IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT

KEITH WELCH, an individual, and PREMIER LAND DEVELOPMENT, INC., a Washington Corporation, Plaintiff, v. CITY OF BURLINGTON, WASHINGTON, a municipal corporation Defendant.	No. 08-2-02096-0 SUPPLEMENTAL MEMORANDUM TO BE HEARD IN SNOHOMISH COUNTY SUPERIOR COURT

I. INTRODUCTION

Washington's Forest Practices Act (FPA). The FPA, originally adopted in 1974, is found in Ch. 76.09, RCW. Forest practices are activities related to growing, harvesting, or processing timber, including, but not limited to, road and trail construction and maintenance, thinning, harvesting, salvage, reforestation, brush control, suppression of diseases and insects, and using fertilizers (RCW 76.09.020(17)). These practices are regulated by the FPA and its corresponding rules, found in Title 222, WAC, promulgated by the Department of Natural Resources (DNR). DNR is the agency that is primarily responsible for regulating forest practices associated with commercial forestry operations.

If a landowner harvests without forest practices authorization or begins conversion to a non-forest use without stating an intent to convert in the forest practices application, DNR must issue a notice of conversion to the local government where the property is located. The local government must then deny all applications for permits and approvals on that property, including those for building or subdivision permits. The local government must enforce this moratorium on permit approvals for a period of six years from the forest practices approval date, or the date that DNR became aware of the harvest activities (RCW 76.09.460). The moratorium may be lifted subject to the requirements of RCW 76.09.460 & RCW 76.09.470.

Washington's Growth Management Act (GMA) requires that each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. [RCW 36.70A.060(2) Geologically hazardous areas, one of a number of "critical areas" identified by the Growth Management Act (GMA), are defined as areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns. [RCW 36.70A.030 (9)].

Because geologically hazardous areas are not valued resources like wetlands or wildlife habitat, but rather are hazards to human health, safety, and welfare, *the point is not to 'protect' geologically hazardous areas, but rather to protect the public from those geologic hazards.*

Geologically hazardous areas include areas susceptible to erosion, sliding, earthquake, or other geological events. They pose a threat to the health and safety of citizens when incompatible commercial, residential or industrial development is sited in areas of significant hazard. [WAC 365-190-080 (4)].

Some geological hazards can be mitigated by engineering, design, or modified construction or mining practices so that risks to health and safety are acceptable. When technology cannot reduce risks to acceptable levels, building in geologically hazardous areas is best avoided. This distinction should be considered by counties and cities that do not now classify geological hazards as they develop their classification scheme. [WAC 365-190-080 (4)]

One of the hazards of geologically hazardous areas is that they are not readily recognizable to the untrained eye. Many persons purchase property or residences only to later find that their investment or personal safety is threatened.

In reviewing local plans and development regulations, it would be good to keep in mind the words of George Mader (1974): *Where does the responsibility lie for protecting people and property?*

An often-heard argument is that if an individual wants to take the risk of building in a hazardous area, he should be allowed to do so. The argument goes on that only he will suffer in the event of a failure. In an isolated location, this position might be acceptable. But in urban and suburban settings, land failure on an individual property usually has intense repercussions on the surrounding area. Decreased property values, possible fire hazards, costly public assistance, and possible physical impact on adjacent land are frequent major results. Similarly, a developer often says he is willing to accept the risk in an unstable area. In the end, of course, that risk is passed on to purchasers in the development and to the public agency that assumes responsibility for streets and other public improvements, for the developer is usually out of the picture by the time a failure occurs. Thus, the burden is unfairly shifted to all the taxpayers in the community.

It becomes clear that geologic hazards are not private matters but concern the public in general. It is therefore incumbent upon government to protect the public interest. All cities and counties in the state, regardless of whether they plan under the GMA, must designate critical areas, RCW 36.70A.170(1), and must adopt development regulations to protect critical areas, RCW 36.70A.060(2).

Critical areas are defined under the GMA as including: wetlands; critical recharge areas for aquifers used for potable water; fish and wildlife habitat conservation areas; frequently flooded areas; and *geologically hazardous areas*. RCW 36.70A.030(5).

Although local governments may allow some impacts on critical areas, local regulations must result in no net loss of values or function. RCW 36.70A.172(1); WAC 365-195 825(2)(b). It may be necessary to regulate some pre-existing uses in order to protect critical areas.

All counties and cities must "include" the best available science in designating and protecting critical areas. RCW 36.70A.172(1); WAC 365-195-915. In its wetlands guidance document, the Washington State Department of Ecology interprets this requirement:

> 1) Local governments must substantively consider the best available science when adopting development regulations to designate or protect critical areas.
>
> 2) The adopted regulations must protect the functions and value of the critical areas.
>
> 3) If the local government determines this protection can be assured using an approach different from that derived from the best available science, the local government must demonstrate on the record how the alternative approach will protect the functions and values of the critical areas.

4) Development regulations under the GMA include zoning, subdivision, binding site plan, and critical areas ordinances and shoreline master programs. RCW 36.70A.030(7).

II. ISSUES PRESENTED

1) Did Mr. Madlung [the developer] obtain a Forest Practices Permit prior to harvesting, clearing, blasting and constructing the roads on Burlington Hill. Short Answer: No.

2) Was Defendant City of Burlington aware of the illegal Forest Practices activities being conducted on Burlington Hill. Short Answer: Yes.

3) Did Mr. Madlung [the developer] build ***any*** of the ***existing*** roads on Burlington Hill. Short Answer: No.

4) Did Mr. Madlung [the developer] build ***any*** logging roads that would eventually become the public streets in the subdivision. Short Answer: No.

5) Did Mr. Madlung [the developer] build ***any*** of the public streets in the subdivision over any portion of the ***existing*** roads. Short Answer: Yes.

6) Were any of the ***existing*** roads near, or in close proximity to the Hillcrest Drive road failures. Short Answer: No.

7) Did the City of Burlington or Mr. Madlung [the developer] ever contact AGRA Earth and Environmental to oversee the 1999 construction of the public streets in the subdivision. Short Answer: No.

8) Was the Hillcrest Drive road constructed ***before*** the December 10, 1998 Annexation. Short Answer: No.

9) Were the Hillcrest Drive road failure locations constructed after the December 10, 1998 Annexation. Short Answer: Yes.

10) Was the City of Burlington aware of the fact, that Mr. Madlung [the developer] failed to construct the Hillcrest Drive roads to the 1998 WSDOT road building standards as per the approved plans. Short Answer: Yes.

11) In the June 15, 2006 Zipper Zemen and Associates Final Report, did the engineers conclude that the causation of the Hillcrest Drive road failures was: (1) an over-steepened slope fill condition that was placed over the original, very steeply sloping ground surface, that is not internally stable, and (2) the original ground was ***not*** terraced on the sides of the existing embankments; transitioning from cuts to fills. Short Answer: Yes.

12) Did the City of Burlington's 2006 ZZA Final Report, and Mr. Madlung's [the developer] 2007 Geotech Consultants Final Report ***both*** concluding that the (Option 1) repair will do nothing to improve the stability of the existing fill embankments that are currently moving, and it is likely that embankment displacement will continue over time and this may present the City some long-term maintenance costs. Short Answer: Yes.

III. FACTUAL ALLEGATIONS

The City of Burlington and Mr. Madlung [the developer] had undeniably allowed and conducted several non-exempt Forest Practices, including road construction well in excess of 6,000 feet, extensive clearing, the blasting of fractured rock called "Greenschist" which is a known host for Naturally Occurring Asbestos ("NOA") in a Geologically Hazardous Area, a seismic zone 3 location, situated on 50 to 70 degree slopes; excavating and moving over 500,000 yards of (*potentially* asbestos laced rock call "Actinolite") and then to conclude the logging of over 70 +/- acres.

After reviewing all the facts and carefully considering both the law and the policy implications, confirmed - in writing - that a Forest Practices Permit was required here. As a result, the developer and the city's entire legal argument is based on a hypothetical that does not apply to the facts presented - Mr. Madlung [the developer] was legally required to apply for a permit under the Forest Practices Act, and the City of Burlington was the legally responsible party and the lead agency to make sure that all required Federal and State laws be administer under Preliminary plats of any proposed subdivision, under the Subdivision Act (58.17 RCW*)*; and all rules of law pertaining to a complete environmental review that was to be conducted prior to any work commencing on Burlington Hill.

The City of Burlington and Mr. Madlung [the developer] quite simply never applied for any permit before beginning work on his road construction, clearing and tree harvest operation. He never did what the law requires every citizen to do in determining

whether he needed to apply for a permit. The record confirms that he completely failed in basic diligence. By his own testimony, the only thing he did before blasting and bulldozing a subdivision through the forest was to keep the City of Burlington, informed of the work being done and a general description of his plans.

The City of Burlington and Mr. Madlung's [the developer] assertion of a good faith belief that he needed no permit is simply not credible. Tellingly, the City of Burlington and Mr. Madlung [the developer] can offered no plausible explanation for their failure to not follow basic laws governing all environmental reviews that needed be conducted prior to any work commencing on Burlington Hill. Not doing a SEPA or an Environmental Impact Statement (EIS) prior to any work commencing on Burlington Hill; until 3 years after work commenced, would invalidate the accuracy of said (EIS) report of record. These actions are a clear case of *"abuse of power"*, and the blatant disregard for authority, and laws governing under several specific RCW's and WAC codes noted herein; it was clearly an environment crime from all 4 corners of the law.

In the years of 1996, 1997, and 1998, the City of Burlington and Mr. Madlung [the developer] obviously ignored the voluminous information and wealth of detail included in the Forest Practice Application packet. As explained by the Washington State Department of Natural Resources, there are many things in the packet - including the application form, the instructions, the sample application, and the conversion statement - which unmistakably indicate that an application is required per the City of Burlington's Critical Areas Ordinances for projects on forest land involving road construction, timber harvest, and conversion to a residential development. Further, there is nothing in that packet that suggests the City of Burlington and Mr. Madlung [the developer] would not need to file an application. For whatever reason, the City of Burlington and Mr. Madlung [the developer]

decided to ignore all of the rules and laws pertaining to and/or referencing the Washington State Department of Natural Resources rules and laws under the Forest Practice Act, Environmental Reviews and/or the Washington State Department of Ecology Environmental Impact Statement (EIS), and the Washington State Department of Labor and Industries Explosive Blasting Technicians Licensing Permits. All which is required by law to be done prior to any work commencing on Burlington Hill.

In leading up to the city's annexation a letter dated September 16, 1997 stated that "timber had been harvested in association with the road construction activity as evidenced by Mr. Madlung's comments regarding what has been done to date." Mr. Madlung's [the developer] tree harvesting was unmistakably part and parcel of his unpermitted road construction and clearing activities.

Another last-minute ***intentional*** concealment or omitted material fact from City of Burlington and Mr. Madlung's [the developer], was the idea that all of the Forest Practices that were conducted *(without a DNR permit)* when Burlington Hill was still in Skagit County; this somehow negates the City of Burlington's legal obligation, liability, and duty. Apparently, the City of Burlington forgot about an Interlocal Joint Planning Agreement they signed in the year of 1997 with Skagit County. The sole purpose of this agreement was to trigger the obligations, duties and responsibilities to the incoming lead agency governing the development; the City of Burlington and Mr. Madlung [the developer] has no legal authority supporting their argument.

The City of Burlington and Mr. Madlung's [the developer] final last-minute ***intentional*** concealment or omitted material fact, was their assertion on January 13th, 1999, in City's Environmental Impact Statement (EIS) that was presented to the Washington State Department of Ecology stating that a Leo Wolden's Site would be left alone, is

simply ludicrous, his "harvest" was completely separate from Mr. Madlung's [the developer] development, even though it was situated on Burlington Hill it had absolutely nothing to do with Mr. Madlung's [the developer] road construction and development, except to be used as a cover up, or to throw off, and or disguise the truth and mislead the public about the illegal operations that were being conducted on Burlington Hill; is yet another attempted fraud on the court. Apparently operating on the assumption that it is easier to get forgiveness than permission, Mr. Madlung [the developer] decided to bulldoze first, and hire lawyers later. Mr. Madlung [the developer] was never licensed or insured as general contractor or a land developer whose corporation – Property Investors LLC - is in the business of subdividing real estate. His behavior is completely unacceptable. "But be that as it may", the City of Burlington went along for the ride.

Untimely the largest and most irresponsible facts arguing in this case to date, was the City of Burlington and Mr. Madlung's [the developer] secret attempted in the fall of 1998, to withhold vital information from the worksheets necessary for the Burlington Hill preliminary plat subdivision approval. The City of Burlington and Mr. Madlung [the developer] took additional steps to hide the known development defects within the Hillcrest Drive roads (and that the presence of a NOA potentially exists throughout the Burlington Hill development). (Then revising written submissions made to government authorities, thereby hiding it further, and removing all reference to the presence of the NOA; so that its existence would not become known to any county or State agencies involved in the plat approval, and then ultimately the construction of the Burlington Hill development).

Additionally, Mr. Madlung [the developer] failed to disclose these potentially known development defects, when the marketing, and selling of lots, and homes had

commenced. An additional fact herein, is that the City of Burlington's failure to disclose the potentially known development defects, during the building permit process.

Our economy depends on city governments following the rules. Rules protect individuals as well as our financial system. These defendants – both experienced in the field of "Land Planning and Developing" – took a myriad of steps to hide the true of Burlington Hill's site conditions, and deficiencies from federal and state regulators.

Working in concert, the City of Burlington and Mr. Madlung, sought to deceive federal and state regulators, along with all prospective buyers so that his company would stay open long enough to recoup losses on their development failures when the economy ultimately turned. In addition to lying to government regulators during the development process, the defendants according to facts, went so far as to cover-up the knowledge of the development defects within the Hillcrest roads (and that the presence of a NOA potentially exists throughout the Burlington Hill development).

Property Investors LLC likely had a greater emotional and financial stake in the success of the Burlington Hill development than the city but, Mr. Madlung and the City of Burlington were aware when they were undertaking a "high-stakes shell game." The defendants both have over three decades in land planning, and developing, which certainly should have given the defendant's time to learn not to lie to government regulators, individuals as well as our financial system.

Serving a community that had been rapidly expanding before the housing bubble burst, the defendant's attempts to keep the development afloat – infusions of their personal wealth, as well as the fraud – failed to match the task at hand. Mr. Madlung devised the scheme and stood to gain the most from the lies he told. Still, the City of Burlington stood to gain from Mr. Madlung's plan and was instrumental in pulling it off. By any measure,

this was an extensive criminal conduct, and the City of Burlington and Mr. Madlung of Property Investors LLC, were at its forefront, directing the conduct of others.

On the facts alleged, the City of Burlington and Mr. Madlung's [the developer] duty not to fraudulently conceal the presence of the NOA present throughout the Burlington Hill development, and the negligent road design and fraudulent construction of Hillcrest Drive, follows the principles set forth in sections 531 and 533 of the RESTATEMENT (SECOND) OF TORTS, and held that the maker of a fraudulent misrepresentation owes a duty not only to the one to whom the misrepresentation is made but also to the members of a class of people whom he intends or has reason to expect will act or refrain from acting in reliance upon the misrepresentation. These same principles apply when fraud is by concealment. Therefore, the factual allegations made, are sufficient in establishing the materiality element of a person unknowingly purchasing a defective property at an inflated price because a significant defect in it had been concealed, by fraud.

The plaintiffs property consists of the improvements *and* the land, however, and, with proof, it could be established that the land in its present state, having the knowledge of a NOA present throughout the Burlington Hill development, and the negligent road design and fraudulent construction of Hillcrest Drive is not as valuable as it would be if there were no negative issues present there, because the use of the land (for example, to build) is limited as long as the knowledge of the presence of the contaminated soils, and the potential future road failures remains. *See* June 15, 2006 ZZA Final Report pg. 17 (Option 1). *See* 2007 Geotech Consultants Report pg. 4, concurring with ZZA's (Option 1) conclusion.

When concealment of a defect in real property is the seller's (or seller/developer's) intended objective, and he takes active measures to hide the defect, he is expecting that in

the ordinary course of events the defect will remain concealed, not only from the initial purchasers but also from future purchasers, *i.e.*, that, absent an intervening event, the concealment will be passed on. The more ingenious the deception by concealment, the more likely it is that the defect will be passed unknowingly from one property purchaser to the next. If the concealment keeps the seller/developer's immediate purchasers in the dark about the existence of the defect, that is due to his proficiency in perpetrating the fraud. He should not be protected from liability for fraud because the defect he has concealed does not become manifest until after the property has transferred hands.

That equitable concept is no different than the one underlying limitations statutes that toll causes of action concealed by fraud. When a fraud tortfeasor has so successfully carried out his plan that his victim does not even know he has been victimized, and therefore cannot know to pursue him in court, it would be unjust to bar the victim from here, a jury could infer that [the developer] failed to make the initial disclosures [*i.e.*, to the initial purchasers] with the intention that subsequent purchasers would also act in ignorance. It was foreseeable that in an urban development tract of homes, that some would change hands. *While an affirmative misrepresentation might not be repeated, a nondisclosure must necessarily be passed on.*

The City of Burlington and Mr. Madlung [the developer] knew what his soils engineers had found, and it was unlikely that others would find out on their own. It was also possible that resulting damage would be anomalous if liability for damages resulting from fraudulent concealment were to vanish simply because of the fortuitous event of an intervening resale. Ultimately in such a case it is the subsequent purchaser who is directly damaged by the initial nondisclosure.

Plaintiffs finds no difficulty in extending the law of deceit to the situation presented here. *Although a developer does not know that there will be subpurchasers, it is foreseeable that there will be and that they will be the ones to suffer damage. The developer has every reason to expect that if there are subpurchasers, a nondisclosure about subsurface soil conditions will be passed on to them*.

Perhaps most important, the rule does not extend the vendor's liability at all - it merely fails to reduce it. At the same time, without such a rule, the subpurchaser has no remedy because he or she can only turn to the vendor with knowledge for recovery suing because of the passage of time.

Likewise, when a seller/developer of real property successfully conceals a defect from his initial purchaser, so that the defect is reconveyed with the property to a new purchaser, it would be unjust to bar that subsequent purchaser, who unknowingly purchased the defective property, from suing because the original victim did not know he had been defrauded.

Of course, as the admonition in comment to section 531 directs, to owe a legal duty to a subsequent purchaser to refrain from fraudulently concealing a material defect in real property, the seller (or developer/seller) must have information that would lead a reasonable man to conclude that there is an especial likelihood that it will reach those persons and will influence their conduct. There must be something in the situation known to the maker that would lead a reasonable man to govern his conduct on the assumption that this will occur.

("[I]t would be anomalous if liability for damages resulting from fraudulent concealment were to vanish simply because of the fortuitous event of an intervening resale.").

IV. LEGAL AUTHORITY AND ANALYSIS

Under the plain language of the statute ("When harvesting takes place without an application, the local governmental entity shall impose the six-year moratorium [.]" RCW 76.09.060(3)(b)(i)(C)). The Appellant's harvesting took place without an application, and Mr. Madlung [the developer] was legally required to submit an application.

There is no legal authority supporting the City of Burlington and Mr. Madlung's [the developer] argument: none of the dictionary definitions require commercial intent in "harvesting," and there are no cases requiring the City of Burlington and Washington State Department of Natural Resources (DNR) to disregard Mr. Madlung's [the developer] unpermitted forest practices in imposing a 6-year moratorium. The same rule and result apply here: because (1) a Forest Practices permit was required (a conclusion now affirmed repeatedly by Washington State Department of Natural Resources (DNR). (2) Harvesting occurred (a conclusion also affirmed repeatedly by Washington State Department of Natural Resources (DNR). (3) The moratorium is appropriate.

The law simply does not require any "causal link" between the harvest and the required Forest Practices permit. Under the plain language of the Forest Practices Act, if a permit is required and harvesting occurs, then the moratorium is appropriate. Furthermore, under the Forest Practices regulations, enumerated forest practices - including "Any harvest on less than 40 acres" conducted "on lands being converted to another use" require a Class IV application. See, WAC 222-16-050(4) and -050(4)(e)(iv).

The Forest Practices Act is a unified statute governing all forest practices - including road construction, timber harvest, clearing and salvage. There is a single, unified application for Forest Practices - not one application for harvesting, and a different application for other forest practices.

The record in this case demonstrates complete disregard for procedure and the law. Rather than follow the requirements of the Burlington Municipal Code and state law, the City of Burlington's (*during the Genesis of the Burlington Hill Development the City of Burlington was a Non-Charter Second Class City until the spring of 2006)* Planning Commission and the City Council rubber stamped a facially deficient application. The City of Burlington's decision to approve the deficient application was made despite the specific evidence presented that the site under consideration is in a Geologically Hazardous and Critical Area. Despite the legal obligations outlined in the Growth Management Act, and the Burlington Municipal Code, State Laws govern the protection of these critical area. In this respect, the City of Burlington's decision improperly interprets the law, and is unsupported by the facts and is an erroneous application of the law to the facts. RCW 36.70C.130 (1)(b)-(d).

The City of Burlington failed to correctly apply its Critical Areas Ordinances, its site development regulations, and failed to apply the site development requirements adopted by the Burlington Municipal Code and Washington State Law. Similarly, Burlington failed to fulfill its review obligations under SEPA, resulting in a hastily-made decision ignoring significant probable adverse impacts. Burlington's failure to apply its development regulations is an erroneous application of law to the facts, and its decisions.

Prior to issuing an Environmental Impact Statement (EIS), the City of Burlington has an obligation to identify specific probable environmental impacts of the proposed development, and to ensure that the impacts are sufficiently mitigated. WAC 197-11-158. "SEPA requires that a decision not to prepare an Environmental Impact Statement must be based upon a determination that the proposed project is not a major action significantly affecting the quality of the environment." *Juanita Bay Valley Cmty. Ass'n v. City of*

Kirkland, 9 Wn. App. 59, 73, 510 P.2d 1140, 1149 (1973) (holding that RCW 43.21C.030(2)(c) requires the agency to comply with procedural requirements of SEPA by considering environmental factors in deciding whether or not to issue an EIS). If the responsible official determines there will be no probable significant adverse environmental impacts, the lead agency issues a DNS. WAC 197-11-340(1).

SEPA also permits an MDNS, which allows an agency to consider mitigation measures that the applicant will implement. WAC 197-11-350. It is a determination that, as mitigated, the proposal will not have a significant adverse environmental impact. An agency's decision to issue an MDNS and not require an Environmental Impact Statement (EIS) is accorded substantial weight. RCW 43.21C.090. *See Indian Trail Property Owner's Ass'n v. City of Spokane,* 76 Wn. App. 430, 441-442, 886 P.2d 209 (1994).

Appeals under SEPA are appeals of the governmental action together with its accompanying environmental determinations. RCW 43.21C.075. The clearly erroneous standard applies to the review of substantive SEPA decisions. *Cougar Mt. Assocs. v. King Cy.,* 111 Wash.2d 742, 747, 765 P.2d 264 (1988).

The court is to "examine the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision." *Id.* at 747. The court must reverse if it is left with the "definite and firm conviction that a mistake has been committed." *Id.* (citations omitted).

Agencies such as the City of Burlington must make a "threshold determination" before taking any major action on a development application. RCW 43.21C.030 (2)(c), 031. A "threshold determination" is the agency's decision whether to require preparation of an Environmental Impact Statement. WAC 197-11-310. A threshold determination is required for any nonexempt proposal which meets the SEPA definition of action. WAC

197-11-310. The City of Burlington's Planning Director properly identified this project as a "nonexempt proposal," but thereafter failed to require sufficient information to make the proper threshold determination. In making a threshold determination, the SEPA Responsible Official must:

> (1) Review the environmental checklist and independently evaluate the responses of the applicant.
>
> (2) Determine if the proposal is likely to have a "probable significant adverse environmental impact."
>
> (3) Consider mitigation measures which the applicant will implement as part of the proposal. 197-11-330(1).
>
> The criteria and procedures for determining whether a proposal is likely to have a significant adverse impact are specified in WAC 197-11-330.

In determining an impact's significance, the Responsible Official must take into account that several marginal impacts when considered together may result in a significant adverse impact; and that for some proposals, it may be impossible to forecast environmental impacts with precision. WAC 197-11-330(3). A threshold determination must not balance whether the beneficial aspects of a proposal outweigh its adverse impacts. WAC 197-11-330(5).

For the DNS to survive judicial scrutiny, the record must demonstrate that "environmental factors were adequately considered in a manner sufficient to establish prima facie compliance with SEPA," and that the decision to issue a DNS was based on information sufficient to evaluate the proposal's environmental impact. *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432, (1997).

WAC 197-11-600(3)(b) provides that preparation of a new threshold determination is required if there are either: "[1] Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts . . .; or [2] New information indicating a proposal's probable significant adverse environmental impacts. This includes discovery of misrepresentation or lack of material disclosure." (Emphasis added). *See also Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 34, 785 P.2d 447 (1990); *West 514, Inc. v. Spokane County*, 53 Wn. App. 838, 845, 770 P.2d 1065, *review denied*, 113 Wn.2d 1005 (1989).

The City of Burlington was required to review the project and determine that probable adverse environmental impacts have been identified and mitigated. *Gardner v. Pierce County Bd. of Comm'rs*, 27 Wn. App. 241, 245, 617 P.2d 743, 746 (1980) [9] (holding a government agency must sufficiently consider environmental factors to comply with SEPA procedural requirements). The *Gardner* case is similar to this case, and concerned a SEPA approval for a preliminary plat, the soils of which were of questionable and unstudied suitability for sewage retention or attenuation. *Id*. at 242. Neighbors of the development drew water from wells in the vicinity of the site. *Id*. at 244. The court, recognizing a deficiency in the record of soil studies, first responded to the alleged failure on the part of the challengers to demonstrate the probability of adverse impacts to groundwater; it stated that "the County's failure to present evidence establishing 'engineering justification' on the record cannot be attributed to ambush tactics by petitioner." *Id*. at 245. The court held that the prima facie case was the government's burden to meet: "Whether or not property owners in petitioner's position specifically raise a SEPA challenge." *Id*.

"The purpose of the broad scope of review is to ensure that an agency, in considering the need for an EIS, does not yield to the temptation of expediency, thus short-circuiting the thoughtful decision- making process contemplated by SEPA." *Asarco, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700-01, 601 P.2d 501, 512 (1979). "The burden is upon the governmental body subject to SEPA to show that it made a threshold determination which 'demonstrate[s] that environmental factors were considered in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA." *City of Bellevue v. King County Boundary Review Bd*., 90 Wn.2d 856, 867, 586 P.2d 470, 477 (1978) (quoting *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54, 59-60 (1978)); *Gardner v. Pierce County Board of Commissioners*, 27 Wash. App. 241, 617 P.2d 743 (1980).

V. CONCLUSION

For the forgoing reason, it is essential that in this case, we adopt the Tort concept of a duty to disclose geological hazards in real estate transactions. Expanding population pressures have increasingly settled in geologically fragile areas. Living in such areas drastically increases risk. And ultimately "failure to disclose" affects the health and wellness of it citizens, along with economic losses, and the forgoing long-term unsustainable depreciation of property values.

In a relatively short time the concept of a "sustainable development" has become firmly established in the field of Environmental law. The World Commission on Environment and Development concisely defined sustainable development as follows:

> *"Development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs."*

This definition takes into account the needs of both the present and future generations as well as the capacity of the earth and its natural resources which by clear implication should not be depleted by a small group of irresponsible people.

Fundamentally, the City of Burlington and Mr. Madlung [the developer] will failed to satisfy their burden of demonstrating that the challenged interpretation is wrong. That burden is particularly high when an individual who utterly disregarded all applicable permit requirements wants the law to be interpreted so as to create a loophole. Any Declaration of any City of Burlington employee, governing the decisions pertaining to the planning, land development, and final plat approval of Burlington Hill, is entitled to no weight, and are legally worthless. The City of Burlington and Mr. Madlung [the developer] illegally disregarded their obligation to submit an application - period.

Plaintiff concludes that the adopted principles set forth in sections 531 and 533 of the RESTATEMENT (SECOND) 11OF TORTS. Section 531 states, as a general rule:

> *"One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced." (Emphasis added.)*

Section 533 states with respect to a representation made to a third person:

> *"The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated, or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved." (Emphasis added.)*

In other words, "fraudulent concealment–without any misrepresentation or duty to disclose–can constitute common-law fraud. . .. Although silence as to a material fact (nondisclosure), without an independent disclosure duty, usually does not give rise to an

action for fraud, suppression of the truth with the intent to deceive (concealment) does." This is so because, as the United States Supreme Court has explained, a "fraudulent concealment is equivalent to a false representation." Fraud may consist of suppression of the truth as well the assertion of a falsehood.

Concealment may amount to fraud "where it is effected by misleading and deceptive talk, acts, or conduct, or is accompanied by misrepresentations, or where, in addition to a party's silence, there is any statement, word, or act on his part, which tends affirmatively to the suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts".

Fraudulent concealment may be common-law fraud when the concealment consists of "deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter."

RESTATEMENT (SECOND) OF TORTS § 550 (1977) ("One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.")

The powerful theme for this matter set out above, that the subdivision should not have been built. In other words, had the city followed the correct protocols, presumably, and required an appropriate geological study during this first phase of this development, before rock extraction began the construction of the roads on 50 to 70 degree slopes, one can argue that the previous mine activity and the potential presence of asbestos, would have required an economically challenged abatement beyond belief. Had it been discovered, presumably, an enormous series of asbestos and geological related procedural state and federal statutes would then have been required. In other words, at the time of the

preliminary application (January 1999) could the Burlington Hill subdivision have even legally qualified as a legitimate residential development. Short Answer No.

SIGNED under penalty of perjury under the laws of the State of Washington at Mount Vernon, Washington, this 29th day of June 2018.

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Keith Welch Plaintiff/Declarant