking*, 30 Wn. App. 144. This is because the Court's authority to hear the eminent domain, declaratory and injunctive relief is based on the Superior Court's original jurisdiction arising under the language of Const. Art. I § 16. LUPA (on the other hand) is an appellate action brought in Superior Court, to challenge a land use action pursuant to RCW 36.70C.120. Under the Court's original jurisdiction it may make findings of fact, but under the appellate jurisdiction it must accept or deny factual findings based on the evidence in the record. *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 35, 184 P.3d 1278 (2008). Herein the Hearing Examiner decided:

> 1. Regulatory Review and Vesting. A complete application was submitted to Planning and Development

> Services (PDS) on September 24, 2007 and was vested as of that date for purposes of regulatory review. (Exhibits A.2 J). ***The 120-day clock started October 21, 2007. PDS and the applicant exchanged various plan sets and review comments four times through November 17, 2010. The proponents of the application also changed. As of the original hearing date 193 days of the 120-day period had elapsed.***
>
> 2. Public Hearing. ***A public hearing was originally set for April 12, 2011. However, a legal dispute arose between the original proponents of the plat (Happy and David Mangat) ("Mangat") and the underlying property owners (Luigi Gallo and Johannes Dankers), (the "Applicant") over the ownership of the application materials and control of the plat application***. (Exhibits K.1 through K.19) Mangat sought and obtained a Temporary Restraining Order (TRO) from Snohomish County Superior Court, preventing the holding of the public hearing on April 12, 2011, and the hearing was cancelled by the Hearing Examiner. The Applicant filed a motion to quash the TRO in Superior Court, which motion was orally denied by Court of Appeals Judge Jay Leach, Servicing as a Judge Pro Tem in Snohomish County Superior Court. The final written order is awaiting the Court's signature at this time.
>
> ***With no remaining legal impediments***, the rescheduled public hearing was held on May 11, 2011.
>
> **[***]**
>
> 21. ***Any Finding of Fact in this Decision, which should be deemed a Conclusion of Law, is hereby adopted as such***.

CP 511, 519 (emphasis supplied). Here the Mangats could not have appealed a decision by the County and exhaust all administrative remedies until such decision was made by the Hearing Examiner. Simply put the

injuries to the Mangats did not set until the Hearing Examiner put her stamp on it.

Further a Court cannot simply substitute a factual finding pursuant to its original jurisdiction for its determination that substantial evidence supports a hearing examiner's factual finding pursuant to a judicial review within the superior court's appellate jurisdiction based on the local jurisdictions record. *See Davis v. Washington State Dept. of Labor & Industries*, 159 Wn. App. 437, 441-43, 245 P.3d 822 (2011); *c.f.*, *Davidson Series & Associates v. City of Kirkland*, 159 Wn. App. 616, 246 P.3d 253 (2011). Without subject matter jurisdiction, a superior court lacks the power to decide a controversy. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

Similarly, the writs of mandate and prohibition are not equivalents of an eminent domain cause of action under Const. Art. I § 16. The jurisdiction conferred upon the judiciary is unique, and limited in scope to determine whether a governmental taking of private property is for a "public use." This limited grant of jurisdiction is not the equivalent of a superior court's exercise of jurisdiction pursuant to extraordinary writs.

For example, a statutory writ of mandamus may be issued "to compel performance of an act which the law especially enjoins as a duty resulting from an office. RCW 7.16.060. However, because a writ of

mandamus is an extraordinary remedy and should be used sparingly, in order for a statutory writ of mandate to be issued, all of the following must be true: (i) the individual at issue must be under a clear duty to act, (ii) the act at issue must be precise and specific rather than general, (iii) the act must be ministerial in nature rather than discretionary, and (iv) performance must not be useless. *See In re Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (1994); *State ex rel Close v. Meehan*, 49 Wn.2d 426, 432, 302 P.2d 196 (1956); *State v. City of Seattle*, 137 Wn. 455, 457, 242 P. 966 (1926); *Burg v. City of Seattle*, 32 Wn. App. 286, 289-90, 647 P.2d 517 (1982).

The same is also true with regard to the writ of prohibition. A writ of prohibition is commonly defined: "as a writ to prevent a tribunal exercising judicial or quasi-judicial powers from exercising its jurisdiction not within its cognizance, or from exceeding its jurisdiction in matters of which it has cognizance." *State ex rel. New York Casualty Co. v. Superior Court for King County,* 31 Wn.2d 834, 838, 199 P.2d 581(1948); *State ex. Rel Meyer v. Clifford*, 78 Wn. 555, 559, 139 P. 650 (1914). For the aforementioned reasons this Court should reverse the trial court's dismissal of LUPA, and Writs of Mandate and Prohibition and remand for further proceedings.

2. The Application of The Doctrine Could Work an Injustice On The Mangats.

LUPA has restrictions on when an action for judicial review may be commenced. *See e.g.*, *Harlan Claire Stientjes Family Trust v. Thurston County*, 152 Wn. App. 616, note 8, 217 P.3d 379 (2009). Challenges brought after the expiration of deadlines for filing local administrative appeals or after LUPA's 21-day time period for filing an appeal constitute impermissible collateral attacks. *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005); *see also, Chelan County v. Nykreim*, 146 Wn.2d 904, 933, 52 P.3d 1 (2002); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000).

Our Supreme Court has held that: "LUPA embodies the same idea expressed by this court in pre-LUPA decisions--that even illegal decisions must be challenged in a timely, appropriate manner. *Habitat Watch*, 155 Wn.2d at 407 (*citing*, *Pierce v. King County*, 62 Wn.2d 324, 334, 382 P.2d 628 (1963) (holding that even though a county resolution constituted illegal spot zoning and was therefore void ab initio, the applicable limitations period "begins with acquisition of knowledge or with the occurrence of events from which notice ought to be inferred as a matter of law")). Thus challenges brought after the expiration of deadlines for filing local administrative appeals or after LUPA's 21-day time period for filing

an appeal constitutes impermissible collateral attacks. *Id.,* 155 Wn.2d at 410-11,

There has yet been a full and fair opportunity to present their case. As previously mentioned, the Mangats pursued judicial intervention and exhaustion of the Type II administrative process, as persons aggrieved, to remedy, rectify, or restore the act of changing the applicant status on the application. LUPA's exclusive process arises only from final decision of the County Council. Further, the Commissioner may alter recommendations and record after hearing and could do so regardless of the effect of Judge Leach's order and was presented additional testimony and evidence at argument. *See* Appendix I (SCC 30.72.060(3)). For these reasons this court should reverse the trial court's order dismissing LUPA, and remand for further proceedings.

F. Mangats Have Standing Under LUPA Because They Are Arguably In The Zone Of Interests And Suffered An Injury In Fact.

> This court has established a two-part test to determine standing under the UDJA. The first part of the test asks whether the interest sought to be protected is "'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" The second part of the test considers whether the challenged action has caused "'injury in fact,'" economic or otherwise, to the party seeking standing. Both tests must be met by the party seeking standing.

Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802, 83 P.3d 419 (2004)(internal citations omitted). Here Mangats assert they are (1) in the zone of interests and (2) suffered an injury in fact, therefore the order dismissing LUPA should be reversed and matter remanded.

1. Mangats Are In The Zone Of Interests Because They Are Former Applicants Substituted By County Action.

The zone of interests test focuses on whether the Legislature intended the agency to protect the party's interests when performing regulations by the statute and ordinances. *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 739-740, 887 P.2d 891 (1995). Here there can be no doubt that the legislature intended to protect applicants as RCW 36.70C.060 specifically confers standing on "applicants." The statute does not say "present applicants." If standing is defective because the Mangats alleged other person aggrieved in complaint, then the appropriate remedy is to allow Mangats to amend their petition to reflect their past applicant status.

2. Mangats Suffered Injury In Fact Because The Hearing Examiners Decision Ripened Their Losses From The County's Conduct.

The injury-in-fact requirement is satisfied where an agency refuses to provide a procedure required by a statute despite the fact that "any

injury to substantive rights attributable to failure to provide a procedure is both indirect and speculative." *Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 794-795, 920 P.2d 581 (1996); *cert. denied*, 520 U.S. 1210 (1997). "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy" *Id.*

In this case, the County failed to follow its own procedures when it delayed, when it requested certain information, when it failed to issue a notice of final decision scheduling the Type II decision, when it failed to issue a notice of delay, when it substituted the applicants with the underlying property owners. The County finalized that decision by bringing those matters before the Hearing Examiner who made findings of fact, conclusions of law and completed the record and the Mangats argued that the vested rights were still theirs. The Mangats suffered losses including the benefit of the over $100,000 made for the application, the additional monies put in for contract extensions, the default on their contract option to purchase, and their rights to alienate or terminate the application.

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V. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order dismissing the LUPA Petition, and applications for Writs of Mandamus and Prohibition, reverse the trial court's order dismissing all claims, and grant Mangats' Motion for Partial summary judgment on their RCW 64.40 delay claim; and remand the matter for further proceedings.

RESPECTFULLY SUBMITTED this 6th day of August, 2012.

By:

Andrew Krawczyk, WSBA 42982

APPENDIX I

SCC Chapter 30.70

GENERAL PROVISIONS

30.70.010 Purpose and applicability.

(1) The purpose of this subtitle is to establish procedures for processing project permit applications and for adopting and amending comprehensive plans and development regulations. These procedures are intended to promote land use decisions that further the goals and policies of the comprehensive plan.

(2) This subtitle is adopted pursuant to the Local Project Review Act, chapter 36.70B RCW, and the GMA.

(3) This subtitle applies to all project permit applications, unless specifically exempted, and to legislative decisions, code interpretations, and other decisions on applications as specifically set forth herein.

(4) State agencies shall comply with the provisions of this subtitle pursuant to RCW 36.70A.103.

(Added Amended Ord.02-064, December 9, 2002, Eff date February 1, 2003)

30.70.015 Exemptions.

The following actions are exempt from the requirements of this subtitle, except the consistency determination required by SCC 30.70.100:

(1) Street vacations under chapter 13.100 SCC;

(2) Approvals relating to the use of public areas and facilities under title 13 SCC;

(3) Building permits exempt from the State Environmental Policy Act (SEPA);

(4) Land disturbing activity permits exempt from SEPA; and

(5) All other construction, mechanical, and plumbing permits exempt from SEPA and related approvals, including certificates of occupancy.

(Added Amended Ord.02-064, December 9, 2002, Eff date February 1, 2003; Amended Ord. 07-084, Sept. 5, 2007, Eff date Sept. 21, 2007; Amended by Amended Ord. 10-023, June 9, 2010, Eff date Sept. 30, 2010)

30.70.020 Pre-application meeting.

(1) A pre-application meeting is strongly encouraged for the following:

(a) Subdivisions;

(b) Planned residential developments;

(c) Rezones;

(d) Conditional use permits;

(e) Development activities and actions requiring project permits when critical areas are located on the subject property;

(f) Any application for which official site plan approval is required; and

(g) Shoreline substantial development, shoreline conditional use and shoreline variance permits.

(2) The purpose of a pre-application meeting is to provide the department with preliminary information regarding the development proposal and to provide the applicant with preliminary information about development requirements, environmental issues, procedural requirements, known community concerns, and other relevant matters prior to the filing of a formal application.

(3) Pre-application meetings provide preliminary information only and are not intended to result in final SCC Title 30 actions or commitments by either the county or the applicant.

(4) The department shall prepare a pre-application submittal checklist that lists specific items or information requested for the meeting. When available, the applicant shall provide the information prior to the meeting.

(5) Within a reasonable time following a pre-application meeting, the department shall provide the applicant with a written summary of the issues discussed and specific instructions for submittal of a complete application, if any.

(Added Amended Ord.02-064, December 9, 2002, Eff date February 1, 2003; Amended Ord. 06-061, Aug. 1, 2007, Eff date Oct. 1, 2007; Amended by Amended Ord. 12-025, June 6, 2012, Eff date July 27, 2012)

30.70.030 Submittal requirements.

(1) The department shall establish and may revise written submittal requirements for each type of application or approval required by this title. The requirements shall be made available to the public in a checklist or other form that clearly describes the material that must be submitted for an application to be considered complete. Establishment of submittal requirements shall not be subject to the rulemaking process of chapter 30.82 SCC, but the department shall provide public notice of such changes 30 days prior to their effective date.

(2) Submittal requirements shall not be waived, except that the department may determine in writing that a particular requirement is not applicable upon a clear showing by the applicant that the requirement is not relevant to the proposed action and is not necessary to demonstrate compliance with applicable requirements.

(3) Additional materials may be required by the department as it determines necessary for review of the application.

(Added Amended Ord.02-064, December 9, 2002, Eff date February 1, 2003)

30.70.040 Completeness determination.

(1) The department shall determine whether a project permit application is complete or incomplete within 28 days after receiving an application. The determination shall be in writing and mailed, faxed, e-mailed, or delivered to the applicant or the applicant's representative within the required time period, except as set forth in SCC 30.70.040(2). When an application is determined incomplete, the determination shall state what is necessary to make the application complete.

(2) An application is complete for the purposes of this section if the department does not provide a written determination to the applicant within the required time period.

(3) A written determination of completeness shall, to the extent known by the department, identify other local, state, or federal agencies with jurisdiction. The department may include other information in the determination.

(4) A project permit application is complete for the purposes of this section when it meets the submittal requirements established by the department pursuant to SCC 30.70.030, including any requirements for environmental review pursuant to chapter 30.61 SCC. The county may require additional information or studies after a determination of completeness.

(5) If the department determines an application is incomplete and the applicant submits additional documents identified by the department as necessary for a complete application, the department shall notify the applicant within 14 days of the submittal that the application is complete or what additional information is necessary to make the application complete.

(Added Amended Ord.02-064, December 9, 2002, Eff date February 1, 2003)SCC Title 30

30.70.045 Notice - general.

The notice requirements of this chapter ensure the county meets or exceeds the notice requirements pursuant to state law. When posted,

mailed or published notice is required pursuant to this title, such notice shall be given as follows, unless otherwise specifically provided:

(1) When posting is required, the applicant shall post two or more signs which meet county standards in a conspicuous location on the property's frontage abutting public rights-of-way. If the property does not abut a public right-of-way, the signs shall be placed on the property at the point of access and on the public right-ofway at the easement or private road that accesses the property. Posting shall conform to the following requirements:

(a) As evidence of posting the applicant shall submit a verified statement containing the date and location of posting;

(b) If verification of posting is not returned to the department within 14 days of application, the department shall suspend processing of the application until such verification is received;

(c) Signs shall remain posted throughout the permit review process until all appeal periods have expired, and may be updated and used for other posted notices required by county code for the proposed project;

(d) Signs and instructions for posting shall be provided to the applicant by the department; and

(e) Signs shall be removed by the applicant no later than 14 days after all appeal periods have expired.

(2) When publication is required, the department shall publish one notice in the official county newspaper.

(3) When mailing is required, notice may be provided either on a letter/legal size publication or post card.

(4) When mailing is required, the department shall mail notice to the following persons or entities:

(a) Each taxpayer of record and each known site address within:

(i) 500 feet of any portion of the boundary of the subject property and contiguous property owned by the applicant;

(ii) 1,000 feet, if the subject property is categorized as rural, natural resource, residential 20,000 (R-20,000), or rural use; or

(iii) 1,500 feet for subdivision applications where each lot is 20 acres or larger, or 1/32nd of a section or larger;

(b) Any city or town whose municipal boundaries are within one mile of a proposed subdivision or short subdivision;

(c) The Washington State Department of Transportation for every proposed subdivision or short subdivision located adjacent to the right-of-way of a state highway or within two miles of the boundary of a state or municipal airport; and

(d) Any other local, state, or federal agency or any person or organization as determined appropriate by the department.

(5) The county may provide additional public notice by notifying the news media and community organizations, by placing notices in neighborhood/community newspapers, appropriate regional, neighborhood, ethnic, or trade journals, or by publishing notice in agency newsletters or on the department or county web page.

(6) The department will recover the costs of notice required by this title from the applicant.

(Added Amended Ord.02-064, December 9, 2002, Eff date February 1, 2003; Ord. 06-093, Nov. 8, 2006, Eff date Nov. 26, 2006)SCC Title 30

30.70.050 Notice of application - timing and method.

(1) The department shall provide notice of application within 10 days after a determination that the application is complete as specified in SCC Table 30.70.050(5). Required notice shall be given in accordance with SCC 30.70.045.

(2) A notice of application posted or published in the official county newspaper or provided by mail on a letter/legal size publication shall include the following information:

(a) Date of application, date of completeness determination, and date of notice of application;

(b) Project description, list of permits requested, assigned county file number, and county contact person;

(c) Any information or studies requested by the department;

(d) Any other required permits not included in the application, to the extent known by the department;

(e) Any existing environmental documents that evaluate the proposed project, including where they can be inspected;

(f) The date, time, place, and type of public hearing, if applicable and if scheduled at the time of the notice;

(g) When notice is for a rezone action or development in a performance standard zone, a statement indicating where the full text and/or map of the rezone action may be inspected;

(h) A statement of when the comment period ends and the right of any person to comment on the application, receive notice of and participate in any hearings, request a copy of the decision once made, and any appeal procedures;

(i) If determined at the time of notice, those development regulations that will be used for project mitigation or to review consistency; and

(j) Any other information determined appropriate by the department.

(3) Mailed notice of application may be provided on a post card.

(4) A post card notice shall contain the following information:

(a) project description;

(b) project file number;

(c) project location;

(d) type of project;

(e) applicable comment dates and notice of where to submit comments;

(f) date the notice of application was published in the official county newspaper;

(g) website address providing access to project information; and

(h) a department contact SCC Title 30

SCC Table 30.70.050(5)

Notice of Application Requirements

Application Type	Post	Publish	Mail
Administrative Conditional Use	X	X	x
Binding Site Plan	X	X	x
Building and land disturbing activity permits subject to SEPA	X	X	x
Code interpretation not related to a specific project		x	
Code interpretation related to a specific project	X	X	x
Final Subdivision [see SCC 30.41A.600-30.41A.730]			
Flood Hazard Permit – except as provided in SCC 30.43C.020			x
Flood Hazard Variance	X	X	x
Freeway service zone official site plan in existing zone	X	X	X
Free-standing sign in FS and RFS zone	X	X	X
SEPA threshold determination and EIS adequacy associated with project permit	X	X	X
Shoreline variance, conditional use, or substantial development permit or permit rescission	X	X	X
Short subdivision and rural cluster short	X	X	x

subdivision			
Variance	X	X	x
Conditional use and major revision	X	X	x
Preliminary subdivision and rural cluster subdivision, and major revision	X	X	X
Planned Residential Development and major revision	X	X	x
Official site plan or preliminary plan approval in performance standard zones (BP, PCB, IP, FS, T, RB, CRC, RFS, and RI)	X	X	x
Rezone – site specific	X	X	x
Review or revocation of a permit or approval pursuant to SCC 30.71.027	X	X	x
Preapplication Concurrency Decision	X	X	x
Any non-listed Type 1 or Type 2 permit application except Boundary Line Adjustments pursuant to SCC 30.41E.020(1)(c)	X	X	x

(Added Amended Ord.02-064, December 9, 2002, Eff date February 1, 2003; Amended Ord. 05-042, July 6, 2005, Eff date Aug. 8, 2005; Ord. 06-093, Nov. 8, 2006, Eff date Nov. 26, 2006; Amended Ord. 07-005, February 21, 2007, Eff date March 4, 2007; Amended by Ord. 08-136, Oct. 29, 2008, Eff date Nov. 24, 2008; Amended by Amended Ord. 10-023, June 9, 2010, Eff date Sept. 30, 2010)[see SCC 30.41A.600 - 30.41A.730]SCC Title 30

30.70.060 Notice of application - Public and agency comment period.

(1) The notice of application shall provide for a public and agency comment period of 21 days, except that for shoreline substantial development permits, shoreline conditional use permits, and shoreline variances, the comment period shall be 30 days. When notice is published, the comment period begins on the day following the date of publication in the official county newspaper.

(2) No decision on a Type 1 or Type 2 land use application shall be issued prior to the end of the public comment period set by the notice of

application, except for a threshold determination of significance (DS) issued pursuant to chapter 30.61 SCC. (Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.70.065 Computing time periods for public comment and appeals.

In computing any time period required for public comment or appeal under this title, the time period shall commence the day after published notice is given for the commencement of the time period. The time period shall not end on a Saturday, Sunday, or legal holiday, and shall instead be carried forward to the next day that is not a Saturday, Sunday, or legal holiday. When published notice is not required, the time period required for public comment or appeal shall commence the day after the posting.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.70.070 Adequacy of mailed notice.

(1) Any mailed notice required by this subtitle shall be deemed adequate where a good-faith effort has been made by the county to identify and mail a notice to each taxpayer of record and known site address.

(2) Notices mailed to taxpayers of record and known site addresses shall be deemed received by those persons if named in an affidavit or declaration of mailing executed by the department. The failure of any person to actually receive the notice shall not invalidate any permit or approval.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.70.080 Combined notice.

(1) Public notice for project permit applications, SEPA documents, predecision hearings, and appeal hearings may be combined when practical, where such combined notice will expedite the permit review process, and where requirements of each individual notice are met by the combined notice.

(2) For projects requiring a predecision open record hearing and a SEPA threshold determination, the SEPA appeal notice shall provide that any appeal, should one be filed, will be heard at the predecision open record hearing. No additional notice of the SEPA appeal is required.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.70.090 Combined county and agency hearing.

(1) When requested by an applicant, the county shall allow a predecision hearing to be combined with a hearing that may be required by another local, state, regional, federal, or other agency for the same project. The 120-day timeline requirements of SCC 30.70.110 shall be waived by the applicant if necessary to combine the hearings. The combined hearing shall be conducted within the geographic boundary of the county.

(2) The hearing examiner shall have the discretion to determine the hearing procedure when county and SCC Title 30agency hearings are combined and there are conflicting hearing procedures. In all cases, appeals and hearings shall be combined in a manner which retains applicable county procedure and allows for hearing and/or appeal before the hearing examiner.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.70.100 Consistency determination.

(1) Pursuant to RCW 36.70B.040, the county shall review all project permit applications for consistency with applicable county development regulations or, in the absence of adopted development regulations, with the appropriate elements of the comprehensive plan or subarea plan adopted under chapter 36.70A RCW. In the consistency review, the county shall consider the following factors:

(a) The type of land use permitted;

(b) The level of development, such as units per acre or other measures of density;

(c) Infrastructure, including public facilities and services needed to serve the development; and

(d) The characteristics of the development, such as development standards.

(2) No specific or separate documentation of consistency is required, except that for projects receiving a written report or other documentation from the department, consistency shall be documented in the report. For projects not requiring a written report, consistency shall be indicated on the permit or decision.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.70.110 Processing timelines.

(1) Notice of final decision on a project permit application shall issue within 120 days from when the permit application is determined to be complete, unless otherwise provided by this section or state law.

(2) In determining the number of days that have elapsed after an application is complete, the following periods shall be excluded:

(a) Any period during which the county asks the applicant to correct plans, perform required studies, or provide additional required information. The period shall be calculated from the date the county mails notification to the applicant of the need for additional information until the date the county determines whether the additional information satisfies the request for information, or 14 days after the applicant supplies the information to the county, whichever is earlier. If the information submitted by the applicant under this subsection is insufficient, the county shall mail notice to the applicant of the deficiencies and the provisions of this subsection shall apply as if a new request for information had been made;

(b) Any period during which an environmental impact statement is being prepared;

(c) A period, not to exceed 30 calendar days, during which a code interpretation is processing in conjunction with an underlying permit application pursuant to chapter 30.83 SCC.

(d) The period specified for administrative appeals of project permits;

(e) Any period during which processing of an application is suspended pursuant to SCC 30.70.045(1)(b);

(f) Any period during which an agreement is negotiated or design review is conducted for an urban center pursuant to SCC 30.34A.180(1) or (2); and

(g) Any period of time mutually agreed upon by the applicant and the county.

(3) The time periods established by this section shall not apply to a project permit application:

(a) That requires an amendment to the comprehensive plan or a development regulation in order to obtain approval;

(b) That is substantially revised by the applicant, in which case a new 120-day time period shall start from the date at which the revised project application is determined to be complete;

(c) That requires approval of a development agreement by the county council;

(d) When the applicant consents to an extension; orSCC Title 30

(e) During any period necessary for reconsideration of a hearing examiner's decision.

(4) Subject to all other requirements of this section, notice of final decision on an application for a boundary line adjustment shall be issued within 45 days after the application is determined complete.

(5) The county shall notify the applicant in writing if a notice of final decision on the project has not been made within the time limits specified in this section. The notice shall include a statement of reasons why the time limits have not been met and an estimated date of issuance of a notice of final decision.

(6) Failure of the county to make a final decision within the timelines specified by this chapter shall not create liability for damages.

(7) Timelines for processing shoreline substantial development, shoreline conditional use and shoreline variance permits shall be in accordance with the provisions of this chapter unless otherwise specified in chapter 30.44 SCC.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003; Emergency Ord. 04-019, February 11, 2004, Eff date February 11, 2004; Amended by Amended Ord. 09-044, Aug. 12, 2009 (veto overridden Sept. 8, 2009), Eff date Sept. 18, 2009; Amended by Amended Ord. 09-079, May 12, 2010, Eff date May 29, 2010; Amended by Amended Ord. 12-025, June 6, 2012, Eff date July 27, 2012)

30.70.120 Consolidated permit review.

(1) The department shall consolidate permit review for all project permit applications for the same proposal when each application is subject to a predecision public hearing and where all permit applications have been submitted concurrently.

(2) If the applicant requests consolidated permit processing for applications that do not meet the requirements of SCC 30.70.120(1), applications may be consolidated when the department finds that consolidation would result in more efficient review and processing. If one or more of the permit applications is subject to the 120-day review time period established in SCC 30.70.110, all consolidated permit applications shall be reviewed within the 120-day period, except as provided in SCC 30.70.120(3).

(3) When a project permit application subject to a timeline requirement established in SCC 30.70.110 is consolidated with a project permit application that is exempt from the timeline requirement under SCC

30.70.110(3), the timeline requirement shall not apply.

(4) A project permit application being reviewed under the consolidated process is subject to all requirements of permit application submittal, notice, processing, and approval that would otherwise apply if the permit were being processed as a separate application.

(5) A final decision on certain consolidated permit applications may be preliminary and contingent upon approval of other permits or actions considered in the consolidated permit process.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.70.130 Authority to impose conditions or deny application.

The county may require modifications to a project permit application and may impose conditions to ensure consistency as required by SCC 30.70.100 and compliance with applicable development regulations. A project permit application that does not comply with applicable development regulations or is determined inconsistentunder SCC 30.70.100 shall be denied.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.70.135 Clerical Mistakes -- Authority to Correct.SCC Title 30

Clerical mistakes and errors arising from oversight or omission in hearing examiner and council decisions and/or orders issued pursuant to this chapter may be corrected by the issuing body at any time either on its own initiative or on the motion of a party of record. A copy of each page affected by the correction, with the correction clearly identified, shall be mailed to all parties of record.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.70.140 Expiration and extension of application.

(1) An application shall expire one year after the last date that additional information is requested if the applicant has failed to provide the information, except that

(a) The department may grant one or more extensions pursuant to SCC 30.70.140(2) and (3) below;

(b) The department may set an expiration date of less than one year when the permit application is the result of a code enforcement action; and

(c) No application shall expire when under review by the department following submittal of a complete application or timely resubmittal of an application when all required information has been provided.

(2) The applicant may request an extension to a date certain prior to expiration of the application. The department may grant an extension request if the criteria of SCC 30.70.140(3) are met. If granted, the department shall set a reasonable expiration date that may be different from the date requested by the applicant.

(3) An applicant's extension request may only be granted when the following criteria are met:

(a) A written request for extension is submitted at least 14 days prior to the expiration date;

(b) The applicant demonstrates that circumstances beyond the control of the applicant prevent timely submittal of the requested information; and

(c) The applicant provides a reasonable schedule for submittal of the requested information.

(4) The department may extend an expiration date for an application with no written request from an applicant when additional time for county processing or scheduling of appointments is required, when the

department needs information or responses from other agencies, or under other similar circumstances.

(5) A permit application approved for issuance pursuant to subtitle 30.5 SCC but not paid for and issued shall expire six months after the date it is approved for issuance.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.70.150 Reapplication after denial of project permit application.

The department shall not accept an application for substantially the same matter within one year from the date of the final county action denying the prior application, unless the denial was without prejudice.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

SCC Chapter 30.72

TYPE 2 PERMITS AND DECISIONS - HEARING EXAMINER

30.72.010 Purpose and applicability.

This chapter describes decision-making and appeal procedures and applies to all Type 2 permits and decisions.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.020 Type 2 permits and decisions.

The following are processed as Type 2 permits and decisions:

(1) Conditional use permit and major revisions;

(2) Rezones (site-specific);

(3) Official site plan or preliminary plan approval when combined with a rezone request in FS, IP, BP, PCB,

T, RB, RFS, and RI zones;

(4) Flood hazard area variance, if combined with a Type 2 application;

(5) Preliminary subdivision approval and major revisions;

(6) Planned residential developments;

(7) Short subdivision with dedication of a new public road;

(8) Shoreline substantial development, conditional use, or variance permit if forwarded pursuant to SCC 30.44.210(2).

(9) Shoreline substantial development permit rescission pursuant to SCC 30.44.320;

(10) Boundary line adjustments as provided in SCC 30.41E.020; and.

(11) Urban center developments as provided in SCC 30.34A.180(2).

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003; Amended by Amended Ord. 09-079, May 12, 2010, Eff date May 29, 2010; Amended by Amended Ord. 12-025, June 6, 2012, Eff date July 27, 2012)

30.72.025 Type 2 process overview.

Type 2 decisions are made by the hearing examiner based on a report from the department and information received at an open record hearing. The hearing examiner's decision on a Type 2 application is a final decision subject to appeal to the county council, except for shoreline permits issued under chapter 30.44 SCC. Appeals of shoreline substantial development permits, shoreline conditional use permits, and shoreline variances shall comply with SCC 30.44.250.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003; Emergency Ordinance No. 05-030, April 18, 2005, Eff date April 18, 2005; Amended by Amended Ord. 12-025, June 6, 2012, Eff date July 27, 2012)

30.72.030 Notice and timing of open record hearing.

(1) Notice of the open record public hearing on a Type 2 application shall be provided at least 15 days prior to the hearing date.

(2) In setting hearing dates, the department shall consider the time necessary for comment and appeal periods on any related SEPA decision and for the hearing examiner to conduct the hearing and issue a decision within the time period established in SCC 30.70.110.

(3) Notice of the public hearing shall contain a description of the proposal and list of permits requested, the SCC Title 30county file number and contact person, the date, time, and place for the hearing, and any other information determined to be appropriate by the department.

(4) Notice shall be provided by publishing, mailing, and posting in the manner prescribed by SCC 30.70.045.

(5) If the appeal period for a SEPA threshold determination has not expired when the notice of the hearing is provided, the notice shall state that any timely SEPA appeal shall be heard at the scheduled open record hearing.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.040 Report of department and transfer of file.

(1) Following expiration of required comment periods on the notice of application, and to complete project review, the department shall coordinate and assemble the reviews of other county departments and governmental agencies having an interest in the application. The department shall prepare a report describing how the application meets or fails to meet the applicable decision criteria. The report shall include recommended conditions, if appropriate, and a recommendation to the hearing examiner on the action to be taken on the application.

(2) The report shall be filed with the hearing examiner and made available for public review and copying at least seven days before the open record hearing.

(3) The department shall transfer the file to the hearing examiner's office concurrently with transmittal of the report.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.050 Open record hearing procedure on Type 2 application.

(1) The hearing examiner shall conduct an open record hearing on the Type 2 application.

(2) The department shall provide a summary of the report of the department and the contents of the project file.

(3) Any person may participate in the hearing and shall have the following rights, as limited by the hearing examiner rules of procedure:

(a) To call, examine, and cross-examine witnesses;

(b) To introduce documentary or physical evidence; and

(c) To present rebuttal evidence.

(4) All hearing testimony shall be taken under oath.

(5) An electronic transcript shall be made of the open record hearing.

(6) When an appeal of a Type 1 decision related to the Type 2 application has been filed, the open record hearing shall serve as both the appeal hearing and the predecision hearing.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.060 Hearing examiner's decision on Type 2 application.

(1) A decision on the Type 2 application shall be issued within 15 calendar days of the conclusion of a hearing, and not later than 120 days after a determination of completeness pursuant to SCC 30.70.110, unless the appellant agrees in writing to extend the time period or the time period has been extended under some other authority.

(2) If an appeal of a Type 1 administrative decision was heard at the open record predecision hearing, a final decision on the Type 1 appeal shall be issued concurrently with the Type 2 decision.

(3) The hearing examiner may grant, grant in part, return to the applicable department and applicant for modification, deny without prejudice, deny, or grant with such conditions or modifications as the hearing SCC Title 30 examiner finds appropriate based on the applicable decision criteria.

(4) The decision shall include findings based upon the record and conclusions therefrom which support the decision.

(5) Reconsideration of the hearing examiner's decision may be requested only in accordance with SCC 30.72.065.

(6) The hearing examiner's decision shall include information on, and any applicable time limitations for, requesting reconsideration or for appealing the decision.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.062 Notice of hearing examiner's decision on Type 2 application.

Notice of the hearing examiner's decision, which may be the decision itself, shall be provided as follows:

(1) By regular mail or inter-office mail, as appropriate, to the applicant and other parties of record; and

(2) To the clerk of the council.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.065 Reconsideration of Type 2 decision.

(1) Any aggrieved party of record may file a written petition for reconsideration with the hearing examiner within 10 calendar days

following the date of the hearing examiner's written decision. The petitioner for reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties of record on the date of filing. The timely filing of a petition for reconsideration shall stay the hearing examiner's decision until such time as the petition has been disposed of by the hearing examiner.

(2) The grounds for seeking reconsideration shall be limited to the following:

(a) The hearing examiner exceeded the hearing examiner's jurisdiction;

(b) The hearing examiner failed to follow the applicable procedure in reaching the hearing examiner's decision;

(c) The hearing examiner committed an error of law;

(d) The hearing examiner's findings, conclusions and/or conditions are not supported by the record;

(e) New evidence which could not reasonably have been produced and which is material to the decision is discovered; or

(f) The applicant proposed changes to the application in response to deficiencies identified in the decision.

(3) The petition for reconsideration must :

(a) Contain the name, mailing address, and daytime telephone number of the petitioner, or the petitioner's representative, together with the signature of the petitioner or of the petitioner's representative;

(b) Identify the specific findings, conclusions, actions, and/or conditions for which reconsideration is requested;

(c) State the specific grounds upon which relief is requested;

(d) Describe the specific relief requested; and

(e) Where applicable, identify the specific nature of any newly discovered evidence or changes proposed.

(4) The petition for reconsideration shall be decided by the same hearing examiner who rendered the decision, if reasonably available. The hearing examiner shall provide notice of the decision on reconsideration in accordance with SCC 30.72.062. Within 14 days the hearing examiner shall:

(a) Deny the petition in writing;

(b) Grant the petition and issue an amended decision in accordance with the provisions of SCC 30.72.060 following reconsideration;

(c) Accept the petition and give notice to all parties of record of the opportunity to submit written comment. Parties of record shall have 10 calendar days from the date of such notice in which to submit written comments. SCC Title 30 The hearing examiner shall either issue a decision in accordance with the provisions of SCC 30.72.060 or issue an order within 15 days after the close of the comment period setting the matter for further hearing. If further hearing is ordered, the hearing examiner's office shall mail notice not less than 15 days prior to the hearing date to all parties of record; or

(d) Accept the petition and set the matter for further open record hearing to consider new evidence, proposed changes in the application and/or the arguments of the parties. Notice of such further hearing shall be mailed by the hearing examiner's office not less than 15 days prior to the hearing date to all parties of record. The hearing examiner shall issue a decision following the further hearing in accordance with the provisions of SCC 30.72.060.

(5) A decision which has been subjected to the reconsideration process shall not again be subject to reconsideration; provided that a decision which has been revised on reconsideration from any form of denial to any form of approval with preconditions and/or conditions shall be subject to reconsideration.

(6) The hearing examiner may consolidate for action, in whole or in part, multiple petitions for reconsideration of the same decision where such consolidation would facilitate procedural efficiency.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.070 Appeal of Type 2 decision.

(1) All Type 2 hearing examiner decisions may be appealed to the county council except for shoreline substantial development permits and permit rescissions, shoreline conditional use permits, and shoreline variances, which may be appealed to the state shorelines hearings board pursuant to SCC 30.44.250 and RCW 90.58.180.

(2) An appeal to the county council may be filed by any aggrieved party of record. Where the reconsideration process of SCC 30.72.065 has been invoked, no appeal may be filed until the reconsideration petition has been disposed of by the hearing examiner. An aggrieved party need not file a petition for reconsideration but may file an appeal directly to the county council. If a petition for reconsideration is filed, issues subsequently raised by that party on appeal to the county council shall be limited to those issues raised in the petition for reconsideration.

(3) Any aggrieved party of record may appeal a decision on reconsideration.

(4) Appeals shall be addressed to the county council and shall be filed in writing with the department within 14 days following the date of the hearing examiner's decision.

(5) A filing fee of $500 shall be submitted with each appeal filed; provided that the fee shall not be charged to a department of the county. The filing fee shall be refunded in any case where an appeal is summarily dismissed in whole without hearing under SCC 30.72.075.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003; Amended Ord. 03-014, March 19, 2003, Eff date April 14, 2003; Amended by Amended Ord. 12-025, June 6, 2012, Eff date July 27, 2012))

30.72.075 Summary dismissal of a Type 2 appeal.

(1) The council may summarily dismiss an appeal in whole or in part without hearing if it determines that the appeal is untimely, incomplete, without merit on its face, frivolous, beyond the scope of the council's jurisdiction, or brought merely to secure a delay. The council may also summarily dismiss an appeal based on lack of standing after allowing the appellant a reasonable period in which to reply to the challenge.

(2) Except in extraordinary circumstances, summary dismissal orders shall be issued within 15 days following receipt of either a complete appeal or a request for issuance of such an order, whichever is later.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)SCC Title 30 30.72.080 Requirements for filing a Type 2 appeal.

(1) An appeal must be in writing and contain the following:

(a) A detailed statement of the grounds for appeal and the facts upon which the appeal is based, including references to specific hearing examiner findings or conclusions, and to exhibits or oral testimony in the record;

(b) Argument in support of the appeal; and

(c) The name, mailing address, and daytime telephone number of each appellant, or each appellant's representative, together with the signature of at least one of the appellants or of the appellants' representative.

(2) The grounds for filing an appeal shall be limited to the following:

(a) The decision exceeded the hearing examiner's jurisdiction;

(b) The hearing examiner failed to follow the applicable procedure in reaching the decision;

(c) The hearing examiner committed an error of law; or

(d) The hearing examiner's findings, conclusions, and/or conditions are not supported by substantial evidence in the record.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.085 Effect of appeal.

Timely filing of an appeal shall stay the effective date of the hearing examiner's decision until such time as the appeal is decided by the council or withdrawn.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.090 Consolidation of multiple appeals.

The council shall consolidate multiple appeals of the same action.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.100 Notice of Type 2 appeal.

(1) Within seven calendar days following the close of the appeal period and upon receipt of a timely filed and complete appeal, the council clerk will mail notice of the appeal and of the date, time, and place of the closed record appeal hearing to all parties of record.

(2) The dates for filing written arguments with the council shall be included in the hearing notice as follows:

(a) Parties of record may file written arguments with the council until 5:00 p.m. on the fourteenth day following the date of the hearing notice mailed pursuant to SCC 30.72.100(1); and

(b) An appellant may file written rebuttal arguments with the council until 5:00 p.m. on the twenty-first day following the date of the hearing notice mailed pursuant to SCC 30.72.100(1).

(3) The hearing notice shall be sent for publication in the official county newspaper the same day the notice of appeal is sent to parties of record.

(4) Within five days of mailing of the hearing notice pursuant to SCC 30.72.100(1), the applicant shall conspicuously post notice of the hearing on the signs in accordance with of SCC 30.70.045.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)SCC Title 30

30.72.110 Type 2 closed record appeal hearing.

(1) An appeal before the county council shall be conducted as a closed record appeal. The hearing shall be limited to the record from the hearing examiner and all written argument timely filed with the council. New evidence shall not be allowed unless specifically requested by the council and consistent with the limitation of subsection (2) below.

(2) Appeal issues shall be limited to those expressly raised in the written appeal. No new appeal issues may be raised or argued after the close of the time period for filing the appeal.

(3) Parties of record may file written argument according to the dates set forth in the notice of the appeal hearing.

(4) Any party of record may present oral argument at the hearing.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.120 County council decision on Type 2 appeal.

(1) The council's decision shall be issued in writing and entered into the record of the proceedings. The decision of the county council shall set forth findings and conclusions that support the council decision and may adopt any or all of the findings or conclusions of the hearing examiner.

(2) The council may affirm the decision of the hearing examiner, reverse in whole or in part, or may remand the matter to the hearing examiner in accordance with the council's findings and conclusions.

(3) The council clerk shall mail copies of the decision to all parties of record within 15 calendar days after the conclusion of the hearing, but not

later than 60 calendar days from the last day of the applicable appeal period, unless the applicant agrees to extend the time period or the time period is extended under some other authority.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.125 Effect of remand.

(1) The effect of remand on the decision of the hearing examiner shall be specified in the county council's decision. A decision by the hearing examiner in response to the remand order shall be issued in the same manner as the original decision.

(2) A remand is not a final decision on the appeal, but shall serve as a decision for purposes of applicable time limitations contained in SCC 30.72.120(3). Issuance of the decision by the hearing examiner in response to the remand order shall commence a new appeal period pursuant to SCC 30.72.070. Issues on appeal shall be limited to the issues remanded to the hearing examiner.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)

30.72.130 Effect and appeal of final council decision on Type 2 appeal.

(1) The county council's decision on a Type 2 appeal is the final decision of the county except where a matter has been remanded to the hearing examiner. A final council decision may be appealed to superior court within 21 days of issuance of the decision in accordance with chapter 36.70C RCW.

(2) The cost of transcribing the record of proceeding, of copying photographs, video tapes and any oversized documents, and of staff time spent in copying and assembling the record and preparing the return for filing with the court shall be borne by the party filing the petition. If more than one party appeals the decision, the costs of preparing the record shall be borne equally among the appellants.

(Added Amended Ord. 02-064, December 9, 2002, Eff date February 1, 2003)SCC Title 30

30.72.140 Vacation of permits or approvals.

(1) Requests to vacate a permit shall be made in writing to the department of planning and development services.

(2) The director shall determine if the conditions in 30.42C.208 are present prior to authorizing the vacation.

(3) Vacation of any permit shall be documented by the filing of a notice of land use permit vacation with the county auditor on a form provided by the department of planning and development services.

(Added Amended Ord. 05-022, May 11, 2005, Eff date May 28, 2005)

30.72.150 Review or revocation of certain permits or approvals.

(1) If the director determines that a permit or approval is in material violation of this title, the director may initiate proceedings before the hearing examiner to review or revoke the permit or approval, in whole or in part.

(2) The hearing examiner shall hold a hearing in accordance with SCC 30.71.100. The director shall provide notice in accordance with SCC 30.70.050.

(3) The hearing examiner, upon good cause shown, may direct the department to issue a stop work order to temporarily stay the force and effect of all or any part of an issued permit or approval until the final decision of the hearing examiner is issued.

(Added Amended Ord. 05-022, May 11, 2005, Eff date May 28, 2005)

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No. 68739-5-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

KHUSHDEV MANGAT and HARBHAJEN MANGAT,
Appellants,

vs.

SNOHOMISH COUNTY, LUIGI GALLO, JOHANNES DANKERS and MARTHA DANKERS,
Respondents.

DECLARATION OF SERVICE

I, Chessa Tachiki, declare under the penalty of perjury that I served a true and correct copy of Appellant's Opening Brief on Respondents' attorneys by depositing a copy of that document with the U.S. Postal Service to the following individuals:

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Kenneth H. Davidson
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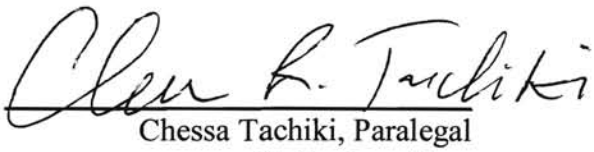
I further state that I mailed the original and one copy of the Appellant's Opening Brief for filing in the Court of Appeals, Division One by depositing said documents with the U.S. Postal Service to the following:

Court of Appeals Division One
Attn: Clerk of the Court
600 University St.
One Union Square
Seattle, WA 98101-1176

DATED this 6th day of August, 2012 at Arlington Washington.



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