

# SETTLING LAND USE LITIGATION: SWORDS INTO PLOUGHSHARES

by  
Carol A. Morris

## I. Why are land use disputes more difficult to settle?

Most land use litigation involves a property owner's appeal of a municipality's denial of a land use permit or imposition of conditions on a land use permit, based on the municipality's interpretation of its code. To arrive at the final decision, the municipality has spent much time and effort analyzing the permit application materials, discussing the alternatives with the applicant, holding one or more public hearings, considering the evidence, voting on the application and drafting the necessary findings and conclusions to support the decision. Therefore, by the time an appeal has been filed of the municipality's decision, the property owner's objections usually have been addressed in the record at length by the opponents of the project, the staff and the final decisionmakers. Compromise solutions have likely been considered by the municipality and rejected.

The appeal is filed by the property owner, typically with a damage claim. Some property owners become so angry at the conclusion of the administrative process that they decide to appeal and add damage claims against the municipality, the individual decision makers, their spouses/marital communities.<sup>1</sup>

While the parties involved in any litigation may become entrenched in their positions, land use litigation is markedly different. The legislative body of the municipality cannot simply decide to "cut losses" and settle by giving the property owner money, or even the permit he/she is demanding. Just as the original permit application was required to be processed according to the municipality's code, any settlement of the dispute involving a revision of the permit must also be processed according to the code. The municipality can't circumvent its zoning procedures in settlement of litigation – resolution of any land use dispute necessarily involves consideration of the public interest and protection of the rights of the public, regardless of whether any member of the public is a named party in the litigation.

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<sup>1</sup> See, *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1988); *Hunt Skansie Land LLC v. City of Gig Harbor, et al.*, 2010 WL 1981040 (W.D. Wash. 2010) (city, councilmembers, their spouses and marital communities sued for damages based on council decision to appeal hearing examiner's decision on land use matter).

## II. What advantages are there to settling land use litigation?

Allowing the courts to decide land use issues removes the final decision-making authority from public officers. A court may decide to interpret a municipality's code in a way never intended by the municipality.<sup>2</sup> And, once the litigation is before a court, the municipality can't assume that a court will remand the matter to allow the municipality another bite of the apple. Even though a court has the ability to remand an appealed land use decision for further action,<sup>3</sup> nothing requires the court to do so.<sup>4</sup>

Another reason to settle land use disputes is obvious to anyone who reads a newspaper – litigation is unpredictable. Consider also the attorneys' fees, potential for a damage award, delays to the developer, and diversion of staff time from municipal planning and permitting activities to litigation. Settlement at the earliest possible stage is the best way to avoid these consequences.

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<sup>2</sup> See, *City of Gig Harbor v. North Pacific Design*, 149 Wash. App. 159, 201 P.3d 1096 (2009) (city council appealed decision of hearing examiner on planned residential development, which was upheld by the courts).

<sup>3</sup> RCW 36.70C.140 (“The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.”)

<sup>4</sup> Compare the facts in the following two cases in which the land use decisions were appealed to the Washington Supreme Court. In both cases, the municipality failed to identify the SEPA authority for the decision, and the court found this to be a fatal flaw. Even so, remand for further action was refused in one and granted in the other.

In *Levine v. Jefferson County*, 116 Wn.2d 575, 807 P.2d 363 (1991), the county issued a building permit for a sawmill with nine conditions, limiting hours of operation, requiring hooded lighting, forward traffic flow, prohibiting parking or loading on county roadways, identifying drainage measures which would prevent negative impacts to groundwater, mandating compliance with regulations for noise abatement and disposal of wood waste. 116 Wn.2d at 582. On appeal, the Washington Supreme Court held that the county did have the authority to impose the conditions under SEPA, but ordered the county to issue the building permit without conditions because of the inadequacy of the record. *Id.* The rationale for the court's refusal to remand: “[t]he County, at this late date, is not entitled to a remand to identify these policies.” The county issued the building permit with the SEPA mitigation on October 29, 1986. The Washington Supreme Court's decision in *Levine* issued on March 28, 1991.

In *Cougar Mountain Assoc. v. King County*, 111 Wn.2d 742, 765 P.2d 264 (1988), a developer submitted a preliminary plat application to the county, and later, an Environmental Impact Statement was prepared for the proposed development. 111 Wn.2d at 758. The county denied the application, largely based on the finding that the subdivision would result in significant adverse environmental impacts that could not reasonably be mitigated. On appeal, the Washington Supreme Court held that even though the county had not properly identified the basis for the denial under SEPA, a remand to the superior court was appropriate, in order to allow the county council to reconsider the preliminary plat and identify the policies supporting its action. The preliminary plat application was filed in July of 1982 and the Supreme Court's decision issued on December 15, 1988. If the rationale for the court's refusal to remand in *Levine* was truly the delay suffered by the developer, there should have been no remand in the *Cougar Mountain* case.

### III. What's different about settling land use disputes?

Land use disputes must be handled differently than settlement of other types of litigation. A municipality's settlement of a land use dispute cannot involve the unlawful surrender of police power.<sup>5</sup> In addition, the public interest must be considered in any settlement, given that the public interest drives the municipality's exercise of zoning power.

### IV. Do municipalities have the authority to settle land use litigation?

Inherent in the local government's power to sue or be sued, and to contract, is the authority to settle litigation.<sup>6</sup> However, such settlement can't unlawfully bargain away the municipality's police power or circumvent the public interest.<sup>7</sup> An *ultra vires* agreement, or one executed in conflict with statutory requirements, is illegal and unenforceable.<sup>8</sup>

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<sup>5</sup> *King County v. Taxpayers of King County*, 133 Wn.2d 584, 611, 949 P.2d 1260 (1997):

A local government may not alter or restrict a legislative grant of power to that local government or its officers. . . . When the Legislature or state constitution has granted a power to the legislative authority of a municipality, the municipality may not limit the scope of that power, or surrender any of it under Const. art. XI, Sec. 11, our state supremacy clause.

*See also, Ad-Ex, Inc. v. City of Chicago*, 207 Ill. App.3d 163, 565 N.E.2d 669 (1991) (settlement agreement which is beyond power of municipality is void and cannot be ratified by municipal action); *Midtown Properties Inc. v. Township of Madison*, 68 N.J. Super. 197, 172 A.2d 40 (1961) (settlement agreement and judgment declared *ultra vires*, illegal and void three years later, after developer spent \$200,000 in reliance thereon); *Warner Co. v. Sutton*, 274 N.J. Super. 464, 644 A.2d 656 (1994); *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264 (8<sup>th</sup> Cir. 2007); *League of Residential Neighborhood Advocates v. Los Angeles*, 498 F.3d 1052 (9<sup>th</sup> Cir. 2007) (charter provision that empowered the city council to "approve or reject settlement of litigation that does not involve only the payment or receipt of money" does not purport to authorize contract exemptions from zoning requirements).

<sup>6</sup> For code cities, *see*, RCW 35A.11.020.

<sup>7</sup> "Acts done without legal authorization or in direct violation of existing statutes are *ultra vires*." *Miller v. Bainbridge Island*, 111 Wash. App. 152, 43 P.3d 1250 (2002). "A municipality is not precluded from enforcing zoning regulations if its officers have issued building permits contrary to such regulations, have given general approval to violations of such regulations, or have remained inactive in the face of such violations." *City of Mercer Island v. Steinmann*, 9 Wash. App. 479, 483, 513 P.2d 80 (1973).

<sup>8</sup> ("It is the general rule that a contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable") *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 26, 183 P.2d 643 (1947). As stated by the court in *Faylor's Pharmacy v. Dept. of Social and Health Services*, 125 Wn.2d 488, 499, 886 P.2d 147 (1994):

A contract in conflict with statutory requirements is illegal and unenforceable as a matter of law. In addition, a government contract beyond an agency's authority is void and unenforceable. Even where a contract is within an agency's substantive authority, failure to comply with statutorily mandated procedures is *ultra vires* and renders the contract void.

Some municipalities believe that a charter or ordinance provision delegating the authority to settle litigation allows a settlement that does not follow the procedures established by ordinance or statute. The courts have held that this does not authorize contractual exemptions from zoning requirements.<sup>9</sup>

## V. How must the public interest be considered when settling land use litigation?

Cities and counties in Washington have long been required to adopt comprehensive plans which serve the public interest by anticipating and influencing the orderly and coordinated development of land and building uses.<sup>10</sup> Zoning ordinances implement and give effect to the comprehensive plan by dividing the city into appropriate zones within which specific standards regulate the use, density, location, height, bulk, number of stories, size of buildings and structures, setbacks, parking, etc.<sup>11</sup> These regulations ensure compatibility of uses and buildings within zones, predictability of impacts associated with the use and appropriate location of infrastructure and utilities, all of which is desirable to the public. To be constitutionally valid, a zoning regulation must provide a legitimate public benefit without being unduly burdensome on the individual property owner, and the adoption process must meet due process standards.<sup>12</sup>

In 1990, the Growth Management Act was adopted to address the “uncoordinated growth” and “lack of common goals expressing the public’s interest in the conservation and wise use of our lands” which poses a “threat to the environment, sustainable economic development and the health, safety and high quality of life enjoyed by the residents of Washington.”<sup>13</sup> Highly structured comprehensive land use planning was mandated, with citizen participation and cooperation in the planning process identified as one major goal to guide the development and adoption of such plans.<sup>14</sup>

In 1995, certain municipalities were required to adopt ordinances establishing an integrated and consolidated permit project process, to be included in their development regulations.<sup>15</sup> Notice to the public of the receipt of project permit applications is integral to this process, which notice includes substantial detail on the application, decisions made

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<sup>9</sup> *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9<sup>th</sup> Cir. 2007); *Trancas Property Owners Ass’n v. City of Malibu*, 138 Cal.App.4<sup>th</sup> 172, 41 Cal.Rptr.3d 200 (2006) (in order to settle a lawsuit, the city approved, in closed session, a written agreement to rescind the disapproval of a subdivision and exempt the developer from all present and future zoning density restrictions that would otherwise block the development).

<sup>10</sup> RCW 35A.63.060. This article will include citations to the statutes applicable to code cities and code cities planning under GMA.

<sup>11</sup> RCW 35A.63.100.

<sup>12</sup> *Girton v. Seattle*, 97 Wash. App. 360, 368, 983 P.2d 1135 (1999).

<sup>13</sup> RCW 36.70A.010.

<sup>14</sup> RCW 36.70A.020(11).

<sup>15</sup> RCW 36.70B.060.

on the application to date, environmental information, statements of preliminary determinations on the application, as well as the date, time, place and type of hearing on the application.<sup>16</sup> All of these procedures are calculated to provide notice to the public of the pending development application at the earliest possible stage. Usually, the municipality also allows at least one administrative appeal of the project permit application, which provides additional public input in the decision-making process.

In sum, the law ensures recognition of the public interest that may transcend the interests of an individual property owner applying for a permit from the local government. Therefore, resolution of a land use dispute necessarily involves compliance with law to ensure consideration of the public interest and protection of the rights of the public, regardless of whether any member of the public is a named party to the litigation.

## **VI. What types of land use disputes can be resolved through settlement?<sup>17</sup>**

A land use dispute will usually involve a challenge or appeal to the municipality that adopts a law, applies or enforces the law (by adopting an ordinance or issuing a final decision on a permit). Such disputes include an applicant/property owner, the municipality and, in many instances, the public (aggrieved neighbor or citizen).

If the dispute involves the municipality's final decision on a project permit application (or certain code enforcement actions), any aggrieved party is required to file an appeal under the Land Use Petition Act ("LUPA") within 21 days of issuance of the land use decision.<sup>18</sup> Filing of a petition under LUPA brings the parties within the court's jurisdiction. LUPA also identifies the person or entity who must be made a party to the litigation, which includes the local jurisdiction, the applicant, the owner of the property, the taxpayer of the property, and each person named in the written decision who filed an appeal to the quasi-judicial decision-maker (unless the appeal was abandoned or the claims were dismissed before the decision issued).<sup>19</sup> It is important that all parties be involved in and participate in the settlement, to reduce the chances of later challenges to its validity.<sup>20</sup>

## **VII. What must be in a settlement to be enforceable?**

Settlement agreements are governed by general principles of contract law.<sup>21</sup> The essential elements of a contract are subject matter, parties, promise, terms/conditions, and price or consideration.<sup>22</sup>

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<sup>16</sup> RCW 36.70B.110.

<sup>17</sup> Obviously, not all land use disputes can be covered in this article. This article centers on the most frequently litigated disputes – appeals of project permit applications.

<sup>18</sup> RCW 36.70C.040.

<sup>19</sup> RCW 36.70C.040(2).

<sup>20</sup> *LeJune v. Clallam County*, 64 Wn. App. 257, 823 P.2d 1144 (1992).

<sup>21</sup> *Stottlemyre v. Reed*, 35 Wash. App. 169, 171, 665 P.2d 1383 (1983).

In the determination whether the exchange of informal writings (*i.e.*, letters) constitutes an enforceable settlement contract, the Washington courts consider whether: (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract.<sup>23</sup> If the subject matter is not in dispute, the terms are agreed upon, and the intention of the parties plain, then a contract exists between them by virtue of informal writings, even though they may contemplate that a more formal contract shall be subsequently executed and delivered.<sup>24</sup>

The party asserting the existence of an express or implied contract bears the burden of proving the essential elements of a contract, including mutual intent.<sup>25</sup> Civil Rule 2A and RCW 2.44.010 govern the enforceability of settlement agreements in Washington. Filing the agreement in court is an important step:

To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in the presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney; . . .

CR 2A provides:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

The purport of a settlement agreement is disputed within the meaning of CR 2A only if there is a genuine dispute over the existence or material terms of the agreement.<sup>26</sup>

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<sup>22</sup> *Eugster v. City of Spokane*, 118 Wash. App. 383, 417, 76 P.3d 741 (2003).

<sup>23</sup> *Morris v. Maks* 69 Wash. App. 865, 868, 850 P.2d 1357 (1993).

<sup>24</sup> *Loewi v. Long*, 76 Wash. 480, 484, 136 P. 673 (1913).

<sup>25</sup> *Bogle & Gates P.L.L.C. v. Holly Mountain Res.*, 108 Wash. App. 557, 460, 32 P.3d 1002 (2001).

<sup>26</sup> *Id.*, 93 Wn. App. at 583.

## VIII. What procedures should be implemented to ensure that the settlement is enforceable?

A. There should be a formal settlement agreement executed by the duly authorized representatives of the parties.

Again, settlement agreements are governed by general principles of contract law.<sup>27</sup> If the intention of the parties is plain and the terms of a contract are agreed upon, then a contract exists, even though no comprehensive writing is executed.<sup>28</sup>

Use of a written, standard form settlement agreement will ensure that no important contract clauses are omitted, especially the indemnification and release of liability. Execution of the settlement agreement by the duly authorized representatives of the parties is required before anyone may attempt to enforce the terms of the parties' agreement. Implementation of an established procedure reminds the parties that a formal agreement exists, and that it cannot be unilaterally revoked by one party without severe consequences.

Consider the facts in one case where the existence of a settlement was disputed. In *Saben v. Skagit County*,<sup>29</sup> the County issued permits to the Sabens, then revoked them. The County also informed the Sabens that a building permit for a residence on their property could not be granted.<sup>30</sup> The Sabens appealed to the hearing examiner and filed a damage claim with the County auditor.<sup>31</sup>

While the appeal was pending, the Saben's attorney telephoned the County's chief civil deputy prosecuting attorney to discuss settlement.<sup>32</sup> The County's attorney followed up this phone call with an e-mail, stating that the "permits which were revoked are to be forthwith reinstated by the [County]. . . . if they comply with all applicable code provisions a [building permit for the residence] will be granted."<sup>33</sup> That same day, the County notified the Sabens that their permits were reinstated and that review of the residence building permit was underway. The Sabens wrote to the County, explaining that they were directing their attorney to drop the appeal.<sup>34</sup>

The Saben's attorney then wrote the County's attorney, seeking reimbursement of the expenses that the Sabens had incurred in the appeal. The County's attorney replied that "for settlement purposes only, the County has authorized me to offer your client the

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<sup>27</sup> *Stottlemire v. Reed*, 35 Wash. App. 169, 171, 665 P.2d 1383 (1983).

<sup>28</sup> *Saben v. Skagit County*, 136 Wash. App. 869, 152 P.3d 1034 (2007).

<sup>29</sup> 136 Wash. App. 869, 152 P.3d 1034 (2007).

<sup>30</sup> 136 Wash. App. at 871.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, at 874-75.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, at 875-76.

sum of \$4,000.00 as full and final settlement of any and all claims/actions relating to the permitting.”<sup>35</sup> He also said that the Sabens would be required to sign a release.

Before issuing the promised permit, the County sought advice from outside counsel.<sup>36</sup> Three months after the Sabens withdrew their appeal, the County denied the permit for the residence and denied that there was any settlement. The County hearing examiner and County Council affirmed the denial. As a result, the Sabens filed a LUPA appeal and demanded damages under chapter 64.40 RCW.<sup>37</sup>

The County’s argument in support of the denial of the permit for the residence was that approval would violate the County’s ordinances, but the court was not convinced:

There was nothing illegal about the interpretation the county adopted when it made its agreement with the Sabens. Whatever public policy the county’s interpretive uncertainties may express, it cannot trump the county’s obligation to honor its settlement with the Sabens. *See, e.g., Anita Foundations, Inc. v. ILGWU Nat’l Retirement Fund*, 902 F.2d 185, 189 (2d Cir. 1990) (“a settlement payment, made when the law was uncertain, cannot be successfully attacked on the basis of any subsequent resolution of the uncertainty.”); *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) (fact that state law was ‘untested’ and later determined to be unconstitutional did not render contracts created under statute unenforceable).<sup>38</sup>

Ultimately, the *Saben* court determined that the “remarkable series of mind changes” by the County were “arbitrary and capricious.” Damages under chapter 64.40 RCW were imposed on the County and it was ordered to issue the permit.<sup>39</sup>

**B. A settlement with a municipality cannot be agreed upon in executive session.**

The fact that the city council (or in some cities, the city attorney) has the authority to settle litigation doesn’t mean that a lawsuit may be settled without conformance to applicable law.<sup>40</sup> The municipality can’t agree to waive adherence to the zoning code in

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<sup>35</sup> *Id.*, at 876.

<sup>36</sup> *Id.* at 873.

<sup>37</sup> *Id.*, at 874.

<sup>38</sup> *Id.*, at 877.

<sup>39</sup> *Id.*

<sup>40</sup> *See, League of Residential Neighborhood Advocates v. Los Angeles*, 498 F.3d 1052 (9<sup>th</sup> Cir. 2007) (charter provision that empowered the city council “to approve or reject settlement of litigation that does not involved only the payment or receipt of money” does not purport to authorize contract exemptions from zoning requirements and settlement agreement was invalidated).

exchange for dismissal of the litigation, and public review of the settlement cannot be avoided by approval in executive session.<sup>41</sup> Even if the parties agreed to keep the settlement confidential, it is a public record, and the municipality would likely have to disclose it under the Public Records Act.<sup>42</sup>

It is also important to follow the procedures for authorization of the settlement agreement. Under the Washington Open Public Meetings Act, no action may be taken in executive session.<sup>43</sup> In the following two cases, the courts invalidated settlements agreed upon in executive session, but the repudiation of the settlements by the cities were not without adverse consequences.

*Feature Realty v. City of Spokane*,<sup>44</sup> arose out of *Mission Springs v. City of Spokane*.<sup>45</sup> In *Mission Springs*, the developer with a planned unit development approval for a large apartment complex of 33 separate buildings satisfied all of the requirements in the City's code for a grading permit. At this point, the city council asked the city manager to withhold the grading permit until additional traffic studies were performed. There was a three week delay before the grading permit issued. As a result, the Washington Supreme Court held that the developer had "stated a cognizable cause of action for wrongful interference in its property rights, and that the members of the city council individually were not immune from liability."<sup>46</sup> The case was remanded to the trial court for further proceedings.

On remand, the developer and the city engaged in settlement negotiations, eventually reaching a tentative settlement in the fall of 1998. The proposed settlement called for the city to pay the developer's attorney fees, to refund certain permit fees, to install a water system in the development and to forego future permit fees in excess of \$1 million.<sup>47</sup> The agreement also required the city to issue necessary permits on an expedited basis, and provided for the abandonment of certain public lands to the developers. In exchange, the developer agreed to dismiss the claims made against the city council and individual members of city government in the *Mission Springs* litigation.

The council considered a memo describing this proposed settlement in executive session. A discussion of the terms of the proposed settlement involved "going around the table" to allow each councilmember an opportunity to indicate their approval or objection to the settlement.<sup>48</sup>

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<sup>41</sup> RCW 42.30.110(1)(i), the section relating to executive sessions in the Open Public Meeting Act, allows a municipality to discuss certain matters outside of the public meeting with legal counsel.

<sup>42</sup> *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wash. App. 319, 890 P.2d 544 (1995).

<sup>43</sup> RCW 42.30.060.

<sup>44</sup> 335 F.3d 1082 (2003)

<sup>45</sup> 134 Wn.2d 947, 954 P.2d 250 (1998)

<sup>46</sup> *Mission Springs*, 134 Wn.2d at 972.

<sup>47</sup> *Feature Realty*, 335 F.3d at 1084.

<sup>48</sup> *Id.*, at 1085.

Thereafter, the city attorney represented to the court that he had the necessary authority to enter into the settlement agreement, which apparently was signed by the attorneys for the parties. The developer dismissed with prejudice its case against the city and city council members.

Two years later, the parties had a further dispute regarding the extent of the city's obligations to construct a water system under the settlement. This dispute led to another court proceeding, and for the first time, the city alleged that its approval of the settlement agreement violated the Open Public Meetings Act ("OPMA," chapter 42.30 RCW), because it was approved in executive session.

The *Feature Realty* court recognized that the city council was entitled to convene in executive session to discuss the settlement agreement. However, the court held that the city council could not "approve the settlement by way of a 'collective positive decision' in closed session," because only the action explicitly specified by the exception is privileged, and all other actions must be taken in public.<sup>49</sup> The settlement agreement was determined by the court to be null and void, even though there was "no suggestion that the city council acted in bad faith." As stated by the court:

[T]he fact remains that [the city council] settled claims made against the city and the individual members of the council *personally*, using hundreds of thousands of dollars out of the public fisc to do so, as well as agreeing to abandon certain publicly-owned lands to the developers. Its decision took place behind closed doors, with no opportunity for public comment. The statutory procedures at issue here are essential to protect the interests of the public. They were ignored, and the settlement agreement is therefore null and void.<sup>50</sup>

The developer argued that the city should be estopped from asserting that the settlement agreement was invalid, because the council had the power to enter into the agreement and merely exercised this power in an irregular manner. The court dismissed this argument, noting that estoppel could not apply where the public's right to have government deliberate in public is violated.<sup>51</sup> The developer was not foreclosed by this decision from seeking *other* relief against the city and individual council members.

In *Burien v. Westmark*,<sup>52</sup> developer Westmark filed an application with King County in 1990 for a building permit to construct a 216-unit apartment building.<sup>53</sup> King

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<sup>49</sup> *Id.*, at 1089.

<sup>50</sup> *Id.*, at 1092.

<sup>51</sup> *Id.*, at 1092.

<sup>52</sup> 140 Wash. App. 540, 166 P.3d 813, 816 (2007).

<sup>53</sup> *Id.*

County issued a determination of significance, which would require the issuance of an environmental impact statement. Thereafter, Westmark revised its plans in an attempt to reduce the possible environmental impacts and avoid EIS preparation.

In 1993, Burien incorporated and executed an interlocal agreement with King County to allow the County to continue to process permit applications filed prior to Burien's incorporation. One of the permits excepted from the interlocal was the Westmark proposed development, and Burien assumed processing this application.

By June of 1996, Burien still had not issued a threshold decision on Westmark's revised application. As a result, Westmark filed a lawsuit against Burien alleging negligence and intentional interference with a business expectancy.<sup>54</sup> In early 1998, the parties exchanged a series of letters on the subject of settlement, but a few months later, Westmark filed a new damage lawsuit – this time seeking to enforce a settlement agreement that Westmark alleged was incorporated in these letters.

In an unreported decision, the Court of Appeals determined that the series of letters indicated Burien's intent to be bound prior to the execution of a formal settlement agreement – a decision supported by Burien's attorney's letter to Westmark's attorneys, stating that the settlement was “confirmed,” and that “as a result of the settlement,” the City struck its two summary judgment motions and pending depositions.<sup>55</sup> In addition, the Court held that the settlement was approved and ratified by the Burien City Council. This was shown by a letter from Burien's attorney, which stated that the City Council deliberated in executive session regarding the settlement, and: “after some significant deliberation and debate, a majority of the City Council has agreed to accept the settlement proposal, as indicated in your February 9<sup>th</sup> letter, with the following three modifications.”<sup>56</sup>

On remand from the Court of Appeals, the parties attempted to implement the settlement agreement, but were unsuccessful. Although the first lawsuit was dismissed, the second lawsuit was set for trial in January 2004. A few months before trial and over five years after the settlement was reached, Burien advised Westmark that the agreement might be void because it never had been approved by the Burien City Council in an open public meeting. Noting that the Court of Appeals had not addressed this issue, the trial court voided the settlement agreement and dismissed the second case with prejudice. It vacated the dismissal of the first case and allowed Westmark to file and serve an amended complaint.

Westmark then named the City and several officials/employees individually, alleging constitutional violations, damages under 42 U.S.C. Section 1983, negligence,

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<sup>54</sup> The claims against the County are not mentioned here.

<sup>55</sup> *Burien v. Westmark*, 103 Wash. App. at page 6.

<sup>56</sup> *Id.*

violation of SEPA (chapter 43.21C RCW), negligent misrepresentation, and intentional or negligent interference with business relations or expectancies. The federal claims were remanded to the federal court, and were stayed pending resolution of the state claims.<sup>57</sup> After a jury trial, Westmark was awarded \$10,710,000 – and this judgment was affirmed on appeal.

The negligent misrepresentation claim extended to Burien’s attorney’s communication to Westmark. Even after the first lawsuit was dismissed in 2000, Burien waited approximately two and a half years to inform Westmark that the settlement had not been approved in an open public meeting. So, for a total of five and half years, Westmark proceeded on the assumption that the matter had been settled. Burien’s argument that Westmark’s reliance on Burien’s attorneys’ representations were unreasonable were rejected by the court, which affirmed the jury award of over \$10 million.

C. All parties to the litigation must be involved in the settlement and the code notice procedures must be followed.

In many instances, a settlement of the land use dispute involves a withdrawal of the old decision and issuance of a new decision. However, in order to issue a new decision, the municipality must follow its procedures for notice to the public (including the persons who participated in the public hearing on the disputed application), SEPA on any new or revised application, and a public hearing (if required by the code) on the new or revised application.

In *Lejune v. Clallam County*,<sup>58</sup> property owner Sahar applied for County approval of a preliminary plat on 60 acres in 1994, proposing to divide it into 100 lots.<sup>59</sup> The neighbors opposed the plat during hearings before both the planning commission and County commissioners. Ultimately, the County commissioners denied the plat and Sahar appealed to superior court by writ of certiorari.<sup>60</sup> He joined the County to the litigation but not the neighbors. The case languished for three years with no action.

In 1988, one of the three County commissioners who voted to deny the plat was replaced, and Sahar stipulated that the superior court should remand the matter back to the board for reconsideration.<sup>61</sup> This stipulation was the basis for a court order of remand.

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<sup>57</sup> *Id.*, 166 P.3d at 817.

<sup>58</sup> 64 Wash. App. 257, 823 P.2 1144 (1992).

<sup>59</sup> *Id.*, 64 Wash. App. at 259.

<sup>60</sup> *Id.*, 64 Wash. App. at 260.

<sup>61</sup> *Id.*, 64 Wash. App. at 261.

On July 12, 1988, a hearing was held before the County commissioners to reconsider the preliminary plat application, under the 1984 zoning laws. The neighbors were given notice, they appeared, objected to reconsideration and had their objections overruled. Once the commissioners voted to approve the preliminary plat, the neighbors filed an appeal of the approval. The superior court upheld the County's approval.

On appeal, the court held that the 1985 denial of the preliminary plat was a final decision subject to res judicata.<sup>62</sup> A non-interlocutory administrative order becomes final for res judicata purposes at the beginning, not the end of the appellate process, although res judicata can still be defeated by later rulings on appeal. According to the court, the neighbors "won" at the administrative level because they persuaded the County commissioners to deny the plat. Therefore, they were entitled to be treated as parties in the 1985 writ action, and as parties they could claim res judicata as to the 1985 denial of the plat.

In addition, the court considered whether the County commissioners had the authority to reopen and reconsider their denial of the preliminary plat three years later. The court determined that the County commissioners may have had the implied power to reconsider its decision in 1985, but by 1988, it lacked such power. Because the County commissioners had no authority to reconsider their 1985 decision, the Board's 1988 reconsideration decision was vacated. The 1985 decision was reinstated.

D. Code procedures don't have to be followed if there has been a violation of law or if compliance would result in a violation.

In *League of Residential Neighborhood Associates v. Los Angeles*,<sup>63</sup> an Orthodox Jewish congregation applied for a conditional use permit to operate a synagogue in an area zoned solely for residential use.<sup>64</sup> Neighbors objected, and ultimately, the City of Los Angeles denied the application. The congregation then filed a lawsuit alleging that the denial of the permit violated its federal and state constitutional rights. All of these claims were later dismissed. However, while the appeal was pending, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA").<sup>65</sup> Concerned about the force of this new federal law and seeking to avoid further litigation, the City entered into a settlement agreement that allowed the congregation to operate the synagogue under certain conditions.

The neighbors filed a lawsuit, alleging that the settlement agreement was void because it effectively granted the congregation a conditional use permit without providing notice and a hearing to the affected community. The federal court agreed,

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<sup>62</sup> *Id.*, 64 Wash. App. at 265.

<sup>63</sup> 498 F.3d 1052 (9<sup>th</sup> Cir. 2007).

<sup>64</sup> *Id.*, 498 F.3d at 1054.

<sup>65</sup> 42 U.S.C. Sec. 2000cc.

reiterating that “municipalities may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public.”<sup>66</sup> However, the court noted that the city might not have to comply with the procedural and substantive limitations set forth in its zoning ordinances if there has been a violation of federal law or if compliance would result in a violation.<sup>67</sup> Here, there were no properly supported findings that such a remedy was necessary to rectify a violation of federal law, so the court could not approve a consent decree which would override state law provisions. Thus, it is not sufficient for a court to find that there is a *potential* violation of federal law – a court must find that there is an *actual* violation, and even then, the court would have to consider the appropriateness of the agreed-to remedy under federal law.<sup>68</sup>

### **IX. Can a municipality settle land use litigation by entering into a development agreement with a property owner to avoid the code requirements?**

A municipality and property owner may enter into a development agreement for the purposes identified in RCW 36.70B.180, such as phasing, payment of impact fees, etc. Prior to the adoption of this statute, these agreements were commonly called “concomitant agreements” and upheld by the Washington courts as valid contracts.<sup>69</sup> However, development agreements are required to be “consistent with applicable development regulations adopted by a local government planning under chapter 36.70A RCW,”<sup>70</sup> and cannot be used to deviate from the code or applicable law.

In addition, execution of a development agreement must follow a statutory process involving adoption by an ordinance or resolution after a public hearing.<sup>71</sup> Therefore, neither a development agreement nor a settlement agreement may be authorized in executive session or without a public hearing.

### **X. Tips for settling land use disputes.**

A. Don’t exchange e-mails or letters back and forth with opposing counsel, using partial descriptions of the proposed settlement. This could lead to a dispute as to the terms of the settlement, or whether or not the parties agreed to a settlement, regardless of whether the e-mails or letters stated that the parties contemplated that a formal settlement agreement would be signed at a later date. The attorneys should also be careful in their verbal discussions regarding the settlement. Send opposing counsel the complete settlement agreement, with the provisions relating to the individual settlement,

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<sup>66</sup> 498 F.3d at 1057.

<sup>67</sup> 498 F.3d at 1058.

<sup>68</sup> 498 F.3d at 1059.

<sup>69</sup> *Myhre v. Spokane*, 70 Wn.2d 207, 216, 422 P.2d 790 (1967).

<sup>70</sup> RCW 36.70B.170(1).

<sup>71</sup> RCW 36.70B.200.

as well as the standard contract clauses.<sup>72</sup> If you are the municipality's attorney, make sure that you are clear in your communications that the settlement is tentative until the settlement agreement is voted upon by the legislative body in open session and executed.

2. Don't establish a procedure in the settlement agreement that is inconsistent with law, such as stating that the parties may agree to remand a final land use decision (prior to any decision by the court that there has been an error) for reconsideration, with no change to the application. Review *LeJune* – the municipality probably doesn't have jurisdiction to reconsider its original decision.

3. If the settlement involves a change to the developer's application, include procedures for the developer's submission of a revised or new application in the agreement, and follow all of the required code procedures, including notice to the public, public hearing and issuance of a final decision with findings of fact/conclusions of law.

4. If the settlement involves a revised or new application, make sure that the settlement provides for a dismissal with prejudice of the appeal of the application that prompted the lawsuit. Otherwise, the developer might not dismiss the old appeal, and if the settlement does not proceed as planned, the developer may decide to appeal the revised/new application as well. In other words, the municipality could end up with two lawsuits instead of one. The doctrine of selection of remedies would probably apply to force the developer to choose one lawsuit over the other, but there is no need to encourage unnecessary, additional litigation.

5. In the settlement agreement, describe the exact manner in which the existing litigation will be settled, and as an exhibit to the settlement agreement, include a copy of the stipulation and order of dismissal (with prejudice) that will be signed by the parties. This will ensure that everyone agrees to the form of the stipulation and order as part of the settlement and leave no disputes to be addressed at a later date.

6. Provide for entry of the stipulation/order of dismissal with the settlement agreement attached as an exhibit, by the court, so that the settlement may be enforced.

7. Involve all of the aggrieved parties. All parties of record must be involved in the settlement. Additional notice to interested parties is important to lessen the possibility of a later challenge to the settlement agreement.

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<sup>72</sup> For those tempted to ignore this advice, read *Evans & Son, Inc. v. City of Yakima*, 136 Wash. App. 471, 149 P.3d 691 (2006) (note that the parties appear to have agreed on the issue in dispute, but the settlement falls apart because of the language of the release in the settlement agreement); *Stottlemire v. Reed*, 35 Wash. App. 169, 665 P.2d 1383 (1983) (oral settlement agreement was final and binding).

8. If the settlement provides for submission of a revised or new application, don't anticipate or guarantee the outcome of the processing of the permit application. The applicable code and statutory procedures must be followed for processing, such as SEPA review, public notice (of application and public hearing), public hearing and final decision based on findings of fact and conclusions consistent with law.

9. Rather than agreeing to a particular outcome in advance of the processing of the new/revised permit applications, specifically state in the settlement agreement that the decision-maker is not bound to any particular outcome. Remember, the point of the public hearing is to obtain public testimony. The remedy for the developer dissatisfied with the outcome should be (a) termination of settlement procedures and return of the parties to their respective places in the pending litigation as the sole remedy; or (b) dismissal of pending litigation with prejudice to allow the parties to appeal the final decision on the settlement application.

10. Make sure that if the parties agree to submission of a revised or new application, that the settlement agreement addresses any delays caused by this procedure – and specifically state that the time involved in this procedure will not be included in any calculation of delay damages. If the developer agrees to a settlement that involves a revised or new application, and if the processing of the revised or new application does not result in the outcome desired by the developer, then the time spent processing the new/revised application should not be included in any claim for delay damages.

11. Include a release from damages in the settlement agreement, even if the lawsuit doesn't include a damage claim. If a lawsuit alleges damages under chapter 64.40 RCW, for example, make sure that the settlement agreement bars the developer/property owner from filing any subsequent claim for damages (such as negligence or 42 U.S.C. Sec. 1983, both of which have longer statutes of limitation).<sup>73</sup>

12. Ensure public participation of the settlement by following all code and statutory procedures. While the proposed settlement agreement should be presented to the council in executive session for discussion, no action should be taken in executive session.

13. If there are no objections to a proposed settlement, have the developer/property owner sign it and place it on the council agenda. Ensure that the council considers (no need for discussion) the proposed settlement agreement in an open public meeting, and votes on it. If the settlement agreement is approved, follow the procedures set forth in the settlement agreement and (again) ensure that it is entered into the court files so that it can be enforced.

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<sup>73</sup> See also, *Hayes v. Seattle*, 131 Wn.2d 7-6, 934 P.2d 1179 (1997) (opinion corrected 943 P.2d 265 (1997)) (damage claim under chapter 64.40 RCW filed after city issued decision on remand was within 30 day statute of limitations).

