NO. 38961-4

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

SECURITY SERVICES NORTHWEST, INC.,

Appellant,

v.

JEFFERSON COUNTY,

Respondent.

APPELLANT'S REPLY BRIEF

Alan S. Middleton, WSBA #18118
Davis Wright Tremaine LLP
Attorneys for Appellant
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

This matter was decided on summary judgment. Jefferson County does not dispute the standard applicable to review of an order granting summary judgment – it just ignores it. This Court must give Security Services Northwest, Inc. ("SSNW"), all favorable inferences from the evidence. It is not enough to affirm that the County disagrees with the inferences that may be drawn; indeed, what the County chooses to infer from the evidence is irrelevant. The issue is what may be inferred in support of SSNW's claims. SSNW provided ample evidence from which the trier of fact could infer (a) arbitrary and capricious action; and (b) unlawful means and improper motive on the part of the County.

On the two key issues relied upon by the trial court, collateral estoppel and "property right," the court clearly erred. Collateral estoppel does not apply because the highly deferential review applied at all stages of the prior proceeding does not apply here, and prior proceeding did not consider, much less rule upon, many of the arguments made by SSNW here. SSNW had a property right in its leasehold interest and the continuity of an existing lawful nonconforming use.

This Court should reverse and remand for trial. Until SSNW can have a process not burdened by a deferential standard of review and untainted by impropriety, it cannot be said to have had its "day in court."

II. COUNTER-STATEMENT OF FACTS

A. The County Shut SSNW Down.

The County claims that it did nothing to shut down SSNW's business except with respect to firearms training and training of third parties. But it is undisputed that the County on August 11, 2005, issued two orders – a "Stop Work Order" and a "Notice and Order" – forbidding SSNW from conducting virtually all of its on-site security training operations, including "[a]ll rifle and handgun ranges," "[m]arine [p]atrol," "[c]ounter [a]ssault [t]raining [even of SSNW employees]," and "[a]ll on-site training." CP 265-66 ¶ 30, CP 305-08, 310-14.

It is also undisputed that the County then sought a temporary restraining order requiring SSNW to comply with all of the County's orders, CP 266 ¶ 31, and that after a hearing, the trial court entered an order requiring SSNW to comply with the County's orders pending a decision in its administrative appeals. *Id.* ¶ 32.

The Examiner's decision, issued on January 10, 2006, is also beyond dispute. Deferring to the County, the Examiner denied that SSNW had ***any*** legal nonconforming use at anytime. CP 428. He therefore ordered that "***all training activities*** and use of firearms and weapons on the property be prohibited," CP 429, effectively shutting SSNW down.

Sanity began to return on October 9, 2006, when Judge Roof

issued a Memorandum Opinion in the First LUPA Appeal. CP 71-84. He held that the Examiner erred in denying that SSNW had a legal nonconforming use. CP 73, 74. He found that a "limited nonconforming use existed prior to enactment of the January 6, 1992, zoning code," and remanded for further proceedings "to determine the scope and nature of SSNW's nonconforming use as of January 6, 1992." CP 74-75. He held that "limited firearms training" was a part of SSNW's legal, nonconforming use, CP 74 – ***a clear rejection of the Examiner's order*** prohibiting "all training activities and use of firearms and weapons on the property." "As an aside, the County has a variety of mechanisms for addressing illegally constructed buildings, other than compelling ***lawful land users to dismantle their businesses or leave the property entirely."*** CP 82.

The Court of Appeals continued the trend by ordering a remand to permit a far broader inquiry into SSNW's legal nonconforming use than allowed by Judge Roof ***as well as permissible intensification.*** This Court directed that the Examiner "consider additional evidence on intensification of pre-1992 uses consistent with this opinion." 2008 WL 1723629.

On remand, Examiner Causseaux confirmed that SSNW had a lawful nonconforming use, with permitted intensification, far broader than previously allowed, including weapons training of on-site security guard employees and marine patrols. App. Br. App. C.

The record belies the County's argument that the restrictions it imposed were limited and in every respect upheld in subsequent review.

B. The Review "Process" Was Deferential and Tainted.

The County does not dispute that review of the County's actions, beginning with Examiner Berteig's proceeding, was highly deferential. At every stage of the proceedings the County alleges preclude SSNW's claims here, the decisionmaker applied a highly deferential standard. The Examiner applied "a *clearly erroneous* standard of review to issues of law, and a *substantial evidence* standard to questions of fact." Judge Roof applied a "substantial evidence" test in his review of the LUPA actions. Although his review of "legal issues" was *de novo,* Judge Roof's review was necessarily restricted by the Examiner's application of a "clearly erroneous" standard to issues of fact. This Court reviewed the Examiner's decision constrained by the clearly erroneous standard applied by and based solely upon the record before the Examiner. These standards are obviously a far cry from the preponderance of the evidence standard applicable to civil damages claims.

The proceedings were tainted from the start. No discovery was available to SSNW before the Examiner, and Judge Roof denied SSNW's request to conduct relevant discovery concerning *ex parte* contacts and application of the so-called "Administrative Rules." SSNW could not

challenge the County's violation of the Open Public Meetings Act in its July 5, 2005, Executive Session – without discovery, it did not find out about this meeting until much later. No discovery has occurred regarding public records abuses by the County. SSNW also did not know of the degree of cooperation between the County and a vocal, politically-powerful citizens group until long after the initial hearing was concluded. Because all subsequent proceedings were on a closed record, SSNW never got the chance to present evidence and argue a major theory underlying its claims here – that the County's motives were improper, even unlawful, and even this Court's conclusion that certain errors may have been harmless is based on an incomplete record.

Under Section 1983, "substantive due process is denied if a local jurisdiction makes a land use decision irrationally, arbitrarily, and capriciously, ... ***or was tainted by improper motive."*** *Cox v. City of Lynnwood,* 72 Wn. App. 1, 9, 863 P.2d 578 (1993), citing *Robinson v. City of Seattle,* 119 Wn.2d 34, 62, 830 P.2d 318 (1992). Likewise, tortious interference may be found if the County either used improper means or had an ***improper motive.*** Interference is wrongful – *i.e.,* it breaches a duty of non-interference – if it is done for an improper purpose or by improper means. *Pleas v. City of Seattle,* 112 Wn.2d 794, 803-804, 774 P.2d 1158 (1989). At no time has the issue of "motive" been considered, much less

decided, in prior proceedings. Certainly the scope and content of *ex parte* communications here would permit a jury to infer that the County's motives were improper – that it sought to shut down SSNW despite clear evidence of a lawful nonconforming use and Washington law permitting intensification of that use. Rather than work with SSNW to establish the boundaries of that use, the County was intent on shutting SSNW down.

Contrary to the County's representation, there was not an "extensive administrative record" before the Examiner disproving SSNW's claims of a lawful nonconforming use. Of the 230 log items presented at the hearing, approximately 62% were complaints of noise of recent vintage and news articles. Only about 14% of the log items related in any way to use of the Gunstone property, and 92% supported SSNW's use. The other 8%, offered by the County, simply offered generalities about the law of nonconforming use and its geographical extent, and did not genuinely contest SSNW's proof. The Examiner's conclusion belies the deference paid to the County, and demonstrates why collateral estoppel should not be applied.

The lack of evidence supporting the County's argument is certainly noteworthy, and supports an inference that the County's motives were in fact wrongful.

C. Issues Not Decided in Prior Proceedings.

It is undisputed that Examiner Berteig, Judge Roof, and this Court did not consider, and made no findings on, issues that underlie SSNW's Section 1983 and tortious interference claims. At no time did any of them consider, among other things:

- *Ex parte* communications between the Examiner, Deputy Prosecutor Alvarez, and members of the community;
- Whether the County acted with improper motive;
- Whether the County's actions were arbitrary and capricious;
- Whether the County had singled SSNW out for "different treatment"; and
- Whether the County in fact had adopted the 1992 Administrative Rules relied upon by the Examiner (no party has yet produced evidence of adoption).

III. ARGUMENT

A. Collateral Estoppel Does Not Apply.

No Washington case has ever applied collateral estoppel to bar a damages action based upon findings entered in a related LUPA proceeding. Certainly no Washington case has applied the doctrine in a context where, as here, the prior proceedings were conducted under a highly

deferential standard of review, were marred by procedural defects, and precluded a full and fair hearing on the merits. This Court should not be the first Washington court to apply collateral estoppel in this fashion.

It is fundamental that differences in the burden of proof preclude application of collateral estoppel. App. Br. at 45-46. The County dismisses this argument as inapplicable where the two proceedings in question are both civil in nature. The County's argument is nonsense. Certainly no Washington case holds as much, and 1 RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982) clearly recognizes that collateral estoppel does not apply where there are differences in the burden of proof even in wholly civil cases. *See id.,* cmt. *f*, illus. 10; *see also* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4422 (2002) (principle applies even to "more subtle" gradations of proof in civil actions).

Cases cited by the County stand solely for the proposition that an administrative determination, in appropriate circumstances, may give rise to collateral estoppel. SSNW does not dispute this general proposition, but offered cases establishing that disparities in the burden of proof between prior proceedings and this case preclude application of collateral estoppel. The County's cases utterly fail to address this issue. For example, *Satsop Valley Homeowners Ass'n v. N.W. Rock, Inc.,* 126 Wn.

App. 536, 108 P.3d 1247 (2005), considered the effect of one administrative action on a subsequent administrative action and contains no discussion of the relative burdens in successive proceedings. The same is true of *Malland v. Dept. of Retirement Sys.*, 103 Wn.2d 484, 694 P.2d 16 (1985). In neither case was the decision granted preclusive effect made under a more deferential standard of review than the subsequent proceeding.

In *City of Bremerton v. Sesko,* 100 Wn. App. 158, 995 P.2d 1257 (2000), there is no indication that the Planning Commission's finding of a nuisance was based upon a deferential standard of review of the City's issuance of cease and desist orders. Similarly, the hearing examiner in *Christensen v. Grant Cty. Hosp. Dist. No. 1,* 152 Wn.2d 299, 96 P.3d 957 (2004), conducted a full hearing and concluded that the terminated employee had failed to establish a *prima facie* case – hardly a deferential standard. For the same reason, *Shoemaker v. City of Bremerton,* 109 Wn.2d 504, 754 P.2d 858 (1987), does not apply. There, the Commission heard an employee's complaints of retaliatory discharge without in any way deferring to the City's actions in firing the employee.

Reninger v. State Dept. of Corrections, 134 Wn.2d 437, 951 P.2d 782 (1991), is likewise inapplicable. In the prior proceeding, the *Reininger* plaintiffs were afforded a full trial-like hearing, complete with discovery, and there is no indication that the hearing examiner applied a

deferential standard of review remotely similar to that applied by the County's hearing examiner, the Superior Court, or this Court.

Collateral estoppel does not apply "with special force" in this case merely because LUPA is involved. LUPA explicitly declares that it does not apply to actions for damages. RCW 36.70C.030(1)(c). None of the cases cited by the County precludes an action for damages under Section 1983 or for tortious interference. Of particular note, in *James v. Kitsap Cty.*, 154 Wn.2d 574, 115 P.3d 286 (2005), a case relied upon by the County, the Supreme Court specifically noted that the petitioner had failed to allege that his action fell within one of the exceptions to LUPA enumerated in RCW 36.70C.030(1). *Id.*, 154 Wn.2d at 586-87. By contrast, SSNW has always argued that its claim falls squarely within the statute's exception for "[c]laims provided by any law for monetary damages or compensation." RCW 36.70C.030(1)(c); CP 150. Finally, the State of Washington clearly is not free to legislate away rights granted by federal law, including in particular Section 1983, by declaring LUPA to be an "exclusive" remedy.

This Court should also reverse because the County failed to prove that issues ***actually decided*** previously are identical to issues presented to the trial court in this action. The Examiner's decision ***did not*** address any of the elements of a Section 1983 action or tortious interference; neither

did Judge Roof's order, and neither did this Court's opinion. Specifically, no tribunal addressed whether the County's actions were arbitrary and capricious, whether the County acted with improper motives, whether SSNW's procedural due process rights were violated, or whether the County had impermissibly treated SSNW differently from other, like persons. As for tortious interference, no tribunal addressed whether the County had employed improper means or acted with an improper purpose. In fact, none of these tribunals could have addressed SSNW's claims regarding *ex parte* communications and improper motive because SSNW was not permitted to discover the facts relevant to those claims.

Before the trial court, the County simply took the approach of claiming vindication by Judge Roof and this Court. However, the most relevant inquiry was whether SSNW had a legal, nonconforming use. On that issue, SSNW ***prevailed.*** Both Judge Roof and this Court held that the Examiner erred in depriving SSNW of its vested legal, nonconforming use, and this Court went one step further to require that the Examiner consider lawful intensification of the established use.

B. The Trial Court Erred in Dismissing SSNW's Tortious Interference Claim.

The County asks this Court to affirm dismissal of SSNW's tortious interference claim on the ground that SSNW "failed to satisfy the elements of such a claim." Resp. Br. at 46. But the County moved to dismiss this

claim on only two very narrow grounds: (a) collateral estoppel; and (b) failure to comply with the nonclaim statute, RCW 4.96.020. CP 905. It has abandoned the latter argument.

The Court should not affirm based upon an argument not made or briefed below. *Van Vonno v. Hertz Corp.,* 120 Wn.2d 416, 427, 841 P.2d 1244 (1992) ("An issue, theory or argument not presented at trial will not be considered on appeal."); *Concerned Coupeville Citizens v. Town of Coupeville,* 62 Wn. App. 408, 814 P.2d 243 (1991) (contentions not made to trial court in its consideration of summary judgment motion need not be considered on appeal). As the County did not argue to Judge Spearman that SSNW could not meet the elements of tortious interference, the only argument the Court should consider here is collateral estoppel.

As noted elsewhere, *supra* at 2-4, the County did not merely shut down third-party firearms training. The County's orders unequivocally forbade SSNW from conducting virtually all of its security training operations. The County sought a restraining order to enforce those orders. The Examiner held that SSNW had no nonconforming use ***at all.*** Judge Roof restored a part of SSNW's nonconforming use, the Court of Appeals remanded on the scope of that use and any intensification, and the Examiner on remand has restored to SSNW significant additional uses – an expensive process that has taken years. This is not a dispute merely about fire-

arms training for third parties. SSNW had a "property right" at least to the full extent found in the remand hearing, and it was deprived of that right by the County's orders and the Examiner's ruling.

The County argues that it merely asserted its legal interests in good faith, and therefore SSNW has no claim for tortious interference. But the issue of "good faith" is one that has not been litigated in any forum. Tortious interference may be based either upon the County's use of improper means or an ***improper purpose.*** *Westmark Development Corp. v. City of Burien,* 140 Wn. App. 540, 166 P.3d 813 (2007), *review denied,* 163 Wn.2d 1055 (2008). In *Westmark,* the Court of Appeals upheld a jury verdict in favor of the developer, finding that the City could have acted to delay permitting of a project for the improper purposes of setting an example or placating a neighboring legislator. *Id.,* 140 Wn. App. at 556-60. Here, there is sufficient evidence from which a jury could conclude that the County acted improperly for nearly identical reasons – setting an example and placating the Discovery Bay Alliance.

The cases cited by the County are inapt. *Birkenwald Dist. Co. v. Heublein,* 55 Wn. App. 1, 776 P.2d 721 (1986), is readily distinguishable. That case involved two private contracting parties and there was no evidence of improper purpose. In *Leingang v. Pierce Cty. Med. Bur., Inc.,* 131 Wn.2d 133, 930 P.2d (1997), a plaintiff claimed the defendant med-

ical bureau interfered with his contract with his UIM carrier because the bureau informed the insurer of its claim for reimbursement from the UIM proceeds, causing the UIM carrier to deposit the funds in the registry of the court. There was no suggestion that the bureau acted in bad faith. In *Bakay v. Yarnes,* 431 F. Supp. 2d 1103 (W.D. Wash. 2006), a cat owner whose cats had been euthanized by animal control officers of Clallam County claimed tortious interference with her business. The County acted pursuant to a statute authorizing euthanization where animals were deemed to be severely suffering. There was no evidence of improper means or improper purpose; the trial court dismissed on summary judgment. The decision in *Reninger v. State Dept. of Corrections,* 134 Wn.2d 437, 951 P.2d 782 (1991), is not "controlling authority." *See supra* at 9-10. None of these cases is remotely similar to that presented here.

For all of these reasons, the trial court erred in dismissing SSNW's tortious interference claim.

C. The Trial Court Erred in Dismissing the Section 1983 Claim.

Judge Spearman explicitly based his dismissal of SSNW's Section 1983 claim on two issues: First, that the claim was barred by collateral estoppel; second, that SSNW had not shown a "property interest" sufficient to give rise to a claim under Section 1983. With respect to the merits of SSNW's claim, he stated that "[t]here was an argument sufficiently

raised to make me want to know more." RP 67 (Dec. 7. 2007). Except with respect to the issue of "property interest," Judge Spearman ***denied*** summary judgment on the merits of SSNW's claim, and properly so.

1. Section 1983 Is Frequently Used To Vindicate Rights in the Land Use Context.

The County is wrong in claiming that Section 1983 has limited application in the land-use context. As noted in SSNW's opening brief, Section 1983 has been used to vindicate rights in this context whether based upon a violation of procedural due process, substantive due process, or equal protection. The cases are in fact legion in which courts have applied Section 1983 in the land-use context. *See* App. Br. at 35; *see generally* K. Bley, *Use of the Civil Rights Acts to Recover Damages in Land Use Cases* (ALI-ABA 2007).

With respect to respondeat superior, although it is beyond dispute that the Examiner was a "policymaker," and thus may expose the County to liability for his having deprived SSNW of its legal, nonconforming use, he was not the only relevant actor. The acts of other County officials are relevant. In *Reed v. Shorewood,* 704 F.2d 943 (7th Cir. 1983) (Posner, J.), a nightclub owner alleged that a village's interference with his business was a policy orchestrated at the highest level of village government. The complaint alleged repeated refusal to renew a liquor license, and a campaign involving the police chief and virtually the entire village official-

dom, to put plaintiff out of business. The Court of Appeals ***reversed*** summary judgment in favor of defendants.

The *Reed* case is similar to that presented here. The *Port Townsend Leader* published its article in which Director Scalf stated that the County would "work with" SSNW on June 29, 2005; as noted in SSNW's opening brief, that provoked a deluge of complaints about "noise" (despite the fact the County had no noise ordinance). In response, on July 5, 2005, the County Council – an admitted "policymaker" for the County – held an unlawful executive session to discuss SSNW with Deputy Prosecuting Attorney David Alvarez, who then became Examiner Berteig's "attorney" for SSNW's appeal. This resulted in issuance of the County's first Stop Work Order on July 8, 2005, which violated the County's ordinance relating to voluntary compliance. As the summer progressed, the County took increasingly egregious action against SSNW, while the County Council took no action to stop it.

On this record, SSNW presents a triable issue concerning whether the County's actions toward SSNW were "official policy," sanctioned by the County Council, so as to expose the County to liability.

2. SSNW's Constitutional Claims Are Not Barred by Waiver or Res Judicata.

Res judicata bars both ***claims*** that were in fact previously litigated and ***claims*** that ***could have been*** litigated in a prior proceeding. The

County argues that SSNW could have brought its constitutional ***claims*** in the prior LUPA action, and so should be barred from asserting them here.

The County cites no authority for the proposition that SSNW could have brought a Section 1983 ***claim*** in proceedings before Examiner Berteig. The Examiner's authority involved only the power to hear SSNW's appeal of the three orders issued by Jefferson County. The Examiner did not have jurisdiction to consider or decide a claim for damages under Section 1983. The same applies to the LUPA action heard by Judge Roof. The Act explicitly states that ***it does not apply to claims for damages.*** RCW 36.70C.030. Because neither the Hearing Examiner nor Judge Roof had the jurisdiction to address the claims SSNW raises here, res judicata does not apply. *See Nichols v. Snohomish County,* 47 Wn. App. 550, 553, 736 P.2d 670 (1987).

The County's reliance on *Migra v. Warren City School Dist.,* 465 U.S. 75 (1984), is misplaced. In *Migra,* the plaintiff had brought a state court suit ***for damages*** for breach of contract and wrongful interference. She dismissed without prejudice for a related conspiracy claim. There was no dispute that the state court had jurisdiction to determine the conspiracy claim. On her subsequent filing of a Section 1983 lawsuit in federal court, her claims were held barred. Although the Court used the phrase "res judicata," its concern was with the splitting of a cause of action. Of in-

terest, the *Migra* Court observed that ***state law*** governs the preclusive effect to be given to judgments. Consequently, *Jama Constr. v. City of Los Angeles,* 938 F.2d 1045 (9th Cir. 1991), and *Sanchez v. City of Santa Ana,* 936 F.2d 1027 (9th Cir. 1991), which apply California law, are inapplicable on their face. Further, in both *Jama* and *Sanchez,* the plaintiffs had previously pursued state court remedies in which their Section 1983 damages claims ***could have been brought.***

The *Jama* and *Sanchez* cases clearly conflict with established Washington law. The County curiously fails to cite *Hayes v. City of Seattle,* 131 Wn.2d 706, 934 P.2d 1179 (1997). In that case, a landowner first brought a writ proceeding seeking to overturn conditions imposed by a municipality on a master use permit. Following termination of that proceeding, the landowner brought an action for damages under Section 1983. The City of Seattle argued that the damages action was barred because the landowner had failed to assert the claim in the writ proceeding. The Supreme Court rejected that argument. Although based on the same transaction, the Court concluded that the matters were distinct:

> [W]e are convinced that Hayes's action for judicial review and his subsequent action for damages are separate. In the action for judicial review, Hayes essentially sought to overturn a decision of the Seattle City Council. In order to establish that lawsuit, Hayes needed only to establish that the Seattle City Council's action met one of the five standards listed in the statutory writ of certiorari. RCW 7.16.120. The evidence he needed to maintain that action

> is far different than the type of evidence that he needed to muster to establish that he was entitled to an award of damages. Indeed, we have previously held that writ actions cannot be used to decide damages issues and must be brought separately. *Lutheran Day Care v. Snohomish County,* 119 Wn.2d 91, 114, 829 P.2d 746 (1992), *cert. denied,* 506 U.S. 1079, 113 S. Ct. 1044, 122 L. Ed. 2d 353 (1993).

Hayes, 131 Wn.2d at 713-14. *Hayes* was decided under pre-LUPA law, but enactment of LUPA should not change the result. LUPA explicitly declares that it does not apply to actions for damages – an endorsement of the Supreme Court's practice of requiring writ and damages actions to proceed separately.

The Court of Appeals in *Hayes* found another reason to reject the res judicata argument – the vast difference in applicable filing deadlines:

> Were it not for the very short limitation period in which a writ may be sought, we would be inclined to apply res judicata to section 1983 claims which are not combined with their related writ actions. However, Section 1983 claims are governed by a 3-year limitation period. [Cite omitted.] If res judicata applied, the limitation period for section 1983 claims involving land use permits would be effectively reduced from 3 years to 30 days. This result is incompatible with and must yield to the policies which underlie the 3-year period for section 1983 claims. ... [T]he short limitation period for actions for writs of review cannot impose itself, directly or indirectly, on the parallel federal cause of action. Consequently, a section 1983 claim is not foreclosed under res judicata by a claimant's failure to join it with a state claim which must be brought within a shorter period.

Hayes v. City of Seattle, 76 Wn. App. 877, 888 P.2d 1227 (1995), *aff'd on*

other grounds, 131 Wn.2d 706, 934 P.2d 1179 (1997). This Court should not abandon Washington precedent in favor of California law.

SSNW did not waive rights to assert constitutional claims by failing to raise procedural irregularities before the Hearing Examiner and before Judge Roof. Fundamentally, SSNW could not waive claims it had no knowledge of.

> Waiver is the intentional relinquishment of a known right. The person against whom waiver is claimed must have intended to relinquish the right and the person's conduct must be inconsistent with any other intent. To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; intent will not be inferred from doubtful or ambiguous facts.

Bill McCurley Chevrolet v. Rutz, 61 Wn. App. 53, 57–58, 808 P.2d 1167, 1170 (1991) (citations omitted). SSNW had no knowledge that the County and its Examiner were engaging in numerous *ex parte* contacts, including contacts of substance between the Examiner and Deputy Prosecuting Attorney Alvarez, who had counseled the County prior to issuance of the first of the County's enforcement orders, and would rely on unpublished, unadopted Administrative Procedures in deciding its appeal. Judge Roof denied SSNW's request to conduct discovery on these issues in the LUPA appeal.

The County cites primarily authorities barring a litigant from raising on appeal issues not previously raised before the trial court ***in the***

same proceeding. *Ramsey v. Mading,* 36 Wn.2d 303, 217 P.2d 1041 (1950); *Hogenson v. Service Armament Co.,* 77 Wn.2d 209, 216-17, 461 P.2d 311 (1969) (comments by judge); and *Van Vonno v. Herz Corp.,* 120 Wn.2d 416, 841 P.2d 1244 (1992) are of this nature. That is not the case here, and these cases are irrelevant.

It is undisputed that the Examiner held that SSNW had no lawful nonconforming use, that Judge Roof reversed on this point, and that the Court of Appeals remanded for further proceedings to determine the scope of that use and its lawful intensification. This does not mean, as the County suggests, that SSNW had no property interest in that use sufficient to support a claim under Section 1983. The issue of "property right" is addressed further below. *See infra* at 21-26.

The proper analysis involves not waiver, but claim or issue preclusion. For the reasons discussed throughout this brief, those doctrines do not apply.

3. SSNW Had a Property Right.

It is beyond dispute that a tenant has a "property right" protected by constitutional guaranties, and thus by Section 1983. *See, e.g., City of Seattle v. McCoy,* 101 Wn. App. 815, 4 P.3d 159 (2000) ("As tenants, the McCoys possess a valuable interest in the real property."). The County

argues that for one technical reason or another, SSNW's leasehold interest does not qualify for protection. Those arguments are meritless.

Most of the arguments raised by the County in its response concerning SSNW's "property right" were anticipated by and addressed in Appellant's opening brief, and the County fails to address SSNW's arguments. For example, it is clear that the doctrine of part performance overcomes the objections raised by the County, including the lack of a writing, inadequate legal description, and the lack of a written assignment. App. Br. at 35-38. The County fails to address the doctrine of part performance at all. Given the facts of record and that whether part performance has been established is a question of fact, *Berg v. Ting,* 125 Wn.2d 544, 557-59, 886 P.2d 564 (1995); *Tiegs v. Watts,* 135 Wn.2d 1, 16, 954 P.2d 877 (1998), summary judgment was improper.

Even if the only tenancy established were month-to-month, SSNW still had a property interest sufficient for purposes of Section 1983. The County misrepresents *Clear Channel v. Seattle Monorail,* 136 Wn.2d 781, 786-87 (2007), as standing for the proposition that a month-to-month tenant can never possess a property interest entitling the tenant to recover damages. *Clear Channel* stands for no such thing.

In *Clear Channel,* a transportation authority condemned land on which Clear Channel had constructed a billboard under a lease with the

prior owner. The tenancy became a month-to-month tenancy upon the expiration of the original lease, well before the authority took possession. Once it had possession, the authority stepped into the shoes of the lessor and gave notice to Clear Channel to remove the billboard. Clear Channel asserted claims for inverse condemnation and violation of Section 1983. Those claims were dismissed.

Two facts distinguish *Clear Channel* from the present case. First, unlike the authority in *Clear Channel,* the County has not acquired the Gunstone property, has acquired no right to terminate the lease, and SSNW has a reasonable expectation in its renewal. More importantly, *Clear Channel* itself recognized an exception, established in *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U.S. 470 (1973), where a tenant made substantial improvements to condemned property under a lease. The Court held that "the probability of renewal of the tenant's lease should be taken into account in establishing reimbursement." *Clear Channel,* 136 Wn. App. at 785-86. The imminent expiration of a lease term is no bar to establishing a property right where renewal is "probable." The *Clear Channel* court distinguished *Almota* on the basis that Clear Channel's billboard "is a removable fixture and not an improvement that enhances the property." *Id.* Here, SSNW has made substantial, permanent improvements to the property it leases from the Gunstones. It

has a reasonable expectation of continuing in its tenancy, including an oral agreement for twenty years. Under *Almota,* that is enough to characterize even a month-to-month tenancy as creating a "property interest" sufficient to establish standing under Section 1983.

Scott v. City of Seattle, 99 F. Supp. 2d 1263 (W.D. Wash. 1999), is readily distinguishable. There, the City issued a notice of violation to the property owner, who then terminated the leases in question. Here, the County issued its orders directly to SSNW, not to the property owners, and the Gunstones have not terminated their lease with SSNW nor have they expressed any intent to do so. To the extent the case is read for any broader proposition, it conflicts with *Clear Channel* and *Almota. See also Ruiz v. New Garden Twnp.,* 232 F. Supp. 2d 418 (E.D. Pa. 2002) (finding protectable property interest in oral month-to-month tenancy).

Although no Washington case has held specifically that a nonconforming use is a protectable "property right" for purposes of Section 1983, neither has any Washington case declared them not to be so protected. Courts across the nation have recognized that nonconforming uses are "property rights" for purposes of Section 1983.[1] There is no principled reason for this Court to hold otherwise, given the strictures of *City of*

[1] *See, e.g., Greene v. Town of Blooming Grove,* 879 F.2d 1061 (2d Cir. 1989); *Gavlak v. Town of Somers,* 267 F. Supp. 2d 214 (D. Conn. 2003); *South Lyme Property Owners Ass'n v. Town of Old Lyme,* 539 F. Supp. 2d 524 (2008).

University Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001), and *Summit-Waller Citizens Ass'n v. Pierce County,* 77 Wn. App. 384, 388, 895 P.2d 405 (1995), which declare nonconforming uses to be vested property rights. The County cites no case holding that a nonconforming use is not a "property right" for Section 1983 purposes. SSNW clearly had a "property interest" under Section 1983 in its nonconforming use at least to the extent of the uses announced on remand, and no "permit" was required.

SSNW had a "property right" in after-the-fact permits even if some discretion is involved. *Mission Springs, Inc., v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998). As state law determines what is a "property right" under Section 1983, that should end the inquiry. App. Br. at 35; *see, e.g., Crowley v. Courville,* 76 F.3d 47 (2d Cir. 1996); *Association of Orange Cty. Deputy Sheriffs v. Gates,* 716 F.2d 733, 734 (9th Cir. 1983).

Town of Castle Rock v. Gonzales, 545 U.S. 748, 125 S. Ct. 2796 (2005), is not to the contrary. In *Castle Rock,* a wife brought a civil rights action against a municipality and police officers based on the officers' refusal to enforce a domestic abuse restraining order against her husband, and the Supreme Court concluded that the wife did not have a "property interest" in enforcement of the restraining order. This is a far cry, and

involves far different policy considerations, from a municipality's consideration of an application for a building or conditional use permit. *Id.*, 545 U.S. at 761 ("deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands").

The County's reliance on *Tutor-Saliba Corp. v. City of Hailey,* 452 F.3d 1055 (9th Cir. 2006), is bizarre, as the case has nothing to do with the issues here. The plaintiff pilot did not own the airstrip in question or otherwise claim a property right similar to a leasehold interest. He simply sought permission to land his (very large) plane, and the municipality denied permission because the plane exceeded weight limitations. *Tutor-Saliba* does not stand for the proposition that government may limit a lawful nonconforming use so long as it does not "eliminate it."

All of the "property rights" identified – the right to use and develop property free from arbitrary conduct in the permitting process; the right to have its permits considered; its vested right to continue a legal, nonconforming use – were denied to SSNW by the County. They are certainly sufficient to prove a "property right" protectable under Section 1983 and in a claim for tortious interference. The trial court erred in dismissing SSNW's claim for lack of a "property right."

4. The Court Should Not Consider the County's Ripeness Argument, Which Is Limited in Scope in any Event.

The County did not argue ripeness in its summary judgment motion, and should not be heard on that issue now. *See supra* at 12 (issue, theory or argument not presented at trial will not be considered on appeal). The ripeness argument is nonetheless limited. At the very least, the entirety of SSNW's lawful nonconforming use as of 1992, together with lawful intensification, required no permit; hence ripeness does not apply. At most, only two permits are at issue – after-the-fact building permits and a conditional use permit for uses in excess of those already established.

Although SSNW has not submitted an application for a conditional use permit, SSNW did attempt to submit a building permit application, and the County would not accept it. Mr. D'Amico attested to this in his declaration, which is a part of the record. CP 264-65 ¶ 28. In arguing that SSNW did not seek a permit, the County relies on the declaration of Mr. Johnsen that contains only selected portions of Mr. D'Amico's deposition and conveniently omits those portions in which Mr. D'Amico testified that he did try to submit a permit. The full extent of Mr. D'Amico's testimony on the subject is set forth in Appendix A, and makes it clear that SSNW did try to apply. The County did not argue ripeness in its motion; consequently, the omitted testimony was not significant. SSNW believes the proper course is for the Court not to consider the County's ripeness argument; if the Court does consider the argument, however, it should consider

the totality of Mr. D'Amico's testimony.

The relevance of Mr. D'Amico's testimony to the ripeness argument is obvious. The ripeness doctrine is subject to a futility exception. *See, e.g., Bannum, Inc. v. Louisville,* 958 F.2d 1354, 1361-62 (6th Cir. 1992); *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1502 (9th Cir. 1990); *Harrington v. County of Sonoma,* 857 F.2d 567, 570 (9th Cir. 1988). Because the County would not accept SSNW's permit applications, it should not be heard now to argue SSNW has no claim.

5. The Trial Court Properly Denied Summary Judgment on SSNW's Procedural Due Process Claim.

SSNW alleged four grounds for its procedural due process claim. First, the County denied SSNW procedural due process when it refused to accept SSNW's after-the-fact permit applications – it denied SSNW any "process" at all. The County argues that SSNW did not actually apply for a permit. That issue is discussed above, *see supra* at 27; Mr. D'Amico testified that he attempted to apply for a permit, but the County refused to accept it. An issue of fact precludes summary judgment in this context.

Second, SSNW presented evidence that the Examiner engaged in improper *ex parte* communications with opponents of SSNW. The *ex parte* communications are not simply those of the alleged "officious intermeddlers" – politically active private citizens – but the County itself, in at

least two contexts. First, Deputy Prosecuting Attorney Alvarez communicated *ex parte* with the Examiner on matters of substance that the Examiner refused to disclose; second, Department of Community Development staffer faxed unknown materials to the Examiner after the close of the hearing. App. Br. at 24-25.

Engaging in *ex parte* communications violates Washington state appearance of fairness rules. More importantly, they violate procedural due process so as to give rise to a claim under Section 1983. *See, e.g., Stone v. FDIC,* 179 F.3d 1368, 1376-77 (Fed. Cir. 1999) (introduction of new information by *ex parte* communications undermines plaintiff's constitutional due process guarantee of notice and opportunity to respond); *Vance v. Housing Opportunities Comm'n,* 332 F. Supp. 2d 832, 842 (D. Md. 2004). The issue is one of notice and opportunity to be heard – the touchstones of procedural due process. SSNW did not have the opportunity to meet and rebut any information provided *ex parte* to the Examiner.

Third, the Examiner used and relied upon the unpromulgated 1992 "Administrative Rules" without giving SSNW notice and opportunity to be heard on the application of those rules to the matter. The County responds that this issue was "resolved" – but the only "resolved" issue was whether the Examiner could take ***judicial notice*** of the "rules." At no time

did the prior proceedings consider whether the "rules" were properly adopted. SSNW has discovered no "adoption" of those rules, and certainly the County has presented no evidence that they were adopted.

Finally, the Examiner's action on remand – without permitting additional input from any party (except the Director of Community Development's direction to the Examiner to proceed with issuing a remand decision) – is emblematic of the County's entire treatment of this matter. The County has constantly dismissed SSNW's right to be heard. Although Examiner Berteig's remand decision was stayed, the County has not stipulated to its vacation despite the subsequent remand to Examiner Casseaux. It continues to be a cloud on SSNW's rightful use of the Gunstone property.

The County flippantly observes that an applicant who has "had his day in court" cannot complain of denial of procedural due process. But the cases cited do no more than recite the general proposition, and fail to address serious issues like *ex parte* communications and lack of notice and opportunity to be heard that have justified relief in cases like *Stone* and *Vance, supra* at 27-28. For example, in *Systems Amusement, Inc. v. State,* 7 Wn. App. 516, 500 P.2d 1253 (1972), a plaintiff sued the State for damages for summary denial of its application for a liquor license, despite its failure to avail itself of remedies afforded by the Administrative Proce-

dures Act and failure to comply with the tort claims statute. It argued that the Washington State Constitutional guaranty of due process was, in effect, self-executing and gave him a claim for damages. The Court of Appeals disagreed, but there is no discussion whatsoever of the adequacy of procedures afforded. *Bay Indus., Inc. v. Jefferson Cty.*, 33 Wn. App. 239, 653 P.2d 1355 (1982), likewise omits any discussion of what sort of "process" must be afforded to meet constitutional guaranties.

6. Proceedings Before the Hearing Examiner Were Tainted.

SSNW does not argue, as the County suggests, that the Examiner could not consider ***relevant evidence*** presented by the public openly, and with an opportunity for SSNW to respond. "Evidence," so-called, given by members of the public at the Examiner's Hearing, however, was irrelevant to the issue – the existence and scope of SSNW's lawful nonconforming use.[2] Indeed, virtually the only substantial evidence on point was that offered by SSNW – which the Examiner proceeded to ignore, despite the fact that even the County's witnesses acknowledged no reason to doubt SSNW's proof.[3] That the Examiner went to such lengths to shut

[2] The County concedes that the evidence "was largely immaterial" on the issue in question – SSNW's lawful nonconforming use. Resp. Br. at 40.

[3] The County's Director of community Development, the person who issued the enforcement orders against SSNW, admitted that he believed the testimony of Mr. D'Amico, CP 637, instructors Tangen, *id.*, and Carver, *id.*, and the letter from the Sequim Police Chief, CP 618, each affirming a broad range of security services and

SSNW down – declaring that SSNW had ***no*** lawful nonconforming use – is evidence that his conclusion was significantly affected by matters outside the record.

SSNW has identified at least two egregious instances of *ex parte* communications – substantive discussions between its Examiner and Deputy Prosecuting Attorney Alvarez and a fax from the County's Department of Community Development *after proceedings were closed.* App. Br. at 25. The backdrop cannot be ignored: Dozens of communications between County officials and members of the Discovery Bay Alliance, including direct contact by Mr. Parker with the Examiner himself, App. Br. at 14-25; communications between the County's attorney and the DBA on conduct of the hearing, *id.* at 21-22; a bizarre request from the Prosecuting Attorney for the DBA's assistance in dealing with a political rival, *id.* at 20 – the very same judge who heard the County's motion for injunctive relief. The goal of the DBA was clear: Shut down SSNW, or there would be a "political price" to be paid by the County. *Id.* at 24.

The County relies upon *Parkridge v. City of Seattle,* 89 Wn.2d 454, 573 P.2d 359 (1978), for the proposition that "views of the community may be considered." In *Parkridge,* the Court considered the validity of a downzone by the City of Seattle where public input favored the down-

---

training practices on the 3,700 acres of the Gunstone Property that involved SSNW employees as well as local law enforcement personnel and other third parties.

zone. The *Parkridge* Court in fact concluded that there was insufficient evidence of a change in circumstances, and that the downzone occurred largely, if not exclusively, due to public disfavor. In the related case of *Pleas v. City of Seattle,* 112 Wn.2d 794, 806-07, 774 P.2d 1158 (1989), the Court ***rejected*** the City's claim that this was simply politics as usual, observing that municipal liability for tortious interference "cannot be avoided simply by labeling such actions 'political.'" Another apt case is *Maranatha Mining Inc. v. Pierce County,* 59 Wn. App. 795, 801 P.2d 985 (1990), in which the Court of Appeals overturned the Pierce County Council's denial of a permit to operate a surface gravel mine and asphalt plant where the denial was based upon community displeasure.

It is disingenuous to argue that the County and its Examiner were not affected by this political pressure simply because that pressure was not noted in the Examiner's decision. If an Examiner were to base his or her decision on public displeasure, he or she is hardly likely to publicize it.

7. The Trial Court Properly Denied Summary Judgment on SSNW's Substantive Due Process Claim.

There is no dispute that SSNW presents a triable claim for denial of substantive due process if the County acted ***arbitrarily and capriciously.*** There also is no dispute that whether the County acted arbitrarily and capriciously is a ***question of fact.*** What the parties dispute is whether this

is a case in which that element may be determined as a matter of law.

The County attempts to relax its burden by referring to several deferential standards it claims applies to this case – most specifically, the "shocks the conscience" standard. This case is fundamentally about the judicial or quasi-judicial consideration of land-use enforcement. What the County fails to tell this Court is that the cases on which it relies (a) arise in the legislative context, where greater deference is due; (b) arise in the context of police brutality (not land-use), where officers must act at times with split-second haste; or (c) arise in circuits other than the Ninth Circuit, where the "shocks the conscience" standard has not been adopted.

The first several cases cited by the County involve legislative action. For example, in *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), the Supreme Court considered the validity of a city-wide zoning ordinance. In *Usury v. Turner Alcorn Mining Co.,* 428 U.S. 1 (1976), the Court considered the validity of the Federal Coal Mine Health & Safety Act – specifically, the provisions of the Act requiring mineowners to compensate disabled miners. In *Halvorson v. Skagit Cty.,* 42 F.3d 1257 (9th Cir. 1994), the Ninth Circuit considered whether Skagit County could be held liable for its 25-year participation in maintenance of dikes when neighboring properties flooded. And in *Dodd v. Hood River,* 59 F.3d 852 (9th Cir. 1995), the plaintiff challenged area-wide forest practices legisla-

tion. These are fundamentally legislative acts entitled to greater deference (*e.g.*, "substantial relation" or "rational basis"). *See* 3 EDWARD H. ZIEGLER, ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 40.6 (2008).

It is clear that the strictest standard argued by the County, the "shocks the conscience" standard, does not apply here. The "shocks the conscience" standard first appeared in *Rochin v. California,* 342 U.S. 165 (1952), a case involving the forced stomach-pumping of a criminal suspect to obtain evidence – swallowed pills. In other words, the Court was specifically looking at the conduct of state court criminal proceedings. The test appears again in *County of Sacramento v. Lewis,* 523 U.S. 833 (1998), cited by the County. There, parents of a passenger killed in a high-speed police chase brought a Section 1983 action against the county. Neither case involved a zoning or permit dispute; instead, they each involved police actions requiring split-second decisionmaking. The singularity of *Lewis* is apparent. The Supreme Court itself carefully pointed out that the "shocks the conscience" test is appropriate for situations where the state actor does not have time to deliberate. The deliberative indifference ("arbitrary or improper motive") test is "sensibly employed ... when actual deliberation is practical." *Lewis,* 523 U.S. at 851.

Since *Lewis,* no Washington case has applied the "shocks the con-

science" standard to a land-use dispute. *Estate of Lee v. City of Spokane,* 101 Wn. App. 158, 2 P.3d 979 (2000), and *State v. Hoisington,* 123 Wn. App. 138, 94 P.3d 318 (2004), each dealt with police action, the latter being a prisoner rights suit. Neither addressed any land-use issues.

There Federal Circuit Courts of Appeal are split. Only three Circuits – the First, Second, and Third – have adopted the "shocks the conscience" test in the land-use context. *E.g., Mongeau v. City of Marlborough,* 492 F.3d 14 (1st Cir. 2007); *United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392 (3d Cir. 2003). The three cases cited by the County are in the First and Third Circuits. *See Licari v. Ferruzzi,* 22 F.3d 344 (1st Cir. 1994); *Eichenlaub v. Township of Indiana,* 385 F.3d 274 (3d Cir. 2004); *Mongeau, supra.*

By contrast, after *Lewis,* "most circuits have concluded that *Lewis* does not mandate the application of the 'shocks the conscience' test in the land use context." C. Levine, *United Artists: Reviewing the Conscience Shocking Test Under Section 1983,* 1 SETON HALL CIR. REV. 101 (Spring 2005). Those Circuits include at least the Fourth, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits. *Id.* (citing cases).

Under these circumstances, it is neither necessary nor prudent to depart from the Washington Supreme Court's enunciation of the applicable standard. In *Lutheran Day Care v. Snohomish Cty.,* 119 Wn.2d 91,

829 P.2d 746 (1992), the Washington Supreme Court stated an "arbitrary and capricious" standard. In *Mission Springs,* the latest decision in this area, the Court identified the standard as "arbitrary or irrational" conduct. *Mission Springs,* 134 Wn.2d at 970 (citing *Bateson v. Geisse,* 857 F.2d 1300 (9th Cir. 1988)). In *Cox v. City of Lynnwood,* 72 Wn. App. 1, 9, 863 P.2d 578 (1993), the Court of Appeals recognized that motive is relevant, citing *Robinson v. City of Seattle,* 119 Wn.2d 34, 62, 830 P.2d 318 (1992). Other courts have recognized the relevance of an improper motive as well. *See, e.g., Marks v. City of Chesapeake,* 883 F.2d 308, 311 (4th Cir. 1989) (finding applicant was singled out for adverse treatment due to "illegitimate political or, at least, personal motives" – desire to placate neighbors); *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116 (1928); *Eubank v. City of Richmond,* 226 U.S. 137 (1912); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 920 F.2d 1496 (9th Cir. 1990); 2 DOUGLAS W. KMIEC, ZONING AND PLANNING DESKBOOK § 7:02 (2000) (9th Circuit follows stricter scrutiny on showing of political animus).

SSNW easily met its burden. The County arbitrarily and capriciously denied SSNW the right to pursue after-the-fact building permits and to continue an existing, vested, legal nonconforming use, due to the objections of the DBA, who wanted SSNW "shut down" despite the lack

of any County regulation of shooting or noise. The County's rationale was pure pretext – the decision was politically motivated.

8. The Trial Court Properly Denied Summary Judgment on SSNW's Equal Protection Claim.

The County acknowledges that SSNW need not prove that it is a member of a protected class if it establishes that it is a "class of one." Resp. Br. at 45. It argues, however, that SSNW cannot meet the high burden imposed in such cases. While it is true that SSNW did not offer evidence below of fact-specific dissimilar treatment of similarly-situated owners, that is not fatal. The County itself established the standard against which SSNW's treatment should be judged – its official written policy of encouraging voluntary compliance before taking more drastic action. App. Br. at 12. Despite SSNW's efforts to comply and County employees' admission that SSNW was cooperative and forthcoming, the County abandoned voluntary compliance in the face of public backlash. *Id.* at 12-13. Dismissal was improper.

D. SSNW's Appeal Is Not Frivolous; the County Is Not Entitled to Fees

SSNW's appeal demonstrably is not frivolous. On the merits of its claims, Judge Spearman concluded that "[t]here was an argument sufficiently raised to make me want to know more." RP 67 (Dec. 7. 2007). On the two grounds Judge Spearman relied upon in dismissing – collateral

estoppel and property interest – he was demonstrably wrong, for the reasons stated above. Certainly there is no controlling Washington authority under which SSNW's argument on these issues can be deemed frivolous. This Court should not award fees to the County.

IV. CONCLUSION

For all of the foregoing reasons, this Court should reverse the trial court's orders granting summary judgment and remand for trial.

RESPECTFULLY SUBMITTED this 24th day of November, 2009.

Davis Wright Tremaine LLP
Attorneys for Appellant

By 

Alan S. Middleton
WSBA #18118
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: (206) 757-8103
Fax: (206) 757-7103
E-mail: alanmiddleton@dwt.com

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of the document entitled **APPELLANT'S REPLY BRIEF** on the following:

Mark R. Johnsen
Karr Tuttle Campbell
1201 Third Avenue, Suite 2900
Seattle, WA 98101-3028

	U.S. MAIL
	ELECTRONIC FILING
X	HAND DELIVERED
	OVERNIGHT MAIL
	FACSIMILE

DATED this 24th day of November, 2009.

Christine Kruger

APPENDIX A

SUPERIOR COURT OF WASHINGTON, KITSAP COUNTY

SECURITY SERVICES NORTHWEST, INC., Plaintiff(s),	
vs.	07-2-00438-8
JEFFERSON COUNTY, Defendant(s).	

DEPOSITION UPON ORAL EXAMINATION OF

JOSEPH N. D'AMICO

10:02 A.M.

MAY 10, 2007

1201 THIRD AVENUE, SUITE 2900

SEATTLE, WASHINGTON

REPORTED BY: KATHY L. HAUCK, CCR Number 2705

dated July 19, 2005 regarding the appeal of the building stop work order?

A. Yes.

Q. Okay. So at least by July 19 you had retained Mr. Amster to represent Security Services Northwest in its dealings with the county?

A. Yes, I think at that point it was just regarding the stop work order appeal.

Q. Right. And there was a subsequent appeal, then, of the notice and order that was issued in August?

A. Yes.

Q. Okay. Now, going back to the buildings, prior to this year, prior to 2007, have you ever submitted an application for building on the property?

A. No, but I had met with Al and he had supplied me with, you know, the applications and the fee schedules.

Q. Okay, let me break that down. So you have not, prior to 2007, applied for a building permit or a land use permit for any buildings or uses on the property, correct?

A. Right. There was a catch-22 with the county. I attempted like the first week to apply for a building permit, because I had an engineering firm redesign all

the buildings or, you know, they had -- I had -- part of the application was I needed three copies of the structural engineering. We got -- the buildings were engineered and were safe. We got a letter from them saying that they were safe to occupy, and I think we gave that to Al in an effort to try to resolve the issue.

And that we went in to submit the building permits and we were rejected. And so Al said, I can't give you a building -- you can't -- I'm sorry, I'm confusing this up. You can't submit the building permits because you first have to have your, and correct me if I'm wrong, the judge -- Berteig hearing because it's the land we would have to get -- you know, if the land is grandfathered or whatever, then you could get the permits. I know it sounds confusing, and I'm just trying to --

Q. Let me again try to break it down. Just to the simple question, you did not submit to the county a building permit application, correct?

A. I did.

MR. MIDDLETON: Object to form.

A. I did submit a building, and it was turned away at the counter.

Q. (BY MR. JOHNSEN) Do you have a copy of it?

A. I believe I do somewhere.

Q. Okay. And you say this was early on, right after the thing came to light?

A. Right.

Q. So it would have been in June of 2005?

A. How I would know the date is I would look at the blueprints, because I had a guy come in right away from a firm, and it's stamped on that blueprint. So I could tell you, in fact, I would have to look at them because they had to be restamped recently.

Q. What is stamped on the blueprint?

A. I believe the date and his Washington state seal.

Q. Okay, so the architect or the engineer?

A. Engineer, that's right.

Q. Does it have any stamp from the county on it?

A. No.

Q. All right. So you had engineering drawings delivered to you, and what did you do with those drawings?

A. I took in a permit or went in to meet with Al, and Al at the time says, because of the land use, you know, it's gray area right now, I can't accept the -- I can't accept your permits.

Q. And you believe that was in June or July?

A. I don't know, but it was sometime during that early stage. It could have been -- it's gone on for two years. It could have been June, July, August, it could have been any time in that time frame.

Q. What were all of the forms that you needed to complete in order to apply for a permit for the buildings you had constructed?

A. I don't remember. All I remember is the stuff that Al recently gave me, that I can recollect, which was to go maybe a parallel route, which was to get a conditional use permit for those buildings.

Q. I'm not talking now about 2007, because I understand you're looking for either rezone or a comprehensive plan amendment or something to that effect, correct?

A. Well, in that same meeting that Al and I had he gave me the permit for the rezone -- or the application for the rezone up on the mountain, and he also then said, here's some paperwork that you could fill out. I haven't had time to do it, but he said here is paperwork you could fill out to get the buildings through a conditional use permit.

Q. Okay, but you're now talking about 2007, a meeting with him in 2007, aren't you?

A. I believe so.

Q. I'm talking about back in 2005, okay, when the county said, hey, you've got some un-permitted buildings here, and you said, apparently, that you wanted to get them permitted after the fact, correct?

A. Correct, that's correct.

Q. Did you submit any filled out application forms at that time?

A. I don't remember, Mark. I would have to go look in the bounds and bounds of paper. But I remember going there with the plans and talking to Al in the front office, and he says, I wouldn't fill this paperwork out right now or I can't accept it, I don't remember the context of it, but he explained to me that because of what was going on with the zoning and the land that there would be no way to fill out that paperwork or I couldn't put -- if I did bring it in there, I don't remember. There was no justification for me to do all that, I guess.

Q. That you'd have to get the land use approval confirmed before you could get a building permit on that property, something to that effect?

A. That's the best of my recollection.

Q. Okay. My question is just going a little deeper into that into detail. Did you fill out any forms at that time?

MR. MIDDLETON: Object to form.

A. I don't remember.

Q. Okay.

A. I don't remember if I did or I didn't.

Q. And can you identify what forms you would have needed to fill out at Jefferson County in 2005 in order to apply for a building permit after the fact?

A. I don't remember. I just know that there's a wall that you pick up forms.

Q. All right. And are you fairly certain that that meeting with Al where you submitted the engineering plans was before, say, the middle of July of 2005, in other words, in the first month or so after the complaints?

A. I would say that -- I'm just thinking from a practical standpoint of having -- the guy having to go out and look at the building and draw the plans, that it was maybe August, August or September. I'll throw that out there. I'm just guessing, but I could tell you for sure --

Q. If you went back now to your office to find what documents you brought in in your meeting with Al Scalf in connection with a possible building permit application, what documents do you think you would find? Engineering plans and what else, if anything?

MR. MIDDLETON: Object to the form.

A. I filled out so many -- I mean, with the appeals and all this, it's kind of all going together here, so I've had to have several documents for Irene or Reed or somebody has to sign something, because they are the actual land owners, so to answer the question, Mark, I would have to look. I don't recall.

Q. (BY MR. JOHNSEN) All right. Do you recollect filling out anything having to do with septic permits or electrical permits or fire safety permits?

A. No.

Q. Do you remember having any meeting with the county to have a preapplication conference to discuss what would be needed by the various departments of the county in order to process a building permit application?

A. I don't remember that.

Q. You didn't have a formal preapplication meeting?

A. No, I mean, I didn't sit around with anybody.

Q. Okay. After Al told you that he couldn't process a building permit application until the land use issue was resolved, what, if anything, did you do about that?

A. Well, it's still, from my understanding, it's

still up in the air, I mean, as far as the land use issue.

Q. My question was did you do anything in response to Al's statement to you that he couldn't process the building permit application at that time?

A. No.

Q. Do you recall a discussion with the building director, Mr. Slota, S-L-O-T-A, that if you were to submit a building permit application they would have to charge you the fee for processing it even though you didn't know if the land use issue would be resolved and that you should probably save your money to see about that before you paid that fee?

A. I don't remember that.

(Deposition Exhibit 10 was marked for identification.)

Q. (BY MR. JOHNSEN) Showing you what's been marked as Exhibit 10 to your deposition, does that appear to be a letter dated July 29th, 2005 from you to Mr. Scalf?

A. Yes.

Q. Okay. And the second paragraph says, quote, We anticipate submitting applications for building permits for the presently un-permitted structures in the near future, correct?