Planning Association of Washington
LAND USE BOOT CAMP #2
June 10, 2016
Mercer Island, WA

LIABILITY PREVENTION IN PERMITTING REVIEW

(*or, how to keep land use decision-makers and local government out of the courthouse*)

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INTRODUCTION

This paper provides a summary of land use law, an overview of claims against local government arising out of land use permitting and decision-making, and tips and strategies for good and defensible permitting and decision-making. This overview is intended as a general guideline and is not an exhaustive treatment of the issues addressed.

This paper is broken into six sections. The first section is entitled "*Some Introductory Comments,"* and includes statements of law or quotes which set the stage for good land use decision-making. The second section, "*Mike's 10 Commandments of Good Land Use Decision-making*," provides the top 10 rules to live by in making defensible land use decisions. The third section, "*Recognizing the Risks in Land Use Decision-Making*," gives an overview of high risk land use actions and decision-making, and which individuals or entities are more likely to generate a potential land use claim through their or its actions. The fourth section, "*The Legal Environment of Land Use Planning and Decision-making*," provides a summary of the federal and state constitutional and statutory provisions which govern land use regulation and review of land use applications and projects. The fifth section, "*Overview of Land Use Claims*," is an overview of commonly asserted claims arising out of land use regulation, permitting and decision-making. This section includes a summary of the most commonly asserted tort, statutory and constitutional claims against government recognized by the courts for wrongful land use regulation and decision-making, and includes a list of risk management tips following each type of claim.[1] The sixth and last section, "*Tips and Strategies for Defending Land Use Claims,*" offers general risk management tips and strategies for various types of permits and decisions, and at different stages of the permitting/regulatory process.

I. SOME INTRODUCTORY COMMENTS

"No person shall be deprived of property without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Fifth Amendment

". . . public officers impressed with the duty of conducting a fair and impartial fact- finding hearing upon issues significantly affecting individual property rights as well as community interests, must . . . be open minded, objective, impartial and free of entangling influences or the taint thereof."

Chrobuck v. Snohomish County, 78 Wn.2d 858, p. 869 (1971)

". . . by the very nature of our society, the initial imposition of zoning restrictions or the subsequent modification of adopted regulations compels the highest public confidence in the governmental processes bringing about such action."

[1] Not included in this paper are other potential claims arising out of land use regulation and decision-making, such as breach of contract, adverse possession, encroachment, code violations and enforcement, impact fee recovery, LUPA CERCLA, MTCA, and similar environmental and remedial statutory and administrative claims or causes of action. Finally, claims arising out of physical damage to real property—as distinguished from claims arising out of government regulation and decision-making—aside from nuisance, are not covered.

Chrobuck v. Snohomish County, 78 Wn.2d 858, p. 868 (1971)

"The citizens of the state expect all state officials and employees to perform their public responsibilities in accordance with the highest ethical and moral standards and to conduct the business of the state only in a manor that advances the public's interest."

RCW 42.52.900

"The basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit."

West Main Associates v. Bellevue, 106 Wn.2d 47, p. 50 (1986)

"The conduct of government should always be scrupulously just in dealing with its citizens; . . . "

State Ex. Rel. Shannon v. Sponburgh, 66 Wn.2d 135, p. 143 (1965)

II. MIKE'S 10 COMMANDMENTS OF GOOD LAND USE DECISION-MAKING

ONE: *Thou shalt know and follow thy code and the law*

Above all, *know* your municipal code and the standards applicable to the land use under consideration, and *follow* your code requirements and all applicable laws. In general, the law does not permit government decision-makers to deviate from code or statutory requirements, unless expressly authorized.

TWO: *Thou shalt not play politics with permit applications or quasi-judicial land use decisions*

Politics has no place in quasi-judicial, administrative or ministerial land use decision-making. Don't let political agendas or political motivations enter into your decision-making. Do not make decisions based on your perception of what is most "popular." Do not make these types of decisions based on what will get you re-elected, re-appointed or re-hired. Do not make decisions based on potential secondary gain to the City. Do not make decisions based on your *perception* of what is in the "best interest" of the City. Do not make decisions for retribution against a land use applicant. Do not make decisions to curry favor with special interest groups. Also, watch what you say, what you do, and how you act. Don't use inappropriate words or conduct in hearings, in public meetings or in documents, don't let personalities dictate the action you take in conjunction with a land use application, and don't let friendships or business relationships enter into or affect your land use decision-making. You should always be fair, independent, cordial and respectful of those to whom you owe a fiduciary duty – the applicant, opponents and the public.

THREE: *Thou shalt regularly review, update and streamline thy land use regulations and processes*

Do a regular – annual if possible – audit and "tune-up" of your code and all land use regulations. Regularly review and update your code, regulations and policies to take into account changes in the law and court decisions. Consult your attorney for changes in the law, or whenever proposing new code amendments or land use regulations. Wherever possible, consolidate and/or streamline regulations and procedures to speed up application, review and decision-making of land use permits. Streamline and/or simplify hearings processes and appeals.

FOUR: *Thou shalt identify high risk land use and permitting decisions and be educated on how to deal with them*

It is important to recognize high risk permitting and land use actions and decisions, and then to address them and mitigate the risks. This comes from training (like this!) and ongoing consultation with your attorney(s) or other professionals in the field. The risk level is different for different decisions-makers, permits, actions and processes. For example, some decision-makers have an inherently higher risk of making a mistake or creating a situation leading to a lawsuit (elected officials making quasi-judicial permit decisions, for example). Certain permits or land use actions have a greater risk of error in either substance, process or outcome, and thus a greater risk of a lawsuit (tent city/homeless encampment permitting, reasonable use exemptions, cell tower siting, permitting of essential public facilities, etc., to name but a few). Large, costly, and environmentally sensitive projects are much riskier than small, minimally costly ministerial permit projects. And certain actions in the process are more risky than others (for example, playing politics with quasi-judicial applications, meddling in the province of staff, delaying permit decisions, making arbitrary and capricious decisions, misapplying or ignoring the law).

FIVE: *Thou shalt make a good record with excellent findings*

This commandment actually contains several rules. *First*, make a good, clear and easily transcribed mechanical or electronic record of public meetings and hearings. This is a legal requirement. Ensure that recording and transcription equipment is up-to-date and in good working order, and that clear recordings are made. Hearings should conform to municipal procedures and State law.

Second, make a good administrative record of the evidence relied upon and reasons why a particular decision is made. The specific reasons (basis) for the decision should be made on the record and should be (1) clear, (2) organized, and (3) articulated in conjunction with the standards for review and approval from your municipal code or from State law. Speakers can (should) be under oath and should identify themselves by name, address and other identifying criteria. Evidence relied upon should be identified in the decision. Remember, you are making the record that will go to court if the decision is challenged. No matter how good your legal counsel, this record cannot be "cleaned up" at a later date.

Third, in general, you cannot pick and choose which evidence you consider in making quasi-judicial and ministerial land use decisions. Your legal obligation is to consider *all* of the evidence and information offered as part of the record. That means reviewing *all* of the staff reports, *all* studies or analyses, *all* letters and memoranda, and listening to *all* of the testimony by *all* of the parties. You can, of course, give different *weight* (emphasis) to the evidence. As a general

rule, unless authorized by statute, code or prior ruling or order, you should not refuse to receive or review evidence while the record is still open.

Fourth, there be sufficient evidence *in the record* to support any decision to grant, deny or condition land use applications or permits. The "quantity of evidence generally required to support a decision is "substantial evidence." To be "substantial" the evidence must be sufficient to convince an unprejudiced, thinking mind of the truth of the declared premise. To constitute evidence that is "substantial," the evidence must be competent, material and relevant to the issues before the decision-making body. Statements of the position of parties, summaries of evidence presented, or general conclusions drawn from an "indefinite, uncertain, in determinative narration of general conditions and events" are *not* adequate. Similarly, evidence based on inaccurate stereotypes or popular prejudices do not constitute "substantial" evidence. Findings that are based on the *assumption* of future non-compliance of imposed conditions do not "substantial" evidence. Evidence cannot be "speculative." Evidence to support a quasi-judicial decision can be in the form of studies, tests, surveys, reports, planning documents, correspondence, or testimony.

Fifth, you must support the decision with well-crafted findings and conclusions. Failing to make good findings and conclusions will guarantee a judicial challenge to a quasi-judicial decision. The purpose of findings of fact is to ensure that the decision-maker has dealt "fully and properly with all the issues in the case before he [or she] decides it," and so that the parties involved and a reviewing court may be fully informed as to the basis of the decision when it is made. Findings of fact *must be made* on matters which establish the existence or non-existence of determinative factual matters. The thinking process used by the decision-maker should be revealed by findings of fact and conclusions of law. The law requires that for *every* quasi-judicial decision (plats, short plats, conditional or special use permits, variances, site plans, permit appeals, etc.) written findings of fact and conclusions of law must be prepared. Failure to make findings and conclusions to support a quasi-judicial decision is arbitrary and capricious as a matter of law.

SIX: ***Thou shalt know and follow thy deadlines***

Missing deadlines or delaying a decision on a permit or land use application is an invitation for customer complaints and, worse, a lawsuit. State law and your own code impose strict deadlines for processing and making decisions on permits and land use application. Note for example: RCW 36.70B.070(1) – 28 days to respond to an application; RCW 36.70B.070(4) – 14 days to respond to additional information; RCW 36.70B.080(1) – 120 days to act on an application. Other deadlines – some shorter than these – may apply to other permits, and can be found in your own code or even in your comprehensive plan. While statutory and code deadlines are mandatory and are your responsibility, the applicant's personal or internal project deadlines or wishes are not your emergency. And remember, piecemeal requests for information, followed by piecemeal responses, lead to delay which, in turns leads to problems and – frequently – litigation.

SEVEN: ***Thou shalt thoughtfully choose and apply thy words -- and thy tone***

The right or wrong word in a permit or land use decision can be the difference between a legally supportable decision and one invalidated by a court. Words have specific meanings and the courts expect that the accepted meaning was in fact intended by the permit decision-maker.

For example, "*shall*" connotes a mandatory obligation, while "*should*" connotes an optional or non-obligatory request, which likely can't be enforced if not done.

And, be aware of the tone you take – orally and in writing – with applicants and citizens. Be polite and professional. No personal attacks or innuendo. Be customer-service oriented. Encourage pre-application meetings, and be professional and respectful when meeting with applications. Respond timely to requests for information; State law requires planners to provide relevant codes and assistance to applicants (*see, e.g.* RCW 36.70B.220). Put all important matters and communications in writing. If it's good enough to say, its good enough to put on paper. And a clear paper trail will avoid misunderstandings and could help win a lawsuit.

EIGHT: *Thou shalt impose only lawful conditions*

"Conditions" can include environmental mitigation, dedication of land or imposition of impact fees. When imposing conditions on a land development, follow strictly the law authorizing imposition of such conditions. Environmental conditions under SEPA can only be imposed pursuant to RCW 43.21C.060, and WAC 197-11-550. Dedication of land and imposition of impact fees are strictly limited under RCW Ch. 82.02, the U.S. Supreme Court's decisions in cases such as *Koontz v. St. John's River Water Management District*, 570 U.S. __ (2013), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and the State Supreme Court's decisions in *Benchmark Land Co. v. City of Battle* Ground, 146 Wash.2d 685 (2002) and *Isla Verde International Holdings Co., Inc. v. City of Camas*, 146 Wash.2d 740 (2002). Taxes, fees, charges, open-space set asides and other forms of direct and indirect charges or conditions must be tied to a specific, identified, direct impact of the proposed development. In general, this means compliance with RCW Ch. 82.02 standards, and current Takings cases. Ensure that every condition: (1) is reasonable; (2) is clear and specific; (3) has an "essential nexus" to the public health, safety or welfare; (4) has a reasonable relationship between the proposed condition and the impact; (5) is "roughly proportional" to the impact of that proposed land use action; and (6) is capable of being accomplished.

NINE: *Thou shalt use a hearing examiner for all final quasi-judicial decisions and administrative appeals*

Use a hearing examiner for deciding all final, quasi-judicial land use decisions; they provide great risk management. Encourage use of a hearing examiner in lieu of a city or county council or commission, or a board of adjustment or similar elected or appointed body. Why? Because hearing examiners: a) avoid political influence or pressure; b) are professional – specially trained; c) experienced with many different jurisdictions and regulations; d) are technically adept (they have knowledge of physical land development and technical feasibility); e) can be cost effective (reducing appeals and judicial challenges); f) can result in a more efficient process (faster); g) can result in a substantial reduction in judicial reversal of land use decisions and legal damages claims against the city or county; h) avoid legal claims against county or city employee or citizen-decision makers personally; i) Instill public confidence in the decision-making process; j) help ensure predictability and consistency; k) provide good customer service; l) help satisfy State law requirements for streamlining the regulatory process and administrative review and appeal process (*i.e.*, the 1995 Regulatory Reform Act, RCW Chapter 36.70B); m) segregate and clearly delineate quasi-judicial decision making functions from legislative (law-making) and

long-term planning functions; and n) using them frees up city council and/or planning commission time for other, important planning and law-making functions.

TEN: ***Thou shalt think like a judge, act like a judge, and decide like a judge***

If you are the decision-maker on a quasi-judicial or ministerial application, remember that *you are the judge*. Even if all you are doing is making a recommendation to another decision-maker, your obligation is to think like a judge, act like a judge, provide a process like a judge, and decide the application like a judge. Judges have an obligation to follow the law (the standards provided): So do you. The law requires a judge to be fair, impartial and unbiased, and the same requirements apply to you. Judges have an obligation to consider all of the evidence presented before making a decision: So do you. Judges have an obligation to enter written findings of fact and conclusions of law to support their decision, judges must rely on competent, substantial evidence to support their decision, judges have an obligation to ensure that a good clear record is made of the proceedings so that a reviewing court can understand what happened at the hearing and understand the reasons for the decision. You have to do all of these things, too.

III. RECOGNIZING THE RISKS IN LAND USE DECISION-MAKING

A. What's at stake?

- Potential invalidation of the decision or regulation
- Money damages against city or entity
- Money damages against individual decision-maker (personally)
- Attorneys' fees to the party suing if they prevail (potentially huge!)
- Attorneys' fees and costs incurred by the city or entity in defending a claim or lawsuit
- Drain on staff time, and increased workload
- Adverse publicity, embarrassment and loss of public confidence

B. Where's the risk?

TYPE OF ACTION — *Legislative v. Quasi-Judicial v. Ministerial*

- Quasi-Judicial (Very High Risk)
- Legislative (Low Risk)
- Ministerial (Moderate Risk)

DECISION MAKER — *City Council v. Planning Commission v. Board of Adjustment v. Design Review Boards v. Hearing Examiner v. Staff*

- City Council (Very High Risk)
- Design Review Board (High Risk)

- Planning Commission (Moderate Risk)
- Board of Adjustment (Moderate Risk)
- Staff (Moderate Risk)
- Hearing Examiner (Very Low Risk)

DECISION — *Recommendation v. Final decision or Appeal*

- Recommendation (Low Risk)
- Final or Appeal (High Risk)

RISK-INDUCING ACTIONS — *All High Risks*:

- Playing Politics With Quasi-Judicial Applications
- Meddling in the Province of Staff
- Delaying permit decisions
- Arbitrary and Capricious Decision-Making
- Misapplying the Law
- Ignoring the Law

CITY EXISTENCE — *Existing City v. Newly Incorporated City*

- Newly Incorporated (Higher Risk)
- Existing City (Lower Risk)

C. Select High risk land use actions

- Assurances/representations of: (1) utility service or capacity; (2) zoning boundaries/restrictions; (3) boundaries of sensitive areas, historic districts or "overlay districts;" or (4) property boundaries or utility lines.

- Zoning, regulation and permitting/licensing of: (1) adult entertainment businesses; (2) group homes; (3) alcohol/drug rehabilitation facilities; (4) work release facilities; (5) sexual predator release facilities; (6) assisted care facilities; (7) essential public facilities under the GMA (airports, sewage treatment plants, recycling facilities, etc.); and (8) gambling casinos/card rooms.

- Approvals for large and/or controversial and/or politically sensitive projects like: (1) shopping centers; (2) strip malls; (3) large subdivisions; (4) essential public facilities; (5) environmentally or historically sensitive projects; (6) mobile homes/mobile home parks; and (7) “big box” commercial projects.

- Violating vested rights.

- Adoption and/or implementation of moratoria.

- Regulation and/or permitting of cellular/telecommunication facilities.
- Off-site development mitigation requirements.
- Design review criteria and decision-making.
- "Tent cities," homeless shelters and camps, etc.
- Wetlands regulations, permitting and limitations
- Reasonable use exceptions/exemptions.
- Code enforcement and nuisance abatement actions
- Sign regulations, permitting and enforcement
- Historic preservation regulations, permitting and enforcement
- Other First Amendment/speech/expression issues
- Medical marijuana – zoning, licensing, permitting, regulation, moratoria, etc.
- Teen dance clubs
- Regulation of and permitting for churches/religious institutions
- Other unique, large, complicated, or controversial proposals with big *$$$* at stake and/or deadlines or timelines for completion

IV. THE LEGAL ENVIRONMENT OF LAND USE PLANNING AND DECISION-MAKING

A. Constitutional law

1. The U.S. Constitution

a) First Amendment (regulation of religious activity, free expression speech, adult entertainment, etc.)

b) Fifth Amendment (takings)

c) Fourteenth Amendment – Equal Protection

d) Fourteenth Amendment – Substantive Due Process

e) Fourteenth Amendment – Procedural Due Process

2. The Washington State Constitution

a) Article I, § 5 (free speech)

b) Article I, §11 (religious freedom)

c) Article I, §12 (equal protection)

d) Article I, § 16 (/inverse condemnation)

B. <u>Federal statutory law (select laws)</u>

- 42 U.S.C. § 2000 – Religious Land Use and Institutionalized Persons Act ("RLUIPA")
- 42 U.S.C. §1983 – Federal Civil Rights Act
- 42 U.S.C. § 3604 – Federal Fair Housing Act ("FHA")
- 42 U.S.C. § 12101 – Americans With Disabilities Act ("ADA")

C. <u>State statutory law (select laws)</u>

- RCW Ch. 36.70 – Planning Enabling Act
- RCW Ch. 36.70A – Growth Management Act ("GMA")
- RCW Ch. 36.70B – Local Project Review Act
- RCW Ch. 36.70C – Land Use Petition Act ("LUPA")
- RCW Ch. 42.30 – Open Public Meetings Act ("OPMA")
- RCW Ch. 42.36 – Appearance of Fairness Doctrine ("AOF)
- RCW Ch. 43.21C – State Environmental Policy Act ("SEPA")

- RCW Ch. 49.60 – State Housing Act
- RCW Ch. 58.17 – State Subdivision Act
- RCW Ch. 64.40 – Liability for wrongful issuance of permits
- RCW Ch. 82.02 – "Taxes, fees or charges" on development
- RCW Ch. 90.58 – Shorelines Management Act ("SMA")

D. State administrative rules (select rules)

- WAC Ch. 197-11 (SEPA regulations)
- WAC Ch. 365-195 (GMA regulations)

E. Local ordinances

- Literally any subject; applicable ordinances vary by city
- Typically: Chapters 1-2 and 14 – 20 (public works, environment, permits, zoning, planning, process and procedures, etc.)

F. Court decisions

- U.S. Supreme Court (the highest court in the land)
- Ninth Circuit Court of Appeals (Washington is part of this circuit)
- Washington State Supreme Court (the highest court in the state)
- Washington Appellate Courts (Divisions I, II and III)

G. Administrative agency decision-making

- Federal or regional boards (*e.g.*, Columbia River Gorge Commission)
- State administrative agencies/boards (*e.g.*, GMHB, PCHB, SMHB, etc.)

H. Other sources of law . . .

- County and/or City comprehensive plans
- Federal or state executive orders or emergency regulations

V. OVERVIEW OF LAND USE CLAIMS

A. Overview of damage (and other) claims in land use

- Tort claims (negligence, negligent administration of regulations, intentional torts, nuisance and trespass, etc.)
- Statutory damages – RCW Ch. 64.40
- Federal statutory claims (Section 1983 civil rights, Takings, due process, equal protection, RLUIPA, etc.)
- Moratoria
- Vested rights
- Arbitrary and capricious conduct
- Discrimination in housing – (ADA, FHA, Rehabilitation Act)
- First Amendment and free speech

B. Tort claims

There is no clearly recognized legal claim known as a "land use tort." Broadly speaking, a "tort" is a "…civil wrong other than a breach of contract, for which the court will provide a remedy in the form of an action for damages". Standler, Ronald B., *Definition of Torts* (rev. October 30, 2002), *available at* http://www.rbs.com/torts.html. Washington courts have provided similar definitions of torts, referring to such actions as "a legal wrong" which, if foreseeable injury results from the act, the wrongdoer is liable in damages to the party injured, *Christianson v. Swedish Hospital*, 59 Wn.2d 545, 368 P.2d 897 (1962), to a private or civil wrong or injury - - "a wrong independent of contract," *Freeman v. I.G. Navarre*, 47 Wn.2d 760, 289 P.2d 1015 (1955).

The following are commonly asserted tort claims against government arising from land use permitting or decision-making.

1. Negligence

Other than tortious injuries to real property - - claims which are expressly excluded from this paper – relatively few land use claims are predicated on a pure, simple negligence theory.

Typically, land use claims predicated on negligence arise either in the form of a "misrepresentation" claim (s*ee* following section), or on negligent administration of regulations (*see, infra*), or on other statutory theories discussed below. It is, of course, possible to assert claims for negligence in the context of adoption or amendment of land use regulations or decision-making on land use applications or permits; however, most such claims fail due to defenses available such as public duty doctrine, ripeness, legislative immunity, quasi-judicial immunity, exhaustion of remedies, causation, etc. Any land use claims predicated solely on simple negligence theories can be defended consistent with typical negligence claims.

2. Negligent misrepresentation

Government is frequently the target of misrepresentation claims, usually in conjunction with issuance of permits or land use application decisions. Like negligence-based claims, misrepresentation claims are subject to a host of recognized defenses (including those referenced in the preceding section, as well as those in the following sections). Like negligence (and intentional torts), the public duty doctrine will frequently be applicable—limiting a duty—and thereby making it difficult to establish a negligent misrepresentation claim against government for either adoption of a land use regulations or land use decision-making. *See, e.g. West Coast, Inc. v. Snohomish County*, 112 Wn. App. 200, 48 P.3d 997 (2002); *Moore v. Wayman*, 85 Wn. App. 710, 934 P.2d 707 (1997); *Mull v. Bellevue*, 64 Wn. App. 245, 823 P.2d 1152 (1992).

3. Negligent administration of regulations

Courts may also be called upon to decide a government's liability for negligent acts in either administering or applying state statutes, city ordinances or government regulations. There are dozens of reported cases on this tort, most of which were dismissed on motions for summary judgment based on the public duty doctrine. In the few instances where the public duty doctrine does not apply, or one of the recognized exceptions did apply, these claims can be successful. *See, e.g., Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988); *Pepper v. J.J. Welcome Construction*, 73 Wn. App. 523, 871 P.2d 601 (1994) *overruled on other grounds*.

4. Intentional (tortious) interference with business expectancy

A claim for intentional, or tortious, interference with a business expectancy arises under the common law. *See, e.g., Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992); *Pleas v. Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989); *Westmark Development Corp. v. City of Burien*,140 Wn. App. 540, 166 P. 3d 813 (2007), *rev. den.* 163 Wn.2d 1055. The cause of action arises from either the government's *improper intent* to harm the plaintiff's contractual or business relationships or the government's use of *wrongful means* that, in fact, cause injury to the plaintiff's contractual or business relationships. *Westmark, supra.*; *Pleas v. Seattle, supra*.

5. Nuisance & trespass

Whether it involves a citizen who decides to use his yard as an automobile wrecking yard, the regulation of "houses of ill repute," or someone's yelping dog, nuisance regulation and abatement governs these, and a myriad of other unpleasant matters. Occasionally, the impact of uses and activities on or affecting private property become so significant as to cause an

"unreasonable interference" with the rights of others to use and enjoy their own land. Such actions or uses resulting in adverse impact to the owner can be considered a nuisance. VII *Washington Real Property Deskbook*, Nuisance, §106.1 (3d. Ed, 1996); *Riblet v. Spokane-Portland Cement Company*, 41 Wn.2d 249, 248 P.2d 380 (1952) *overruled on other grounds*. An unauthorized interference affecting the rights of a landowner to use and enjoy his property is a *private* nuisance. RCW 7.48.150. An unauthorized interference affecting the community as a whole – or a large number of private property owners – is a *public* nuisance. RCW 7.48.130 (civil) and RCW 9.66.010 (criminal).

Nuisance and trespass actions are frequently compared, contrasted and even intermixed by the courts. *See, e.g. Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985). Thus, actual physical encroachments—by private parties or by the government—can be both a trespass and a nuisance. *See, e.g., Bradley, supra*.; *Peterson v. King County*, 45 Wn.2d 860, 278 P.2d 774 (1954); *Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 701 P.2d 518 (1985).

- ✓ **Risk management tips for *tort* claims**

  Tip No. 1 Follow your code and state law for the specific permit application

  Tip No. 2 Don't create special relationships with promises, guarantees, etc.

  Tip No. 3 Don't misstate facts, omit key facts or hide information

  Tip No. 4 Watch what you say at the permit counter

  Tip No. 5 Use clear and specific disclaimers (as appropriate)

  Tip No. 6 Follow all deadlines, and don't delay decisions

C. Statutory damages claim: ch. 64.40 RCW

In 1982, the legislature created a cause of action for damages for governmental decision-making on permits and other land use approvals relating to real property. This legislative enactment is codified in RCW ch. 64.40 *et seq*, "Property Rights – Damages From Governmental Actions," and allows for recovery of reasonable expenses and losses for acts of the government which are "arbitrary, capricious, unlawful, exceed lawful authority, or for relief from a failure to act within time limits established by law ....". RCW 64.40.020(1). Since its enactment, Ch. 64.40 actions (along with actions under 42 U.S.C. § 1983), provides the most frequently asserted and litigated means of obtaining money damages for wrongful land use decision-making by government agencies.

- ✓ **Risk management tips for *RCW ch. 64.40* claims**

  Tip No. 1 Follow your code and state law for the specific permit application

  Tip No. 2 Don't delay permits or decisions; follow all time limits

Tip No. 3 Don't make decisions for political reasons

Tip No. 4 Don't make decisions based on community desires, demands or displeasure

Tip No. 5 Follows the tips in the arbitrary and capricious section

D. Federal law claims

1. Civil rights claim: 42 U.S.C. §1983

A federal remedy that is available for constitutional violations in land use cases is provided by §1983 of the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983. This statute was originally enacted as § 1 of the Ku Klux Klan Act of 1871. Although other sections of the 1871 Act dealt specifically with the problem of Klan violence, § 1983 had three basic purposes: (1) Impose liability upon state and local government officials who use their authority to deprive individuals of federally secured rights; (2) confer jurisdiction on the federal courts to hear civil rights claims; and (3) expand the 1866 Civil Rights Act, which prohibited certain acts of discrimination on the basis of race or a previous condition of slavery, by civil remedies to state actors. *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989).

42 U.S.C. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 is a *remedial* statute. It does *not* create or confer any substantive rights. In land use cases, its primary function is to provide a cause of action against local government to protect rights guaranteed by the U.S. Constitution or by federal statutory (or other) law. 42 U.S.C. § 1983; *Collins v. Harker Heights*, 112 S.Ct. 1061 (1992); *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992). Section 1983 is an enabling measure that creates a private cause of action to enforce certain federal rights, *Id.*, and with RCW ch. 64.40 provides the most commonly asserted damages claim for land use decision-making.

- ✓ **Risk management tips for *42 U.S.C. Sec. 1983* claims**

Tip No. 1 Follow your code and state law for the specific permit application

Tip No. 2 Follow the mandates of the U.S. Constitution

Tip No. 3 Avoid Takings claims; follow tips for Takings

Tip No. 4 Follow the tips to avoid Substantive Due Process claims

Tip No. 5 Follow the Appearance of Fairness Doctrine

Tip No. 6 Follow the tips to avoid Procedural Due Process claims

Tip No. 7 Follows the tips to avoid arbitrary and capricious action

2. Fifth Amendment Takings

The Fifth Amendment to the U.S. Constitution provides, in part, that "... private property [shall not] be taken for public use, without just compensation." The Fifth Amendment is applied to the states through the Fourteenth Amendment of the U.S. Constitution. A "taking" under the Fifth Amendment is a popular description of the formal cause of action known as "inverse condemnation." The Washington State Constitution provides the same right, although in a slightly different form. *See* Wash. Const. Art. I, § 16 (Amendment 9). The two are frequently considered synonymous. A Taking/inverse condemnation can occur in either of two ways: through a direct physical invasion of property, or by over-regulation (regulatory taking). Examples of direct physical invasions include flooding of property through artificial channeling of water, directing noxious fumes onto private property, or allowing airport noise over private property. A regulatory Taking occurs when government adopts a regulation or imposes a condition on development that deprives the owner of a fundamental attribute of ownership, is unduly burdensome, or deprives the owner of all economically viable use of the property. Local government is liable for a Taking under the Fifth Amendment, which can also be redressed through 42 U.S.C. § 1983.

- ✓ **Risk management tips for *Fifth Amendment* claims**

Tip No. 1 Be cognizant of the U.S. Constitution, Fifth Amendment, and the Washington Constitution, Art. I, Sec. 16, and stay abreast of developments in Takings law. Takings law changes frequently and is complex

Tip No. 2 In general, impact fees are not Takings if imposed in conformance with RCW ch. 82.02

Tip No. 3 Warning sign: *Does the regulation or action result in a permanent or temporary physical occupation of property*?

Tip No. 4 Warning sign: *Does the regulation or action deprive the owner of all economically viable uses of the property*?

Tip No. 5 Warning sign: *Does the regulation or action deny or substantially diminish a fundamental attribute of property ownership*?

Tip No. 6 Warning sign: *Does the regulation or action have a severe impact on the property owner's economic interest*?

Tip No. 7 When imposing conditions (mitigation, dedications, fees, off-site improvements etc.) on development, ensure that there is evidence in the record that: (1) Establishes that the development will create or contribute to an identified problem; (2) identifies a condition designed to address that problem; (3) shows that the condition will solve or alleviate the problem; and (4) shows that the proposed condition is "roughly proportional" to the problem and has an "essential nexus" with the problem created or contributed by the development

Tip No. 8 Get attorney advice when potential claims first arise

3. Fourteenth Amendment: *Procedural* Due Process

The Fourteenth Amendment of the U.S. Constitution provides that no state shall deprive any person of life, liberty or property "without due process of law." The due process requirement provides that local governments ensure that constitutionally adequate procedures are in place so that property rights are not violated. To assert a procedural due process claim under the Fourteen Amendment, three threshold questions must be answered: (1) Whether a property right has been identified; (2) Whether governmental action with respect to that property amounts to a deprivation; and (3) Whether the deprivation, if one has occurred, was done without due process of law. *Parratt v. Taylor*, *supra* at 536-37. This proposition, however, has been limited to the extent that "a mere lack of due care" by a state official will *not* deprive an individual of life, liberty, or property under the Fourteenth Amendment. *Daniels v. Williams*, 474 U.S. 327 (1986).

✓ **Risk management tips for *procedural due process* claims**

Tip No. 1 Follow your code and state law for the specific permit application

Tip No. 2 Establish rules and procedures by ordinance or resolution. Provide to the public via website, posted notices and handouts

Tip No. 3 No more than one open record hearing and no more than one closed record appeal

Tip No. 4 Use a hearing examiner to the fullest extent possible. You can use a hearing examiner for: (1) Recommendation to legislative authority; (2) making final quasi-judicial or administrative decisions; (3) administrative appeals; (4) code enforcement hearings

Tip No. 5 Follow Regulatory Reform Act, Ch. 36.70B RCW, for State requirements for hearings and processes

Tip No. 6 You have authority to require that all persons wishing to present testimony sign in, give their name and addresses, the agenda item, and whether they wish to speak as a proponent, opponent, or for others or on specific issues

Tip No. 7 You have authority to establish time limits, determine the order of speaking and presentations, and otherwise control the hearing and process

Tip No. 8 As part of discussion and debate and decision, identify and follow all applicable approval criteria (your code and State law)

Tip No. 9 Ensure that decisions are supported by a written record that establishes a factual basis and findings that support conclusions and the ultimate decision

4. Fourteenth Amendment: *Substantive* Due Process

The Fourteenth Amendment provision that no state shall deprive any person of life, liberty or property "without due process of law," also provides for substantive due process (as well as procedural due process). Substantive due process has been defined as:

> ... a limit on a state's ability to pass unreasonable or irrational laws which deprive an individual of property rights. The inquiry here is distinct from the takings analysis and a separate standard is used.

Sintra v. Seattle, supra at 20-21. Under substantive due process of the Fourteenth Amendment, and under Washington state law, a regulation—resolution, ordinance, statute, etc.—that is violative of due process is *void*. It cannot be enforced.

- ✓ **Risk management tips for *substantive due process* claims**

Tip No. 1 Follow your code and state law for the specific permit application

Tip No. 2 Make your decision specifically on the criteria for the specific permit

Tip No. 3 Ensure that decisions are supported by a written record that establishes a factual basis and findings that support conclusions and the ultimate decision

Tip No. 4 Follow the tips for avoiding arbitrary and capricious decision-making

Tip No. 5 No politics or "NIMBY" reasons as the basis for the decision

5. Fourteenth Amendment: Equal Protection

Under the rational basis test for an equal protection violation,

> ... a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.

Manor v. Nestles Food Company, 131 Wn.2d 439, 448-9, 932 P.2d 628 (1997) *disapproved of on other grounds*. At a minimum, under a Fourteenth Amendment equal protection analysis, there must be evidence of "intentional conduct" to provide disparate treatment in order for a violation to exist. *See, Washington v. Davis*, 426 U.S. 229 (1976). The courts have established a three-part test for determining whether a "rational basis" exists for legislative classifications subject to an equal protection analysis. *Forbes v. Seattle*, 113 Wn.2d 929, 943, 785 P.2d 431 (1990). Under

the test set forth in *Forbes*, the court asks three questions: (1) Does the legislation apply alike to all persons within a designated class; (2) Are there reasonable grounds to distinguish between those who fall within the class and those who do not; and (3) Does the classification have a rational relationship to the purpose of the legislation? *Forbes, supra*, at 943. Money damages is not a remedy or form of relief for an equal protection violation; rather, a section 1983 action is necessary when damages are sought for constitutional violations of equal protection. *See, e.g.*, Blaesser & Weinstein, *Federal Land Use Law & Litigation*, Section 8:22, p. 783 (2009).

✓ **Risk management tips for *equal protection* claims**

Tip No. 1 Follow your code and state law for the specific permit application

Tip No. 2 Make your decision specifically on the criteria for the specific permit

Tip No. 3 Treat all applicants equally and consistently; NOTE, HOWEVER, this does not mean the same result on the same permit applications – only equal and consistent process and treatment (not necessarily the same outcome)

Tip No. 4 Make your decision only on the criteria for the specific permit

Tip No. 5 Ensure that decisions are supported by a written record that establishes a factual basis and non-discriminatory findings that support conclusions and the ultimate non-discriminatory decision

Tip No. 6 Follow the tips for avoiding arbitrary and capricious decision-making

6. Religious Land Use Institutionalized Person Act, 42 USC § 2000 (RLUIPA)

RLUIPA (42 USC 2000 cc *et seq*) was enacted "to address what Congress perceived as inappropriate restrictions on religious land uses." *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 at 1170 (9th Cir. 2011). Section 2000cc(b)(1) provides that a government may not treat a religious organization or assembly "on less equal terms" than a nonreligious assembly. The statute also provides that government may not discriminate on the basis of religion or impose regulations that exclude or unreasonably limit religious assembly from a jurisdiction. §2000cc(b)(2)-(3). RLUIPA has two provisions to maintain a cause of action. First, a "substantial burden on the religious exercise of a person" must be imposed through the use of a land use regulation. 42 U.S.C. §2000cc(a)(1). Second, the imposition of a land use regulation must not treat a religious assembly on "less than equal terms with a nonreligious assembly," "that discriminates against any assembly or institution on the basis of religion," and that "totally excludes religious assemblies from a jurisdiction; or unreasonably limits religious assemblies…within a jurisdiction." 42 U.S.C. §2000cc(b)(1-3).

✓ **Risk management tips for *RLUIPA claims***

Tip No. 1 Follow your code and state law for the specific permit application.

Tip No. 2 Keep abreast of the RLUIPA statute and cases interpreting it

Tip No. 3 Follow the tips for equal protection

Tip No. 4 Ensure that decisions are supported by a written record that establishes a factual basis and non-discriminatory findings that support conclusions and a non-discriminatory decision

Tip No. 5 Follow the tips for avoiding arbitrary and capricious decision-making

Tip No. 4 Seek and follow attorney advice when issues or questions arise

E. Moratoria

A moratorium, sometimes known as an interim land use control, is a temporary limitation on development. A municipality may adopt a moratorium to give it time to revise its comprehensive plan or land use regulations. A moratorium prevents new development that may be inconsistent with the revised plan or regulations. A community may also adopt a moratorium to prevent environmental damage because public facilities, such as sewage treatment systems, water supplies, or flood control facilities, are inadequate. A moratorium may prohibit all development during the moratorium period, or may allow development only under the land use regulations in effect when the moratorium was adopted. Brian W. Blaesser and Alan C. Weinstein, *Federal Land Use Law and Litigation* (West, 2009); Jules B. Gerard & Scott D. Bergthold, *Local Regulation of Adult Businesses* (West, 2009); Eugene McQuillen, *The Law of Municipal Corporations* (3rd Ed., West, 2003); and Brian W. Blaesser, *Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion* (Thompson West, 1997).

Thus, moratoria are one of the principal tools in the "toolbox" of local governments for implementing planning and GMA objectives. Moratoria are typically adopted by ordinance, and if adopted in good faith, provide a community with the time to conduct and review studies necessary for adopting or revising a land use plan and related regulations to achieve growth management policies. Because planning activities are time consuming, a moratorium allows for a "planning pause" period during which period land development activity is frozen or limited until permanent regulations implementing the plan can be adopted.

Washington and federal courts have historically recognized broad authority for local government to enact moratoria to ". . . preserve the status quo so that new plans and regulations will not be rendered moot by intervening development." Moratoria ordinances do not violate the vested rights doctrine. In general there are strong presumptions in favor of a government entity enacting a moratorium. The presumptions and burdens of proof in challenging a moratorium ordinance are the same for other general application ordinances. Generally, an ordinance is presumed constitutional and a heavy burden rests upon the challenger to establish unconstitutionality. *Rabon v. City of Seattle*, 135 Wn.2d 278, 287, 957 P.2d 621 (1998).

> " '[T]he wisdom, necessity and expediency of the law are not for judicial determination,' and an enactment may not be struck down as beyond the police power unless it 'is shown to be clearly unreasonable, arbitrary or capricious.' "

Weden v. San Juan County, 135 Wn.2d 678, 700, 958 P.2d 273 (1998) (quoting *Homes Unlimited, Inc. v. City of Seattle*, 90 Wn.2d 154, 159, 579 P.2d 1331 (1978)).

Cities and other government entities have broad statutory authority to impose moratoria on permit applications for various purposes. Three statutes currently authorize the use of moratoria in Washington: RCW 35.63.200 (adopted under the State Planning Enabling Act); RCW 35A.63.220 (authorizing non-charter code cities to enact moratoria); and RCW 36.70A.390 (adopted as part of GMA, and addressing interim control measures). These statutes authorize government to adopt a six-month moratorium without holding a public hearing; however, a public hearing must be held within 60 days after adoption at which time findings supporting the need for and purpose of the moratorium must be adopted. If the moratorium is extended longer than six months, the process must be repeated, with the City making new findings to support continuance of the moratorium.

Under these statutes, no declaration of emergency is required; there need not be an actual or *de facto* "emergency" to justify a moratorium under these three statutes. However, declaring an emergency as part of adoption of a moratorium is a good idea, good risk management, and can help limit claims of vesting before the ordinance takes effect. All three statutes provide, broadly, for the right to adopt "a moratorium or interim zoning ordinance, . . ." without any specific limitation or exception.[2] Under these statutes, a city:

- Can "adopt a moratorium or interim zoning ordinance";
- Without holding a public hearing;
- Without advance notice of the action;
- But must hold a hearing on the adopted moratorium or interim zoning ordinance "within at least 60 days of its adoption";
- Must adopt findings of fact justifying the moratorium either before the hearing or "immediately after this public hearing";
- Can adopt a moratorium ordinance which is effective for "not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing such a longer period"; and
- Can renew a moratorium for "one or more six-month periods" if a subsequent public

[2] The GMA moratoria statute, RCW 36.70C.390, does provide a exception which exempts from the application of that specific statute only, designation of critical areas, agricultural lands, forest lands, and mineral resource lands, and conservation of those lands and protections of areas under RCW 36.70A.060, as well as implementing development regulations under GMA.

hearing is held and findings of fact are made "prior to each renewal."

Common challenges to moratoria include claims that such actions rise to the level of a taking, violate substantive due process, or violate the First Amendment. Generally, the legal defensibility of a moratorium against a temporary takings claim depends on whether the moratorium was adopted for a reasonably short period of time and whether the local government proceeded diligently in completing whatever study or analysis was deemed necessary in adopting permanent regulations. It is also important that there be reasonable and beneficial economic uses possible during the period of the moratorium. Claims involving substantive due process may involve an argument that the moratorium is not reasonably related to a substantial public purpose and that the means used were not reasonably necessary for the accomplishment of the purpose. When First Amendment rights are involved courts analyze whether the moratorium constitutes a prior restraint on speech, whether it gives unbridled discretion to the municipalities, whether it presents opportunity for undue delay, and whether it generally fails to protect free speech.

- ✓ **Risk management tips for *moratoria* claims**

Tip No. 1 Follow strictly state law for moratoria adoption

Tip No. 2 Craft strong and clear record to support the need for and limits of the moratorium

Tip No. 3 Rely on honest and credible data to support the moratorium

Tip No. 4 Don't base moratorium on political agenda or secondary gain

Tip No. 5 Follow strictly the time limits in the statutes (6 months, with limited six month renewals or a one year work plan)

Tip No. 6 Hold timely and compliant public hearings

Tip No. 7 Make as narrow as possible

Tip No. 8 Do as an emergency ordinance to avoid vesting

Tip No. 9 Ensure that the moratorium ordinance prohibits *submission* of applications, and not just processing or approval of applications

Tip No. 10 Complete your work diligently, and keep on top of your work

Tip No. 11 Show your work to establish the need and design of the moratorium

Tip No. 12 Don't justify continuation of a moratorium by budget problems or lack of financing or staff resources

Tip No. 13 Remember to terminate the moratorium!

Tip No. 14 No moratoria on adult entertainment licensing, permitting or regulation

F. Vested rights

"Vesting" refers generally to the notion that a land use application, under the proper conditions, will be considered only under land use statutes and ordinances in effect at the time of the application's submission. *Friends of the Law v. King County,* 123 Wn.2d 518, 522, 869 P.2d 1056 (1994); *Vashon Island Community for Self Government v. Washington State Boundary Review Board,* 127 Wn.2d 759, 767-68, 903 P.2d 953 (1995). Vesting, in effect, "fixes" the rules that will govern land development, regardless of subsequent zoning or regulatory changes. *Erickson & Assoc., Inc. v. McLerran, supra,* 123 Wn.2d at 868. *See, also, Hull v. Hunt,* 53 Wn.2d 125, 130, 331 P.2d 856 (1958) (vesting provides a "date certain" on which the right to develop land vests or is locked in or preserved). *See, also, Julian v. City of Vancouver,* 161 Wn. App. 614, 255 P.3d 763 (2011) (concept of "vesting" refers generally to the notion that a land use application, under the proper conditions, is considered only under those land use statutes, ordinances and regulations that were in effect at the time the application was complete and submitted).

Thus, the date on which development rights vest determines which laws, rules and policies will apply to the development. *Friends of the Law, supra; Erickson and Assoc., Inc., supra.* The development is controlled by the laws in effect at the time of vesting – not laws later enacted. *West Main Associates v. Bellevue,* 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986); *Victoria Tower Partnership v. Seattle,* 49 Wn.2d 755, 761-62, 745 P.2d 1328 (1987).[3]

Washington is in the minority of states with regard to its application of the vested rights doctrine. Most states do not allow rights until the applicant has "undergone a substantial detriment in reliance." *William B. Stoebuck and John W. Weaver,* 17 Wash. Prac., §4.12. Washington's vested rights doctrine is justified on the basis of fundamental fairness to developers. It provides a measure of certainty to developers and protects their expectations against fluctuating land use policy. *Friends of the Law v. King County, supra,* 123 Wn.2d 867-68; *West Main Assoc., Inc. v. City of Bellevue,* 106 Wn.2d 47, 51, 720 P.2d 782 (1994).

There are three primary sources of law relating to vesting and vested rights in Washington State. The first is applicable vesting statutes: (1) RCW 19.27.095(1), relating to building permits; (2) RCW 58.17.033, relating to preliminary plats (both short plats and full plats); and (3) RCW 36.70A.300 and RCW 36.70A.302, provisions of the State Growth Management Act (GMA) relating to comprehensive plans and Growth Management Hearings Board decisions.

A second source of vesting law is development agreements under GMA. See RCW 36.70B.200 - .220. Parties can agree through a properly adopted development agreement to specific vesting dates, schedules and permit. *See, e.g., Potala Village Kirkland, LLC v. City of Kirkland,* 183 Wn. App. 191, 334 P.3d 1143 (2014).

A third source of vesting law is municipal regulations – county or city ordinances. A municipality can choose to enact an ordinance declaring which developments vest, and when those

[3] In essence, vesting precludes the government from moving the proverbial "goal posts" part way through the game.

developments vest in current land use controls – as long as the ordinance is not in conflict with other State statutes (see above) addressing vested rights. Thus, as long as local vesting ordinances do not conflict with State law, they have been upheld as valid exercises of local land use authority. *See, Erickson and Assoc. v. McLarren, supra*. Nothing requires a municipality to adopt a vesting ordinance; rather, many government entities simply rely on the "default" vesting rules that have evolved in case law and, since 1987, through State statutes.

While Washington's vesting doctrine originated at common law, the courts have made clear that it is now purely statutory. There is no such thing in Washington as "common-law vesting, and vesting only applies to building permits, short and full plats, agreements to vest through development agreements, or where local code or regulations specifically recognize vesting to other types of permits or land use decisions. *Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 334 P.3d 1143 (2014).

In order to vest a land use application under Washington law, an applicant must satisfy three requirements; right to develop land vests if the applicant files an application which (1) complies with the existing zoning ordinance and other development and building code regulations (compliance), (2) is filed during the effective period of the ordinances or regulations under which the applicant seeks to develop (timeliness), and (3) is sufficiently complete (completeness). *See, e.g.*: RCW 19.27.095(1); RCW 58.17.033(1); *Erickson and Assoc. v. McLarren, supra*.

- ✓ **Risk management tips for *vesting* claims**

Tip No. 1 Note on all applications, staff reports, memoranda and internal communications the vesting date of the application

Tip No. 2 Ensure the vesting date is absolutely accurate; double-check that all requirements for a fully complete application have in fact been satisfied before setting a vesting date

Tip No. 3 Develop and follow a clear permit review policy and procedures based on accurate vesting date determination

Tip No. 4 Applicants cannot selectively choose which regulations it wants to vest to and which it does not; it is either all or none; applicants generally cannot "cherry pick" which regulations they want to vest to and which they don't

G. Arbitrary and capricious standard – potential damages liability

"Arbitrary and capricious" is a standard of judicial review (not a cause of action in and of itself) that governs many land use liability claims. "Arbitrary and capricious" decisions are those that are willful and unreasoning, and done without consideration for and in disregard of facts and circumstances. *State v. Wittenbarger*, 124 Wn.2d 467, 486, 880 P.2d 517 (1994); *Cougar Mountain Assoc. v. King County*, 111 Wn.2d 742, 750, 765 P.2d 264 (1988); *Alpha Kappa Lambda v. WSU, supra.* Where there is room for two opinions, a government decision is *not* arbitrary or capricious if it is made honestly and upon due consideration, even though a reviewing court may have reached a different conclusion. *Id.; Barrie v. Kitsap County*, 93 Wn.2d 843, 850, 613 P.2d

1148 (1980).

Some examples of arbitrary and capricious conduct are:

- Failing to make findings of fact and conclusions of law for quasi-judicial decisions
- Making quasi-judicial decisions based on political agenda or motives
- Ignoring/not applying the law
- Applying the wrong law
- No evidence in record to support decision
- Ignoring evidence or testimony
- Imposing standards or requirements not authorized by statute or code
- Waiving standards or requirements of code
- Making quasi-judicial decisions based on the number of proponents or opponents
- Applying legislative policies, goals, or "visioning" when deciding quasi-judicial applications
- Basing quasi-judicial decisions on community desires, community displeasure, or public sentiment or complaints
- Making quasi-judicial decisions based on economic viability of project
- Wrongfully delaying decisions on permits or approvals
- Ignoring city attorney advice

✓ **Risk management tips for to avoid *arbitrary and capricious* decisions**

Tip No. 1 Follow your code and state law

Tip No. 2 Don't make decisions based on political gain or for political reasons

Tip No. 3 Rely on honest and credible data to support decisions

Tip No. 4 Don't base decision on community desires or displeasure, etc.

Tip No. 2 No policy-making, "visioning" or city goals.

Tip No. 3 Recognize and enforce *vested rights*.

Tip No. 4 Consider *all* of the evidence

Tip No. 5 Make decisions timely (your code or 120-day rule).

Tip No. 6 Always include good written findings and conclusions.

Tip No. 8 Use a hearing examiner for all final (or appeal) quasi-judicial decisions or for administrative appeals.

Tip No. 9 Do not base decisions on "what's good for the community" or on "the best interests of the city," or for "NIMBY" reasons

Tip No. 10 Base decisions on "substantial evidence" in the record

H. Discrimination in housing and accommodation for disabled persons

Several Federal and State statutes prohibit discrimination in housing and requiring accommodation for people with disabilities who enacting or enforcing land use regulations. *See*, *e.g*., the Americans with Disabilities Act, 42 USC 12101 ("ADA"), the Federal Fair Housing Act, 42 U.S.C. §3604, *et. seq*. and its amendments ("FHA"), the Rehabilitation Act of 1973, 29 U.S.C. 701 and 794, and the State Housing Discrimination Act, Chapter 49.60 RCW.

1. Americans with Disabilities Act (ADA)

The Americans with Disabilities Act ("ADA") was signed into law on July 26, 1990, and prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, state and local government services, public accommodations, commercial facilities, and transportation. Title II of the Americans with Disabilities Act ("ADA") provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Public entities include counties, cities and towns. 42 U.S.C. § 12131(A).

Zoning qualifies as a public *program* or *service* and the enforcement of a zoning ordinance constitutes an *activity* of a locality within the meaning of Title II. *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008); *START, Inc. v. Baltimore County*, 295 F. Supp. 2d 569 (D. Md. 2003) (the administration of zoning laws is a "service, program, or activity" within the meaning of the ADA). Thus, local government is required to reasonably accommodate disabled persons by modifying its zoning policies, practices and procedures and may not intentionally

discriminate against disabled persons. *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir., 2001). 28 C.F.R. § 35.130(b)(7) provides:

> A public entity shall make *reasonable modifications* in policies, practices, or procedures when the modifications are *necessary* to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

The ADA also mandates the establishment of TDD/telephone relay services. To be protected by the ADA, one must have a disability, which is defined by the ADA as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.

2. Federal Fair Housing Act (and amendments) (FHA)

The FHA is intended to ensure that people with disabilities have full use and enjoyment of their dwelling. The FHA is codified at 42 USC 3601, *et seq.*, and is similar in scope and operation as the ADA. To comply with its intended purpose, the FHA imposes a duty on municipalities to make reasonable accommodations "when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling." 42 U.S.C. §3604 3(B). However, this duty does not require cities to modify every zoning code, or disregard their zoning code.

The FHA covers most residential housing. In some circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members. Although the federal government has stated that the FHA does not preempt local zoning laws, the Act nonetheless can preempt the way a locality's zoning regulations are administered. Under the FHA, it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of a person residing in or intending to reside in that dwelling. 42 U.S.C. § 3604(f)(1)(B).

Discrimination under the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). A *handicap* under the FHA is the same as a disability under the ADA. *Dadian, supra*.

3. Rehabilitation Act

The Rehabilitation Act is codified at 29 U.S.C. § 701. Both Title II of the ADA and the Federal Rehabilitation Act (29 U.S.C. § 794) have been found to apply to zoning ordinances and land use regulations enacted by local government. Both require that government make "reasonable modifications" to their zoning and land use regulations to accommodate "disabled persons." *See, Bay Area Addiction Research v. City of Antioch,* 179 F.3d 725 (9th Cir., 1999). The ADA and the Rehabilitation Act both require the presence of a disability; the two are similar in their scope of

relief and protections.[4] *See*, *Bay Area Treatment Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730, n.8; 42 U.S.C. § 12133 (Title II) ("The remedies, procedures, and rights set forth in section 794a of Title 29 [the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of Section 12132 of this title").

4. RCW Ch. 49.60

Chapter 49.60 RCW governs discrimination and is implemented through the State Human Rights Commission. RCW 49.60.030 provides as follows:

> The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> (a) The right to obtain and hold employment without discrimination;
>
> (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
>
> (c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;
>
> (d) The right to engage in credit transactions without discrimination….

✓ **Risk management tips for to avoid *housing discrimination* claims**

Tip No. 1 Follow your code and state law

Tip No. 2 Keep abreast of current developments in housing regulations and discrimination law

Tip No. 3 Consider the potential discriminatory impact or effect of permitting actions before making decisions

Tip No. 4 Don't base decisions on quotas or segregation criteria unless expressly authorized by federal or state laws

[4] The pertinent RA provision is 29 USC § 794(a): "No otherwise qualified individual with a disability…shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance." Thus, the RA only applies to government entities receiving federal assistance. The ADA applies regardless of whether a government entity receives federal aid.

Tip No. 5 Get legal advice before making zoning or permitting decisions that could result in housing or racial discrimination claims

I. First Amendment and protected speech/expression land use, sign, display and advertising regulation

Sign codes and other land use regulations implicating the U.S. Constitution First Amendment (or its counterpart under the Washington Constitution, Art. I, Sec. 5), and/or protected speech are frequently challenged, and are becoming much more difficult to defend. *See, e.g., Ballen v. City Of Redmond*, 466 F.3d 736 (9TH Cir. 2006) and *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 575 U.S. ___ (2015). Such regulations implicate both the Federal and State Constitutions, both facial and as-applied challenges, and challenges that they constitute an unlawful "prior restraint" on speech. Much care and thought needs to be taken to ensure that such sign codes, design, style and similar aesthetic regulations, as well as panhandling and similar regulations will pass constitutional muster if they are challenged.

Ensuring that such regulations are content and viewpoint neutral – both facially and as applied to specific situations – is crucial. *See, e.g., Reed v. Town of Gilbert, supra.*. In the recent *Reed v. Town of Gilbert* case, the U.S. Supreme Court established a rule that strict scrutiny applies to any regulation that is "content-based." The Court identified three general classes of regulations which are content-based, and thus subject to strict scrutiny analysis. The first is where the regulation "on its face" draws distinctions based on the message the speaker conveys. This was the category applicable to the Town's regulations. The second category involves laws that can't be justified "without reference to the content of the regulated speech." The third are laws adopted by the government "because of disagreement with the message [the speech] conveys." *Id*, pp 6-7.

The Court in *Reed* also held that government's allegedly good intentions will not save sign codes and other similar aesthetic regulations from being struck down under the First Amendment if they discriminate on the basis of content. *Id.* There are several key steps in the analysis. The first step in an analysis of a land use regulation (or related regulation regarding signs, displays and advertising) is determining if the First Amendment (or companion State Constitutional provision, Art. I, §5) is even implicated. The second step is determining whether the protected activity is in a public forum. The third step is determining the nature of the challenge: "facial" or "as-applied." The fourth step is to do a content and viewpoint analysis to determine if the regulation content and viewpoint are neutral. Finally, a substantive law analysis is required.

The *Reed* case is highly significant in this area and radically changed the law regarding permissible sign regulations. The majority Court has set now forth a bright line test for sign code regulation. When laws single out a specific topic or subject matter they are facially content-based. When they are facially content-based, they are automatically and universally subject to strict scrutiny. Strict scrutiny is a stringent standard of review. To satisfy strict scrutiny, the government must show that a content-based distinction "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." It is the "rare case" in which a speech restriction will withstand strict scrutiny. And, the *Reed* decision likely applies to most forms of sign regulation, including permanent and temporary signs, fixed and portable signs, wind, blade and animated signs, illuminated and non-illuminated signs, ongoing information and activities, as well as one-time events – and more.

Note that the law in this area changes rapidly, the analysis may be different depending on whether the challenge is made under the Federal Constitution (First Amendment) or the State Constitution (Art. I, §5). This is a very complex area of law, and in every case, legal counsel should be consulted for advice BEFORE the regulation is adopted or applied.

- ✓ **Risk management tips for to avoid *First Amendment, speech and sign code* claims**

Tip No. 1 Establish by ordinance clear, understandable rules

Tip No. 2 Create a great legislative record to justify regulations

Tip No. 3 When applying, follow your code and standards, and apply them uniformly and fairly

Tip No. 4 Don't make up or guess at standards or criteria

Tip No. 5 Review and follow *Reed v. Town of Gilbert* decision

Tip No. 6 Follow current, applicable First Amendment law and tests. Keep abreast of and follow the most current First Amendment law (*see, e.g., Reed v. Town of Gilbert*) and follow applicable First Amendment tests (such as *Central Hudson*) Ask: Is the speech is constitutional (lawful, not misleading)? Does city have a "substantial" interest in the regulation? Does the regulation directly advance the city's interest? Is the regulation no more extensive (broader) than absolutely necessary to serve the substantial interest? Is the regulation facially *content* neutral (not discriminate against the content of the message) Is the regulation facially *viewpoint* neutral (not discriminate re: views)? Does the regulation provide clear guidance, through clear standards – without unbridled discretion -- to allow or restrict signage, displays, advertising, etc.?

Tip No. 7 Get attorney advice early on

VI. GENERAL RISK MANAGEMENT TIPS AND STRATEGIES FOR PERMITTING AND LAND USE DECISIONS

The following are the most important tips, strategies and defenses for good – defensible – land use decision-making and permit review.

A. Tips/strategies for legislation (adopting ordinances or regulations)

Tip No. 1 Follow your code and state law

Tip No. 2 Remember vested rights; incorporate vesting into legislation

Tip No. 3 All legislation must be: (1) clear; (2) easy to understand; (3) not vague or ambiguous; and (4) not in conflict with state or federal law

Tip No. 4 Eliminate internal conflicts in code and conflicts with State and/or federal law

Tip No. 5 All legislation must advance the public health, welfare, safety, or the fiscal health of the city

Tip No. 6 Use moratoria sparingly and carefully; must protect vested rights

Tip No. 7 Provide for administrative appeals of quasi-judicial actions

Tip No. 8 Legislation must not impair public or private contracts

Tip No. 9 GMA requires by ordinance or resolution an "integrated and consolidated permit process." Review and revise your code accordingly

Tip No. 10 Your code should specify which decision makers shall made the decision or recommendations, conduct the hearing, or decide the appeal

Tip No. 11 Have your attorney review and approve all code amendments or other legislation

B. Tips/strategies for quasi-judicial permits and decisions

Tip No. 1 Follow your code and State law for the criterion and process for the specific permit under review

Tip No. 2 No policy-making, "visioning" or city goals

Tip No. 3 Recognize and enforce *vested rights*

Tip No. 4 Consider *all* of the evidence

Tip No. 5 Make decisions timely (your code or 120-day rule)

Tip No. 6 Always: Good written findings and conclusions

Tip No. 7 Don't let citizen complaints or community displeasure influence decision

Tip No. 8 Use a hearing examiner for all final (or appeal) quasi-judicial decisions or for administrative appeals

Tip No. 9 Do not base decisions on "what's good for the community" or on "the best interests of the city.

Tip No. 10 Base decisions on “substantial evidence” in the record

Tip No. 11 Don't promise, guarantee or assure results or decisions

Tip No. 12 Don't waive code requirements or standards

Tip No. 13 Treat all classes of applicants equally and consistently

Tip No. 14 Don't let citizens "taint the record" or pending permit applications or projects through comments during "citizen comments" or "gripe session" portions of council or public meetings or workshops

Tip No. 15 Get attorney advice when needed (*e.g.*, high risk projects or applications)

C. <u>Tips/strategies for ministerial permits</u>

Tip No. 1 Ministerial permits typically are not discretionary; thus, once the code/statute requirements are met, you must issue promptly

Tip No. 2 Follow strictly all statutory and code criteria

Tip No. 3 Do not delay – issue promptly (follow your code or 120 day rule, whichever is shorter)

Tip No. 4 Do not interject city council or politics into administrative process or decision-making

Tip No. 5 Ensure that decision-making/issuance is not: (1) unreasonable; (2) cost-excessive; or (3) burdensome permit review processes

Tip No. 6 Do not impose excessive or unreasonable bonding or indemnification requirements

Tip No. 7 Decisions must be competitively neutral and applied non-discriminatorily

Tip No. 8 Do not condition on: (1) financial viability; (2) technical capability or expertise; (3) disclosure of proprietary information; or (4) waiving legal rights

Tip No. 9 Do not get involved in private property agreements, CCR's, homeowner's agreements, etc.

Tip No. 10 Treat all permit applicants equally and consistently

Tip No. 11 Don't promise, guarantee or assure specific decisions or approvals

Tip No. 12 Request attorney advice when needed – and follow it

D. Tips/strategies for good staff reports

Tip No. 1 Err on the side of being over-inclusive with information

Tip No. 2 Provide full name and address of owner and applicant

Tip No. 3 Provide a detailed summary of permit or action requested

Tip No. 4 Fully describe the site, legal and common description, etc.

Tip No. 5 Provide a description of access

Tip No. 6 Identify date application vested

Tip No. 7 Provide history of the requested permit/action

Tip No. 8 Provide history of prior applications for site

Tip No. 9 Provide maps of the areas

Tip No. 10 Summarize other land uses surrounding the site

Tip No. 11 Identify all applicable approval criteria

Tip No. 12 Identify all applicable development regulations

Tip No. 13 If appropriate (per code), analyze the consistency of proposal with the most pertinent and up-to-date policies of your comprehensive plan

Tip No. 14 Include conditions of approval recommended by staff, other departments, or government agencies

Tip No. 15 Identify and discuss all significant issues regarding the project and property

Tip No. 16 Distinguish any significant policies or issues that may run counter to staff's conclusions.

Tip No. 17 Include clear conclusions and recommendation(s)

Tip No. 18 Be objective, fair and impartial

Tip No. 19 Ensure a legally sound basis for exactions, dedication requirements, conditions, mitigation, etc.

Tip No. 20 Be prepared to defend the decision and analysis!

E. Tips/strategies for public hearings

Tip No. 1 Establish rules and procedures by ordinance or resolution. Provide to the public via website, posted notices and handouts

Tip No. 2 No more than one open record hearing and no more than one closed record appeal

Tip No. 3 Use a hearing examiner to the fullest extent possible. You can use a hearing examiner for: (1) Recommendation to legislative authority; (2) making final quasi-judicial or administrative decisions; (3) administrative appeals; (4) code enforcement hearings

Tip No. 4 Follow the Regulatory Reform Act, Ch. 36.70B RCW, for State requirements for hearings and processes

Tip No. 5 You have authority to require that all persons wishing to present testimony sign in, give their name and addresses, the agenda item, and whether they wish to speak as a proponent, opponent, or for others or on specific issues

Tip No. 6 You have authority to establish time limits, determine the order of speaking and presentations, and otherwise control the hearing and process

Tip No. 7 As part of discussion and debate and decision, identify and follow all applicable approval criteria (your code and State law)

Tip No. 8 Help the public and presenters through the hearing process. Explain the process and rules. Be respectful and patient with those uncomfortable with public speaking, who are angry or argumentative, or other decision-makers who may not agree with or understand your perspective or arguments

Tip No. 9 Don't let citizens "taint the record" of pending permit applications through comments or testimony during "citizen comment" or "gripe session" portions of council meetings or workshops

Tip No. 10 Follow a consistent order of presentation. One example:

- First – Staff report
- Second – Presentations from applicant/appellant
- Third – Presentations by opponents to application/appeal
- Fourth – Rebuttal by each side
- Other times – Presentations by other agencies, input from planning staff, Q & A, etc.

Tip No. 11 Follow hearing and public notice procedures in your code and State law

Tip No. 12 Insist on an adequate and complete staff report (*see* staff report tips)

Tip No. 13 Allow expert testimony. Testimony or written reports from expert witnesses is frequently necessary to rebut contrary expert opinion on technical or scientific issues (*e.g.*, traffic, soils, hydrology, environmental or other complex issues)

Tip No. 14 Ensure that:

- Recording equipment is working and turned "on"
- Parties have submitted all relevant exhibits
- All testimony is preserved – either oral or written
- Witnesses identify themselves <u>on the record</u>
- Exhibits are identified by letter or number, in order
- Witnesses refer to specific exhibit letter or number
- You have a clear, understandable record recording and transcript

Tip No. 15 Swearing in witnesses is optional (but recommended)

Tip No. 16 Cross-examination is optional (but recommended for evidence of technical or expert nature)

Tip No. 17 Allowing hearsay evidence is optional

- Typically allow hearsay evidence
- Look to Local Rules
- Be consistent

Tip No. 18 Discuss, evaluate and decide properly. Decision-makers should: (1) discuss why they support approval or disapproval and/or conditions, and base their decision solely on code (or state law) criteria; (2) determine their positions or consensus for action and not seek new evidence after the record is closed; (3) make an appropriate motion to approve, disapprove, or approve with conditions; (4) instruct staff to prepare draft findings of fact and conclusions of law documenting the reasons for the decision; and (5) set a date for discussion on and approval of the findings and conclusions at the next earliest meeting

Tip No. 19 If in doubt about hearing processes, procedures, evidence, unruly attendees, etc., get and follow attorney advice

F. <u>Tips/strategies for a solid record and findings and conclusions</u>

Tip No. 1 The record should include, <u>at a minimum</u>: (1) the application and supporting documentation; (2) the SEPA determination and documentation; (3) the staff report and all attachments; (4) letters or documents submitted by the proponent, opponents, the public or interested parties; (5) minutes and a verbatim transcript of any hearing or proceeding, and any exhibits offered during the hearing; (6) the applicable decision criteria or standards; and (7) carefully crafted findings of fact and conclusions of law supporting the decision (*see* below)

Tip No. 2 Remember the purpose of findings of fact: To ensure that the decision-maker has dealt fully and properly with all issues in the case, ensure the parties involved and a reviewing court are fully informed as to the reasons for the decision

Tip No. 3 Findings of fact and conclusions of law are subject to the same scrutiny as are those drawn by a trial court judge. For most land use and permit decisions, findings and conclusions are subject to the review standards in the State Land Use Petition Act, RCW 36.70C.130

Tip No. 4 Findings of fact are required whenever required by State law, city code or for any quasi-judicial (and some ministerial) land use decisions. This includes, but is not limited to: (1) Permit appeals; (2) special use permits; (3) conditional use permits; (4) variances; (5) boundary line adjustments; (6) site plans; (7) short plats; (8) major plats; (9) site specific rezones; and similar quasi-judicial permits and decisions

Tip No. 5 Findings of fact should be crafted for all matters which establish the existence or non-existence of determinative factual matters. And, they are required to support each criterion for approval, denial or imposition of conditions

Tip No. 6 Findings of fact and conclusions of law should: (1) show the thinking process used by the decision-maker; (2) be supported by "substantial evidence;" (3) be based on actual evidence *in the record*; (4) be clear, precise and understandable; (5) always reference and apply the applicable standards, decision criteria and policies

Tip No. 7 Findings and conclusions should always be adopted by the deadline established by State law or your code (whichever is shorter, if there is a conflict). If no deadline in State law or your code, adopt as soon as practicable

Tip No. 8 The following (for example) are NOT defensible findings or conclusions: (1) Findings without evidence in the record to support them (information, facts or opinions that were *not* presented in testimony or in evidence at the hearing); (2) Evidence which is speculative, conjectural or based on guesswork; (3) findings/conclusions based on a "belief " a "feeling", an "assumption", an "anticipation," etc.; (4) statements of the positions of the parties; (5) summaries of evidence presented; (6) Findings based on stereotypes or prejudices; (7) findings based on assumption of future non-compliance with conditions; (8) findings that a project would "negatively impact" other properties (unless this is a clearly established criterion for approval or disapproval); (9) facts or conclusions which relate to the property owner, rather than to the land itself; or (10) general community displeasure, or "NIMBY" complaints

I. Before the land use application is submitted or the regulation adopted

Tip No. 1 *Know* your municipal code. Carefully review those sections of your code which are applicable to the decision-maker's duties, paying particular attention to both procedures and substantive requirements for decision-making

Tip No. 2 *Follow* all municipal code requirements. In general, the law does not permit decision makers to deviate from code requirements, unless authorized by the code, by State law, or by common law

Tip No. 3 If in doubt about validity, interpretation or enforceability of a municipal regulation, or application of code to a permit application, seek advice of an attorney

Tip No. 4 Ensure that information given to the public is accurate and complete. Don't make representations of fact unless you are sure that the information is accurate and up to date. Don't guess at answers to questions from property owners or applicants

Tip No. 5 Consider the effect on the property owner or applicant of every significant, controversial or big-dollar decision made

Tip No. 6 Treat persons in the same class equally and consistently. This does not necessarily mean the same result for similar permits or applications, but it does mean equal and consistent *process and treatment*

Tip No. 7 Follow strictly all State and local time limitations for land use approvals and hearings

Tip No. 8 Whenever possible, use a hearing examiner for all final, quasi-judicial and administrative decision-making and for administrative appeals

Tip No. 9 Don't let personalities dictate action taken in conjunction with permit applications, appeals or decisions

Tip No. 10 Don't do anything to frustrate or delay efforts of property owners to develop their land

Tip No. 11 Don't let politics interfere with quasi-judicial land use decision making

Tip No. 12 Don't give legal advice or legal opinions (lay government employees). Refer all legal questions to local government attorney for response

Tip No. 13 Don't foster unrealistic expectations of property owners

Tip No. 14 Ensure that there is a rational basis for every ordinance or regulation

Tip No. 15 Ensure that all government legislation (states, ordinances, etc.) is clear, easy to understand and follow, not vague or discretionary, and always reviewed by a government attorney

Tip No. 16 For quasi-judicial decision-making, make a good, thorough, administrative record

Tip No. 17 For quasi-judicial decision-making, ensure that there is sufficient evidence in the record to support the decision on applications or permits

Tip No. 18 Ensure that for each quasi-judicial decision there are sound findings of fact and conclusions of law to support the decision

Tip No. 19 For all land use decision-making at the local or administrative level, ensure that the decision is supported by facts and law, and is not "arbitrary and capricious"

Tip No. 20 Remember and protect vested rights

Tip No. 21 Don't waive municipal code requirements for permits and other land use approvals (unless authorized by State law or your code)

Tip No. 22 Identify early on high-risk land use matters, and educate decision-makers to deal with them

Tip No. 23 Regularly review, update and revise your code (keep abreast of the law)

Tip No. 24 Where possible, have your code provide for administrative appeals *before* going to court

Tip No. 25 Ensure adequate, trained staff to handle planning and permit review, and plan ahead for large or high-risk projects coming to the government for review or approval

Tip No. 26 Correct your code, zoning and regulatory standards *legislatively* – not through or as part of a quasi-judicial or administrative permit process

Tip No. 27 Administrative decision makers should not meddle in staff's permit review or decision making

Tip No. 28 For administrative hearings and for site-specific permit review and decision-making, consider *all* of the evidence offered.

J. <u>During the permitting process when risk is high and claim is likely or threatened</u>

Tip No. 1 Watch for warning signs! Look for red flags of a lawsuit, such as: (1) direct threats; (2) implied threats; (3) an attorney actively involved or writing letters; (4) an applicant or attorney referencing claims or damage theories in administrative proceedings; (5) an applicant with history of land use litigation; (6) a controversial or high profile project; (7) a big dollar development or big investment at issue; (8) public records requests (by applicant or third parties); (9) lots of public inquiries and/or interest; or (10) newspaper reports or high media attention

Tip No. 2 Be prepared for a lawsuit. Don't wait for a complaint to be filed where suit is likely, plan for defenses and strategies in advance

Tip No. 3 Where suit is likely, meet with staff and decision-makers early on. Gather information, assemble documents, determine liability, plan strategy, etc. Learn and understand the city's goals and expectations. What is the city trying to achieve? Is there way to avoid litigation?

Tip No. 4 Consider getting expert consultants lined up *before* suit is filed. Possible city experts include: (1) appraiser; (2) permit expert or development expert; (3) business evaluation expert or forensic economist; (4) environmental specialist

Tip No. 5 Consider getting second legal opinion re: liability and strategies to stave off a lawsuit

Tip No. 6 Discuss settlement/resolution with applicant or opposing party when liability appears likely –early on

Tip No. 7 If your code allows for it and if timely, consider a remand of the decision to correct defects or mistakes, and avoid lawsuit

Tip No. 8 Alert senior administration officials and decision-makers of potential claim or lawsuit (no surprises!)

# # #