No. 46895-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION TWO

MAYTOWN SAND AND GRAVEL, LLC, and
PORT OF TACOMA,

Respondents,

v.

THURSTON COUNTY,

Appellant.

ON APPEAL FROM LEWIS COUNTY SUPERIOR COURT
Honorable Richard L. Brosey

APPELLANT'S CONSOLIDATED REPLY AND RESPONSE BRIEF

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I. INTRODUCTION

Plaintiffs concede that the "crucial question" for their damages case was whether they should have been compelled to take their request for amendments to the Special Use Permit before the hearing examiner. Before the hearing examiner, Plaintiffs challenged the referral to the examiner as legally improper -- the impermissible result of public pressure from opponents of Maytown's mine project. The hearing examiner ruled against Plaintiffs on this issue, finding that County staff properly exercised their discretion in making the referral. Plaintiffs then decided not to appeal that decision to the Board of County Commissioners, ostensibly because their lawyers feared the BOCC would rule that the staff had *no choice* but to refer the amendments to the hearing examiner.

Plaintiffs then turned around and based their state law damages case on the very claim the hearing examiner rejected -- that the amendments issue had been improperly referred to the hearing examiner, and that referral had fatally delayed the start of mining, dooming the project. The testimony of Plaintiffs' land use expert, Mr. John Hempelmann, should leave no doubt that, while Plaintiffs conceded that the hearing examiner's decision on the claim was "final for the permit process," Plaintiffs did not agree that it should be deemed final for their damages action:

> Q: Didn't you in fact study it at some length and discuss it with the Port of Tacoma the pros and cons and decide[] no we're not going to appeal?
>
> A: Yes.

Q: Therefore, because that conclusion was not appealed, it is final and can't be changed at this point; correct?

A: Well, you and the judge and counsel have to decide whether it is challenged. The point I've always made is the County said in writing they would do an administrative minor amendment and then under pressure they changed their position. We should never have been here, it should have been an administrator minor amendment as they said on February 16, 2010.

Q: *But, Mr. Hempelmann, you made that argument to the Hearing Examiner, she rejected it, and it is final; correct*?

A: *Well, in the permit process it is final.* ***I don't know whether it is final in this courtroom***.

RP 1476-77 (emphasis added).[1]

Plaintiffs' abandonment of the administrative process midstream should have barred their state-law damages claims. The Supreme Court made clear in *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014), that the Land Use Petition Act's exhaustion-of-administrative-remedies requirement must be strictly enforced. The trial court failed to do that here. Plaintiffs' defense of the trial court's ruling allowing their state law claims to go to the jury is an exercise in revisionist history, utterly at odds with what they told the trial court and the jury. Plaintiffs litigated and lost the amendments issue, presenting the same arguments to the hearing examiner that they later presented to the jury. Plaintiffs could have appealed to the BOCC, they just chose not to. (And if the hearing

[1] On the stand as a witness, Hempelmann may have exhibited some agnosticism on whether Plaintiffs should be allowed to relitigate the correctness of the hearing examiner's decision ("I don't know…"). But the closing arguments of Plaintiffs' trial counsel left no doubt that Plaintiffs were urging the jury to reject the hearing examiner's determination. *See* RP 3721, 3724-26, 3741-42, 3757, 3873-74.

examiner's decision was truly the final administrative decision, then Plaintiffs should have -- but did not -- file a LUPA petition seeking review of that decision.) Allowing a party to a land use dispute to bail after they have lost the first-level administrative challenge to a local government's land use decision, and then turn around and seek damages for a supposedly erroneous land use decision based on claims rejected by the administrative decision maker, will frustrate LUPA's stated purpose of "establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. That is exactly what has happened here: a jury was allowed to determine that the County's decision to refer proposed SUP amendments to a hearing examiner was improper, ***after the hearing examiner had ruled the referral was proper***. LUPA's exhaustion of administrative remedies requirement was intended to prevent exactly this kind of inconsistent, unpredictable, and untimely result.

Maytown's substantive due process claim also should never have been submitted to the jury. Maytown's defense of that submission rests on cases that have been superseded by the United States Supreme Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), which limited substantive due process claims in land use matters only to when local government misconduct can be said to "shock[] the conscience." Elected officials pressuring a local bureaucracy to do something because their constituents want it and

because they share the views of the constituents can be wrong and, in some cases, could even be deemed arbitrary. But it is not conduct that should be shocking to the conscience of citizens in a democracy. An overly zealous dedication to the representative obligations of elected officials should not be deemed a violation of the decencies of civilized conduct. Maytown did not prove that level of egregious misconduct, and what they did prove is legally insufficient to support an award of damages for a violation of substantive due process protections.

The dangers inherent in allowing claims such as Plaintiffs' to proceed against local government entities, bypassing LUPA's exhaustion of remedies requirement and the constitutional limitations on substantive due process claims, are starkly illustrated by the record here. Maytown's mining venture, in which the Port joined, faced enormous challenges, including severe undercapitalization and the worst economic downturn since the Great Depression. In the end, Maytown was unable to generate any significant sales, even after mining had commenced and was operating without restrictions for nearly two years. RP 2466-71, 2489-96. Maytown defaulted on every cash installment payment during its ownership, making only one partial payment in the form of gravel before the Port repossessed the property in 2013. RP 2223-24. Yet the trial court allowed Plaintiffs' claims to go to the jury, thereby turning complex factual issues of cause and effect and damages into factual questions that, *if properly submitted to the jury*, could only be set aside under the strict standards for reviewing a jury's factual determinations.

It is no surprise that, going into such a high-risk economic venture, Plaintiffs' lawyers prepared from the outset to "push the *Burien* trigger." CP 3294. That "trigger," however, was the product of a patchwork legal system that the Legislature intended should be fully displaced by the adoption of the Land Use Petition Act. This Court should hold, in no uncertain terms, that the days of the *Burien* trigger are over. The judgment on the jury's verdict should be vacated, and the case remanded for a dismissal of Plaintiffs' claims with prejudice.

II. REPLY ARGUMENT

A. Plaintiffs' state-law tort claims were barred under LUPA.

1. The hearing examiner's decision on the amendments was adverse on the issue the Plaintiffs admit was critical to their damages claim. And not only could they have appealed that decision, they were *required* to do so to preserve their ability to seek damages.

Plaintiffs assert that "[e]very part" of the hearing examiner's decision on their application for amendments and appeal -- including the part that concluded that "[a]n SUP amendment was required" -- was favorable to Maytown. Respondents' Brief ("RB") 48; Exh. 446 at 30. This remarkable assertion flies in the face of the record.

When Plaintiffs appealed the amendment process issue to the hearing examiner, *see* Exh. 446 at 2, 30-31, they each argued in separate prehearing briefs the *exact* grounds they would later argue to the jury -- that the County had acted by improper means and for an improper purpose by imposing an unnecessary amendment process to appease project

opponents by delaying and frustrating Maytown's ability to mine. Thus, the Port argued in its brief to the hearing examiner:

> After first concluding that the technical amendments could be done at the staff level (a decision that was unappealed), the County reversed itself and determined that a full SUP amendment process before the Hearing Examiner was required. The County stated in writing that the decision was prompted by the scope of MSG's request, but ***County staff orally informed MSG that the switch was made due to the high volume of opposition to the requests***. Although ***this sort of regulatory decision may not be made to quell project opposition***, *Maranatha Min., Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990) ("Community displeasure cannot be the basis of a permit denial."), the County persisted.

CP 7535 (emphasis added). Similarly, Maytown argued:

> On April 22, 2010, MSG applied for the administrative amendments discussed in the Compliance Memo. FORP submitted approximately 100 pages of comments and additional documents. ***Largely based on FORP's comments, the County changed its mind*** about the ability to amend the SUP through an administrative action and determined that "the April 22, 2010 application to amend SUP 020612 must be submitted to the Hearing Examiner for decision-making." …
>
> The County's decision to impose a SUP amendment hearing in addition to the Five Year Review Compliance Hearing ***cannot be based solely upon public opposition to the changes***. *Maranatha Mining v. Pierce County*, 59 Wn. App. 795 (1990); *see also, Sunderland Services v. Pasco*, 127 Wn.2d 782 (1995).
>
> …
>
> ***[I]n response to citizen opposition*** the County chose to create an unlawful process with the result of providing opposition groups additional appeal opportunities and subjecting MSG to additional prejudicial delay.

CP 7544-46 (emphasis added; footnote omitted).[2] And as John Hempelmann acknowledged at trial, the hearing examiner "rejected" Plaintiffs' arguments. RP 1474-77; Exh. 446 at 30 (Conclusion II.A.1).

Plaintiffs now assert that this conclusion was merely "part of the Examiner's reasoning on Maytown's successful *SEPA appeal*." RB 48-49 (emphasis added). But the hearing examiner's conclusion that an amendment was required had nothing to do with Maytown's successful appeal on a separate issue, which it raised under SEPA.

The hearing examiner addressed Maytown's appeals under two separate headings. In Conclusion II.A.1, the hearing examiner rejected Maytown's first appeal issue, regarding the amendment process, by determining that "[a]n SUP amendment was required." Exh. 446 at 30. In Conclusion II.A.2, the examiner granted Maytown's second appeal issue, concluding that the County had incorrectly deemed the proposed changes to the water-monitoring conditions to be an "action" under SEPA, requiring an environmental threshold determination of significance or nonsignificance. Exh. 446 at 31. It was only on this latter issue that the County sought reconsideration. Exh. 446 at 31; Exh. 125. Indeed, the examiner herself stated on reconsideration that the County's

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[2] In addition, while examining Kain during the amendments hearing, Hempelmann stressed that whether an amendment was necessary was a contested issue:

> And you understand that that is very much a contested issue in this proceeding, that Maytown has briefed to this Hearing Examiner that whole threshold question of whether or not the SUP has to be amended in this process as opposed to being amended at all or being amended in the final review process? Do you understand that's a contested issue?

CP 3351. Kain answered in the affirmative. CP 3351.

reconsideration request was "limited to Conclusion II.A.2, *which disposed of the MSG [Maytown Sand & Gravel] SEPA appeal.* ***MSG argued no other issues in its SEPA appeal*** aside from the allegedly unlawful environmental threshold review." Exh. 125 at 2 (emphasis added).

Evidently attempting to conflate the hearing examiner's conclusions on these separate issues, Plaintiffs assert that the hearing examiner's entire decision was favorable to Maytown, when in fact it was not favorable on the issue most critical to its damages case: whether the County had imposed an unnecessary amendment process to appease project opponents. In fact, Plaintiffs were so unhappy with the examiner's decision on the amendment process issue that they initially decided to appeal it to the BOCC, but then reconsidered after their counsel concluded that -- as John Hempelmann wrote to his client, Maytown -- an adverse decision from the BOCC could be even *more* adverse to their position and that "*would make our damage case more difficult.*" Exh. 449 (e-mail from J. Hempelmann to clients, 4/25/11) (emphasis added).[3] If every part of the examiner's decision was favorable to Plaintiffs, ***why would they ever have***

[3] At trial, Hempelmann testified, "[E]ven if you don't get 100 percent of what you ask for, you almost never appeal your own permit." RP 1476. He did not testify that no appeal was available. To the contrary: he acknowledged that he had studied the issue, and decided not to appeal after discussing the pros and cons with the Port's attorneys. RP 1476. The billing records of the Port's attorneys, moreover, confirm the attention given by the Port's counsel to the issue (including their consultations with Hempelmann), immediately preceding the decision not to appeal. *See* CP 3346-47 (billing entries for Port counsel Gillespie, Settle, and Washburn, through 4/25/11, referencing possible appeal including consultations with Maytown -- "MSG" -- counsel).

considered appealing the decision on the amendment process issue to the BOCC?

In yet another stunning shift from the position they took before the trial court and the jury, Plaintiffs now assert that they were legally *prohibited* from appealing the hearing examiner's decision on the amendment process -- under SEPA. This is incorrect. It is true that SEPA and related laws allow only one agency appeal of an "environmental determination" (*i.e.*, a determination of significance or nonsignificance or a final environmental impact statement), which must await and be combined with any appeal on the underlying governmental action (*e.g.*, issuance of a permit). RCW 43.21C.075. But the County's requiring that amendments to SUP requirements be approved by the hearing examiner was in no sense an "environmental determination" and was thus not subject to SEPA's limitation on appeals.[4]

Moreover, assuming Plaintiffs were correct now (and wrong in the position they took before the trial court and the jury) about the availability of an appeal, this could only mean that the hearing examiner's decision was "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with

[4] The hearing examiner denied the County's motion for reconsideration of her decision that amending the permit was not an "action" requiring SEPA review. Exh. 125 at 3-5. The County disagrees with that decision, but even assuming it were correct, that does not mean that the amendment process issue was subject to the same limitation. Plaintiffs' argument that a petition for judicial review of a SEPA determination must accompany a challenge of the underlying governmental action (RB 52) is similarly based on their assertion that SEPA applied to the amendment process issue, which it plainly did not.

authority to hear appeals" -- ***which Plaintiffs were required to challenge with a timely land use petition, and which they evidently never undertook***. *See* RCW 36.70C.020(2); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 376, 223 P.3d 1172 (2009) (holding that a challenge to a SEPA determination was barred as untimely because it was not pursued by a LUPA petition). Thus, if one accepts Plaintiffs' present claim that they could not appeal the hearing examiner's decision, their claims would still be barred under LUPA. The only difference their argument makes would be to change the operative LUPA rule that bars their claims, from a failure to exhaust administrative remedies to a failure to bring a timely LUPA petition.[5]

As will be discussed more fully later in this brief, Maytown and the Port were required to raise before the hearing examiner their challenge to the staff's decision to refer the amendments to the hearing examiner. They did so, claiming that the County acted by improper means and for an improper purpose, when it required amendment of the permit by the hearing examiner. When Plaintiffs lost that issue before the hearing examiner, they were aggrieved, even though only that part of the hearing examiner's decision was unfavorable. *See, e.g., James v. County of Kitsap*, 154 Wn.2d 574, 586, 115 P.3d 286 (2005) (holding that developers were required to appeal the imposition of impact fees, even though they otherwise "prevailed" in obtaining permits). Plaintiffs' appeal was to the

[5] In this regard, it is worth noting the testimony of John Hempelmann admitting that the hearing examiner's decision was final "in the permit process[.]" RP 1477.

BOCC. And if they lost before the BOCC, the decision of the BOCC would constitute a "land use decision" subject to the filing of a land use petition to the superior court.

In any event, having received the examiner's unfavorable decision on the amendment issue, Plaintiffs chose not to appeal to the BOCC. FORP appealed from the hearing examiner's decision, but FORP's appeal challenged only the portion of the decision that *was* entirely in Maytown's favor. *See* RB 52. The *absence* of a land use decision on the issue of the amendment process was entirely due to Plaintiffs' own, deliberate decision not to take an appeal to the BOCC.[6] And that failure to exhaust administrative remedies means that any tort claims based on a challenge to the County's handling of amendment to the SUP were barred and should have been dismissed by the trial court. *See Applewood Estates Homeowners Ass'n v. City of Richland*, 166 Wn. App. 161, 169-70, 269 P.3d 388 (2012) (holding that a challenge to a city's determination that an amendment was minor was time barred under LUPA). LUPA's strict exhaustion of administrative remedies requirement compels this result. *Durland v. San Juan County*, 182 Wn.2d at 66.

[6] The fact that FORP appealed to the BOCC also meant that an appeal by Maytown would not have caused any additional delay.

2. Plaintiffs' claims are not exempt from LUPA as "claims…for monetary damages" where an underlying premise of those claims was the asserted invalidity of the hearing examiner's decision rejecting their appeal argument that the amendment process was unlawful.

Plaintiffs cannot escape LUPA's requirements through its exemption for "[c]laims provided by any law for monetary damages or compensation." RCW 36.70C.030(1)(c). This exemption merely clarifies that a claim for monetary damages or compensation need not be asserted in a land use petition. Remarkably, Plaintiffs acknowledge that the exemption does *not* allow one to pursue a damages claim that is premised on the invalidity of a land use decision without first timely exhausting available appeals under LUPA. RB 53. This is made clear by court decisions that have (1) applied LUPA when the claim for damages was premised on the invalidity of a land use decision[7] and (2) not applied LUPA when the municipality could have been liable under the plaintiff's damages theory regardless of the validity of the decision.[8]

Asserting that this case is properly in the second category, Plaintiffs state that their damages theory was premised not on the invalidity of any land use decision, but only on "the delay and interference the County caused[.]" RB 56. Plaintiffs analogize to *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 927, 296 P.3d 860 (2013), and *Woods*

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[7] *James v. County of Kitsap*, 154 Wn.2d 574, 583-86, 115 P.3d 286 (2005); *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 401-03, 232 P.3d 1163 (2010); *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006).

[8] *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 927, 296 P.3d 860 (2013); *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 24-25, 352 P.3d 807 (2015).

View II, LLC v. Kitsap County, 188 Wn. App. 1, 24-25, 352 P.3d 807 (2015), where the courts held that LUPA did not apply to claims that did not depend on the validity of the land use decisions that allegedly caused the damages. In *Lakey*, the plaintiffs alleged that the granting of a variance amounted to an inverse condemnation. 176 Wn.2d at 915. LUPA did not apply because they sought damages for the claimed effects of the variance, without regard to whether it was proper to grant the variance. *Id.* at 927-28. In *Woods View*, the plaintiffs sought damages strictly for delay in issuing decisions that were favorable to them. 188 Wn. App. at 25.[9]

But this case is unlike *Lakey* or *Woods View*. Plaintiffs here did not premise their damages claims on the effects of a decision without regard to its validity, or delay in ultimately issuing a favorable decision. Plaintiffs claimed that their damages resulted not purely from delay, but from an unlawful amendment process imposed *for the purpose* of causing delay. The crux of Plaintiffs' damages theory was that the amendment process required by the County was improper and was imposed by the County for an improper purpose of appeasing project opponents, and that being required to submit to that process prevented them from starting to mine in 2010. *See* RB 15; CP 3600; RP 3745. Their damages case amounted to a collateral attack on the hearing examiner's rejection of the same allegations, and a land use decision (by the BOCC) would have

[9] *See also Libera v. City of Port Angeles*, 178 Wn. App. 669, 675 n.6, 316 P.3d 1064 (2013) (holding that a damages claim premised on delay alone was not barred).

issued on these matters but for Plaintiffs' election not to exhaust the available administrative appeals.

This case is more like *Asche v. Bloomquist* than *Lakey* or *Woods View*. The court in *Asche* properly recognized that claims that depend on the validity of a land use decision are barred if not brought in compliance with LUPA, but conversely that "[c]laims that do not depend on the validity of a land use decision are not barred." 132 Wn. App. 784, 800, 133 P.3d 475 (2006). The court then held that the exemption in RCW 36.70C.030(1)(c) for claims for monetary damages or compensation did not apply to the plaintiffs' public nuisance claim, which was barred because it depended entirely on a challenge to the validity of the building permit that gave rise to the alleged nuisance. *Id.* at 801; *see also Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 401-03, 232 P.3d 1163 (2010) (applying LUPA to bar a claim for damages under U.S. Constitution and 42 U.S.C. § 1983 that depended on a challenge to the validity of a permit). The result should have been the same here.

The claims at issue in *James v. County* of Kitsap were similarly premised on the invalidity of land use decisions. 154 Wn.2d at 583-86. The plaintiffs in *James* sought refunds of impact fees, the imposition of which the Supreme Court held was a land use decision that had to be challenged under LUPA prior to any damages action. *Id.* at 584-86. While the plaintiffs in that case did not argue that a statutory exemption to LUPA applied, the majority rejected, at least implicitly, the position advocated by Justice Sanders in his dissent that LUPA did not apply

because RCW 36.70C.030(1)(c) was a bright-line exemption of all claims for monetary damages or compensation. *See id.* at 590-91 (Sanders, J., dissenting). Furthermore, the majority reinforced LUPA's strict policy of finality by rejecting an argument that LUPA did not apply for a different reason (*i.e.*, because the superior court had original jurisdiction under the Washington State Constitution). *Id.* at 587-89.

In its Opening Brief, the County acknowledged *dicta* in two Court of Appeals decisions, arguably to the effect that LUPA does not preclude claims for damages generally, both citing to RCW 36.70C.030(1)(c) as the sole authority for this proposition. *See Asche*, 132 Wn. App. at 800; *Libera*, 178 Wn. App. at 675 n.6. The County also agrees that the claimants in *James* did not rely on .030(1)(c), but instead on principles of constitutional jurisdiction. That contention, however, was rejected by the *James* majority for reasons that also compel rejecting Plaintiffs' reading of 030(1)(c). Plaintiffs would have this Court take .030(1)(c) out of its statutory context, and read it in isolation -- the same approach taken by Justice Sanders in his dissent in *James*, and one that conflicts with Washington's "context" approach to statutory interpretation. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002) (modifying Washington's "plain meaning" rule and adopting the "context" approach).

Plaintiffs appealed the amendment process issue to the hearing examiner and lost, but elected not to appeal the adverse decision on that issue to the BOCC. Yet without having exhausted the available

administrative remedies as required by LUPA, Plaintiffs were then allowed by the trial court to make the very same arguments to the jury which had been rejected by the hearing examiner, as the central basis for recovering damages from the County.[10] Allowing a jury to second guess a hearing examiner's unappealed decision on an issue of land use law or procedure plainly conflicts with LUPA's express purpose of "establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. This Court should give effect to this statement of purpose. *See G-P Gypsum Corp. v. State, Dep't of Revenue*, 169 Wn.2d 304, 309-13, 237 P.3d 256 (2010) (holding that statements of purpose are to be considered part of statutory context). The trial court committed legal error in refusing to dismiss Plaintiffs' state law claims under LUPA, and the judgment the court entered on the jury's verdict on those claims should be reversed.

3. Plaintiffs cannot point to issues not raised to the hearing examiner to save the judgment. They were required to raise all issues to the hearing examiner and exhaust the available administrative remedies.

Plaintiffs repeatedly state that their damages case was premised on other actions or conditions imposed by the County, in addition to those

[10] Plaintiffs' closing arguments leave no doubt on this point. After John Hempelmann had testified that dealing with the requested amendments without referral to the hearing examiner was a matter of common sense, RP 1212-13, counsel in closing argument made exactly the same point using exactly the same language. RP 3740-41 3873-74. Yet the hearing examiner had rejected exactly this claim, when ruling that referring amendments to the hearing examiner was a proper exercise of staff discretion.

addressed by the County in its Opening Brief that were decided by the hearing examiner. But if there were other County actions or conditions that Plaintiffs objected to and wished to preserve as a basis to later claim damages, they were required to raise those issues before the hearing examiner as well, and exhaust all available administrative remedies. For instance, the Port appealed the County's requirement of a "notice to proceed" before starting mining and the restriction on earth-disturbing activities pending review of compliance, but then dropped those issues before any administrative decision could be made on them, only to revive the point in this litigation. Since those conditions were not challenged administratively, they could not be collaterally attacked in a damages lawsuit. An unappealed permit decision or condition is deemed valid. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000).

Furthermore, Plaintiffs' castigating characterizations of the County's conduct notwithstanding, virtually all the substantive decisions by the County were in Plaintiffs' favor and against project opponents:

- The County rejected challenges in 2009 by FORP and BHAS, who argued that the permit had lapsed or expired for lack of mining activity. Exh. 322.
- The hearing examiner's decision on the five-year review of the permit was entirely in Maytown's favor, and the County did not appeal that decision. Exh. 429.
- When FORP appealed the five-year review decision, the BOCC affirmed on all issues with the exception of a limited remand for additional critical areas review. CP 106-10.

- The hearing examiner's decision on the amendments was favorable to Plaintiffs, except as to Maytown's challenge of the amendment process. Exh. 446.
- When FORP appealed the amendments decision, the BOCC affirmed the examiner's decision in its entirety. Exh. 454.

The County did not appeal any of these decisions.

The allegedly unreasonable positions taken by the County -- to impose additional water monitoring and require review for additional critical areas -- were shared by other agencies, including Washington State Department of Fish and Wildlife, Washington State Parks, Washington State Department of Ecology, and by the Chehalis Tribe. *See* Exhs. 403, 412, 424. Moreover, the hearing examiner *agreed* with the County's decision to require additional water monitoring. Exh. 446 at 21, ¶ 32. And that decision *alone*, as the Port stated in its appeal from that requirement, meant mining could not begin in 2010.[11]

In any event, Plaintiffs acknowledge that the "crucial question" for their damages case was "whether the amendments would be minor or major -- whether staff would make the initial decision or send it to the hearing examiner." RB at 15. As discussed, Plaintiffs litigated and lost that issue before the hearing examiner, and then deliberately chose not to exhaust the available administrative remedies -- or to file a LUPA petition, which they should have done if one accepts their newly minted position on appeal that SEPA barred them from further administrative review -- on

[11] This case is nothing like *Alger v. City of Mukilteo*, 107 Wn.2d 541, 730 P.2d 1333 (1987), where the city revoked issued permits simply because the mayor opposed the project, without any substantive reason.

that issue. Yet Plaintiffs were allowed to argue this as their primary damages theory at trial. *Durland v. San Juan County* should leave no doubt that this was error under LUPA's strict exhaustion of administrative remedies rule. *See* 182 Wn.2d at 66. The judgment should be reversed.

B. Plaintiffs' state-law tort claims were barred on grounds independent of LUPA.

1. Plaintiffs' tortious interference claims were precluded under the doctrine of collateral estoppel.

(a) The unclean hands doctrine does not apply.

Invoking the unclean hands doctrine, Plaintiffs argue that the trial court's decision allowing them to collaterally attack the hearing examiner's decision was justified because the jury ultimately agreed with them and disagreed with the hearing examiner. Plaintiffs cite no authority for the proposition that unclean hands will bar application of collateral estoppel. This narrow equitable doctrine allows a court sitting in equity to deny relief to a party who has "dealt unjustly in the very transaction concerning which he complains." *McKelvie v. Hackney*, 58 Wn.2d 23, 31, 360 P.2d 746 (1961), quoting *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 74, 113 P.2d 845 (1941). Here, Plaintiffs do not claim, nor is there any evidence, that the County acted in bad faith *in connection with the hearing examiner proceeding* that produced the decision it has consistently asked be given preclusive effect.

Moreover, the purpose of collateral estoppel (*i.e.*, issue preclusion) is to promote the policy of ending disputes. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). Applying

the unclean hands doctrine to bar collateral estoppel would negate this purpose by allowing relitigation of issues based on a mere allegation that the party invoking collateral estoppel had unclean hands. This should not be allowed. *See Negrón-Fuentes v. UPS Supply Chain Solutions*, 532 F.3d 1, 8 (1st Cir. 2008) (declining to apply clean hands doctrine to bar a defendant from invoking collateral estoppel because "this is just a collateral attack on [the earlier decision] -- precisely what issue preclusion is designed to avoid").

(b) The lawfulness of the amendment process was raised and determined adverse to Plaintiffs before the hearing examiner.

First, Plaintiffs ignore that they *had* to raise the issue of the lawfulness of the administrative process before the hearing examiner, and specifically their contention that the County staff decision to refer amendments to the hearing examiner was the result of improper political pressure. *See* Appellant's Opening Brief at 50-51 (citing and discussing *City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978); *Aera Energy, LLC v. Salazar*, 642 F.3d 212, 221 (D.C. Cir. 2011)); *see also* RCW 42.36.080 (where an appearance of fairness issue "is known or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be relied on to invalidate the decision"); *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 904, 83 P.3d 433 (2004) ("A party must raise an appearance of fairness objection as soon as the party knows of the problem."), citing

RCW 42.36.080 & *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 887-88, 913 P.2d 793 (1996).

Second, it is immaterial whether the lawfulness of the amendment process was necessary to the hearing examiner's decision on whether to approve the amendments. Plaintiffs affirmatively raised the lawfulness of the process as a distinct issue for determination by the hearing examiner (as they undisputedly were required to do, *see* Appellant's Opening Brief at 50-51), and the hearing examiner determined that issue, as requested. Even if whether to approve the amendments had not been before the hearing examiner for decision, the lawfulness of the process still could have been raised and decided as a standalone issue. And in the event it *was* raised and decided, and *against* the Plaintiffs.

(c) The issues Plaintiffs raised at trial to support their damages claim were the same issues decided against them by the hearing examiner.

Plaintiffs litigated before the hearing examiner their allegation that the amendment process was unlawful because the County acted by improper means and for an improper purpose. The County has already quoted at length from the Port's and Maytown's briefs to the hearing examiner on this very point (Section II.A.1, *supra*, at 6), and will not repeat those quotations here. Plaintiffs concede that, "had the Examiner concluded that the County code *required* a hearing examiner process, she would have taken the amendment process off the table for purposes of a tort action[,]" RB 59 (emphasis in original), ignoring that the hearing examiner specifically ruled that "[a]n SUP amendment was required."

Exh. 446 at 30. But Plaintiffs fail to explain why the examiner's statement that the County "exercised discretion in deciding which process applied" should be taken as leaving a door open for Plaintiffs to claim damages on the basis that the County abused its discretion. Exh. 446 at 31.[12]

Moreover, in light of Plaintiffs' arguments to the examiner, her decision can only be taken as a *rejection* of Plaintiffs' argument that the County exercised its discretion in bad faith, for an improper purpose. Had the examiner accepted Plaintiffs' arguments on improper purpose, she would have had to *grant* Maytown's appeal because this would have compelled a conclusion that the County had *abused* its discretion. *See Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (holding that a decision is an abuse of discretion if it is based on untenable reasons); *cf.* RCW 34.05.570(3)(c), (i) (requiring reversal of an agency decision that results from an unlawful procedure or decision-making process or is arbitrary or capricious). That the examiner denied Plaintiffs' appeal on the amendment process issue leads ineluctably to the conclusion that the hearing examiner found Plaintiffs' improper political pressure claim to be meritless.

[12] That the hearing examiner could not have determined Plaintiffs' entitlement to damages on a tortious interference claim also does not mean that her disposition of the issues lacks preclusive effect as to those issues. "Disparity in relief *does not* justify ignoring the strictures of collateral estoppel[.]" *Reninger v. State, Dep't of Corrections*, 134 Wn.2d 437, 451, 951 P.2d 782 (1998) (emphasis in original).

(d) No injustice would result from applying collateral estoppel.

The jury's verdict is no indication that it would be unjust to apply collateral estoppel. A collateral attack cannot be deemed appropriate in hindsight merely because it was successful. In determining whether to apply collateral estoppel, the court generally does not consider whether the earlier decision was substantively correct. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 317, 96 P.3d 957 (2004). The hearing examiner's determination of the improper means and improper purpose was not a "ruling on a collateral SEPA issue…that was not only part of Maytown's *successful* SEPA appeal, but one that…Maytown could not have appealed." RB 65 (emphasis in original). As already discussed, the decision on the amendments process issue was not part of the SEPA appeal on which Maytown prevailed.

Plaintiffs assert that giving collateral estoppel effect to the hearing examiner's decision would place too much weight on the administrative process. But Washington courts have long given preclusive effect to administrative proceedings, notwithstanding the inherent procedural differences. *Reninger v. State, Dep't of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). And Hempelmann emphasized the similarity of the hearing examiner proceeding to the trial on Plaintiffs' damages claim, likening it to a bench trial in court and telling the jury the only difference was that the examiner didn't wear a robe. RP 1051, 1056, 1252.

Plaintiffs now complain that discovery was limited and assert that they had "little understanding at the time of the reasons for staff's

actions." RB 29. But the trial record shows Plaintiffs knew the key facts (supposedly) supporting their allegations of improper motive and raised them to the hearing examiner, holding back only the allegation that Kain's job had (supposedly) been threatened.[13] In December 2009, Hempelmann noted that all commissioners were "hostile" to the project. Exh. 370. The "*Burien* trigger" e-mail stated that the Port and Maytown were preparing to pursue a damages claim "from day one," and they entered into a joint-defense agreement as early as December 2009. CP 3207-15 (joint defense agreement), 3294 ("*Burien* trigger" e-mail). In July 2010, Hempelmann referred to alleged pressure from "those on high" forcing Kain to send the amendments to the hearing examiner. Exh. 405. And Kain's alleged statement to Hempelmann that the BOCC wanted him to pursue further critical areas review would have occurred in early December 2010, months before the amendments hearing. In short, Plaintiffs had all the "evidence" they needed to allege unlawful pressure from the commissioners when they asked the examiner to conclude that the process was improper.

Contrary to Plaintiffs' assertion that they had "no reason, and no opportunity, to challenge the abusive nature of the amendments process," RB 66, Plaintiffs not only had the opportunity but they did raise that challenge to the hearing examiner, and then chose not to appeal the

[13] It bears repeating here that Plaintiffs were *required* to raise any appearance-of-fairness challenges at the first opportunity. *See* Appellant's Opening Brief at 50-51, and cases cited therein.

examiner's decision only because they thought an adverse BOCC decision might hurt their damages case. No injustice will result from holding Plaintiffs to the consequences of their choice, under established law.

2. Plaintiffs' negligent misrepresentation claims were barred for reasons independent of LUPA.

(a) The special-relationship exception to the public duty doctrine was not established where the alleged "express assurances" were mere opinions or predictions.

Plaintiffs' reliance on the jury's verdict to escape the public duty doctrine is misplaced. The existence of a duty is a question of law determined by the court. *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988). And Plaintiffs are incorrect that the public duty doctrine is limited to cases where government officials failed to act. In the land use context, it has consistently been applied in cases involving affirmative acts such as permit approvals and inspections. *See, e.g., id.*; *Pierce v. Yakima County*, 161 Wn. App. 791, 251 P.3d 270 (2011); *Fishburn v. Pierce County Planning & Land Servs. Dep't*, 161 Wn. App. 452, 250 P.3d 146 (2011).[14]

Plaintiffs failed as a matter of law to establish the special-relationship exception to the public duty doctrine, which arises from an express, unequivocal, and unqualified assurance by the government.

[14] Only in the context of whether to hold police officers liable for the criminal acts of third parties have Washington courts drawn a distinction between affirmative acts and omissions of the officers. *See Robb v. City of Seattle*, 176 Wn.2d 427, 435-37, 295 P.3d 212 (2013); *Coffel v. Clallam County*, 47 Wn. App. 397, 403, 735 P.2d 686 (1987).

Meaney v. Dodd, 111 Wn.2d 174, 180, 759 P.2d 455 (1988). A statement of opinion or advice is distinguished from an express assurance and does not give rise to a special relationship. *Sundberg v. Evans*, 78 Wn. App. 616, 624, 897 P.2d 1285 (1995). Nor does a prediction of the government's future actions. *Fabre v. Town of Ruston*, 180 Wn. App. 150, 161, 321 P.3d 1208 (2014).

Plaintiffs identify five supposed express assurances by the County, but none qualifies for that characterization. To begin with, the record establishes that associate planner Tony Kantas did not represent in 2008 that the Port was in compliance with all MDNS conditions, but only confirmed that the permit had not expired (a true statement that the County never denied) and that certain information requested by the County had been received. Exh. 85. In reminding the Port that "[i]t is the property owners' responsibility to ensure the property remains in compliance with all adopted Hearing Examiner conditions[,]" Exh. 83, Kantas did not state a fact or even an opinion regarding the Port's actual compliance as of that time.

The remaining four examples offered by Plaintiffs were opinions or qualified predictions and thus do not meet the criteria for an express assurance.

First, Mike Kain's opinion that there were no "skeletons in the closet" and that the MDNS conditions could be deemed satisfied in as little as 30-60 days was an opinion or prediction that would depend on the

outcome of the County's review of the actual status of compliance with the conditions, which had not even begun. RP 2226-27.[15]

Second, Kain's opinion that there were "no unmet requirements that rise to the Hearing Examiner level to attain compliance" was preceded by the qualifier, "*[a]t this point*, our analysis is…", Exh. 382 at 1, and the compliance memo expressed a mere possibility that the required amendment could be approved by staff, stating, "Such minor timeline change *may* be approved by staff upon submittal of an application for amendment." Exh. 383 at 3 (emphasis added). While Plaintiffs suggest alternative, narrower interpretations of these qualifiers, RB 72, nothing in the text of Kain's letter or memo indicates that they were intended to be so limited. Moreover, even assuming the existence of alternative, reasonable interpretations, this would only mean that Kain's statements were ambiguous and thus cannot be deemed express assurances upon which Plaintiffs could justifiably rely.

And Plaintiffs did not take Kain's memo as an assurance that mining could start soon. They now assert that Maytown could have started mining in September 2010, after completion of the additional groundwater monitoring. RB 72-73. But in March 2010, the Port filed an appeal complaining that mining could not start in 2010 if they had to conduct the additional groundwater monitoring, acknowledging that the County would need to review the second set of samples taken in

[15] In addition, Plaintiffs were aware that Kain qualified his statement as a mere "guess." Exh. 122 at 2.

September and this together with winter weather would likely push the start of mining into 2011. Exh. 386 at 15 & 16 n.20 (*see* Appellant's Opening Brief at 23-24). Plaintiffs then acknowledged in their April 2010 real estate contract that the outcome of a request for minor amendments to the permit was "uncertain." Exh. 390 at MSG000285. And contrary to Plaintiffs' argument, their lack of actual reliance on Kain's statements does not go to the issue of breach, but negates any special relationship. *See Meaney*, 111 Wn.2d at 179-80.

Third, any statements by Kain that particular amendments could be handled as minor (if submitted individually) and that SEPA review would not be required were, at most, qualified predictions. RP 3311-12.[16] And Maytown did not rely on Kain's prediction as to SEPA review: Hempelmann advised Maytown that SEPA was "extremely broad" in terms of what constitutes an action that requires an environmental determination, RP 1465, and he agreed that SEPA review was required to amend MDNS conditions. RP 1468, Exh. 405.[17] Hempelmann further acknowledged that the SEPA checklist he completed was "the skinniest environmental checklist I have ever done." RP 1470. The County promptly issued an MDNS with no new conditions, and the SEPA review issue caused no independent delay when it was decided as part of the

[16] After Maytown submitted a combined request for eight amendments to six MDNS conditions, the County undertook its review and determined that hearing examiner approval was needed. Exh. 55 at 1.

[17] BHAS and FORP requested that the entire permit be subject to a new SEPA review. Exh. 51 at 4; RP 3217.

amendments hearing that occurred in March 2011. RP 1470, 3219. Nor is there any precedent for awarding damages based on issuance of an MDNS.

Fourth, Kain's alleged statement that if Maytown "pulled enough amendments out" of its list of requests the remaining amendments "could" be approved by staff was another qualified and indefinite prediction or opinion. *See* RP 1361 (Hempelmann quoting Kain: "I got to go check on this...."); 3312 (Kain).[18]

This case is not like *Rogers v. City of Toppenish*, 23 Wn. App. 554, 596 P.2d 1096 (1979), where the city zoning administrator staff negligently misinformed a property buyer regarding the zoning classification of the property -- a verifiable fact and not an opinion or prediction. Here, as a matter of law, there was no unequivocal express assurance by the County upon which Plaintiffs justifiably could have relied. The special-relationship exception was not established and, under the public duty doctrine, the County owed no duty to Plaintiffs.

(b) Plaintiffs failed to prove a false representation by the County.

For purposes of a negligent misrepresentation claim, the false representation must pertain to a presently existing fact; a prediction of promise of future conduct is not actionable in negligence. *Havens v. C&D*

[18] The County moved forward with the hearing because it determined that amending the water quality parameters in Condition 6C of the permit was actually a major amendment and because the County had already notified the public that there would be a hearing. RP 3206.

Plastics, Inc., 124 Wn.2d 158, 182, 876 P.2d 435 (1994). The Supreme Court did not hold otherwise in *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 55 P.3d 619 (2002). There, a law firm stated that no estate taxes were due and owing, which was incorrect. *Id.* at 542. Reversing a summary judgment granted to the law firm, the Supreme Court rejected the notion that this was a true statement of the law firm's opinion, for which there could be no liability. *Id.* at 547. Relying on comments to Restatement (Second) of Torts § 552(1), the court held that a negligently obtained or communicated opinion could constitute "false information" for purposes of a negligent misrepresentation claim. *Id.*

The holding of *Lawyers Title* regarding statements of opinion is inapposite here. The type of opinion at issue in *Lawyers Title* was an opinion as to a presently existing fact, not a prediction or promise of future conduct, which remains nonactionable after *Lawyers Title*. Moreover, as Plaintiffs acknowledge, the County may be held liable for negligent misrepresentation only in the context of the special-relationship exception to the public duty doctrine, which means that the representation must qualify as an unequivocal express assurance. *West Coast, Inc. v. Snohomish County*, 112 Wn. App. 200, 207-08, 48 P.3d 997 (2002). An unequivocal express assurance can only be a statement of fact and not an opinion or prediction. *Fabre*, 180 Wn. App. at 161; *Sundberg*, 78 Wn. App. at 624.

Asserting that the County made statements of existing fact, Plaintiffs offer some of the same purported examples already addressed

above in the context of the express assurance requirement. The only additional example is that the BOCC's attorney, Elizabeth Petrich, told Kain that staff could no longer approve minor amendments. RB 78. But this could not be the basis of a negligent misrepresentation claim because, as Plaintiffs acknowledge, there is no evidence it was repeated to Plaintiffs, RB 32 ("Mike Kain did not inform Maytown of this development."), and there certainly was no reliance on such a statement. As no false misrepresentation by the County was proven by clear and convincing evidence (or otherwise), this Court should reverse.

(c) Plaintiffs have no response to the County's argument that collateral estoppel precluded their negligent misrepresentation claim.

Even assuming the County owed a duty, Plaintiffs make no response to the County's argument that collateral estoppel barred their negligent misrepresentation claim. *See* RB 76-77. Plaintiffs argued to the hearing examiner that the County was bound by its alleged representation that the amendments could be approved by staff as minor amendments, and the hearing examiner rejected that argument. *See* Appellant's Opening Brief at 66.

3. Plaintiffs' negligence claims were barred for reasons independent of LUPA.

(a) The special-relationship exception to the public duty doctrine was not established.

Plaintiffs address the public duty doctrine in a single section as it relates to both negligence and negligent misrepresentation. Plaintiffs

tacitly concede that, if the special-relationship exception was not established, then the County owed no duty for purposes of either a negligent misrepresentation or a general negligence claim. As discussed in Section II.B.2(a) of this brief, Plaintiffs have failed to show that a special relationship was established.

(b) Maytown compromised and settled its claims regarding the groundwater monitoring requirements by agreeing to a compromise plan.

The County's preclusion argument based on compromise and settlement is not based on Maytown's acquiescence to expanded groundwater monitoring under protest. Plaintiffs confuse the facts.

In March 2010, the Port filed an appeal, later joined by Maytown, from the February 2010 compliance memo. The Port argued that the County had imposed new, unnecessarily strict water-monitoring requirements, compliance with which would require samples to be taken in March and September 2010 and delay mining until 2011. *See* Appellant's Opening Brief at 23-24, citing Exh. 386. On July 1, 2010, Maytown withdrew its appeal from the compliance memo and agreed to conduct the additional monitoring under protest. Exh. 50 at 2. This was not a compromise or resolution of the underlying issues. But following the five-year review hearing in December 2010, the hydrogeologists for the County and Maytown (Nadine Romero and Pony Ellingson) worked out a compromise plan for groundwater monitoring going forward. Maytown and the County jointly submitted the compromise plan to the

hearing examiner. Exh. 446 at 21-11, ¶ 34; RP 1001 (Ellingson), 1523 (Hempelmann).

The County does not advocate a "waiver-by-implication theory." RB 75. Nor is there any question whether a settlement was reached. The revised plan was presented to hearing examiner as an "agreement." *See* Exh. 446 at 21-23, ¶¶ 34, 41. The examiner found that the plan had been jointly prepared and included a more robust program of monitoring than the original plan, as well as an additional year of monitoring before the start of mining (which by then had been completed):

> In the wake of the December 2010 Five Year Review hearing, Mr. Ellingson, Ms. Romero, and Department staff jointly developed a new Groundwater and Surface Water Monitoring Plan (the 2011 Plan). … As compared to the 2005 Plan, the 2011 Plan requires an additional year of ground water monitoring before mining could begin. …
>
> … Over a five year period, the total number of measurements that would be taken under the 2011 Plan is nearly five times greater than the total number of measurements taken over five years pursuant to the 2005 Plan.
>
> …
>
> … In the 2011 Plan, the Applicant and the County have reached agreement as to the additional water quality parameters that apply to the mine site. …

Exh. 446 at 21-23 (¶¶ 34, 35, 41). Moreover, the hearing examiner expressly adopted the revised plan. Exh. 446 at 34. A compromise plan adopted by the adjudicator precisely meets the definition of an agreement on the record under CR 2A. The hearing examiner's adoption of the plan

in her written decision is at least the equivalent of an agreement being "entered in the minutes." CR 2A.

Plaintiffs' claim of coercion falls flat. Maytown did not appeal the hearing examiner's decision, including the finding that the plan was agreed. If Maytown believed it was being "forced" to settle, it should have maintained its position under protest, objected on the record of the hearing examiner proceeding, and appealed from the decision. Plaintiffs cannot have it both ways. They elected to support the compromise plan and should not have been allowed to argue to the jury that the County negligently imposed stricter groundwater monitoring requirements than called for in the original plan. *See* Appellants' Opening Brief at 67-68. And contrary to Plaintiffs' assertion, the County is not raising this issue for the first time on appeal; it was argued to the trial court and rejected. CP 2914, 3623.

(c) Plaintiffs' negligence claims are precluded under the doctrine of collateral estoppel.

Without elaboration, Plaintiffs refer to their arguments in the tortious interference context (unclean hands, lack of issue identity, and injustice) to argue that collateral estoppel should not apply to the issue of the groundwater monitoring requirements. The County's responses on unclean hands and injustice arguments have been addressed in Sections II.B.1(a) and (d) of this brief. The precise issue raised by Plaintiffs at trial -- that the County negligently imposed stricter groundwater monitoring requirements than called for in the original plan -- was decided by the

hearing examiner. The hearing examiner determined that the expanded groundwater monitoring requirements the County had imposed were "necessary." Exh. 446 at 21, ¶ 32. Although Plaintiffs allude to other negligence theories, they specify none apart from this and negligent misrepresentation, and these were the issues raised to the hearing examiner and argued at trial. *See* RP 3739; CP 3606.

C. Maytown's substantive due process claim fails as a matter of law.

1. The Washington cases relied on by Maytown are no longer good law. Maytown failed to make out a jury question under the controlling "shocks the conscience" standard.

Although Maytown ultimately conceded that the shocks-the-conscience standard should apply, and although the jury was instructed to apply that standard, Maytown continues to rely on Washington case law applying a more lenient arbitrary-and-capricious standard to defend the jury's verdict. *See* RB 81. *See also* RP (10/3/14) 3944 & CP 7159, citing *Mission Springs, Inc. v. Spokane*, 134 Wn.2d 947, 970, 954 P.2d 250 (1998) (holding that "[a]rbitrary or irrational refusal or interference with processing a land use permit violates substantive due process[]") and *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992), and *Norquest/RCA-W Bitter Lake P-ship v. City of Seattle*, 72 Wn. App. 467, 481, 865 P.2d 18 (1994) (holding that under *Lutheran Day Care* "an arbitrary and capricious denial of a building or conditional use permit automatically entitles one to section 1983 damages.").

Maytown ignores that the cases applying the easier-to-meet arbitrary-and-capricious standard cannot be reconciled with the United States Supreme Court's holding that the standard for substantive due process liability is whether the arbitrary government conduct "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). The United States Supreme Court has applied that standard in the land use context. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003) ("'only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'"), quoting *Lewis*, 523 U.S. at 846.

To the extent *Mission Springs* and *Lutheran Day Care* and *Norquest* allow plaintiffs to establish a substantive due process violation on a *lesser showing* than that required by *Lewis* and *City of Cuyahoga Falls*, those cases must yield to the United States Supreme Court. "When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's ruling." *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008).

This evolution in the law is exemplified by the Third Circuit decision in *United Artists*, which overruled its pre-*Lewis* precedent -- cases relied on by *Mission Springs*[19] -- to hold that it was no longer

[19] *Mission Springs, Inc. v. Spokane,* 134 Wn.2d 947, 965, 954 P.3d 250 (1998), citing *Blanche Rd. Corp. v. Bensalem Twp.*, 57 F.3d 253, 267-68 (3d Cir. 1995), and *Bello v. Walker*, 840 F.2d 1124, 1129-30 (3d Cir. 1988).

sufficient for the frustrated developer to satisfy the "less demanding" standard of showing that municipal officials acted with improper motive. *United Artists Theatre Circuit v. Township of Warrington, PA*, 316 F.3d 392, 399-401 (3d Cir. 2003) (Alito, J.). *United Artists* held that, as a result of the Supreme Court's decision in *County of Sacramento v. Lewis*, plaintiffs were required to show that the conduct of the land-use planning board "shocked the conscience." 316 F.3d at 401. Maytown fails to acknowledge this development in the law when citing to the fact patterns of cases that apply the less demanding standard or which rely on case law that has been fatally undermined by supervening United States Supreme Court authority. Maytown further fails to recognize that the Third Circuit has not applied *United Artists* to *legislative* action, and thus Maytown's reliance on *County Concrete Corp. v. Town of Roxbury*, a case applying the less-demanding standard to legislative action, is misplaced. 442 F.3d 159, 169 (3rd Cir. 2006) (distinguishing *United Artists* on the basis that the challenged zoning ordinance was not an *executive* action).

Likewise, *Bateson v. Geisse*, the Ninth Circuit case relied on by *Mission Springs* and by Maytown on appeal, no longer sets forth the proper standard for substantive due process violations arising from land use decisions. 857 F.2d 1300 (9th Cir. 1988). Although *Bateson* has not been expressly overruled, the Ninth Circuit has recognized that the *Lewis* standard controls substantive due process challenges to land use decisions, such that "only 'egregious official conduct can be said to be 'arbitrary in the constitutional sense[.]'" *Shanks v. Dressel*, 540 F.3d 1082, 1088-89

(9th Cir. 2008), quoting *Lewis*, 523 U.S. at 846 and citing *City of Cuyahoga Falls*, 538 U.S. at 198. That official conduct "must amount to an 'abuse of power' lacking any 'reasonable justification in the service of a legitimate governmental objective.'" *Id.* The burden of proving that an executive action is "constitutionally arbitrary" is "exceedingly high." *Id.* at 1088.[20]

Further, Maytown's attempt to defend the jury verdict by comparison to cases applying a less demanding standard must fail for the simple reason that the jury was instructed under the shocks-the-conscience standard. *See* CP 6376. There was no such behavior here -- this was a run of the mill land use dispute. Maytown fails to explain what actions where shocking to the conscience without resort to gratuitous adverbs. Just saying that County's behavior was "extreme and outrageous" does not make it so. Having elected officials pressure a local bureaucracy to do something because their constituents want it and they share the views of the constituents can be wrong, and it could result in arbitrary conduct, but that is not shocking to the conscience in a democracy. An overly zealous dedication to the representative obligations of elected officials does not violate the "decencies of civilized conduct." *Rochin v. California*, 342 U.S. 165, 172-73, 72 S. Ct. 205, 96 L. Ed. 2d 183 (1952).

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[20] While *Shanks* chose to distinguish *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), instead of holding that its "arbitrary and irrational" standard was too lenient after *Lewis* and *City of Cuyahoga Falls*, the standard endorsed by the United States Supreme Court must now be applied.

Applying the standard set forth United States Supreme Court means that only the most egregious abuses of executive power in the land use context are actionable under the United States Constitution, but it does not prevent every disappointed developer from bringing a claim. For example, there would still be liability for "conduct deliberately intended to injure in some way unjustifiable by any government interest." *Lewis*, 523 U.S. at 849. *See also Shanks*, 540 F.3d at 1088-89. The County does not suggest by its citation to *EJS Properties* that the solicitation of funds in relation to the approval of a project could never shock the conscience, but the case does perfectly illustrate that the degree of egregiousness required before the Constitution plays a role in land use disputes -- the behavior must be "so shocking as to shake the foundations of this country." *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 862 (6th Cir. 2012).[21]

If the members of the BOCC had been shown to have taken bribes from opponents of Maytown's mining project, and had interjected themselves into the administrative process for that reason, this would be a very different case. But this is not such a case. Instead, the heart of Maytown's substantive due process case was a quarrel with the decision to handle any amendments to the special use permit by a hearing before the hearing examiner and, as a matter of law, that cannot be said to constitute a governmental action "shocking to the conscience." In addition, as discussed above in Section II.A.3, virtually all the substantive decisions by

[21] "While the measure of what is shocking to the conscience is no calibrated yard stick," it does point the way. *Lewis*, 523 U.S. at 847.

the County were in Maytown's favor and against project opponents, and several state agencies as well as the Chehalis Tribe agreed with the County's position.

2. Maytown lacked a cognizable property interest.

Finally, while Maytown had a property interest in the special use permit, it had no constitutionally protected interest in avoiding the hearing examiner procedure for the special use permit amendments. *See Dorr v. Butte County*, 795 F.2d 875, 877-78 (9th Cir. 1986) (a substantive property right cannot arise merely by virtue of a procedural right). And because the hearing examiner held that the County had discretion as to how to handle the amendments, no property interest was implicated. *See Baumgardner v. Town of Ruston*, 712 F. Supp. 2d 1180, 1201 (W.D. Wash. 2010), citing *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005) (a "benefit is not a protected entitlement if government officials may grant or deny it in their discretion.").

III. RESPONSE TO CROSS-APPEAL

A. Washington does not allow recovery of attorney's fees as damages.

For its cross-appeal, the Port challenges the trial court's ruling in limine that the Port could not recover attorney's fees incurred during the five-year review and SUP amendment process. (While Maytown was allowed to seek fees on its statutory claims, *i.e.*, RCW 64.40 and 42 U.S.C. §§ 1983 and 1988, the Port did not have statutory claims.)

Contrary to the Port's assertion that "the American Rule does not apply to damages," Washington's version of the rule applies to both costs and damages: "Washington's American rule is attorney fees are not available as *costs or damages* absent a contract, statute, or recognized ground in equity." *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997) (emphasis in original).

Nor has Washington has recognized an "equitable exception" to the American rule arising in the context of land use permits. The Port cites *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989), but there is no indication that the fee award was specifically challenged on appeal or that application of the American rule was raised by any party. The Port also analogizes to existing equitable exceptions, but exceptions to the American rule against awarding fees are narrowly construed. *See McCready*, 131 Wn.2d at 274-78.

B. The Port's request for fees as a sanction is made for the first time on appeal and is not warranted.

The Port alternatively requests fees as a sanction under an equitable exception that allows a court to sanction a party for bad faith conduct related to the litigation. *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113 (2012). The Port never requested fees on this ground in the trial court. A request for fees (let alone additional damages) based on a new legal theory on appeal comes too late. *Scott v. Goldman*, 82 Wn. App. 1, 10, 917 P.2d 131 (1996).

Even if the Port had preserved the issue of imposing a sanction against the County for bad faith, this Court should decline to consider the request. The Port requests fees as a sanction for "prelitigation misconduct." RB 97, citing *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927-28, 982 P.2d 131 (1999). But there is no precedent for an *appellate court* imposing a sanction for prelitigation misconduct. "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). This Court should follow the wise counsel of the United States Supreme Court in *Chambers*, and decline to do so here.

Furthermore, even assuming the jury's verdict is affirmed, there is no evidence that the County committed the type of conduct that could warrant a sanction for prelitigation misconduct. This Court cited an example of such misconduct in *Rogerson Hiller Corp.*, referring to a case where fees were awarded to a class of children and their parents when they were forced to sue a school district to implement desegregation following *Brown v. Board of Education*.[22] *See Rogerson Hiller Corp.*, 96 Wn. App. at 927-28, citing *Bell v. Sch. Bd.*, 321 F.2d 494, 500 (4th Cir. 1963). This Court observed that an award of fees for prelitigation misconduct "can be compared to a 'remedial fine[] imposed by a court for civil contempt' in that the party acting in bad faith is wasting private and judicial resources.

[22] 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

Id., quoting Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613, 633 (1983). Plaintiffs, however, did not sue to enforce an earlier decision or to vindicate a clear legal right. Plaintiffs sued for damages based on legal theories that required the jury to *ignore* earlier decisions. The Port's request should be denied.

IV. CONCLUSION

This Court should vacate the judgment on jury verdict and Maytown's attorney fee award under 42 U.S.C. § 1988, and remand with directions that the Port and Maytown's state law tort claims, and Maytown's substantive due process claim, be dismissed with prejudice. This Court should remand for further proceedings on Maytown's RCW Chapter 64.40 claim, with directions it be limited to what damages, if any, Maytown can prove were caused by the BOCC's remand decision. This Court should further hold that Maytown may not recover its transactional attorney's fees as an element of damages under that statute.

Respectfully submitted this 23rd day of December, 2015.

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC and PORT OF TACOMA, Respondents, v. THURSTON COUNTY, Appellant.	NO. 46895-6-II DECLARATION OF SERVICE (Consolidated with No. 11-2-00396-3)

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of *Appellant's Consolidated Reply and Response Brief and Declaration of Service* on the below-listed attorney(s) of record via Email and first-class United States mail, postage prepaid, to the following:

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DATED this 23rd day of December, 2015.

Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

December 23, 2015 - 11:05 AM

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