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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’S BRIEFING (1) IN
RESPONSE TO COURT’S MARCH
3, 2016 E-MAIL INQUIRY AND (2)
IN SUPPORT OF PROMISSORY
ESTOPPEL CLAIM**

CITY OF SEATAC,

Plaintiff,

v.

GERALD and KATHRYN KINGEN,

Defendants.

I. INTRODUCTION

On March 3, 2016, the court stated:

Counsel-

I am willing to sign dismissals of Plaintiff’s claims under privileges and immunities clause, procedural due process and substantive due process claims. However, there is some mention of promissory estoppel without further explanation (see pg. 2, line 1 of Plaintiff’s supplemental memorandum).

*Please explain your request.*¹

K&S has already moved to voluntarily dismiss its privileges and immunities claim, so the court should dismiss that claim with prejudice.

It also appears from the above-quoted e-mail that the Court, based on the doctrines of mootness or constitutional avoidance, does not plan to reach the merits of K&S's state Procedural and Substantive Due Process claims. If that is true, K&S has no objections to the court dismissing those two claims **without** prejudice, due to the doctrines of mootness or constitutional avoidance.²

Other than to claim that the state Procedural Due Process claim was never part of K&S's lawsuit, the City has not weighed in on this issue. The court should therefore dismiss the Procedural and Substantive Due Process Claims without prejudice.

The Court's above e-mail has requested additional briefing on K&S's promissory estoppel claim. Briefly stated, K&S requests this Court find in K&S's favor on its promissory estoppel claim and award damages consistent with the only expert testimony provided on this issue, in the amount of \$12,682,500.

II. FACTS ESTABLISHED AT TRIAL

K&S proved the following:³

1. Since March 2004, K&S had been working through the City's formal pre-application process with the Planning Department to obtain the approvals to build a 1,200-stall parking garage.⁴

¹ Court's March 3, 2016 e-mail.

² In the unlikely event the jury's verdict is set aside on appeal, K&S wants to preserve the right to have those claims reinstated on any type of remand.

³ K&S incorporates the statement of facts contained in its other briefs before this court.

⁴ Trial Exhibit 81, Butler's July 11 Chronology of Events summarizes the events leading up to the Moratorium and July 11th Letter Agreement.

1 2. On February 28, 2006, the City Council, without notice to K&S, enacted
2 an emergency moratorium to bar park-and-flies within the 154th Street Station Area.
3 Although they did not disclose their true intentions or its effect on K&S's proposal,
4 Planning Director Steve Butler and City Manager Craig Ward wanted the City Council
5 to pass the moratorium primarily to stop K&S's park-and-fly.

6 3. Later, after they learned of K&S's proposed park-and-fly and how its
7 staff had mistreated K&S⁵, the City Council directed Manager Ward to sign a July 11,
8 2006 letter agreement (the "Letter") at a City Council Meeting.⁶ In this Letter, Ward
9 promised to quickly process, finalize, and "fully support" a development agreement to
10 allow K&S to move forward with its park-and-fly garage. A nearly completed and
11 negotiated draft of the Development Agreement (DA) was attached to the July 11th
12 Letter and contained most of the essential terms of the agreement between the City
13 Manager and K&S.

14 4. In the Letter, Ward and his staff promised to (1) not significantly change
15 the terms of the DA attached to the Letter, (2) expeditiously process the DA, and (3)
16 "fully support" K&S's proposed 1,200-stall park-and-fly. "Fully support" is a term of
17 art within the land-use community which means that the city staff will join with the
18 applicant and recommend that the city council approve the land-use proposal, even in
19 the face of opposition by the city council or others.⁷

20 5. In return for Manager Ward's promises and representations, and based
21 upon the individual City Council's comments at Council meetings that they would
22 approve the DA, K&S agreed to give-up its right not to challenge the City's moratorium

23 ⁵ Trial Exhibit #81 and Trial Exhibit 80(.008), pages 5-6 (May 23, 2006 SeaTac City Council Regular
24 Meeting Minutes).

25 ⁶ Trial Exhibit #43.

26 ⁷ *William Geyer's Testimony.*

1 or its adoption of the interim regulations.⁸ K&S further agreed, in return for having the
2 City treat its proposal as vested, to support the City’s adoption of the interim regulations
3 to disallow future park-and-flies within the 154th Street Station Area.⁹ The City Council,
4 Manager and staff knew K&S was giving up its legal right to challenge the moratorium
5 or interim regulations in reliance upon the City Manager signing the July 11th Letter.

6 6. Instead of complying with the promises laid out in the July 11th Letter,
7 City staff intentionally delayed the negotiations with K&S and failed to “fully support”
8 the garage. The City staff actually undermined K&S’s efforts.

9 7. Manager Ward admitted he did not fully support the terms of the July
10 11th Letter because he felt he could change its terms, which he attempted to do often.

11 8. After 15 months of negotiations, the City Council reversed its course and
12 stated it would not support a park-and-fly. The City staff and Manager supported the
13 City Council’s flip-flop and did nothing to convince the Council to honor the July 11th
14 Letter or draft Development Agreement. The City Manager did not “fully support” the
15 terms of the Development Agreement he had negotiated prior to July 11, 2006.

16 9. For example, during a September 18, 2007 work session, Ward advised
17 that allowing K&S’s proposed park-in-fly would be the “worst case scenario” and that
18 if the Council allowed the DA, it should require that it eventually be converted to other
19 uses.¹⁰ Ward also admitted that, despite his contractual duty to “fully support” the park-
20 and-fly, he never believed he was required to “advocate” for the City Council’s
21 approval” and had a right to change the terms of the DA at any time.

22
23 _____
⁸ Trial Exhibits 80(.017), page 3 (July 11, 2006 SeaTac City Council Regular Meeting minutes).

24 ⁹ K&S’s attorney Mike Murphy testified that the City wanted assurances that K&S would not challenge
25 the City’s moratorium and to support the City’s interim regulations. Mr. Murphy insisted upon the
26 Manager issuing the July 11th Letter to document his client’s position.

¹⁰ Trial Exhibit 85.004, pages 1-3 (September 18, 2007 Land-use and Parks Committee (LUP))

1 10. There was additional evidence of the staff’s true feelings about K&S and
2 its proposed park-and-fly. The City’s consultant, Heartland, interviewed Planning
3 Director Butler and other city staff on September 4, 2007—one month before the City
4 Council made clear that it would no longer support the garage. In summarizing the
5 meeting, Heartland wrote that staff believes K&S is “not [a] capable or reliable
6 developer.”¹¹ Heartland also notes that “we should learn more about [the negotiations of
7 the DA with K&S] before they get so far down the track that they create a **fundamental**
8 **dysfunction** right in the middle of any potential trying to be achieved at this station
9 area.”¹² They also quote Mr. Butler as concerned with how the DA could constitute spot
10 zoning and allowing the park-and-fly could “inadvertently drive-up land values thereby
11 dampening redevelopment interest.”¹³

12 11. The staff also decided after it had signed the July 11, 2006 Letter that it
13 wanted to acquire K&S’s property. The City believed permitting a park-and-fly would
14 only increase the value of the property which meant the City must pay more to acquire
15 K&S’s property.¹⁴ No one from the City ever shared its desire or intent to acquire
16 K&S’s property with K&S until after the City acquired it at the end of 2009.

17 12. Based upon the staff’s lack of support and failure to expeditiously
18 process the park-and-fly DA, the Council ultimately flip-flopped and refused to approve
19 the park-and-fly DA.

20 13. Due to the extremely long delay in getting a final decision from the City,
21 and its justifiable reliance upon the City’s July 11, 2006 promises, K&S fell victim to
22 the Great Recession and, at the end of 2008, defaulted on its loans.

23 _____
24 ¹¹ Trial Ex. 61.

25 ¹² Trial Ex. 61.

26 ¹³ *Id.*

¹⁴ Trial Exhibit 107 (Station Area Plan Implementation)

1 Because promissory estoppel was originally an equitable doctrine, the fifth
2 element may appear to limit recovery to specific performance. However, the courts have
3 clarified that damages are recoverable under a promissory estoppel theory.¹⁷

4 The doctrine of promissory estoppel was developed to cover certain
5 circumstances in which perhaps certain formalities of a contract or consideration is
6 lacking, but the enforcement of the promise is appropriate because the promisor should
7 have expected the promisee to rely upon the promise.¹⁸ Promissory estoppel can be a
8 “sword” in a cause of action for damages.¹⁹

9 **B. K&S reasonably relied upon the City Manager’s July 11, 2006 promises**
10 **when it chose not to challenge the City’s moratorium and agreed to**
11 **support the Interim Regulations.**

12 In return for K&S giving up important legal rights, and even agreeing to support
13 the City’s approval of the interim-regulations, Manager Ward promised in his July 11,
14 2006 Letter that “[t]he City staff shall process said application as expeditiously as
15 possible, and shall fully support approval of the Development Agreement before the
16 City Council.”

17 K&S was led to believe that in return for not challenging the City’s moratorium
18 or interim zoning, the staff would expeditiously process and fully support its park-and-
19 fly DA before the City Council. There can therefore be no doubt that K&S acted in
20 reliance upon this Letter (and the promises within that Letter) when it agreed to not
21 challenge the moratorium or the interim development regulations.

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¹⁷ *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259 n.2 (1980).

25 ¹⁸ *Hatfield v. Columbia Fed. Savs. Bank*, 57 Wn. App. 876, 885, 790 P.2d 1258 (1990).

26 ¹⁹ *Klinke*, 94 Wn.2d at 259.

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C. Manager Ward and his staff broke their promises.

Staff and Ward failed to fulfill the promises they made in Manager Ward’s Letter. They did not promptly process the DA. They also failed to fully support the DA before the Council. It was Ward and his staff who led the charge (primarily behind the scenes) to kill the park-and-fly because the City staff (and ultimately the City Council) wanted to (1) acquire K&S’s property for less than its fair market value, (2) limit competition from the City’s (or its public/private partner, MasterPark’s) own proposed park-and-fly proposal at the 176th Street Station Area, and (3) support Mayor Fisher’s agenda to increase housing prices to force out the refugees in his neighborhood.

If the staff had fulfilled Ward’s promise and fully supported the DA, then it’s very likely the Council would have adopted the DA. K&S showed through expert testimony that city councils normally follow the recommendations of their staff, and the staff’s failure to fully support the DA led to it being rejected by the Council, causing K&S damages as set forth below.

The evidence also showed that the City staff did not like Gerry Kingen or his partner, Scott Switzer, perhaps for their having called the staff onto the carpet before the Council for their misconduct related to the moratorium. The obvious animus toward K&S, as revealed by Heartland’s interview of the staff members,²⁰ led the staff to misuse the City’s police powers to retaliate against K&S.

For whatever reason, Manager Ward and his staff failed to fulfill the promises made in the July 11th Letter, to K&S’s detriment.

²⁰ Trial Exhibit 61.

1 **D. K&S is not seeking to apply Promissory Estoppel to the City Council.**

2 The City has argued that the City Manager could not bind the City Council to
3 sign the Development Agreement. K&S agrees. But K&S is claiming something
4 entirely different.

5 Craig Ward had the authority to bind himself, and his staff, to the promises
6 made in the Letter Agreement. While that Letter could not bind the City Council, it
7 bound Manger Ward and his staff to (1) not make substantial changes to the draft
8 Development Agreement, (2) quickly process and submit the DA to the City Council,
9 and, (3) “fully support” the City Council approving the DA.

10 Under RCW 35A.13.080(1) and (2), the city manager has general supervision
11 authority over the administrative affairs of the City, including the right to appoint and
12 remove all department heads and employees. It is also undisputed that Manager Ward
13 had the authority to bind himself and the staff to the two promises made in the Letter—
14 prompt processing of the park-and-fly DA and full support of the DA before the
15 Council. While the July 11th Letter could not bind the City Council, K&S was entitled
16 to have the City staff (1) not significantly change the DA attached to the letter, (2)
17 expedite the review process, and, (3) fully support having the City Council approve the
18 DA.

19 **E. Manager Ward and his staff’s breach of their promises caused K&S**
20 **to suffer damages.**

21 As evidenced by the jury’s verdict, there is no doubt that K&S suffered damages
22 because of the City staff’s broken promises. Believing its approval was “just around the
23 corner” and that it could then obtain conventional financing, K&S continued to pay high
24 interest on its loans awaiting the City to approve its project. This eventually led to K&S
25 having to face the recession head-on without an approved and viable project or the
26 ability to obtain financing.

1 To make matters worse, the City then exploited K&S's dire financial condition
2 which the City caused, and used a phantom buyer to force a deed-in-lieu transaction for
3 millions of dollars less than the property's fair market value.

4 The Jury, on a 10-to-2, awarded \$9,589,703.00 in damages to K&S on its
5 takings, interference with a business expectancy, and intentional misrepresentation
6 claims.

7 **F. K&S suffered \$12,682,500 in damages.**

8 As stated above, K&S is the only party that provided any expert testimony on
9 damages—the City chose not to put on any damages expert at trial and offered little
10 evidence to rebut K&S's damages analysis. Therefore, the only expert testimony on
11 damages was that provided by expert witness George Johnson.

12 In his testimony, Mr. Johnson described the four (4) damages scenarios,²¹ Trial
13 Exhibits 146 (Damage Scenarios) and 522 (Damages Calculations). These scenarios
14 provided damages that ranged between \$12,081,408 to \$21,264,084.

15 Scenario Three specifically describes the scenario caused by Manager Ward and
16 his staff's breach of the July 11, Letter Agreement. Since this is the only evidence of
17 damages, the court should, if it finds in K&S's favor, award damages in the amount of
18 \$12,682,500.²²

19 **IV. CONCLUSION**

20 K&S proved each of the elements of its promissory estoppel claim. While he
21 may not have been able to legally bind the City Council, Manager Ward had the
22 authority to bind himself and his staff, especially when that letter was signed in the
23 presence of and with the express approval of the council members.

24
25 ²¹ Land-use expert William Geyer also laid the foundation for the four damages scenarios (Trial Ex. 146).

26 ²² K&S is not seeking that the court adds this amount to what the jury has already awarded.

1 K&S reasonably and justifiably relied on these promises when it gave up
2 important legal and political rights (i.e. to not challenge the moratorium or interim
3 development regulations). K&S instead agreed to trust the City Staff to quickly finalize
4 and fully support the DA.

5 The court should therefore find for K&S's Promissory Estoppel claim and award
6 damages in the amount of \$12, 682,500.

7

8 DATED this 14th day of March, 2016.

9

LANDERHOLM, P.S.

10

/s/ Bradley W. Andersen

11

BRADLEY W. ANDERSEN, WSBA #20640

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PHILLIP J. HABERTHUR, WSBA #38038

13

Of Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is HEATHER A. 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 14th day of March, 2016, a true and correct copy of the foregoing **PLAINTIFF'S BRIEFING (1) IN RESPONSE TO COURT'S MARCH 3, 2016 E-MAIL INQUIRY AND (2) IN SUPPORT OF PROMISSORY ESTOPPEL CLAIM** was delivered via email and first class United States Mail, postage prepaid, to the following person(s):

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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: March 14, 2016
At: Vancouver, Washington

/s/ Heather Dumont
HEATHER A. DUMONT

CONFIRMATION RECEIPT

Case Number: 12-2-40564-6 KNT
Case Title: K & S DEVELOPMENTS VS SEATAC CITY OF ET AL
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Bar Number: 20640
User ID: bwandersen
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