IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

K & S DEVELOPMENTS, LLC, a Washington limited liability company, Plaintiff, v. CITY OF SEATAC, et al, Defendants.	Consolidated Under Case No. 12-2-40564-6 KNT **PLAINTIFF K&S DEVELOPMENT, LLC'S AND DEFENDANTS GERALD AND KATHRYN KINGEN'S TRIAL BRIEF**
CITY OF SEATAC, Plaintiff, v. GERALD and KATHRYN KINGEN, Defendants.	

I. INTRODUCTION

The purpose of this Trial Brief is to succinctly set forth the elements of the pending causes of action to assist the Court with issues that may arise in deciding relevance. It is not intended to preview all of the positions K&S believes it will prove at trial. Nor is it intended to address specific evidentiary objections that may arise. Instead, this Trial Brief sets forth the legal framework at issue with a sampling of facts K&S expects to prove to the jury that meet the requirements of the various causes of action.

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II. K&S' CAUSES OF ACTION AGAINST THE CITY AND COLLIERS

A. Tortious Interference with Business Expectancy

The elements of tortious interference with a business expectancy are:

1. The existence of a valid contractual relationship or business expectancy;
2. That defendants had knowledge of that relationship;
3. An intentional interference inducing or causing a breach or termination of the relationship or expectancy;
4. That defendants interfered for an improper purpose or used improper means; and
5. Resultant damages.

Westmark Development v. City of Burien, 140 Wn.App. 540, 556 (2007) (citation omitted).

> "Ill will, spite, defamation, fraud, force, or coercion, on the part of the interferor, are not essential ingredients," although they may be relevant.

Calbom v. Knudtzon, 65 Wn.2d 157, 162–63 (1964).

> Once these elements are established, the defendant has the burden of justifying the interference or showing that his actions were privileged.

Id. at 163 (citing Prosser on Torts (3d ed.) § 123, p. 967; 30 Am.Jur., Interference § 57, p. 93).

> Interference can be "wrongful" by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession.
>
> Therefore, plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a "duty of non-interference; i.e., that he interfered for an improper purpose ... or ... used improper means ..."
>
> … [T]he City was under a "duty to act fairly and reasonably in its dealings with the plaintiffs" and that this duty was breached when the City wrongfully refused to grant a building permit. *King* [*v. City of Seattle*, 84 Wn.2d 239, 247–48 (1974)].

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Pleas v. City of Seattle, 112 Wn.2d 794, 804 (1989) (city liable for tortious interference with a property developer's business expectancy because city was aware of developer's plans to build and operate an apartment house, and city, through officials, officers, and agents, intentionally prevented, blocked, and delayed those plans).

Tortious interference does not require proof that the defendant had knowledge of the plaintiff's specific customers. Plaintiff merely must show that the Defendant "was aware of its general business expectancies." *Hillstrom Cabinets, Inc. v. Town of South Praire*, 118 Wn.App. 1050 (2003). Additionally, the Washington Supreme Court has eliminated the "independent business judgment rule" which formerly could be used in the land use regulatory context to bar claims where the plaintiff exercised its own business judgment not to proceed with alternative methods of seeking relief. *City of Seattle v. Blume*, 134 Wn.2d 243 (1997).

K&S will prove that its business expectancies were no secret and that the City interfered by failing its "duty to act fairly and reasonably in its dealings with K&S," used fraud, breaches of promissory estoppel and actions which violate constitutional rights. The City's interference was for improper means, namely to enable it to acquire property at a lower than market price, to prevent competition with its own park and fly business plans and to further the mayor's discriminatory and personal financial agenda. The City and Colliers interfered with K&S's lenders and encouraged them to push foreclosure. Colliers also interfered with K&S by putting pressure on Scott Switzer to sign the Deed in Lieu of Foreclosure and not inform his co-manager, Gerry Kingen.

B. Fraud or Intentional Misrepresentation

The elements of fraud or intentional misrepresentation are:

(1) a representation of an existing fact;
(2) the fact is material;
(3) the fact is false;

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(4) the defendant knew the fact was false or was ignorant of its truth;
(5) the defendant intended the plaintiff to act on the fact;
(6) the plaintiff did not know the fact was false;
(7) the plaintiff relied on the truth of the fact;
(8) the plaintiff had a right to rely on it; and
(9) the plaintiff had damages.

Baertschi v. Jordan, 68 Wn.2d 478, 482 (1966).

K&S will prove that the City, through Colliers, threatened that it (although an undisclosed phantom buyer at the time) would pursue personal remedies against the Kingens after purchasing the K&S notes, even though the City was prohibited from purchasing notes by the constitutional prohibition on lending of credit. Additionally, Colliers represented K&S in real estate transactions regarding this property and had a fiduciary duty to K&S. Certainly, K&S had no known reason to distrust Colliers. The sum of all these circumstances meets all of the requirements for fraud.

C. Negligent Misrepresentation

The elements of negligent misrepresentation are summed up as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> A plaintiff must prove he or she justifiably relied upon the information negligently supplied by the defendant.

ESCA Corp. v. KMPG Peat Marwick, 135 Wn.2d 820, 826 (1998) (quoting Restatement (Second) of Torts § 552(1) (1977)).

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Although K&S believes that the false information upon which it relied was intentionally supplied by the City and Colliers, if for any reason their actions can be construed as unintentional, their actions were at least negligent.

III. K&S CLAIMS ONLY AGAINST THE CITY

A. Contract-related Claims/Promissory Estoppel

1. Breach of contract.

The Development Agreement entered in February 2008 was a contract.

K&S will prove that the City breached its duty of good faith and breach of its duty of non-interference in its interactions with K&S and others to ensure that K&S could never fulfill the purposes of the Development Agreement. *See, e.g., Columbia Park Golf Course, Inc. v. City of Kennewick,* 160 Wn. App. 66 (2011).

2. Promissory Estoppel.

The elements of promissory estoppel are:

> (1) a promise which
> (2) the promisor should reasonably expect to cause the promisee to change his position and
> (3) which does cause the promisee to change his position
> (4) justifiably relying upon the promise, in such a manner that
> (5) injustice can be avoided only by enforcement of the promise.

Havens v. C & D Plastics, Inc., 124 Wn. 2d 158, 171–72 (1994) (quoting *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn. 2d 255, 259 n. 2, 616 P.2d 644 (1980)). Because promissory estoppel was originally an equitable doctrine, the fifth element may appear to limit recovery to specific performance. However, the *Klinke* case clarifies that damages are recoverable under a promissory estoppel theory. *Id.*

K&S will prove the July 11, 2006, letter from Craig Ward to K&S was a promise by City staff to fully support and process the Development Agreement into a

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final form, a promise on which K&S justifiably relied and in the absence of performance of the promise, K&S has suffered damages.

B. Constitutional Claims

1. Just Compensation for the Taking or Damaging of Property under Article I, Section 16 of the Washington Constitution.

Article I, Section 16 protects property owners from having property taken or damaged by the Government without first payment of just compensation, which is essentially the fair market value of the property.

> A "taking" has occurred when government conduct interferes with the use and enjoyment of private property, with a subsequent decline in market value. *Martin v. Port of Seattle,* 64 Wn. 2d 309, 320 (1964).

Lambier v. City of Kennewick, 56 Wn. App.275, 279 (1989).

As the United States Supreme Court has explained,

> [N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking.

Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012). There are "nearly infinite variety of ways in which government actions or regulations can affect property interest." *Id.* Here, the taking or damaging occurred as a result of a series of events.

One of the ways in which Government can take property is by regulating in such a way that the property is devalued and facilitates acquisition by the Government at a lower than market price. *See, e.g., Richmond Elks Hall v. Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir. 1977); *City of Monterey v. Del Monte Dunes of Monterey. Ltd.*, 526 U.S. 678, 700 (1999) ("city had considered buying, or inducing the State to buy, the property"). One case which has gathered several cases nationwide on this subject is *W.J.F.Realty Corp v. Town of Southampton*, 351 F. Supp.2d at 18 (E.D.

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N.Y. 2004) (evidence suggested that moratoria on development was to depress value for Town's eventual acquisition).

Additionally, Washington law recognizes that a regulatory taking may occur if the regulation of property goes beyond preventing harm to the public. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 16 (1992). Also, unlike federal law, Washington recognizes that regulation of property that fails to substantially advance a legitimate governmental interest "automatically constitutes a taking." *Id.* at 16-17 (citing *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 333 (1990).

K&S will prove that the City regulated K&S's property in such a way as to preserve for itself the opportunity to acquire the property at less than fair market value, substantially interfered with K&S's rights in a way which devalued the property, regulated in a way that went beyond preventing harm to the public, and failed to substantially advance a legitimate government interest. The result was a compensable taking or damaging under Washington law.

2. Substantive Due Process under the Washington Constitution.

Washington law recognizes there are several tests for determining whether government action violates substantive due process protections in the Washington State Constitution. A substantive due process violation occurs if the government action:

1. Is not aimed at achieving a legitimate public purpose.
2. Does not use means that are reasonably necessary to achieve that purpose;
3. Is unduly oppressive on the plaintiff.

Presbytery of Seattle v. King County, 114 Wn.2d 320, 330-31 (1990). Other formulations of substantive due process violations include "arbitrary or capricious actions" or decisions "tainted by improper motive." *Cox v. City of Lynnwood*, 72 Wn. App. 1, 9 (1993).

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Implicit in the test for having a legitimate purpose and reasonably necessary means includes a legitimacy of the means. For instance, in *Nollan v California Coastal Commission*, 483 U.S. 825 (1987), the Commission conditioned a building permit upon the owner giving up an easement for public beach access.[1] While acquiring a public beach access was a legitimate government interest, it was not acquiring it in a legitimate way. Similarly, the City's interest in acquiring property generally may be legitimate, but the way in which it was done, by leveraging its regulatory power to keep the price down, by using an agent to trick the property owner into thinking they would suffer personal loss and for illegitimate motives, such as reducing competition for the City's own park and fly enterprise or to satisfy the mayor's own personal undisclosed and discriminatory interests.

K&S will show that the City regulated its property in a way that was unduly oppressive, was not pursuing any legitimate city interests in a legitimate way and was not using reasonably necessary means, was arbitrary or capricious, and was tainted by improper motive.

K&S seeks declaratory relief on this claim, which can be based on a jury's findings. *See e.g., New York Life Ins. Co. v. Newport,* 1 Wn.2d 511 (1939). If the City has violated K&S's rights to substantive due process or privileges and immunities, the jury can find that the City acted improperly for purposes of the tortious interference claim.

3. Privileges and Immunities under the Washington Constitution.

This provision protects citizens from being treated differently by government for no legitimate reason. *Grant Cnty. Fire Prot. Dist. No. 5*, 150 Wn.2d 791, 805 (2004)

[1] *Nollan* was originally a case involving a Fifth Amendment taking caused by a regulation that failed to substantially advance a legitimate governmental interest (in a legitimate way). Subsequently, the Supreme Court in *Lingle v. Chevron USA*, 544 U.S. 528 (2005), explained that *Nollan* should have been decided as a substantive due process problem rather than a taking.

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(citing *Seeley v. State*, 132 Wn.2d 776, 788 (1997)). K&S will show that the City deliberately chose to use underhanded tricks to acquire its property while, at the same time, acquiring property from others in an open public process. Again, while this claim is only for declaratory relief, a determination that the privileges and immunities clause has been violated can be used by the jury to find that the City used improper means for purposes of K&S's tortious interference claim.

IV. AFFIRMATIVE DEFENSES

The City raises 31 separate affirmative defenses and it is impractical to address them all in detail. Suffice it to say that the City's motion for summary judgment was denied, and the extent to which the City pursues its remaining affirmative defenses, they will necessarily be resolved by the jury. K&S is prepared to respond to the Defendants' defenses they attempt to prove at trial.

V. CITY OF SEATAC'S COUNTERCLAIMS

The City filed a separate lawsuit against Gerry and Kathy Kingen personally in 2014 pursuing claims associated with the Deed in Lieu (DIL) transaction. The City has filed as counterclaims the same claims against K&S:

1. Negligent or Intentional Misrepresentation
2. Civil Conspiracy
3. Interference with a Business Expectancy
4. Breach of Contract
5. Conversion and Theft

All of these relate to the DIL transaction, which the City asserts that the Kingens and K&S misrepresented facts related to the DIL. K&S will prove these claims have no validity. Further, as the Court has already ruled, the City must prove that its claims accrued after March 3, 2011, or that the claims accrued earlier, but were not known or could not have been reasonably discovered until after the three year period. The

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evidence will prove otherwise—the City knew of its purported claims well before March 3, 2011. Most, if not all, of the City's claims must be dismissed.

VI. DAMAGES

A. The New Business Rule Does Not Bar K&S's Damages

K&S anticipates the Defendants will argue that it cannot obtain damages related to the park and fly or housing units that were never built due to the Defendants' actions. Washington's new business rule does not prohibit damages related to projects not constructed. The Washington Supreme Court modified the new business rule in *Larsen v. Walton Plywood Co.*[2] The Court ruled that recovery of lost profits was not barred when a reasonable estimation of damages could be made based on an analysis of the profits of identical or similar businesses operating under substantially the same market conditions.[3]

The Court in *Larsen* specifically held that expert testimony alone could be a sufficient basis for an award of lost profits in the new business context when the expert's opinion is supported by tangible evidence with a "substantial and sufficient factual basis" rather than by mere "speculation and hypothetical situations."[4] So long as an expert's opinion affords a reasonable basis for inference, there is departure from the realm of uncertainty and speculation, and lost profits may be awarded.[5]

This limitation on the new business rule follows the rationale to recover lost profits: when plaintiff provides a reasonable basis for estimating the loss, "there is nothing in the nature of future profits per se which would prevent their allowance… [and that] each case must be governed by its own facts."[6]

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[2] 65 Wn.2d 1, 16, 390 P.2d 377, 396 P.2d 879 (1964)
[3] *Larsen*, 65 Wn.2d 1, 17
[4] *Larsen*, 65 Wn.2d 1, 19 and *No Ka Oi*, 71 Wn. App. 844, 849
[5] *Larsen*, 65 Wn.2d at 17, 19
[6] *No Ka Oi*, 71 Wn. App. 844, 849-50 quoting *Andreopulos*, 95 Wash. 282, 285

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Therefore, a plaintiff may recover lost profits if the evidence establishes the damages with reasonable certainty.[7] Although any reasonable basis for estimating the loss will suffice, the evidence generally must be the "best available" under the circumstances.[8] But this rule, requiring the best evidence available, pertains to the substance of the evidence, not its source.[9] The reliability of such evidence is for the trier of fact to determine.[10] Also, a plaintiff shall not be denied a substantial recovery because the amount of the damage is incapable of exact ascertainment.[11]

In *No Ka Oi Corp. v. Nat'l 60 Minute Tune*,[12] 60-Minute Tune refused to honor an agreement with No Ka Oi. No Ka Oi sued 60-Minute Tune for lost profits. On a motion for summary judgment, the trial court dismissed No Ka Oi's claims for lost profits reasoning that No Ka Oi had to produce evidence of lost profits based on comparisons with the same type of business in the same locale, which No Ka Oi had failed to do. The appellate court reversed and held it would have been inequitable to deny No Ka Oi lost profits where No Ka Oi produced the best evidence available and that the evidence produced was sufficient to afford a reasonable basis for estimating the loss.

The court also allowed lost profits in *Kaech v. Lewis County Pub. Util. Dist. No. 1*.[13] In *Kaech*, dairy farmers sued the Lewis County PUD for damages claiming that leaking insulators allowed "stray voltage" to affect their herd. A jury awarded substantial damages. The PUD appealed and argued that the trial court erred in allowing the farmers' damages expert to testify because the testimony was based on speculative

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[7] *Lundgren v. Whitney's, Inc.*, 94 Wn.2d 91, 97-98, 614 P.2d 1272 (1980)
[8] *Lundgren*, 94 Wn.2d 91, 98
[9] *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 418
[10] *Larsen*, 65 Wn.2d 1, 18
[11] *Lundgren*, 94 Wn.2d 91, 98; *Dunseath v. Hallauer*, 41 Wn.2d 895, 902, 253 P.2d 408 (1953); *Buchanan v. Hammond*, 54 Wn.2d 354, 340 P.2d 556 (1959)
[12] 71 Wn. App. 844, 863 P.2d 79 (1993)
[13] 106 Wn. App. 260, 23 P.3d 529 (2001)

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evidence and did not consider all purported factors. The appellate court ruled that the farmers' expert's testimony regarding economic loss calculations was admissible, as it was based on tangible evidence with a sufficient and substantial factual basis. The court of appeals, therefore, ruled that the testimony did not violate the new business rule.

Here, the new business rule does not bar K&S from recovering lost profits. K&S will provide expert testimony from George Johnson. As determined in *Larsen,* expert testimony alone is sufficient to establish lost profits. Moreover, Mr. Johnson's testimony is supported by tangible evidence with a substantial and sufficient factual basis because he relies upon data complied or provided by Paul Krakow, revenue and business information from other park and fly businesses in the City of SeaTac, and information available to the general public regarding park and fly businesses in the City of SeaTac (including information on revenue generated).

Mr. Johnson's opinion/analysis is based solely upon facts, hard data, profit information, and other factors relating to identical or similar park and fly businesses operating under substantially the same market conditions. Therefore, K&S's request for lost profits is not based upon speculation and does not violate the new business rule.

B. Contract and Promissory Estoppel

The measure of damages in a contract claim or promissory estoppel claim:

> is "'not the mere restoration to a former position, as in tort, but the awarding of a sum which is the equivalent of performance of the bargain—the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled.'" *Rathke v. Roberts*, 33 Wn.2d 858, 865, 207 P.2d 716 (1949) (emphasis omitted) (quoting McCormick on Damages 560, § 137).

Columbia Park Golf, 160 Wn. App. at 86.

The new business rule provides that lost profits from a new business or one that has not yet established is often too speculative. However,

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> [s]uch damages may be recovered, however, if a reasonable estimate can be made by analyzing market conditions and profits of substantially similar businesses.

Columbia Park Golf, 160 Wn. App. at 88 (citing *Farm Crop Energy*, 109 Wn.2d at 928).

C. Torts

For a tortious interference claim, the plaintiff "may recover **all 'losses'** proximately caused by the interference." *Mutual of Enumclaw Insurance Co. v. Gregg Roofing, Inc*., 178 Wn. App. 702 (2013) (emphasis added) (damage for loss of reputation appropriate for tortious interference claim) (quoting Sunl*and Investments, Inc. v. Graham*, 54 Wn. App. 361, 364 (1989).

> (1) One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for
>
> (a) the pecuniary loss of the benefits of the contract or the prospective relation;
> (b) consequential losses for which the interference is a legal cause; and
> (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.

Gregg Roofing, 178 Wn. App. at 714 (quoting Restatement (Second) of Torts § 774A (1965)).

Here, K&S will prove substantial damages resulting from the City's and Collier's tortious conduct.

D. Taking or Damaging under Article I, Section 16 of the Washington Constitution

The measure of damages for a taking under Article I, Section 16 of the Washington Constitution is the fair market value of the property that was taken at the

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time it was taken. The property owner is entitled to pre-judgment interest from the time of the taking until paid. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 656-57 (1997).

Here, K&S will prove that the City's interference with its property was sufficient to constitute a taking as early as October 2007 and the jury should determine the fair market value of the property on that date, apply pre-judgment interest, and then offset the total by the amount of compensation actually or already paid.

VII. CONCLUSION

While this brief is relatively short given the numerous legal theories and facts in this case, K&S remains prepared to brief any issue of concern to the Court as the trial progresses.

DATED this 26th day of October, 2015.

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CERTIFICATE OF SERVICE

1. My name is Heather Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 26th day of October, 2015, a copy of the foregoing **PLAINTIFF K&S DEVELOPMENT, LLC'S AND DEFENDANTS GERALD AND KATHRYN KINGEN'S TRIAL BRIEF** was delivered via e-mail, to the following persons:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: October 26, 2015

At: Vancouver, Washington

/s/Heather Dumont
HEATHER DUMONT

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CONFIRMATION RECEIPT

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