

No. 46895-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

THURSTON COUNTY, a political subdivision of Washington State,
Appellant/Cross-Respondent,

v.

MAYTOWN SAND AND GRAVEL, LLC, a Washington limited liability
company, and THE PORT OF TACOMA, a Washington special purpose
district,

Respondents/Cross-Appellants.

**RESPONDENT/CROSS-APPELLANTS' JOINT RESPONSE AND
OPENING BRIEF**

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I. INTRODUCTION

In *Alger v. City of Mukilteo*, the Supreme Court described politically motivated governmental interference with an issued permit as a “reprehensible misuse of governmental power.” 107 Wn.2d 541, 548-52, 730 P.2d 1333 (1987) (affirming jury award arising out of the city’s “outrageous” invalidation of issued permits). Here, five years after Thurston County’s hearing examiner approved a special use permit to mine gravel (the “SUP”), two new members of the Board of County Commissioners (BOCC) unjustifiably directed County staff to prevent the SUP’s timely use, destroying a mining company in the process and causing \$12 million damages.

After 20 days of trial, the jury took one day to return a Special Verdict Form with affirmative answers to all 15 questions regarding liability, proximate cause, and damages. Finding the County liable on every claim, the jury unanimously concluded that the County’s multiple breaches of duty proximately caused \$8 million in damage to the Port and \$4 million to Maytown.

This case involves interference with an *issued permit*, rather than with a permit *application*, and the culpable acts of the County’s officials are more egregious than those in other published decisions holding a local government liable in tort for abusing its regulatory authority. The

evidence that persuaded the jury demonstrates that two of the three County Commissioners abused their authority in pursuit of their personal political and ideological agendas, and did so over a period of 17 months, by directing County staff to prevent lawful activity pursuant to an *issued* County permit. Things got so bad that at one point, Mike Kain, the County's Planning Manager, apologized to Maytown's attorney for the interference, saying he received his direction to do so "from on high," and the Deputy Prosecutor representing the County's Resource Stewardship Department stated that Kain feared for his job if he tried to help Maytown.

The Port and Maytown did not learn about most of the Commissioners' tortious conduct until filing this lawsuit and conducting discovery, with one dramatic exception. At a public meeting with County staff, Commissioner Karen Valenzuela asked what it would take to stop all development at the mine in spite of the County's approval of the SUP, which had occurred years before she joined the Board of County Commissioners ("BOCC"). Staff responded that it would take an emergency, such as discovery of a new protected species at the site, and Commissioner Valenzuela responded:

"Well then, find me an emergency."

Other evidence of the Commissioner's culpable conduct remained largely hidden until discovery in this lawsuit. For example, Plaintiffs

knew that the Commissioners, when sitting as a quasi-judicial body to hear an appeal of the Hearing Examiner's decision approving the Five-Year Review of the SUP, issued an appellate ruling so lacking in basis in law and fact that the reviewing judge summarily reversed it and then adjudged it arbitrary and capricious, and knowingly unlawful. What Plaintiffs did not learn until they deposed the Commissioners was that two of the three Commissioners were actually *members* of the organization that brought the appeal, in whose favor they ruled.

The County does not challenge the sufficiency of the evidence, the instructions given to the jury, or the trial judge's evidentiary rulings. Instead the County makes legal arguments to the effect that its culpable conduct, no matter how egregious, should never have reached the jury. The County seeks refuge in a theory of the Land Use Petition Act ("LUPA") that would turn a hearing on a LUPA appeal into a full-scale tort trial. The County makes this tortured argument the centerpiece of its brief even though (1) no LUPA appeal was available to Plaintiffs on the SEPA issue that the County says Plaintiffs should have appealed; (2) the argument already has been rejected by this Court ; (3) LUPA itself states that it "does not apply" to "[c]laims provided by any law for monetary damages or compensation;" and (4) the Legislature prohibited discovery in most LUPA appeals so that the evidence needed to establish tort liability

was not available to Plaintiffs prior to this damages action.

In addition, the County asks this Court to sit in equity to shield an intentional tortfeasor from liability. The County asserts that it owed no duty to act with due care because in the years-long course of conduct involving dozens of communications between staff and the permittee, staff did not utter the magic words the County believes necessary to create a special relationship. The County advances a theory of constitutional rights that would eviscerate the concept of substantive due process. None of the County's theories has merit and its appeal should be rejected for all the reasons analyzed below.

The trial judge did make one reversible error in excluding evidence of attorneys' fees as damages. The Port and Maytown, in their cross-appeal, ask this Court to rule that attorneys' fees incurred in an effort to repair harm and to prevent further harm caused by a tort – fees separate from the costs of a tort action – are recoverable as damages. Our Supreme Court affirmed such an award in *Pleas v. City of Seattle*, 112 Wn.2d 794, 799, 774 P.2d 1158 (1989). In addition, the County's egregious pre-litigation behavior supports an award of fees.

The Port and Maytown, collectively, "Plaintiffs," jointly submit this brief, with the exception of Section IV.F, submitted only by Maytown, as only Maytown had an action for damages under 42 USC § 1983.

II. COUNTERSTATEMENT OF THE ISSUES

1. A County is liable in tortious interference when it interferes with private business *either* through improper means *or* for an improper purpose. The evidence established that County staff, at the direction of elected officials, invented new regulatory processes, prohibited on-site work, gave project opponents special access to staff and elected officials, and took many other steps for the improper purpose of preventing operation under an issued land use permit. Is the County liable in tortious interference? **Yes.**
2. SEPA, the Local Project Review Act, and the Thurston County Code each allow one and only one administrative appeal of SEPA determinations. Maytown exercised its only SEPA appeal to the County's Hearing Examiner, and prevailed. Are Maytown and the Port barred from seeking any damages for failing to bring a prohibited appeal of the Hearing Examiner's *reasoning* to the Board of County Commissioners? **No.**
3. LUPA requires a showing that an appellant is adversely affected or prejudiced by the land use decision, so a party cannot appeal a *favorable* land use decision. The BOCC affirmed the Hearing Examiner's approval of SUP amendments that staff forced Maytown to request. Are Maytown and the Port barred from seeking any damages because they did not file a LUPA appeal of a favorable land use decision? **No.**
4. SEPA prohibits "orphan" environmental appeals, both administrative and judicial, instead requiring appeals of SEPA determinations to be joined with appeals of the underlying government action. Because LUPA precludes appeal of favorable land use decisions, Maytown had no underlying government action it could appeal to bring the Hearing Examiner's favorable SEPA determination to court. Are Maytown and the Port barred from seeking *any* damages because they did not file an improper judicial appeal for the sole purpose of challenging the reasoning the Hearing Examiner employed when she granted Maytown's SEPA appeal? **No.**
5. By its terms, LUPA "does not apply to . . . [c]laims provided by any law for monetary damages or compensation." RCW 36.70C.030(1)(c). Plaintiffs do not challenge any County land use decision except the adverse decision they successfully appealed in 2011, but seek damages

for the County's tortious interference. Are Plaintiffs barred from seeking damages because they did not attempt to apply LUPA to establish their damages claim? **No.**

6. A party must have clean hands to obtain relief in equity. The County does not challenge the jury's findings that its elected officials and staff acted intentionally to defeat a private business expectancy. Does the County have the clean hands necessary to obtain equitable relief in the form of collateral estoppel? **No.**
7. Courts do not apply collateral estoppel where doing so would result in substantial injustice. Here, after a hearing without discovery, the Hearing Examiner issued a final, unappealable SEPA ruling in favor of Maytown, containing reasoning consistent with Plaintiffs' damages theory. Should the Court rely on the Examiner's reasoning to collaterally estop Plaintiffs from recovering the \$12M in damages the jury found the County caused? **No.**
8. The special relationship exception to the Public Duty Doctrine creates a duty to act with due care where government officials respond to private inquiries with assurances on which the recipient reasonably relies. Here, over the course of several years, County staff responded to multiple requests from Plaintiff with multiple assurances on which Plaintiffs reasonably relied. Did the County owe a duty of due care to Plaintiffs? **Yes.**
9. To prove negligent misrepresentation, a plaintiff must prove that the defendant misrepresented information on which plaintiffs reasonably relied to their detriment. Plaintiffs reasonably relied on multiple staff representations about the status of compliance with SUP conditions, the applicable process for SUP amendments, and other information within the County's control, that later proved false when staff, under extreme pressure from the BOCC, changed its mind. Can the County be held liable for negligent misrepresentation? **Yes.**
10. A tortfeasor is liable for all damages proximately caused by the tort. Knowing Maytown needed to start mining as soon as possible, County staff tortiously forced Plaintiffs to acquiesce to a hearing examiner amendments process, during which Plaintiffs worked with staff to make the process as smooth as possible. May the County raise a factual issue for the first time on appeal, and ask the Court to assume that the jury would have found that a "settlement and compromise"

occurred when there is substantial evidence to the contrary in the record, even though the issue was not litigated? **No.**

11. Where the County, in its determined effort to kill the Maytown mine, engaged in an extreme, abusive course of conduct, motivated by purely political ideological motives, and employing deceptive, duplicitous, illegal, and unjustifiable means, which conduct the jury found “shocked the conscience” and constituted a violation of Maytown’s rights to procedural due process guaranteed by the 14th Amendment, is the County liable for damages, costs, and attorneys’ fees under 42 U.S.C. § 1983 et seq.? **Yes.**

III. FACTS

As explained in the Introduction above, the evidence proved that County staff, at the direction of two of the three Commissioners, intentionally acted to delay and prevent mining pursuant to an issued permit, and succeeded in doing so for seventeen months. While events were unfolding, however, Maytown and the Port caught only glimpses of what was happening. Only later, during discovery in this damages case, did Maytown and the Port learn most of the evidence presented to the jury that demonstrated that these Commissioners orchestrated a campaign to destroy the value of the permit by any means necessary.

Disregarding the standard of review in this case, which requires the facts to be viewed in the light most favorable to Plaintiffs, the County selectively recites facts that the jury concluded did not excuse its outrageous conduct. Nor do the facts cited by the County have any bearing on its legal theories. The County’s statement of facts therefore

should be disregarded.

A. The Port Bought a Permitted Mine in 2006

In 2006, the Port of Tacoma paid \$20.7M to buy a permitted mine on 745 acres near Maytown, Thurston County, with the goal of constructing a multi-modal freight facility. RP 2656:1; *generally* RP 744:745:9. The parcel had previously been part of a 1610-acre site that included a large wetland and prairie, and the Port's predecessor, Citifor, excluded these critical areas and their buffers from the proposed mine when it applied for the SUP even though these areas included millions of cubic yards of marketable gravel. RP 950:12-951:11. After approval of the SUP, Citifor sold more than 800 acres containing the largest critical areas to the Washington State Department of Fish and Wildlife for over \$3M. RP 1657:24-1658:5. The difference between the approximately \$3M that Citifor received for open space and the more than \$20M that it received for a gravel mine of similar size reflects the value of the right to mine provided by the SUP.

Much of the mine area was severely polluted by its prior, 50-year use as an explosives manufacturing facility, so the Port had to clean up the property pursuant to an Agreed Order with the Department of Ecology. RP 747:24-748:8. The Port also applied for and obtained the two remaining permits to allow mining: a Reclamation Permit from the

Department of Natural Resources and a Sand & Gravel stormwater permit from Ecology. RP 1658:6-23.

Charles “Pony” Ellingson, a state-certified hydrogeologist who first started studying the site’s groundwater in the 1990’s, RP 911:25-912:7, conducted the 2002-2004 hydrogeological review of the site and drafted a complex groundwater monitoring plan for the mine, . In 2004, the Black Hills Audubon Society (“BHAS”) appealed the original SEPA determination, including the groundwater plan. RP 931:15-21. The parties negotiated a settlement agreement that would require the applicant to pay, upon sale to a mining company, \$325,000 to BHAS to allow BHAS to monitor and acquire habitat. RP 931:15-934:8; Ex. 44 ¶ 2.1. Citifor also agreed to set aside larger buffers (100’ rather than the required 35’) and to reduce the mine boundary to 284 acres. Ex. 302 at 1. As a result of that agreement, Ellingson drafted a more streamlined groundwater monitoring program (“GMP”) that focused on preventing offsite contamination. *See* RP 937:14-939:18 & Ex. 179. BHAS and other environmental groups submitted letters in 2005 affirming that the Settlement Agreement and the new GMP addressed their concerns. Exs. 88, 90, 96. The County re-issued its Mitigated Determination of Non-Significance (“MDNS”) in October 2005, requiring compliance with the new GMP. Ex. 302.

Thurston County's Hearing Examiner approved the SUP in December of 2005 after a full evidentiary hearing. Ex. 89. He concluded that the GMP adequately protected groundwater. *Id.* at 39-40 (carryover sentence). The SUP designated the 284-acre mine area as mineral land of long-term commercial significance. *Id.* at 43 ¶ 7. It took over three years to acquire the SUP in 2005. *See* RP 950:3-9. The SUP was not appealed.

B. The Port Sold a Permitted Mine in 2010

Under Thurston County Code ("TCC"), a permittee has three years to commence operations or the permit expires. When the Port abandoned its plans for a multimodal facility in 2008, it asked the Hearing Examiner for more time to prevent SUP expiration prior to selling the mine. *See* Ex. 144; RP 753:9-16. The Port also worked with County staff to confirm the SUP's validity. *See* RP 754-766, 770-771. In response to Port inquiry in the fall of 2008, County staffer Tony Kantas, the County planner who had handled the SUP since 2002, RP 3335:24-3336:7, confirmed that the SUP had not expired. Ex. 85. Kantas also requested groundwater monitoring reports. *Id.* The Port's hydrogeologist complied. Ex. 180 & RP 954:8-957:4. Jeff Fancher, the County's deputy prosecutor representing the Development Services Department, confirmed to the Port's attorney Kantas's statement that the hydrogeologist reports "meet[] all the conditions he brought up." Ex. 145. Kantas then sent a letter confirming

receipt of the reports and stating that the Port must ensure that the property “remained in compliance” with SUP conditions. Ex. 83.

In reliance on these assurances, the Port withdrew its pending Hearing Examiner requests, Ex. 82, and marketed the property as a permitted mine, RP 774:7-775:7.¹ The Port offered favorable terms such as seller financing on 5% down and the ability to make payments in kind, accepting gravel rather than in cash. RP 794:2-18; 1965:20-1966:18.

The Port selected the bid submitted by a company owned by Jim Magstad and Steve Cortner. Cortner and Magstad partnered with Dan and Randy Lloyd, majority owners of a Federal Way mining company called Lloyd Enterprises, Inc. *See* RP 2204:21-2205:12. Their father started the company in the 1960s, RP 1928:4-17, and Dan and Randy took it over in the mid-1990s and doubled revenues and grew employment to 100, RP 1927:50-1928:3. With the Lloyd brothers on board, Cortner did not need to create a mining company as first envisioned. Lloyd Enterprises was ready to extract and sell aggregate on day one. RP 2208:4-11.

Cortner, Magstad, and the Lloyd brothers formed Maytown as the company that would purchase and hold the mine. Maytown hired Lloyd Enterprises as operator. Lloyd Enterprises, with its substantial amounts of

¹ County staff would confirm its determinations of SUP validity in a March of 2009 exchange of letters with FORP’s attorney. *See* RP 775:8779:10; Exs. 140-143.

capital equipment, *See* Exs. 148, 152, plentiful manpower, and established market presence, would handle every aspect of mining, marketing, and sales, paying Maytown \$2/ton and keeping any remaining profit. RP 2212:4-2216:17; RP 1950:3-1951:19 (D. Lloyd describes Maytown and LEI); 1959:8-1963:17 (D. Lloyd describes royalty). The SUP authorized the extraction and sale of 34 million tons of aggregate, which potentially meant \$64M in revenue for Maytown, which would own the property and pay the note from the revenue. RP 2216:18-23. Any additional capital expenses would be covered by Lloyd Enterprises. RP 1986:11-15.

C. Maytown Receives Assurances During Due Diligence

In October, 2009, before the purchase, Maytown principals met with County staff including Mike Kain, the County’s Planning Manager, who knew that Maytown was conducting its due diligence and deciding whether to close its purchase of the mine, RP 3236:6-10. Mr. Kain reconfirmed that the SUP was valid, that the SUP had no “skeletons in the closet,” and that a purchaser could be mining within 30-60 days (a statement he repeated in the newspaper, Ex. 122). *See, e.g.*, RP 2226:17-2227:11.

For reasons that Maytown and the Port did not understand at the time, however, staff then told Maytown that prior to mining, the permittee must request a “letter to proceed” – an appealable, affirmative staff

determination that all SUP conditions had been complied with and mining could commence. Ex. 361 ¶ 2. Neither Maytown, the Port, nor the mining consultants had heard of such a requirement, RP 1664:17-1665:1, and the requirement is not set forth in the TCC, RP 3277:15-19; RP 1501:3-8 (Hempelmann: “We tell our clients to follow the law. We help them follow the law, and in a year and a half neither Mr. Kain nor Mr. Fancher nor the Hearing Examiner or anyone else could ever show us a provision that authorized them to force us to wait for a letter to proceed.”). Worse, staff decided it would not even *process* a request for a letter to proceed until the County received a memo from the Friends of Rocky Prairie (“FORP”) – a non-profit that formed to fight the Port’s planned freight facility, then opposed mining, RP 3364:18-3365:12 – containing *FORP*’s analysis of the SUP’s viability. Ex. 361 at 1 ¶ 2. Yet, demonstrating the *ad hoc* nature of the letter to proceed, staff stated it would commence review if FORP’s letter was “not timely.” *Id.* In his 37 years of experience, Maytown’s mining expert had never before heard of a regulator refusing to commence a regulatory process until opponents had their say regarding an issued permit. RP 89:25-91:3 [Vol. 7 afternoon].²

Despite the oddity of this “letter to proceed,” Maytown relied on

² Two court reporters transcribed the seventh day of trial. The afternoon report is separate from the rest of the Report of Proceedings. References to this portion of the record are noted herein as “Vol. 7 Afternoon.”

Kain's oral confirmation that there were "no skeletons in the closet" and that mining could commence within 30-60 days. Maytown also knew that even if FORP opposed efforts to mine, staff had already issued an unappealed decision that the SUP was valid, vested, and compliant. RP 1524:23-1525:2. Maytown and the Port executed a purchase-and-sale agreement in October 2009, in which Maytown agreed to pay \$17M, including \$1M at closing, plus 7% annual interest for the 20-year life of the contract. RP 794:2-18. The contract allowed Maytown to make payments of principal with gravel rather than cash, an arrangement Dan Lloyd called a "phenomenal business opportunity". RP 1964:3-1966:18. Maytown also would have the ability to ship gravel to the Port by means of the rail line that crossed the mine, which would cost a fraction of trucking. This deal allowed the Port to receive its value at a discount to Maytown, while giving Maytown time to ramp up.

D. County Staff Reverses Itself and Determines the Port is Out-of-Compliance With SUP Conditions

In December of 2009, more than a year after staff issued its unappealed determinations that the SUP was valid and the Port in compliance with its conditions, and two months after Kain confirmed in person to Maytown that the SUP was valid, Kain sent an e-mail that asserted the SUP was out-of-compliance because of omissions occurring

months or years earlier. Ex. 371. Kain's December 11, 2009 e-mail depended on review of the *very same documents* that Kantas reviewed 13 months earlier, yet Kain concluded that the SUP was out of compliance and compliance could not be achieved without amending the SUP. *Id.*

Kain wrote that the County would determine whether amendments were major (requiring a hearing examiner hearing) or minor (decided by staff) "only upon submittal of a formal request to amend, or at the time of request for a Letter to Proceed." Ex. 371 at 2. The Port objected to the invented letter-to-proceed process, but nevertheless requested the letter on January 4, 2010. Ex. 67 at 18-19.

Kain's amendment requirement was bad, but not fatal. The crucial question was whether the amendments would be minor or major – whether staff would make the initial decision or send it to the hearing examiner. RP 1323:11-1324:5 (Hempelmann); RP 2012:13-2014:25 (D. Lloyd); RP 3312:4-9. The difference is significant, as County Manager Cliff Moore confirmed, RP 2980:12-15, because ground-disturbing activities could begin upon staff approval and continue during any appeals. RP 1422:15-21, 1514:2-16. Removal of the topsoil, even during an appeal of staff's decision, would moot any argument regarding unexamined critical areas that might have been in that topsoil. RP 1323:11-1324:5; RP 3255:15-21, 3256:11-22. By contrast, a Hearing Examiner's decision would not only

take longer to obtain, but would be stayed during any appeal to the BOCC. RP 1514:2-16, which would mean that mining could not commence until any BOCC appeals were exhausted.

E. In Reliance of County Confirmation of Minor Amendment Process, Plaintiffs Close the Sale of the Mine

Given the doubt created by Kain's December 2009 e-mail, the sale almost fell through. On the morning of February 16, 2010, the Port's attorney circulated a document that he had prepared at the Port's direction to cancel the PSA. Ex. 384. However, later that day, Kain finally responded to the Port's request for a letter to proceed. Ex. 62. In what he styled as an appealable decision, Kain concluded that "Such minor timeline change may be approved by staff upon submittal of an application for amendment." *Id.* at 5, 6. Kain confirmed on the stand that this statement meant that staff would handle the amendments. RP 3297:19-23; 3315:5-11. The Port filed a protective appeal challenging the assertion that each determination was actually separately appealable, but when no other party appealed, the Port did not prosecute its appeal. Ex. 429 at 42.

In reliance on Kain's unappealed decision that the amendments were minor, the Port and Maytown closed the sale of the mine on April 1, 2010. RP 897:8-10. The Port paid \$325,000 into escrow for BHAS, as the Settlement Agreement with Citifor required. RP 2670:6-15.

After closing, Maytown prepared its request for minor amendments. Since staff was forcing Maytown to request minor amendments anyway, Maytown decided to ask for tweaks to a few other SUP conditions to make operations easier. *See generally* RP 1136:20-1152:8. However, in light of the need to avoid a hearing examiner process, Maytown first sought and received Kain's and Deputy Prosecutor Fancher's confirmation that each and every additional amendment request would also be minor. RP 1354:3-21 (Hempelmann); RP 3311:23-3312:3 (Kain). In reliance on these multiple oral assurances, Maytown submitted its request on April 22, 2010, three weeks after closing. Ex. 59.

F. Staff Reverses Itself and Requires A Hearing Examiner Amendments Process With SEPA Review

On June 17, 2010, nearly two months after Hempelmann submitted the request for minor amendments, Kain wrote that staff would send the minor amendments to the hearing examiner. Ex. 55. On the stand Kain confirmed that this had never happened in his 22 year career with the County. RP 3301:2-3302:6.

To make matters worse, and even though staff never varied from its conclusion that the amendments would produce no environmental impact whatsoever, *see, e.g.*, Ex. 11 at 45 (In December 2010, the Hearing Examiner wrote at ¶ 4.A that “[n]o harm has resulted or will result from

the timing of compliance. There is adequate background data to commence earth disturbing activities, including mining above the water table.”); RP 975:1-17 (NR agreed in Nov. 2010); RP 3297:24-3298:15, staff required SEPA review of the amendments. RP 3306:16-23. And, instead of using an unappealable SEPA addendum – the appropriate level of review for actions that produce no unexamined environmental impact – staff ignored the advice of its attorney and issued an appealable threshold determination, opening the door to FORP’s appeal. RP 1193:22-1194:13 (Hempelmann) & Ex. 40; RP 3306:24-3307:21; *accord* Ex. 33. Without SEPA review, even a hearing examiner amendments process could have been completed in 2010, together with the first round of the expanded groundwater monitoring. The SEPA review added months of process that pushed the hearing into March of 2011. *See* RP 1159:5-12, 1180:20-1181:13; RP 1514:2-16; RP 3327:23-24.

In an effort to return to the staff-level decision promised in February, Maytown spoke with Kain and Fancher through the summer of 2010. *See, e.g.*, Ex. 124. As late as July of 2010, Kain assured Maytown that if it removed some of the superfluous requests, the process could revert to minor. RP 1361:6-1362:2 (Hempelmann); RP 3312:15-3313:22 & Ex. 49 (July 2010 memo from Kain). Because getting staff approval was so important – it would have allowed mining to commence

immediately – Maytown twice reduced the scope of its request, Exs. 401, 21, even though each time it did so the County issued new notice and pushed the hearing farther out. RP 3204:15-24. In the end, Maytown reduced its requested amendments to only those the County had confirmed in writing in its February 16, 2010 memo would be minor, yet the County *still* required a hearing examiner proceeding. Ex. 21.

G. The Hearing Examiner Rules for Maytown and the Port on Every Point At Five Year Review, But the BOCC Reverses

The Thurston County Code and the SUP require review of compliance with mining permit conditions every five years. *See* Ex. 89 at 43 ¶ C. Maytown’s first five-year review was the first time that such review in Thurston County would precede commencement of mining. RP 3254:11-20. For months leading up to the review, Kain told Hempelmann that because no ground-disturbing activities had taken place, the review would include no new conditions. RP 1200:3-13. This conclusion was obvious under the Supreme Court’s 2001 ruling in *City of Univ. Place v. McGuire*, that even non-conforming mining rights extend to the unopened portions of an entire mine site. 144 Wn.2d 640, 649-52, 30 P.3d 453.

1. Staff Propose to Apply New Critical Areas Regulations to Issued SUP

On November 24, 2010 – the day before Thanksgiving – Kain emailed his draft staff report to Maytown’s and the Port’s attorneys. RP

1206:3-14; Ex. 14. Kain's report contradicted his earlier statements and required re-review of the entire site under the new critical areas ordinance adopted years after SUP issuance. The report estimated that the new critical areas ordinance would eliminate more than 100 acres from the 284-acre mine area. Ex. 14 at 30. The report suggested that preservation of additional prairie areas would mitigate loss of prairie habitat on federal land at Joint Base Lewis-McChord. Ex. 14 at 30.

The staff report was so shocking that Maytown's attorney did not share it with his clients until the day after Thanksgiving, to avoid ruining their holiday. RP 1215:1-9. It would turn what should have been a straightforward, half-day hearing into a three-day adversarial proceeding, RP 1320:13-16, complete with expert testimony and briefing. And Kain went even farther at the hearing, asking the Examiner to require Maytown to re-order the mining plan to work Mine Area 1 last,³ allowing mining opponents time to raise funds to purchase it. Ex. 429 ¶ 76; RP 3272:2-3276:10; RP 1233:2-1234:11 (Hempelmann). Recognizing the hardship the County's change had created, Kain apologized to Maytown's attorney during a break at the hearing. As Hempelmann testified:

³ Mine Area 1 is the farthest area from the access road. Requiring it to be mined last would be like requiring a janitor to mop a room by starting in the middle, working toward the door, then finishing with the far side of the room – if mopping the floor also destroyed the floor and left a lake in its place, like mining and reclamation does. See generally RP 1641:1-21 & Ex. 172.C.

And [Kain] said, “John, I’m sorry we’re doing this. **I think you know the commissioners want us to do it.**” And that was a stunning statement. I walked back to the counsel table, and I dropped into my chair, and I said, Tayloe, you will not believe what Mike Kain just told me.

RP 1269:12-17 (emphasis added); *accord* RP 1499:14-25.

Despite the County’s efforts, the Hearing Examiner wrote a strong opinion in December 2010 agreeing with Plaintiffs on every substantive point. Ex. 469. She wrote that accepting the County’s position would “lack common sense,” Ex. 429 at 46 (¶ 5.A), and was “inconsistent with land use law as interpreted and applied by the courts of Washington,” *id.* ¶ 5.C. She found no evidence of missed critical areas. *Id.* ¶ 5.C. She concluded that the “record is devoid of evidence upon which the Examiner could or should invalidate the permit.” *Id.* at 47 (¶ 7).

Even after this decision, staff would continue to prohibit Maytown from performing any ground-disturbing activities until August, 2011, RP 1988:12-18, even though the Hearing Examiner concluded that the background groundwater monitoring data was already sufficient in December 2010 to allow earth-disturbing activities, Ex. 429 at 45 (¶ 4.A).

2. The BOCC Arbitrarily and Capriciously Reverses the Examiner in Favor of the Black Hills Audubon Society

BHAS and FORP each appealed the Examiner’s decision to the

BOCC,⁴ which reversed the Hearing Examiner and remanded for a new critical areas review. Ex. 7. Without altering the Examiner’s findings of fact, the BOCC claimed there was “undisputed evidence that there are newly discovered critical areas within the proposed mine area,” Ex. 7 at 2. No such evidence existed. The BOCC also wrote that the SUP contained a condition mandating avoidance of all critical areas. *Id.* at 4. No such condition existed, and the only support that the BOCC could cite for its invented condition was a *statement of intent in the preamble* to the 2005 Mitigated Determination of Nonsignificance. *Compare* Ex. 7 at 3 (referencing “a condition of the 2005 special use permit to ‘avoid’ ‘all critical area habitat and species.’”) *with* Ex. 302 at 3 (“The conditions listed below are intended to avoid or mitigate the potential objectionable effects of traffic congestion, noise, glare, odor, air and water pollution, fire or safety hazards and all critical area habitat and species.”).

Maytown and the Port appealed the BOCC’s decision to Lewis County Superior Court under the Land Use Petition Act (“LUPA”), and Judge Brosey reversed the BOCC. CP 111-116. He later that the BOCC’s decision was arbitrary and capricious. CP 2590-2592.

⁴ BHAS used the County’s hearing briefs as its legal argument on its appeal. *See* RP 1282:10-14.

H. Maytown and the Port Comply Under Protest with the County's Amendment Requirement

On February 9, 2010, Nadine Romero, the County hydrogeologist, had issued a memo greatly expanding the groundwater monitoring requirements beyond the program the Examiner had approved in 2005. Ex. 63. She did so within five days of Kain's request, *id.*, without reviewing the file or consulting Ellingson, the hydrogeologist that had designed the groundwater monitoring program and conducted the monitoring, – a hydrogeologist that the County itself had depended upon as its own consultant over the course of twenty years, RP 985:13-21. Based on Romero's memo, staff unilaterally expanded the scope of monitoring to include nearly all of the state's priority pollutant list, adding tremendous expense and delay with no environmental benefit. RP 984:12-23. Then, Romero issued a second memo in June of 2010 asserting that the requested amendments were not minor changes to the groundwater monitoring program. Ex. 117. Kain cited this memo to support his position that the amendments were major, RP 3287:19-3288:12, when in fact the amendments merely brought the summary language of the SUP/MDNS condition in line with the approved GMP, RP 978:25-979:10.

Moore and Kain refused to allow Ellingson to meet with Nadine Romero, RP 2949:7-2952:11 (Moore) until October 2010, when Ellingson

learned that Romero had reviewed neither the GMP itself, nor the 4” thick binder of application materials that supported it, which Ellingson called “unreasonable” and “very bad practice.” RP 1009:3-19 & Ex. 501. Ellingson explained the errors in her analysis, but in November of 2010, Romero issued a memo that demonstrated her ongoing ignorance of the facts surrounding the GMP. Ex. 16 at 6 (multi-color paragraph) & 969:4-970:20. Romero’s November 2010 memo nonetheless again confirmed that the non-compliance for which staff was requiring SUP amendment had created no environmental harm. Ex. 16 at 6 (underlined paragraph).

Maytown agreed under protest, *see, e.g.*, Ex. 127 at 15 n.9; RP 1329:22-1330:21; RP 3265:11-20, to adopt a new water monitoring program that incorporated the original GMP and the additional background testing that Kain now required, but did not meaningfully change the monitoring protocol in the future. RP 1001:12-1002:14. The new program, drafted jointly by Ellingson and Romero, was not more protective of the environment, and there was no scientific reason to adopt a new program. RP 982:8-14. But it allowed Maytown to get through the amendments process and commence mining sooner. RP 1204:16-24. The County imposed the new program as an MDNS condition.

1. Maytown Prevails in its Challenge to SEPA Review of the Amendments

At the same time it submitted to staff's hearing examiner amendment process, Maytown (but not the Port) also filed a SEPA appeal challenging the County's requirement for SEPA review. The Hearing Examiner consolidated the SEPA appeal together with the hearing on the amendments, and issued a combined opinion on both issues. Ex. 127. Maytown argued that SEPA review was improper because the hearing examiner amendment process itself was illegal. Ex. 127 at 2. It also argued that SEPA review was improper because the amendments were not an "action" under SEPA. *Id.* While the Examiner disagreed with the former argument, she agreed with the latter, writing:

[Maytown] has successfully demonstrated that the proposed changes to the water monitoring conditions would not impact the environment and should not be considered an 'action' pursuant to SEPA regulations, rendering environmental threshold review superfluous.

Ex. 127 at 31 (¶ II.A.2). Recognizing that it had lost the SEPA appeal, the County (unsuccessfully) asked the Examiner to reconsider her SEPA ruling. *See* Ex. 125. Under TCC, hearing examiner SEPA rulings are final and no additional administrative appeals are allowed, so neither the County nor Maytown appealed the SEPA ruling to the BOCC. *See id.* at 2 (quoting TCC 17.09.160.K). Maytown, satisfied with its victory on the merits, also had no reason to appeal. RP 1463:22-1464:1 (Hempelmann:

“We won. We don’t appeal when we win.”). As Mr. Hempelmann wrote his clients, Ex. 449, while the Examiner’s ruling on the propriety of the hearing examiner amendments process did not go as far as Maytown had hoped, it preserved the argument that staff had exercised its discretion for an improper purpose – exactly the theory the Plaintiffs would present to the jury, *see* RP 3302:24-3310:18.

2. FORP’s Appeal of the Amendments Is Rejected

FORP appealed the Examiner’s amendments decision to the BOCC. Ex. 454. While Judge Brosey considered the BOCC’s earlier decision on the 5-year review, the BOCC affirmed the Examiner’s amendments decision. *Id.* FORP then brought a LUPA appeal of the BOCC’s decision that was dismissed for lack of standing. RP 1464:5-12.

I. When the County Finally Allows Work to Commence, Maytown Completes All Premining Conditions in 90 Days

Despite staff’s prior assertion that it would not allow ground-disturbing activities while the amendments were pending, in August 2011, during the pendency of FORP’s judicial appeal, staff finally relented. Every pre-mining condition the County spent so much time discussing at trial as potential alternative causes for the delay – including the 1,000-foot-long noise attenuation berm (*see* RP 2001:10-2002:13), railroad crossing permitting and construction, offsite road improvements including the I-5 turnpocket – *every* condition was satisfied within 90 days of

County staff allowing ground-disturbing activities, and would have been completed within 60 days except that the County's delays forced these activities into months with unfavorable weather. RP 2001;10-2006.22. Had staff not prohibited ground-disturbing activity for 14 months, Maytown could have commenced operations by July 2010 – even as it continued the expanded background groundwater monitoring staff required – exactly as they had planned when they bought the mine.

J. The County Issues the “Letter to Proceed” 17 Months After Closing, but Too Late to Save Maytown’s Business

Even after he confirmed Maytown’s compliance with all conditions at a site visit on November 4, 2011, Kain told Hempelmann that the Commissioners still would not let him allow mining to commence until he had vetted the letter to proceed with project opponents. RP 1320:20-1321:11. On November 8, Kain issued the “letter to proceed,” Ex. 1, and Maytown began mining. But the County’s delay caused Maytown to miss significant market opportunities. Had the County acted properly, for example, Maytown could have competed for a share of the millions of dollars in fill work resulting from a major I-5 expansion project near the mine. *See* RP 2246:21-24. That work went elsewhere while Maytown and the Port fought the County’s efforts. The County’s delay also forced Maytown into technical default for months, creating the

possibility of the Port having to repossess the mine, RP 2610:15-2613:4, and forcing Maytown and the Port to re-negotiate their contract. RP 1448:13-1450:18. Eventually, due to non-performance, Maytown lost the ability to make payments in gravel, rather than cash, RP 2124:7-15.

Although Maytown had access to all the capital it needed through the Lloyd family, RP 1986:4-15 (D. Lloyd); RP 2131:1-11, Ex. 388, it could not keep throwing good money after bad. RP 2136:24-2137:21. Without the confidence in the SUP, with another five-year review looming, and constantly facing the possibility of losing its SUP rights, Maytown's principals could not provide the bonding or personal assurances of performance required to bid large projects. RP 2032:10-2033:13; RP 2043:23-2044:4. Maytown worked the mine in this diminished capacity for approximately 18 months before finally foundering. It returned the mine to the Port in October 2013. RP 2045:17-2046:18. The Port marketed the mine as a fully permitted, ongoing operation, but at the time of trial, had not received inquiries from anyone other than the Department of Fish and Wildlife. 2616:20-24; 2659:7-20. The County's unwarranted interference and resistance rendered the SUP valueless, and the land valuable only for open space. RP 2138:19-2139:10; Ex. 504.

K. County staff prevented mining for 17 months at the direction of two of the three County Commissioners

The actions of County staff summarized in the prior subsections surprised and dismayed Maytown and the Port, but they had little understanding at the time of the reasons for staff's actions. They did know that Commissioner Valenzuela held work sessions to study the mine, even though at trial she could not articulate a reason why one of the County's highest elected officials needed to study a project that already had an issued and valid SUP. *See* RP 1786:2-1788:1. The Port's former real estate manager, Jack Hedge, testified that during one such work session, Commissioner Valenzuela asked what it would take to prevent development at Maytown, and staff replied it would take some kind of emergency, such as discovery of a protected species. She replied:

“Find me an emergency.”

RP 801:12; 892:25-894:6. This statement went un rebutted at trial.

Plaintiffs also knew that Kain, during a break at the hearing on the five-year review of the SUP, apologized to Maytown's attorney:

John, I'm sorry we're doing this. I think you know the commissioners want us to do it.

RP 1269; *accord* RP 1499:14-25. Plaintiffs learned that Mike Kain feared for his job if he tried to help Maytown. As Mr. Hempelmann testified:

Mike was under a lot of pressure. Jeff Fancher told me Mike was at risk of losing his job, because he was trying to get us through the

process. Jeff said I might lose my job too but I'm not as worried about my job as Mike's.

RP 1189:20-24. And at the end of the 17-month delay, Maytown and the Port learned that Commissioners still would not let Kain allow mining to commence until he had vetted the letter to proceed with project opponents.

RP 1320:20-1321:11.

Only during discovery in this action for damages did Maytown and the Port learn the rest of the story.

Even County witnesses acknowledged at trial, that the law gives elected officials no say over already-permitted uses such as the mine, and every County witness who was asked the question agreed that individual Commissioners have no authority to direct staff. *See, e.g.*, RP 3066:4-3067:3. Mr. Moore described this limitation on the Commissioners' authority to act as individuals as a "wall" between Commissioners and staff, RP 2892:25-2893:8, and yet the trial was replete with evidence of Commissioners Valenzuela and Romero breaching this wall. This evidence included, for example:

1. In November 2009, County Manager Cliff Moore and the Deputy Prosecutor who represented the BOCC, Elizabeth Petrich, RP 3337:5-7, examined the question of whether Title 53 RCW gave the Port the municipal authority to operate in Thurston County – yet another area of law over which the County had no jurisdiction – nearly a year after Kantas had concurred with the Port's statement of its authority. RP 3336:18-3337:12 & Ex. 114 at 11.

2. Commissioner Valenzuela directed staff to argue during what should have been routine review of SUP compliance at the five-year review that an interim critical areas ordinance, adopted years after SUP issuance, should be applied to the already permitted mine, RP 1733:19-1734:11 (Valenzuela); (staff estimated doing so would remove more than 100 acres from the 284-acre mine, Ex. 14 at 30; RP 3259:15-3260:5 (Kain agrees it's "very significant"));
3. Commissioner Valenzuela had what then-County Manager Don Krupp described as "a visceral response" to an email from FORP about an alleged – and previously disproved – stream within the mining area (see Ex. 31). She then told him, "I'm going to open it [review of the SUP] all up again," RP 3067:4-3070:22; 3076:21-3077:2, which is exactly what staff then attempted to do;
4. Commissioner Romero wrote to Krupp on July 19, 2010 (Ex. 47) "Please find out why staff does not agree with the FORP's attorney. This may be key to the whole project";
5. Referencing the already-issued and valid permit, Commissioner Valenzuela wrote "we do have a say in what actually happens on the property through the permitting process" (Ex. 60);
6. Commissioner Romero asked County Resource Stewardship Department manager Mike Kain "why can't we agree w/FORP atty that we must reopen entire SEPA" Exhibit 114 at 29
7. The Commissioners directed staff to require the SEPA review. *See* RP 1701:1-6; 1848:20-1850:16.
8. In response to a suggestion made by FORP, RP 1845:5-17 & Ex. 39; 1848:20-1849:3, Commissioner Romero wanted to go farther and re-open SEPA review of the full mine, proposing to recuse herself from any future decisions, Ex. 94 at 47 & RP 1849:9-19. She even explored the possibility of making *the BOCC* the SEPA lead agency, rather than the Resource Stewardship Department. Ex. 94 at 54; RP 1849:4-1850:16.
9. Commissioner Valenzuela believed her years as an elected official gave her the ability to identify critical areas, and that she had observed them during a site visit. RP 1779:17-1781:11. She also relied on FORP to conclude there were unprotected habitats. RP 1698:4-13.

She didn't know if they were inside of the mine area, *see* RP 1698:14-1699:14.

10. Elizabeth Petrich, the BOCC's attorney, told Kain that staff could not make a minor amendment decision, RP 3298:16-3299:25, even though staff had always made such decisions and the code had not changed. Mike Kain did not inform Maytown of this development.

The record contains much more evidence to similar effect. Email upon email, and meeting upon meeting, established the cozy relationship between mine opponents and Commissioners Valenzuela and Romero. *See, e.g.*, Emails at Exs. 92 (Valenzuela working with FORP president Coontz on opposition to mine, wishes Coontz a happy birthday), 192-193; 194 (Coontz offers to order concert tickets for herself and Valenzuela), 195; calendar entries at Ex. 98; *see generally* RP 1706:9-1710:2. While the Commissioners denied such a relationship on the stand, an email from the most prominent mining opponent to Commissioner Valenzuela bearing the salutation "Hi, tweetums" speaks for itself. Ex. 195, RP 1708:16-21. This close relationship would manifest itself, among other ways, in staff providing project opponents with opportunities to review communications to Maytown and the Port before they were sent, and project opponents providing the same opportunity to the County. RP 1332:3-12. Indeed, the County inadvertently submitted as evidence in this case an undated, unsigned draft, contained in the County's own files, of a letter FORP's attorney eventually sent to Kain. RP 3339:25-3341:5; *compare* Ex. 140

with Ex. 321. And County Manager Don Krupp diligently informed project opponents of staff meetings with Maytown and other developments, but did not tell the Port or Maytown when staff met with project opponents. RP 3046:7-3063:3 & Exs. 218-222, 26, 34.

The Commissioners made their personal opposition to the permitted mine the official policy for the County beginning in the fall of 2009, when Kain removed Tony Kantas – who had worked on the SUP for seven years – and assigned it to himself. RP 3335:24-3336:7.

In discovery Plaintiffs also learned that before Karen Valenzuela and Sandra Romero joined the BOCC in January 2009, they both signed a petition supporting FORP’s request that the County downzone the mine to prevent industrial uses and reduce residential density by 75%. Ex. 91 at 3-4; RP 1865:9-23; RP 1991:25-1992:12.

These two Commissioners then sat in judgment of the BHAS’s quasi-judicial appeal of the Hearing Examiner’s amendments decision, without revealing that **they were both members of the BHAS:**

Q: So at the time that you sat on the appeal of Friends of Rocky Prairie and the Black Hills Audubon Society and didn’t disclose your membership, you were not only a member of the Black Hills Audubon Society, you knew it had accepted money in exchange for not appealing; is that accurate?

A: Yes.

RP 1788:8-1789:9; *accord* RP 1822:23-1823:16 (Valenzuela was a “card-

carrying” BHAS member); 1884:20-1885:19 (Romero did not reveal her BHAS membership); 1716:17-20 (no commissioner disclosed BHAS affiliation). After she sat in judgment on her own appeal, Valenzuela continued to press for SUP invalidation, writing: “[i]t remains meaningful to me that BHAS is objecting to the requested amendments.” Ex. 31.

L. The Trial Court Excludes Evidence of Attorneys’ Fees as Damages

As mentioned above, the trial court did not permit Plaintiffs to present evidence of the attorneys’ fees they incurred in their successful (though Pyrrhic) effort to preserve the SUP. The evidence would have shown that Plaintiffs spent nearly two million dollars as a direct result of the County’s interference, not including money they spent in this damages action unrelated to compelling the County to abide by the law.

IV. RESPONSE TO APPELLANT’S BRIEF

Through its silence, the County’s opening brief concedes that the County intentionally interfered with the mine for the improper purpose of preventing its opening.⁵ Rather than argue that elected officials and staff behaved properly – which would plainly contradict the facts – the County argues that its preclusion theories shield it from liability for the intentional acts its elected officials and staff took to defeat Plaintiffs’ business

⁵ This intent is implicit in the jury’s verdict finding liability in tortious interference and for violation of Maytown’s constitutional rights under 42 U.S.C. § 1983.

expectations. Neither the law nor the facts support the County's theories.

Further, the County's theories apply only to one subset of the County's intentional interference with the mine: staff's faux-legislative creation of a hearing examiner SUP amendment process. Far from "the critical decision of the County," Br. at 52, this was but one of many actions that subjected the County to liability. The County is liable because the sum total of its actions created such a toxic environment that Maytown could not trust the SUP and could not continue doing business. Even if the Court ignores the amendments process entirely, the facts *still* support the jury's verdict.

A. Standard of Review.

The trial court's denial of a motion for summary judgment on evidentiary grounds is not reviewable where, as here, the jury has returned a verdict based on that evidence. *Washburn v. City of Federal Way*, 169 Wn. App. 588, 608-10, 283 P.3d 567 (2012), *aff'd*, 178 Wn.2d 732 (2013). A pretrial order denying summary judgment can be reviewed only if it involves a question of law. *See McGovern v. Smith*, 59 Wn. App. 721, 735 n. 3, 801 P.2d 250 (1990). Review of questions of law is *de novo*. *Dewar v. Smith*, 185 Wn. App. 544, 552-53, 342 P.3d 328, *review denied*, 355 P.3d 1153 (Wash. 2015).

A court will not overturn a jury verdict if substantial evidence

exists to support it. *Larson v. City of Bellevue*, __ Wn. App. __, 355 P.3d 331, 341 (2015). Hence, to overturn the jury verdict, the County must demonstrate that the record did not contain “a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question,” interpreting the evidence “most strongly against” the County and “in the light most favorable” to Plaintiffs, and assuming the “truth of [Plaintiffs’] evidence and all inferences that can be reasonably drawn therefrom.” *Washburn*, 169 Wn. App. at 606

To overturn the trial judge’s refusal to grant a new trial, the County must demonstrate that the trial court abused its discretion, in that its decision to deny a new trial was “manifestly unreasonable or based upon untenable grounds.” *Collings v. City First Mortgage Servs., LLC*, 177 Wn. App. 908, 917-18, 317 P.3d 1047, 1053 (2013) (citations omitted), *review denied*, 179 Wn.2d 1028, 320 P.3d 718 (2014); *Harrell*, 170 Wn. App. at 408-09.

B. Thurston County is Liable for Interfering with Maytown for an Improper Purpose and Through Improper Means

Land use law—and specifically the Doctrine of Finality—exists to insulate permittees from shifting politics. This case, like *Alger* and the tortious interference cases discussed below, shows why. Plaintiffs purchased an *issued, final permit* that gave them the right to mine. The

permit battle was fought and won four years before the events described above. RP 60:15-61:3 Vol. 7 [afternoon]. Then, when County politics changed, elected officials and staff employed every means they could – legal and illegal – to prevent the permitted use. RP 1322:10-14. The Supreme Court described such politically motivated interference with an issued permit as a “**reprehensible misuse of governmental power.**” *Alger v. City of Mukilteo*, 107 Wn.2d 541, 548-52, 730 P.2d 1333 (1987). If anything, the abuses documented here are more egregious than those discussed in *Alger* and allied cases discussed below.

The elements of tortious interference include: a business relationship that is known to defendant; intentional interference that causes a breach or termination of the relationship; interference for an improper purpose or through improper means; and damages. *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 557, 166 P.3d 813 (2007). The County does not deny its knowledge of the business relationship, nor the termination of that relationship. It challenges neither the jury’s finding of causation nor its damages award.

Instead, the County argues only that any interference was not improper, but the County addresses only the hearing examiner process the County imposed. The County’s theory is that, if that process was valid as a matter of law, the County interfered only through proper means and has

no liability. This is incorrect, as we demonstrate in section C below. But even if the SUP amendment process were valid as a matter of law, there is still a mountain of evidence justifying the jury's conclusion that the County tortiously interfered with Plaintiffs' business relationships, such as the fallacious "letter to proceed," the unsupported staff decision to prevent all ground-disturbing activities, and the decision to conduct SEPA review.

The County's arguments ignore the fact that "improper interference" includes acts taken for improper *purposes*, even if the means selected are otherwise proper. "A cause of action for tortious interference arises from **either** the defendant's pursuit of an improper objective of harming the plaintiff **or** the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships." *Westmark*, 140 Wn. App. at 558 (emphasis added); *accord Pleas v. City of Seattle*, 112 Wn.2d 794, 803-04, 774 P.2d 1158 (1989). Even if the amendments process were a proper *means*, the County is still liable for damages arising from that process because staff acted for an improper *purpose*.

A regulator acts for an improper purpose when it actively undermines valuable rights created by an issued entitlement the regulator itself approved after years of process at great private expense. The desire to further a political agenda or gain political approval at the expense of a permittee is an improper purpose for regulatory action. *See, e.g., Pleas*,

112 Wn.2d at 805; *Westmark*, 140 Wn. App. at 560; *cf. Maranatha Mining Inc. v. Pierce Cty.*, 59 Wn. App. 795, 801 P.2d 985 (1990) (community displeasure cannot be the basis of a permit denial). Because County staff and elected officials acted with the improper purpose of killing a permitted project and defeating private business expectancies, the County is liable even if *none* of the means it employed were improper.

Commissioner Valenzuela best summarized the County’s culpable attitude toward the mine when she issued her directive to staff: **“Find me an emergency.”**⁶ This statement encapsulates the County’s determination to use both improper purpose and improper means to defeat the uses the County itself had previously permitted. RP 1772:8-18 (Vol. 8, p. 87).

Valenzuela’s statement was only the tip of the iceberg. By the time Maytown abandoned the mine, Maytown had learned:

1. Staff prohibited mining under the issued permit until staff issued a “letter to proceed,” despite knowing no such letter was required by Code, RP 3277:15-3278:25;
2. Staff would not even *process* a request for a letter to proceed until it reviewed a memo from project opponents outlining their view of the

⁶ This statement contrasts sharply with the non-culpable sentiment of a Kitsap County regulator in *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 352 P.3d 807 (2015): “the County staff and elected officials believe that they have *actively worked to find ways within the law to deny this project.*” *Woods View* at 812.

Port's compliance with SUP conditions, Ex. 361 at 1 ¶ 2 & RP 89:25-91:3 [Vol. 7 afternoon];

3. After Commissioners Valenzuela and Romero joined the Commission, Mike Kain removed the planner who had worked on the project for seven years and who issued a binding determination of SUP validity. Kain then assigned Maytown to himself, and, with no new information, reversed the determinations of SUP compliance and validity, RP 2963:5-2965:14;
4. Kain required the permittee to seek an amendment of the SUP to retroactively erase non-compliance with deadlines that staff agreed were environmentally irrelevant;
5. Staff wanted to delay the start of mining to allow project opponents time to raise funds to purchase part of the area. *See* Ex. 62 at 2. When Maytown declined to volunteer to rearrange the order of mining to preserve the "best" habitat to allow opponents time to raise funds for a purchase, then asked the Examiner to require the re-ordering;
6. Staff asserted jurisdiction over water rights, a subject that the County knew is clearly and exclusively the province of the State Department of Ecology, RP 3339:3-23 & Ex. 114 at 21; Ex. 14 at 18-19; RP 2959:25-2962:9 (Moore); RP 1131:1-8l, 1136:4-16 (Hempelmann);
7. In contravention of well-established case law that they understood, the

Commissioners required staff to argue to the Hearing Examiner that the 2009 critical areas ordinance – which even the County’s own website acknowledged was prospective only – should be applied to the SUP, which was issued in 2005. Staff acknowledged this position could eliminate 40% of the minable area, which is designated under the GMA as “mineral land of long-term commercial significance”;

8. While granting the Black Hills Audubon Society’s appeal, the BOCC manipulated precatory language in an MDNS to fabricate an SUP condition in support of a ruling so lacking in basis the superior court would later summarily reverse it on appeal, adjudging it arbitrary and capricious as well as knowingly unlawful;
9. The County Commissioners did not disclose their membership in the Black Hills Audubon Society before granting the Society’s quasi-judicial appeal, and would not do so until discovery in this lawsuit ;
10. Staff imposed expansive new groundwater monitoring requirements without providing the staff hydrogeologist with the facts necessary to evaluate the Groundwater Monitoring Plan that the County’s then-hydrogeologist *and* Hearing Examiner approved in 2005;
11. After Kain determined, consistent with decades of practice, that staff could make the amendments decision, Ex. 62 at 1, 5-7 & RP 1354:3-21, the BOCC’s attorney directed staff, for the first time, to send

minor amendments to the Hearing Examiner, RP 3301:2-3302:6;

12. Knowing Maytown wanted to avoid a Hearing Examiner process, Kain assured Maytown as late as July 2010 that staff could decide the amendments request if Maytown reduced the number of amendments. Maytown did so twice, only to learn in discovery that the *BOCC's attorney* told staff that it could no longer make minor SUP amendments – and nobody explained why the BOCC's attorney was suddenly advising the Resource Stewardship Department;
13. Staff prohibited any ground-disturbing activities, including necessary pre-requisites to mining such as off-site road improvements, until the SUP amendments process was completed, while acknowledging that the required improvements would produce no environmental harm;
14. Staff prohibited use of the property's gravel for required offsite road improvements that had no express timing requirement, but that staff required prior to mining, even though doing so would have less impact on the environment than shipping the materials from a competitor;
15. Staff prohibited mining prior to completion of a state-requested road project on a state highway, despite the fact that the condition had no timing requirement and the state's engineer told Kain that the project could wait until mining generated more than 100 truck trips per day;
16. Three weeks before the BOCC remanded the SUP, Staff proposed to

allow pre-mining work, such as the 1000' long, 15' high berm, only if Maytown pledged to undo such work should the SUP be invalidated;

17. Commissioners directed staff to conduct additional SEPA review, *see* RP 1847:18-1850:16, even though, as the Hearing Examiner agreed, the amendments were not an “action” requiring SEPA review;

18. Commissioners and the County Manager met repeatedly, in private, and without notice to Plaintiffs, with project opponents, then made opponents’ positions the County’s positions;

19. Commissioners and the County Manager consistently informed project opponents of meetings and other developments on the SUP, without ever informing the Port or Maytown;

20. Finally, after 17 months of delay, Kain issued the “Letter to Proceed,” which closes with: “if necessary to meet the standards of the code, the Examiner may impose additional conditions on the operation at the time of the five year review.” Ex. 1. Not only does this misstate the law, it demonstrates that staff continued to believe it could impose new conditions on a permitted, active mine – a position the current County Manager would attempt to defend at trial. RP 2967:22-2970:13 & 2973:8-2975:16.

In light of this litany of official misbehavior and official animus toward the mine, and all the additional evidence admitted at trial that

cannot fit within the confines of even an overlength appeal brief, Maytown could not reasonably depend on its permit. Maytown therefore could not make needed investments, could not post bonds, and could not give the personal guarantees necessary to bid the large projects that might have ensured the mine's success. This is exactly why courts have developed the Doctrine of Finality. Without that certainty, businesses fail.

The County (Br. at 52-53) minimizes this evidence by asserting that this mine was already doomed by the time the amendment process was completed. Not only does the County rely on its own tortious action to shield itself from liability, the evidence demonstrates otherwise. For example, had staff handled the amendments, Maytown could have begun ground-disturbing activities immediately, while complying with the County's expanded groundwater monitoring requirement. Even with a hearing examiner process, staff could have allowed Maytown to complete pre-mining conditions, and even commence mining above the water table. *See* 973:1-5 & Ex. 16. The evidence demonstrates that any missed groundwater reports (which happens routinely, RP 1008:16-1009:1), had no value for protecting groundwater, RP 952:6-22, and that the County's expanded groundwater monitoring was inappropriate for a gravel mine. RP 1006:14-21. In short, the jury could conclude, based on the evidence, that there was no reason to require that all amendments be processed and

all appeals exhausted before Maytown could begin any work.

Some of the County's actions rendered Maytown's performance literally impossible for a time, but such literal impossibility is not necessary for liability; a defendant is liable if it makes the option of terminating an expectancy more attractive than performing. The County is liable to Maytown if the County's culpable actions made Maytown's performance "more expensive or burdensome," Restatement § 766A, and the County is liable to the Port for "inducing or otherwise causing" Maytown not to perform, Restatement § 766.⁷ "Inducing" means:

situations in which **A causes B to choose one course of conduct rather than another**. Whether A causes the choice by persuasion or by intimidation, B is free to choose the other course if he is willing to suffer the consequences.

Id. Comment h (emphasis added). These are questions of fact for the jury and a huge volume of evidence, for more than enough to satisfy the substantial evidence standard, supports the jury's findings that the County's egregiously abusive course of conduct was far beyond what any reasonable business could tolerate.

Plaintiffs prevailed before the jury because the cascade of evidence of official interference for improper purposes and through improper means shows the County intentionally vitiated Maytown's rights under the SUP

⁷ Washington courts have adopted both Restatement sections. *See Eserhut v. Heister*, 52 Wn. App. 515, 518, 762 P.2d 6 (1988).

and killed the real estate deal. The County's argument addresses only one part of this larger course of conduct, and not even the most important one. Even if the amendments process – and its attendant delay – were valid as a matter of law (and it is not), the County is not liable for merely delaying mining. Rather, the County is liable because the sum of its actions destroyed the finality of the SUP, and Maytown could not proceed without that certainty. The County's argument falls far short of demonstrating that, even if its legal theories were correct (and they are not, as discussed below), the jury's verdict would be unsupported by substantial evidence.

C. The County's Preclusion Theories Regarding the Amendments Process Lack Merit

The County advances two preclusion theories: one based on LUPA and one on collateral estoppel. However, the County's preclusion arguments address only the process whereby the County required amendments to the SUP to be reviewed and approved by the Hearing Examiner rather than by staff (hereafter the "hearing examiner amendment process"). The hearing examiner amendment process was but one step the County took to destroy Maytown's SUP rights, and, for the reasons just described, the jury's verdict is therefore supported by substantial evidence even if the hearing examiner amendments process were valid as a matter of law. In any event, the County's preclusion theories are wrong. **The**

Examiner decision on which the County relies could not have been appealed administratively or judicially.

Before addressing the County's arguments, the Court should understand the oddity of staff's decision to impose a hearing examiner amendment process. Minor non-compliance with permit conditions is utterly ordinary, and staff routinely takes appropriate enforcement action to ensure compliance. RP 1681:19-1682:19; 11:2-24 [Vol. 7 Afternoon], *see also* RP 1682:20-24. Here, by contrast, more than a year after Kantas confirmed the Port's compliance with the groundwater monitoring conditions, his boss, Kain, reversed and determined that (1) the Port was out of compliance with the SUP for failing to meet minor deadlines that Kantas knew had been missed before he confirmed compliance, and (2) the noncompliance could be corrected only by amending the SUP to retroactively eliminate those deadlines, even though the County always acknowledged the error caused no environmental harm. *See* Ex. 16 at 6 (underlined paragraph). As the Port's attorney argued in closing, this is like a trooper pulling over a driver for traveling 56 miles per hour on an empty highway in a 55 mile-per-hour zone, then, rather than writing a citation or issuing a warning, taking the keys away and telling the driver that she may not drive again until she convinces the legislature to retroactively raise the speed limit to 56.

The County's attempt to escape liability for this egregious abuse of power is baseless for several reasons. First, the Hearing Examiner SEPA decision the County claims should bar this action was in Maytown's favor, and Maytown could not have appealed it for several reasons. Second, by its plain terms, LUPA does not apply to damages actions like this one, and, because the Plaintiffs' damages arose from abuses of power that could not be corrected through a LUPA appeal, the County's contrary arguments are wrong. Third, the County's collateral estoppel argument fails for multiple reasons, chief among them the fact that the Plaintiffs' damages theory was consistent with the Examiner's decision.

1. The Examiner's Rulings Favored Plaintiffs And Could Not Be Appealed Under LUPA or Otherwise

In April, 2011, the Hearing Examiner approved the amendments to the SUP Maytown sought at Kain's insistence. Ex. 127. Plaintiffs asked the Examiner to approve the amendments so that they could commence permitted activities as quickly as possible. Every part of the Examiner's decision – including the passage on which the County relies – favored Plaintiffs and was consistent with their damages theory.

The Examiner approved the amendments on the merits and granted Maytown's appeal on the ground that SEPA review was not required. Ex. 127. The passage the County relies on – that staff exercised discretion to

require a hearing examiner amendments process – was part of the Examiner’s reasoning on Maytown’s successful SEPA appeal. *See id.* at 30 (heading “II. SEPA Appeals”). Recognizing that it had lost the SEPA issue, the *County* moved for reconsideration. *See* Ex. 125.

Now the County argues that the SEPA decision for which *the County* sought reconsideration was actually adverse to Maytown (and the Port, despite the fact that the Port filed no SEPA appeal⁸). But the fact that the Examiner’s reasoning did not go as far as Maytown asked when she granted the SEPA appeal does not render her decision “adverse” to Maytown. Mere disagreement with the manner in which an administrative tribunal reaches a decision is insufficient to establish aggrievement. *See Henrickson v. State*, 140 Wn.2d 686, 691 n.1, 2 P.3d 473 (2000); *State ex rel. Simeon v. Superior Ct.*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944). Accordingly, a prevailing party that objects to an administrative tribunal’s reasoning cannot appeal. *See City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 685, 743 P.2d 793, 796 (1987); *Telecomms. Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990).

Nevertheless, even if the procedural SEPA decision had been

⁸ The Port did argue at every opportunity that the hearing examiner amendments process was improper, and will continue to do so for as long as its attorneys draw breath. However, the Port did not file a SEPA appeal, Ex. 127 at 2, and any implications to the contrary in the Examiner’s decision are in error.

adverse to Maytown in some way, as discussed below, Maytown, as the prevailing party on the merits, had no means to appeal the decision.

a. SEPA prohibits multiple administrative appeals

Maytown's appeal to the Hearing Examiner was the only administrative SEPA appeal allowed by law because, with certain exceptions not relevant to this case, SEPA prohibits more than one administrative appeal of a SEPA procedural determination:

(3) If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:

(a) Shall allow no more than one agency appeal proceeding on each procedural determination (the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement); . . .

RCW 43.21C.075; *accord* WAC 197-11-680(3)(a). The Local Project Review act includes a similar prohibition. RCW 36.70B.060. Contrary to the County's argument to this Court,⁴ the TCC also prohibits a second administrative appeal to the BOCC of the Examiner's SEPA decisions. Ex. 125 at 2 (quoting TCC § 17.09.160.K prohibiting administrative appeals of hearing examiner's SEPA rulings).

Even if a second administrative appeal were allowed, SEPA also prohibits stand-alone SEPA appeals, either administrative or judicial:

⁴ The County chides Plaintiffs, writing that they "*refused* to exhaust what were undeniably their available administrative remedies." Opening Brief at 49. Plaintiffs hereby deny any administrative remedy was available. TCC 17.09.160.K.

The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.

RCW 43.21C.075(1). SEPA appeals must be combined with challenges to the underlying government action:

(2) Unless otherwise provided by this section:

(a) Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.

RCW 43.21C.075. Here, the underlying governmental action – the decision whether to approve the amendments to the SUP – was favorable to Maytown. Thus, there was no adverse “governmental action” Maytown could appeal to the BOCC, and therefore no appeal of a governmental action to support a SEPA appeal – of a ruling in Maytown’s favor.

b. Both SEPA and LUPA prohibited Maytown from judicially appealing the County’s land use and SEPA decisions

The BOCC denied FORP’s appeal of the Hearing Examiner’s amendment decision, an outcome unquestionably favorable to Plaintiffs. This decision was the only appealable “land use decision” regarding the SUP amendments, RCW 36.70C.020(2), but LUPA does not allow appeal of favorable decisions. LUPA requires that a petition for review of a “land use decision” set forth:

(7) A separate and concise statement of each error alleged to have been committed;

(8) A concise statement of facts upon which the petitioner relies to sustain the statement of error;

RCW 36.70C.070. Since the BOCC decision on FORP's appeal was favorable to Maytown, Maytown could allege no errors and no facts to sustain such non-existent errors. A petition for review of the BOCC's favorable decision on the SUP would have been defective as a matter of law as well as meaningless.¹⁰

Since there was no adverse *land use decision* for Maytown to appeal, Maytown also could not have judicially appealed the *SEPA decision* because SEPA absolutely prohibits a judicial appeal of a SEPA procedural determination unless such a SEPA appeal accompanies an appeal of the underlying government action:

(c) Judicial review under this chapter shall *without exception* be of the governmental action together with its accompanying environmental determinations.

RCW 43.21C.075(6)(c) (emphasis added).

In sum, even if one assumes that the Hearing Examiner's procedural SEPA decision was adverse to Maytown, Maytown could not have appealed to the BOCC because SEPA itself, the Local Project Review act, and the County code all prohibited such an appeal, and LUPA and SEPA together prohibited a later judicial appeal by Maytown of the favorable BOCC decision denying FORP's appeal. There also was no

¹⁰ This is in accord with general principals of appellate practice. For example, under RAP 3.1, only an "aggrieved" party may seek review by the appellate courts. Similarly, under the Administrative Procedures Act, only an "aggrieved party" may seek appellate review. RCW 34.05.526.

factual reason to appeal. The Hearing Examiner granted Maytown's SEPA appeal and her SEPA decision was just as favorable to Maytown as her approval of the amendments on their merits. As Mr. Hempelmann testified: "We won. We don't appeal when we win." RP 1463:22-1464:1.

c. LUPA does not apply to actions for damages that do not require reversal of a land use decision

The County's argument is also incorrect because LUPA "does not apply to . . . [c]laims provided by any law for monetary damages or compensation," RCW 36.70C.030(1)(c). Where, as here, damages do not depend on the correctness of a land use decision, a plaintiff may sue in tort without first appealing under LUPA. Both the Supreme Court in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013) and this Court in *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 352 P.3d 807 (2015), applied LUPA according to its plain language and rejected the same argument the County makes here.

In *Lakey*, homeowners alleged a taking. 176 Wn.2d at 926. They did not challenge the taking in a LUPA action; rather, they accepted the local government's action and filed an action seeking "just compensation." *Id.* The Supreme Court ruled that a LUPA action is not a prerequisite to filing an action for damages unless the damages depend on a judicial determination that the land use decision was invalid. *Id.* Similarly, in

Woods View, the appellant eventually received all the land use permits it sought, then sued in tortious interference on the theory that Kitsap County took too long to issue the permits. 188 Wn. App. at 10-11.¹¹ Kitsap County argued that the plaintiffs' failure to challenge the favorable land use decisions under LUPA precluded them from seeking damages. *Id.* at 24. Relying on *Lakey*, this Court rejected that theory. *Id.* at 25.

Like the city in *Lakey*, the County bases its argument on cases, such as *James v. Kitsap County*, 154 Wn.2d 574, 115 P.3d 286 (2005) and *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010), that require LUPA appeals of *adverse* land use decisions – decisions that themselves harm the plaintiff – prior to seeking damages.¹² Every case the County cites as an analogous administrative exhaustion requirement, Br. at 49 n.26, involved damages flowing from the administrative decision itself. In each of those cases, the damages would have been avoided by reversal of the offending decision.

¹¹ The County's brief attempts to distinguish *Woods View* by arguing that it applies only when the sole cause of alleged damages is delay. Opening Brief at 55. That position not only misstates the facts of *Woods View*, but improperly limits that case's holding. The logic of *Woods View* compels the conclusion that damages are recoverable without a LUPA appeal whenever they are caused by torts that do not depend on the correctness of a regulator's substantive decision on a permit application.

¹² The County cites *Durland v. San Juan County*, 182 Wn.2d 55, 240 P.3d 191 (2014), a case that does not address the applicability of LUPA to *favorable* land use decisions, or LUPA's express exemption for damages actions. *Durland* addressed the question of whether project opponents who received no notice of a land use decision could challenge the decision after the 21-day appeal period. *Id.* at 60-61. *Durland* is irrelevant.

In *Lakey*, however, the Supreme Court distinguished those cases from cases like this one, where damages could not be avoided by appealing the land use decision. As the Court wrote:

The cases the City cites are inapposite to the homeowners' claim, which only seeks compensation rather than a reversal or modification of a land use decision.

176 Wn.2d at 927. Similarly, this Court acknowledged in *Asche v. Bloomquist* that, absent a LUPA appeal, damages are limited only to the extent they depend on an unappealed land use decision: “**To the extent** that the Asches’ claim depends on challenging the validity of a land use decision, . . . the Asches were barred” 132 Wn. App. 784, 796, 133 P.3d 475 (2006) (emphasis added). Acknowledging that this passage contradicts its position, the County’s brief argues in a footnote that the Court may ignore it because it resembles Justice Sanders’s dissent in *James*. Opening Brief at 55-56 n.29. The County is wrong.

In *James*, the majority held that a permit condition requiring payment of impact fees was an adverse land use decision that must be appealed under LUPA prior to seeking recovery of the improper exaction. *Id.* at 586. The County incorrectly asserts that the reading of RCW 36.70C.030(1)(c) Justice Sanders advanced in dissent “was rejected by the majority.” Opening Brief at 55-56 n.29. While Justice Sanders urged the majority to rely on LUPA’s express exemption of damages actions, *id.* at

593-94 (Sanders, J. dissenting), because the respondents did not raise this argument, the majority expressly declined to address the exemption:

At no time have the Developers argued they are not subject to the procedural requirements of LUPA because their claims fall within one of the exceptions enumerated in RCW 36.70C.030(1).

Id. at 586-87. By contrast, Plaintiffs here squarely argue that RCW 36.70C.030(1)(c) applies, and *James* offers no guidance on the question.

Here, as in *Lakey* and *Woods View*, Plaintiffs' damages do not depend on the correctness or incorrectness of any land use decision. Rather, the damages depend on the delay and interference the County caused with the intent to destroy Plaintiffs' expectations. There is no exhaustion requirement in tort, and recovery of such damages requires neither a meaningless and improper appeal of the BOCC's favorable decision upholding the Hearing Examiner's decision to approve the SUP amendments nor a non-existent appeal of the Examiner's SEPA decision.

In addition, the County's argument is inconsistent with the centuries-old requirement of tort law that plaintiffs mitigate or avoid damages. Requiring plaintiffs to appeal *favorable* land use decisions would require them to incur additional damages as they pursue meaningless land use appeals instead of proceeding with their projects. By accepting the BOCC's decision affirming the SUP amendments, Maytown furthered its efforts to begin mining as soon as possible, thereby

mitigating its damages consistently with tort law.

In the cases cited by the County, the damaging act *is* the land use decision, and reversal can remedy or prevent harm. Here, by contrast, the damages Plaintiffs suffered are independent of the various favorable decisions. Unfavorable land use decisions would have inflicted additional damages, and Plaintiffs would have appealed them just as they did successfully appeal the BOCC's five-year review decision. The culpable actions supporting the damages here had already occurred when the County issued its favorable decisions. The damages do not arise out of the Hearing Examiner's decision, they arise from staff's extended efforts, at the behest of two of the County Commissioners, to prevent mining in 2010 pursuant to a permit issued in 2005.

d. Exhibit 449 Has No Preclusive Effect

The County makes a great deal of noise about Exhibit 449, an email from Maytown's attorney to his clients discussing a potential appeal to the BOCC of the Hearing Examiner's decision. Mr. Hempelmann sent this email on April 25, 2011, 16 months after Mike Kain reversed Tony Kantas' unappealed decision that the SUP was valid. The email focuses on preserving Maytown's ability to recover damages already caused by this 16-month delay, and assumes without analysis that Maytown could appeal the Hearing Examiner's favorable SEPA decision. For all the

reasons discussed above, this assumption was unwarranted.

Nevertheless, Mr. Hempelmann's analysis of the damage issue was accurate and appropriate. He was doing what any good attorney would do in such a situation: analyze how to preserve his clients' right to seek redress for 16 months of harm, and he correctly concluded that the Hearing Examiner's decision was consistent with his belief that "the County staff, under pressure from FORP and the Commissioners, chose the most burdensome and lengthy approach" to amend the SUP. Ex. 449. In other words, even though the Hearing Examiner determined, during the course of her SEPA analysis, that County staff had the discretion to require a hearing examiner amendment process, that determination says nothing about whether the County exercised its discretion for an improper purpose or otherwise committed torts that damaged Maytown.

Nothing about this privileged communication from Maytown's attorney to his clients¹³ precludes Maytown from obtaining relief from the County's tortious conduct. And of course a privileged communication from *Maytown's* attorney to his clients has no effect on the *Port's* ability to obtain relief from the County's torts.

As Exhibit 449 correctly asserts, the Examiner's decision was

¹³ Maytown waived the privilege with regard to this and hundreds of other communications so that Mr. Hempelmann could testify.

entirely consistent with the evidence admitted at trial, which demonstrated that whenever staff exercised discretion with regard to the SUP, it chose the most onerous path possible, furthering the improper purpose of imposing delay and expense on Maytown. *See* RP 3302:24-3310:18. Had the Hearing Examiner agreed that the amendment process was *illegal*, that determination would have been yet another example of the improper *means* the County used to delay the commencement of mining pursuant to the issued SUP. By contrast, had the Examiner concluded that the County code *required* a hearing examiner amendment process, she would have taken the amendment process off the table for purposes of a tort action, leaving for the jury all the *other* actions staff took to delay mining pursuant to the issued SUP. But the Hearing Examiner instead found that County staff had the discretion to require a formal amendment process, which, as Mr. Hempelmann wrote his client, allowed the Port and Maytown to argue that the County exercised its discretion for the improper purpose of preventing the mine from opening.

In other words, how County staff chose to exercise its discretion was relevant to whether the County acted with an improper purpose to prevent mining pursuant to the issued SUP. When faced with a range of options from simple enforcement to a formal hearing examiner amendment process preceded by a SEPA threshold determination, staff

had the discretion to choose the latter, most onerous option. Within the context of all the other actions the County took, at the instigation of two of its three Commissioners, to prevent mining pursuant to an issued permit, the amendments process was no more than one example of how the County acted for an improper *purpose* through otherwise proper *means*.

2. Collateral Estoppel Does Not Apply Here

Despite its unclean hands, the County asks the Court to exercise its equitable powers to preclude *both* Maytown *and* the Port from arguing that the County is immune from any liability based on staff's decision to impose a hearing examiner amendment process,¹⁴ but collateral estoppel cannot preclude Plaintiffs' damages action. First, as explained above, **the theory Plaintiffs presented to the jury was *consistent with the Hearing Examiner's ruling***. After staff reversed its unappealed position that the amendments procedure was minor, the Examiner held only that staff had discretion to require a hearing examiner amendments process, which says nothing about whether the County acted for improper purposes.

In addition, collateral estoppel does not apply here for four reasons. First, the County's unclean hands preclude equitable relief. Second, because no party asked the Examiner to deny the amendments, the Examiner did not "necessarily determine" whether the process was

¹⁴ The Port did not file a SEPA appeal and was not a party to Maytown's SEPA appeal.

improper. Third, the land-use issues presented to the Hearing Examiner were not identical to the tort issues in this case, e.g., the Hearing Examiner had no jurisdiction to rule on the County's state of mind, and she did not have the benefit of the evidence that the Plaintiffs later uncovered during discovery. Finally, a court should not use an equitable doctrine to work an injustice. The jury found the County liable for \$12M. It would be manifestly unjust to bar these damages based on an unappealable Hearing Examiner decision on an ancillary issue that formed but a small part of the evidence of County wrongdoing presented to the jury.¹⁵

a. The Court Should Not Rely on Equity to Relieve An Intentional Tortfeasor of Liability

Collateral estoppel is an equitable doctrine, *Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001), and a party seeking relief in equity must have clean hands. *See, e.g., Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940) (“Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy.”). Equity cannot shield an intentional tortfeasor from liability.

¹⁵ The collateral estoppel argument is limited to the propriety of the hearing examiner amendments process, but because that process was only one of dozens of interfering actions that supported the jury's verdict this argument does not support reversal of the jury's determination of liability for the reasons discussed above in Section IV.B

A necessary corollary of the jury's findings – none of which the County challenges here – was that the County lacked clean hands. The jury found that elected officials and staff intentionally acted to prevent the use of the County's own issued permit and kill Maytown's business that depended on that permit. The jury found that the County's intentional behavior shocked the conscience. The trial court ruled as a matter of law that the highest elected officials in the County behaved arbitrarily and capriciously. As such, granting relief in equity would require this Court to *abuse* its equitable powers. *Cf. Henry v. Russell*, 19 Wn. App. 409, 416, 576 P.2d 908 (Div. 2 1978).

b. The Issue of the Propriety of the Amendment Process was Not “Necessarily Determined”

Collateral estoppel requires the issue to have been necessary to the earlier determination. *See, e.g., Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). It was never necessary for the Examiner to review or determine the question of the propriety of the hearing examiner amendments process, because both the Port and Maytown requested that the Examiner *grant* the amendments regardless of their propriety. No party asked the Examiner to dismiss the amendments request as improper, so it was not necessary for the Examiner to determine the question before approving the amendments on their merits.

c. The Issues Before the Hearing Examiner Differed From the Issues Before this Court

While collateral estoppel requires the prior issue to be *identical* to the later issue, *Hadley*, 144 Wn.2d at 311, the land use issues before the Examiner differed from the torts at issue here. The County’s statement that “the underlying issues were litigated to a final decision at the administrative level,” Br. At 59, finds no support in the facts. The facts relevant to the damages claims – most notably, the County’s purpose in interfering – were not litigated before the Hearing Examiner, nor could they have been since those facts are not relevant to the issues decided in an administrative land use hearing. As discussed above, the Hearing Examiner decided only that the County had the discretion to require a hearing examiner process but made no ruling on motive.

The County’s claim that the Hearing Examiner “ruled that the County did not act for an improper purpose or by improper means,” Brief at 57,¹⁶ is therefore flatly incorrect. She made no such ruling! A hearing examiner has no jurisdiction to judge her employers’ motive in requiring a given process, as it is irrelevant to whether an application meets code. No evidence of purpose was offered. The Examiner had no reason, and no

¹⁶ The County’s concession at p. 57 of its brief that “public pressure” was a reason that the amendment hearing was required is *itself* evidence of the County’s improper actions. Under *Maranatha Mining* and similar cases, the County cannot impose additional, onerous land use entitlement processes simply because doing so is politically popular.

jurisdiction, to adjudicate, for example, state-of-mind, duty, breach, proximate cause, and damage. In addition, discovery in a hearing examiner proceeding is very limited, and no discovery was conducted on the tort issues presented to the jury until after the Hearing Examiner ruled. Thus, the jury examined a completely different set of facts than the Hearing Examiner. Because the damages claims involve separate considerations and different evidence from those before the Examiner, preclusion is inappropriate.

Similarly, because the Examiner has no jurisdiction over whether the County's acts interfered with Maytown's contract with the Port, no evidence of causation was presented to the Examiner. A hearing examiner cannot rule on issues such as diminution in the mine's value resulting from County interference; Maytown's inability to bid major contracts due to uncertainty created by the County's interference; the propriety of the County's prohibition of pre-mining work prior to amendment; or on any of the other issues that were relevant to the County's intentional interference.

Finally, the questions presented to the Examiner were different from those presented at trial. Maytown argued to the Hearing Examiner in its SEPA appeal that the amendments process was not permitted. By contrast, Plaintiffs argued at trial that the decision to require a hearing examiner amendment process was one decision in a string of decisions

that the County made in the course of the County's improper (and culpable) effort to prevent operations under an issued permit.

d. Preclusion Would Work Substantial Injustice

Because it would work substantial injustice in favor of a party with unclean hands, this Court, sitting in equity, should decline the County's invitation to bar valuable claims. *See Shoemaker*, 109 Wn.2d at 507. Here, the jury found that the County's intentional acts caused \$12M in damages – out of the \$40M in damages the evidence supported. The County seeks to preclude this entire damages action because of the Hearing Examiner's ruling on a collateral SEPA issue – a ruling that was not only part of Maytown's *successful* SEPA appeal, but one that, as established above in section V.B, Maytown could not have appealed. Giving the Hearing Examiner the final say on a subsequent damages action that only obliquely implicates a portion of the Examiner's reasoning would work a substantial injustice. Equity should not place so much weight on the Hearing Examiner process.

Similarly, collateral estoppel does not apply when the parties in the prior action lacked sufficient motivation to fully and vigorously litigate an issue. *Hadley, supra*, 144 Wn.2d at 315. The County argues that the “injustice” prong is only relevant to procedural irregularity, Br. at 58-59, but *Hadley* is to the contrary, 144 Wn.2d at 312. The Court allowed the

defendant to testify how an accident occurred despite the failure to appeal a \$95 traffic fine. *Id.* To determine whether the doctrine would work an injustice, the Court examined whether the “the party against whom the estoppel is asserted [had] interests at stake that would call for a full litigational effort.” *Id.* The Court wrote:

Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice. To that end, we hold it is not generally appropriate when there is nothing more at stake than a nominal fine. ***There must be sufficient motivation for a full and vigorous litigation of the issue.***

Id. at 315 (emphasis added).

Hadley applies fully here because Maytown had no reason, and no opportunity, to challenge the abusive nature of the amendments process (as opposed to whether the County had discretion to use this process) before the Examiner. Maytown’s overriding interest was in starting mining as quickly as possible. Even if an additional SEPA appeal had been available, Maytown simply had no “interest at stake” in appealing further because the Hearing Examiner approved the amendments that Maytown requested. Plaintiffs asserted their position that the County lacked authority to implement the hearings process to preserve the argument for appeal if the Hearing Examiner denied the amendments. The Hearing Examiner’s decision on the issue mooted the procedural challenge. It would be ironic if they were precluded from now seeking

damages, not due to waiver, but *because* they raised the issue earlier.

D. The County Negligently Damaged Plaintiffs

The County's brief does not dispute the jury's conclusion that the County failed to act with due care, but rather relies on technical defenses – the Public Duty Doctrine, a new “compromise and settlement” argument, and collateral estoppel – to escape liability. As discussed herein, none of these theories are availing. To overturn the jury's verdict, the County therefore must demonstrate that no rational person could find negligence based on the evidence in this record. But the evidence supporting the jury's verdict is not just adequate, but overwhelming. The County has not met its burden to overcome the jury verdict.

1. The Public Duty Doctrine Does Not Bar the Negligence Claims

The trial court instructed the jury according to the County's expansive reading of the Public Duty Doctrine (“PDD”), and the jury *still* found the County liable in negligence *and* negligent misrepresentation. The County owed a duty to these Plaintiffs because either the PDD does not apply, or the “special relationship” exception does.

The PDD “provides only that an individual has no cause of action against law enforcement officials for failure to act. Certainly if the officers do act, they have a duty to act with reasonable care.” *Coffel v. Clallam County*, 47 Wn. App. 397, 403, 735 P.2d 686 (1987). Here,

County liability is based on its affirmative acts – its affirmative misrepresentations and negligent actions – not its failure to act. Accordingly, the PDD has no application.

Even assuming the PDD applies, the special relationship exception establishes a governmental duty to a plaintiff who seeks and receives assurances from the government, then acts in reliance on those assurances. *Chambers*, 100 Wn.2d at 286. The evidence plainly supports the jury’s verdict on this point. And, once the special relationship is established, the County’s duty to the Plaintiffs is established, and analysis of liability proceeds according to traditional tort principles. The County offers no authority for the proposition (Br. at 62 n.31), that a special relationship ends, and a municipality owes no continuing duty, upon subsequent negligent acts that render the original reliance unreasonable.

The County’s brief focuses on one part of one official statement, reading it in the light most favorable to the County. On the County’s motion, however, the Court must look at *all* the evidence and grant all reasonable inferences to Plaintiffs. **Out of the years-long course of communications between Plaintiffs and County staff, the evidence establishes at least five exchanges, beginning in the fall of 2008 that each independently create a special relationship, apart from the one the County addresses.** The evidence of these assurances, and Plaintiffs’

reasonable reliance on each one, is summarized in the chart below:

Assurance	Reliance/Falsehood
<p>Fall 2008: Kantas responds to Port inquiry, confirming SUP remains valid, and, after reviewing compliance with SUP conditions including groundwater monitoring, writes that permittee is responsible for “remain in compliance” Exs. 87, 86, 85, 84, 83</p>	<p>The Port strikes its pending Hearing Examiner requests and markets the property as a permitted mine. Ex. 82, RP 774:7-775:7.</p> <p>Kain reversed the determination in Fall 2009 and requires amendment to groundwater monitoring conditions. Ex. 371.</p>
<p>October 2009: Kain confirms the SUP has no “skeletons in the closet” and that mining can commence within 30-60 days.¹⁷ RP 2226:17-2227:11; Ex. 122</p>	<p>Port and Maytown move forward with negotiations on Purchase and Sale Agreement. RP 2145:23-2149:7</p> <p>County would prevent mining for 18 months after closing</p>
<p>Feb. 2010: Kain confirms that amendments are minor. Ex. 371 at 2 (minor/major decision made at time of request for letter to proceed); Ex. 67 at 18-19 (request for letter to proceed); Ex. 62 at 5-6.</p>	<p>Maytown and the Port close the sale. <i>Compare</i> Ex. 384 (preparing to cancel PSA) with Hedge, RP 787:9-788:1 (“[W]hile it wasn’t great news, we could proceed with closing of the property.”); <i>accord</i> R. Lloyd (RP 2149:7-2150:2).</p> <p>Staff sent amendments to Hearing Examiner. Ex. 55.</p>

¹⁷ This is not an assurance that mining would commence within 60 days of closing, for Kain properly had no control over that. Rather, this is an assurance that the County would not seek to prevent mining, which would prove false when staff delayed commencement of ground-disturbing activities for 14 months and mining for 17 months.

Assurance	Reliance/Falsehood
April 2010: Kain and Fancher confirm orally that additional amendments were minor and that no SEPA review was required. RP 1136:20-1152:8	Maytown submits request for minor amendments beyond those confirmed to be minor in the Feb. 2010 memo. Ex. 59. Staff sent all amendments to Hearing Examiner and required SEPA review. Ex. 55.
July 2010: Kain tells Maytown that reducing scope of amendments could return process to “minor” RP 1361:6-1362:2; Kain cross RP 3312:15-3313:22 & Ex. 49	Maytown twice reduces the number of requested amendments, each time delaying the process while staff re-issues notice. RP 3204:15-24; Exs. 37; 22 BOCC attorney decided staff could no longer make minor SUP amendments. Kain cross

In *Taylor v. Stevens County*, the court wrote: “A duty of care may arise where a public official charged with the responsibility to provide accurate information fails to correctly answer a specific inquiry from a plaintiff intended to benefit from the dissemination of the information.” 111 Wn.2d 159, 171, 759 P.2d 447 (1988). The evidence demonstrates that Plaintiffs repeatedly sought accurate information from the relevant County officials and those officials failed to provide correct information, to the Plaintiffs’ serious detriment.

Rather than address the whole body of evidence, the County addresses only the February 2010 assurance, and, in parsing that communication, ignores the context from which the jury could conclude

that the meaning is both clear and constituted an assurance by the County.¹⁸ In December 2009, when Kain wrote for the first time he would require SUP amendments, he wrote that staff would decide whether the process would be minor or major “upon submittal of a formal request to amend, **or at the time of request for a Letter to Proceed.**” Ex. 371 at 2 (emphasis added).¹⁹ The Port requested a letter to proceed. Ex. 67 at 18-19. In response, Ex. 62 at 1, Kain wrote:

As no earth disturbing or mining activity has taken place, although the deadline was not met, at this time, staff do not consider this a significant issue. Such minor timeline change may be approved by staff upon submittal of an application for amendment.

Ex. 62 at 5.²⁰ Kain confirmed on the stand that this language means what it says: the County had determined that the amendments were minor and could be handled by staff, RP 3297:19-23; 3315:5-11, just as Plaintiffs had understood it at the time. Plaintiffs relied on this statement when they closed the sale; as Jack Hedge testified, “while it wasn’t great news, we could proceed with closing of the property”, RP 787:9-788:1. No authority supports the County’s argument that reliance becomes unreasonable when a party takes steps to protect its interests, such as the

¹⁸ Extrinsic evidence of context is admissible, and critical, to the interpretation of a writing. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

¹⁹ The County ignores the emphasized language and asserts that staff would only make the major/minor determination upon submission of an application to amend. Brief at 61.

²⁰ Kain used similar language elsewhere in the document.

protective appeal the Port filed but did not prosecute. Ex. 127 at 14 ¶ 12.

Even dissecting Kain’s language as the County requests confirms the meaning Plaintiffs view and provides substantial evidence for the jury’s verdict on negligent misrepresentation. The phrase “at this time” qualifies only whether staff considered the issue significant in light of the fact that no earth-disturbing or mining activity had taken place, suggesting the conclusion could change if such activity did occur (which it did not). The word “may” does not mean “might,” as the County suggests. (Br. at 61 n.30). Rather, the word “may” in that context means “has the authority to,” a position the BOCC’s attorney would abandon when she decided – for the first time in County history – that staff may not to make minor SUP amendments. The phrase “may be approved by staff upon submittal of an application for amendment” means only that staff would decide whether to approve the request, not that staff might switch processes entirely.

Arguing that its own strong-arm tactics shield it from liability, the County insists (Br. at 62) that Maytown’s acquiescence to staff’s expanded groundwater monitoring requirements meant mining could not commence in 2010, which is incorrect as a matter of fact, and irrelevant to the question of the existence of a duty. It is incorrect because, even under the improper groundwater monitoring requirement, mining could have started in September 2010 (after the second sampling session required by

Romero). Ex. 63. It is irrelevant because the “reliance” goes only to the special relationship, which establishes the existence of a tort duty. The question of whether the County breached that duty is separate, and properly analyzed under traditional tort principles.

The Port requested Kain’s determination of whether the process would be major or minor, and he provided it. The County now attempts a post-hoc reinterpretation of Kain’s memo to create equivocation where none exists, attempting to preclude liability based on assurances that both speaker and recipient understood. Nothing in the County’s argument provides any reason for the Court to conclude that the jury’s verdict was unreasonable in light of the obvious meaning of Kain’s memo and the other evidence proffered by Plaintiffs.

This case is different from the building permit cases the County relies upon. In those cases, the plaintiffs asked staff a legal question about zoning or building codes that the plaintiffs could have verified for themselves, and the courts decline to hold the government liable when the answer proves to be wrong. *See, e.g., Taylor*, 111 Wn.2d at 171 (building code compliance); *Meaney v. Dodd*, 111 Wn.2d 174, 179-80, 759 P.2d 455 (1988) (project violated noise ordinance, but SEPA checklist said “minimal noise”); *Mull v. City of Bellevue*, 64 Wn. App. 245, 247, 823 P.2d 1152 (project designed to 19’, City gratuitously and erroneously said

height limit was 30’).

By contrast, this matter involved inquiries into “regulations” that Plaintiffs had no independent way to confirm for themselves – the ad hoc and illegal processes, like the letter to proceed and the amendments requirement, which were created by staff on the fly and are not codified anywhere for public review. Hence, this case is governed by *Rogers v. Toppenish*, in which only the planner knew the uses allowed on a given parcel because the zoning maps available to the public were not kept current. 23 Wn. App. 554, 560, 596 P.2d 1096 (1979). The city could be liable when the planner provided incorrect information to property owners seeking to comply with the city’s zoning codes. *Id.* at 561.

2. There Was no “Settlement and Compromise”

For the first time on appeal, the County argues (Br. 67-68) that Plaintiffs’ acquiescence to expanded groundwater monitoring constitutes a “settlement and compromise” that waived Plaintiffs’ rights to pursue damages for the County’s intentional conduct. The notion offends justice. The County dragged Maytown, kicking and screaming, into a process designed to justify the more onerous monitoring plan imposed on Maytown, despite the lack of environmental benefits of the new plan. In its effort to commence operations as quickly as possible, RP 1203:4-12, Maytown acquiesced, but always under protest. RP 1329:22-1330:21; RP

3265:11-20. Indeed, Plaintiffs repeatedly reminded the County that its actions continued to inflict damages. *See, e.g.*, Ex. 33. It would be a miscarriage of justice to conclude that the County’s abusive course of conduct implicitly excused it from liability for that very course of conduct.

Settlement must be reflected either in a written agreement or by assent made in open court. CR 2A; *Condon v. Condon*, 177 Wn.2d 150, 157, 298 P.3d 86, 89 (2013). Neither exists here. Further, any release of liability “must be expressly stated and not implied,” *id.* at 165, and the County’s waiver-by-implication theory therefore fails. *See id.* at 163-64; *Howard v. Dimaggio*, 70 Wn.App. 734, 739, 855 P.2d 335 (1993).

Of course, because the County did not raise the question at trial, the Court cannot presume that the jury would even agree a settlement took place. An evidentiary hearing is necessary to resolve disputed issues of fact. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000). To prevail here, the County would have to demonstrate that, under the terms of the purported settlement, “reasonable minds could reach only one conclusion” regarding the parties’ intent to settle. *Condon*, 177 Wn.2d at 161-62. The County has not done so.

The County’s argument recalls the “independent business judgment rule” the Supreme Court abandoned in *Blume v. City of Seattle*. 134 Wn.2d at 252. *Blume* held that the question of causation is decided

under traditional proximate cause analysis. *Id.* at 258-60. If there was a “settlement” here, the question for the jury is why. If Maytown “settled” because staff’s tortious activity forced it to, the County remains liable.

3. Collateral Estoppel Does Not Bar the Negligence Claims

Conceding the facts that support the jury’s finding of negligence, the County argues that a single issue argued to the Hearing Examiner to collaterally estop Plaintiffs from seeking any negligence damages at all. Brief at 68-69. The County does not explain why negligence *other than* that pertaining to the improper groundwater monitoring requirement should also be barred. Nevertheless, collateral estoppel should not apply here because (a) the County has unclean hands, (b) the issues were not identical (and, in the absence of discovery, could not have been fully explored), and (c) application of the equitable doctrine on these facts would work an injustice. The authority cited above in section C.2 applies to this argument, as well.

E. The County Negligently Misrepresented Facts to Plaintiffs’ Detriment

In the context of a business transaction, the same facts that support the existence of a special relationship also support a finding of liability in negligent misrepresentation. Simply substitute “representation” for “assurance,” and the two standards are virtually identical. Although the County argues that the “clear and convincing” standard was not met, this

is a question of fact for the jury, and the County’s brief, which does not address the majority of misrepresentations made by staff (some of which are summarized above in the table in § D.1), does not explain why the overwhelming evidence does not satisfy the burden. The County does not challenge the jury instructions on the heightened burden of proof, and the jury still found the County liable in negligent misrepresentation.

The County’s argument that an actionable misrepresentation must involve a then-existing fact misstates Washington law. Liability in negligent misrepresentation turns on whether *information*, not “fact,” is correct; it “is based upon negligence of the actor in failing to exercise reasonable care or competence in *supplying correct information . . .* and . . . supplying information encompasses *obtaining or communicating the information.*” *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 547 (2002) (internal quotes omitted). “Thus, under the Restatement, a negligently obtained or communicated opinion will constitute ‘false information’ for purposes of a negligent misrepresentation claim.” *Id.*

Even if an existing fact were required, the misrepresentations here were of existing fact, not promises of future action. For example, Kantas stated as a matter of fact in 2008 that the SUP was still valid; Kain proved that wrong when he reversed Kantas in 2009 based on the same information available to Kantas in 2008. Similarly, in response to the

Port's request, Kain stated in February 2010 that the applicable process – a then-existing fact – was minor, not major. That proved false later in 2010 when the BOCC's attorney sent minor amendments to the hearing examiner for the first time in County history. Finally, Kain stated as late as July 2010 that reducing the scope of requested amendments could cause the process to revert to minor (a fact: staff can and did decide minor amendments); yet Elizabeth Petrich, the *BOCC'S attorney*, told Kain that staff could no longer make minor SUP amendments. The jury properly held the County liable for these misrepresentations.

F. The Jury's Conclusion That The County Violated Maytown's Constitutional Rights In Violation of 42 USC § 1983 Is Fully Supported By The Evidence.

Applying the “shocks the conscience” standard advocated by the County, the jury specifically found that the County, acting through its BOCC, violated Maytown's constitutional due process rights, and that these violations proximately caused Maytown to suffer \$4 million in damages. RP 3971. Maytown is therefore entitled to damages under 42 U.S.C. §1983, and attorneys' fees and costs under 42 U.S.C. § 1988 because the County, acting “under color of any statute, ordinance, regulation, custom, or usage, of any State” subjected Maytown to a “deprivation of” Maytown's Constitutional right to substantive due process.

The jury's verdict is supported by voluminous evidence demonstrating that the County Commissioners and staff engaged in a single-minded, determined campaign to stop Maytown from mining, and employed a variety of outrageous and illegal tactics to attain this goal.

The County offers two arguments, asserting, despite the overwhelming record evidence to the contrary, that Maytown's constitutional right to substantive due process was not violated, and that the jury should not have found that the County's conduct shocked the conscience. Neither argument makes sense.

First, while conceding that Maytown "had a property interest in the SUP," (Br. 69) the County nonetheless claims (Br. 70) that Maytown did not establish a cognizable property right. This is incorrect. When Maytown purchased the property, it also purchased a valid SUP, which became final in 2005, good for a period of twenty years of mining, allowing Maytown to mine gravel so long as it complied with the conditions of the SUP. RP 1101.12-25; 1166.12-1167.10. Because its property rights are vested, Maytown is entitled to the protection of the Fourteenth Amendment, which protects Maytown from government deprivation of "property without due process of law." U.S. Const., 14th Amdt. As the Ninth Circuit has observed: "landowners have 'a constitutionally protected property interest' in their 'right to devote [their]

land to any legitimate use.’ An arbitrary deprivation of that right, thus, may give rise to a viable substantive due process claim.” *Action Apartments Ass’n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007) (citations omitted).

The County relies on *Dorr v. Butte County*, 795 F.2d 875 (9th Cir. 1986), but *Dorr* decided only that a probationary employee has no vested employment right. In this case, it is undisputed that Maytown had a vested property right arising from the 2005 SUP, and nothing in *Dorr* entitles the County to use contrived and extra-legal procedures like those involved here as a weapon to destroy property rights. On the contrary, the Washington Supreme Court, following the “vast majority of federal courts,” *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 125, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079 (1993), has concluded that a violation of substantive due process rights arises from land use procedures if, as documented here, there is a substantial infringement of state law prompted by animus directed at an individual or a group, or a “deliberate flouting of the law that trammels significant personal or property rights.” *Mission Springs, Inc. v. Spokane*, 134 Wn.2d 947, 970, 954 P.2d 250 (1998).

The County’s second argument (Br. 72-78) is that, despite the jury’s findings that the County’s sordid course of conduct shocks the

conscience, the evidence does not as a matter of law “shock the conscience.”

The County concedes that the jury was instructed, using the jury instruction it submitted, to apply a “shocking to the conscience” standard to Maytown’s Section 1983 claims (Br. 71). The County offers no reason to believe that the jury improperly found its “conscience shocked” by the County’s egregious abuse of power. And, if the County’s claim is that the trial court erred in failing to grant the County’s summary judgment motions, those decisions are unreviewable for the reasons stated in the “Standard of Review” section of this brief. If the claim is that the trial court erred in failing to grant the County’s motion for a new trial, the County fails to meet the heavy burden it must bear on that question. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990) (“the importance of the specific facts and circumstances relating to the property and the facts and circumstances relating to the governmental action militate against summary resolution in most cases” involving substantive due process violations).

In any event, the courts have regularly found that egregious official conduct much less egregious than that demonstrated here is sufficient to justify an award of damages under 42 U.S.C. § 1983. Making clear that even a single improper act of a government official can justify

damages under Section 1983, *Mission Springs*, 134 Wn.2d at 962, the Washington Supreme Court has so ruled at least three times. In *Mission Springs*, the Court reversed the trial court's grant of summary judgment for Spokane, finding that where the plaintiff had a vested right to develop its property, the City's two-month delay, granted at the behest of project opponents, in issuing a grading permit so that the City could conduct a study at its own expense, justified submitting the plaintiff's Section 1983 claim to the jury because the City had no legal authority to delay issuing the permit. 134 Wn.2d at 965-67.

In *Lutheran Day Care*, 119 Wn.2d 91, 96-97 & 125, the Court found that damages under Section 1983 were justified by the County's thrice-repeated refusal to grant a building permit after a court found the refusal improper, even though there was no evidence of intent to destroy property rights, as is clear in this case. And in *Sintra, Inc. v. City of Seattle*, ruling on a complaint asserting that the City repeatedly delayed processing the plaintiff's request for a master use permit and attempted to impose charges on the plaintiff under a Housing Preservation Ordinance that had been struck down by the courts, the Court overturned the trial court's grant of summary judgment, holding that "Sintra's complaint is more than sufficient to state a cause of action" under Section 1983 because it showed a "deliberate flouting of the law that trammels significant

personal or property rights. “ 119 Wn.2d 91, 12 & 23, *cert. denied*, 506 U.S. 1028 (1992).²¹ *See also Norquest/RCA-W Bitter Lake Partnership v. Seattle*, 72 Wn. App. 467, 481, 865 P.2d 18 (upholding lower court’s award of damages under Section 1983 where City arbitrarily delayed issuance of building permit in response to political pressure and improperly sought to require master use permit), *rev. denied*, 124 Wn.2d 1021 (1994).

Other courts have also found substantive due process violations in circumstances similar to those at issue here, although with far less outrageous official conduct. For example, in *County Concrete Corp. v. Township of Roxbury*, plaintiffs applied to the Township’s Planning Board to merge two tracts so the plaintiff could extend its sand and gravel extraction operations. The gravel mine owner filed a complaint alleging that “Township officers ‘engaged in a campaign of harassment designed to force [owner] to abandon its development,’” including “false accusations, verbal disparagement and the imposition of illegal conditions and restrictions on their business.” 442 F.3d 159, 170 (3rd Cir. 2006). Reversing the lower court’s grant of summary judgment, the court held the

²¹ After remand, the trial judge ruled that the City’s actions were so irrational that they violated Sintra’s due process rights and therefore justified an award of damages under Section 1983. However, the damage claim failed because the jury found the City’s unjustifiable actions did not proximately cause Sintra’s damages. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 654-55 (1997).

Township's "obstructive course of conduct" states a substantive due process claim upon which relief can be granted. 442 F.3d at 177. *See also Schneider v. County of Sacramento*, 2014 WL 4187364 at *7-*8 & n. 1 (E.D. Cal. 2014) (where county imposed large increase in reclamation bond "without an accompanying change in conditions justifying the increase," which was the result of "collusive political activity between various members of state and local government" and neighbors opposed to the mine, substantive due process violation was question for jury).

Likewise, the Ninth Circuit has repeatedly found violations of substantive due process rights from abuses far less odious than the County's in this case. For example, in *Del Monte Dunes*, the Ninth Circuit reversed the trial court's dismissal of a developer's due process claims where some, but not all, of the abuses demonstrated here occurred. The city's professional staff determined that the developer fulfilled all 15 conditions in its development permit, but the city council denied the developer permission to proceed, finding violations of some conditions that were factually unsupported, and also requiring the developer to provide letters of compliance from federal agencies, an impossible condition because, as with the Department of Ecology water rights at issue in this case, those agencies could not provide such assurances. 920 F.2d at 1504-06. The Court rejected a grant of summary judgment in favor of

Monterrey, concluding “[w]e cannot say . . . that the actions of the city council . . . were not arbitrary and irrational and, thus, a violation of plaintiff’s substantive due process rights.” *Id.* at 1508.

Similarly, in *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), the Court affirmed the District Court’s conclusion that the defendant city violated plaintiff’s substantive due process rights where the plaintiff met all the regulatory requirements to obtain a building permit, but the city council delayed issuing the building permit for two months, allowing it enough time to rezone the area to exclude plaintiff’s activities. 857 F.2d at 1302-03. Because it was taken without any legal basis, the Court concluded that the city’s action constituted a violation of the plaintiff’s due process rights and held the city (and the individual council members involved) liable for the resulting economic damages. *See also David Hill Development, LLC v. City of Forest Grove*, 2012 WL 5381555 at *24-*25 (D. Or. 2012) (jury found City violated developer’s substantive due process rights where City actions were unsupported by applicable codes and regulations resulting in one-year delay of permit approvals; court found “the record is sufficient to support the jury’s determination that the City’s actions . . . were an abuse of power lacking reasonable justification”); *Ruff v. County of Kings*, 2008 WL 4287638 at *13 (N.D. Cal. 2008) (rejecting motion for summary judgment where plaintiff

alleged County delayed processing his permit request for unsupported reason and denied permit based on ordinance that had not yet been adopted, in effort to create delay).

Relying entirely on cases from outside the Ninth Circuit, the County (Br. 72-77) attempts to fashion a construct that would effectively render substantive due process a nullity, eliminating any right for property owners to recover damages even in cases where government officials extort bribes from the property owner. The County's argument fails for several reasons.

Most obviously, there is simply no support in the Ninth Circuit or Washington law for the extreme version of the "shocks the conscience" standard the County attempts to manufacture. In addition, much of the County's argument (Br. 72-75) is based on the proposition that substantive due process should not be applied to "run-of-the-mill" land use disputes. But, as the record evidence amply demonstrates, the disputes in this case, and the County's extreme and outrageous course of conduct, is anything but run-of-the-mill. There is, accordingly, no threat that awarding damages to Maytown here will result in entangling the federal courts in ordinary land use disputes. The "shocks the conscience" standard is intended to avoid such entanglements, not to immunize government officials from extreme abuses of power like those at issue here. *See*

Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir.) (due process is intended to guard against official processes “tainted with procedural irregularity,” not “run of the mill dispute[s]” involving land use), *cert. denied*, 459 U.S. 989 (1982). Unlike this case, nearly every case relied upon by the County involves a run-of-the-mill land use dispute. *See Mongeau v. City of Marlborough*, 492 F.3d 14, 19 (1st Cir. 2007) (“we discern nothing more than a run-of-the-mill dispute between a developer and a town official”), *cert. denied*, 552 U.S. 1131 (2008); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (although evidence that official action was motivated by “personal and political animus, totally unrelated to legitimate government functions . . . might support a due process violation,” plaintiff failed to provide such evidence); *SFW Arecibo Ltd. v. Rodriguez*, 415 F.3d 135, 141 (1st Cir. 2005) (“the Developer’s claim is essentially that the Planning Board made an erroneous decision in violation of state law”), *cert. denied*, 546 U.S. 1075 (2005); *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 286 (3rd Cir. 2004) (dispute is “the kind of disagreement frequent in planning disputes” and “local officials are not accused of seeking to hamper development in order to interfere with otherwise constitutionally protected activity at the project site”); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 39 (1st Cir. 1992) (permits were denied for

“commonplace reasons” rather than for political retaliation or “some other constitutionally impermissible reason”); *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1103-04 (8th Cir. 1992) (City relied on ordinance that all parties believed to be valid); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992) (zoning board merely violated administrative “arbitrary and capricious” standard, but “citizens have a substantive due process right not to be subjected to arbitrary or irrational zoning decisions”). *See also, e.g., Mongeau*, 492 F.3d at 18 (“conduct that is the product of a deliberate and premeditated decision might be conscience-shocking whereas the same conduct might not be if undertaken in the heat of the moment”).

In any event, many cases from other Circuits have found substantive due process violations where land use officials have engaged in an extreme, arbitrary, and extra-legal course of conduct much less shocking than the County’s conduct here. *See, e.g., Royal Crown Day Care, Inc. v. Dept. of Health*, 746 F.3d 538, 544-45 (2nd Cir. 2014) (evidence that defendant’s decision to shut down day care center based on improper motive states claim of Section 1983 substantive due process violation); *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 785 (2nd Cir. 2007) (reversing grant of summary judgment on substantive due process claim where process denying plaintiff’s was tainted with

“fundamental procedural irregularity”): *Simi Investment Co. v. Harris County*, 236 F.3d 240, 251 -54 (5th Cir. 2000) (county used non-existent park to deprive plaintiffs of access to their property in order to benefit favored political interests, which violates substantive due process), *cert. denied*, 534 U.S. 1022 (2001); *Brady v. Town of Colchester*, 863 F.2d 205, 208-09, 213 (2nd Cir. 1988) (town engaged in course of conduct to deny occupancy permit to plaintiff without legal authority in order to deny office space to rival political party): *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983); *Watrous v. Borner*, 2013 WL 3818591 (D. Conn. 2013) (rejecting motion for new trial where jury found substantive due process violation based upon evidence that town planning board acted outside its jurisdiction in attempt to defeat plaintiff’s vested property rights), *aff’d*, 581 Fed. Appx. 14 (2nd Cir. 2014) (unpublished); *Cornell Companies, Inc. v. Borough of New Morgan*, 512 F.Supp.2d 238, 261-62 (E.D. Pa. 2007) (denying motion to dismiss substantive due process claim where city’s “course of conduct” was designed to impermissibly delay opening of plaintiff’s facility in order to benefit politically favored interests). This includes cases from the First Circuit, which has gone well beyond the Ninth Circuit, or any other Circuit, in restricting substantive due process rights. *Brockton Power LLC v. City of Brockton*, 948 F. Supp. 2d 48, 68-70 (D. Mass. 2013) (city officials “often acted against advice of counsel,

to further their own personal and political interests, and while knowing there was no legal justification for their action”); *Collier v. Town of Harvard*, 1997 WL 33781338 at *5-*7 (D. Mass. 1997) (where evidence suggests “improper motivation” by town planning board in denying permit, “plaintiffs’ claims can pass through this modest opening” left by First Circuit due process case law).

Finally, the most extreme language cited by the County is *dictum*. See *City of Chesterfield*, 963 F.2d at 1105 (no bad faith by City, so “[a] bad-faith violation of state law remains only a violation of state law” is *dictum*). In particular, the County relies heavily on the Sixth Circuit’s bizarre conclusion in *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1635 (2013), that solicitation of a bribe by a government official does not violate the victim’s substantive due process rights. But *EJS* turns on the Court’s conclusion that “[b]ecause EJS had no protectable property interest, its substantive due process claim must fail”). 698 F.3d at 862. Hence, the passage relied upon by the County is pure *dictum*, including the phrase “shake the foundation of the country,” which the County uses in an attempt to transmogrify the heightened “shocks the conscience” standard into a standard that would eviscerate the concept of substantive due process rights. *Id.* In any event, the Sixth Circuit’s *dictum* makes no sense legally.

It relies on precedent holding that “petty harassment of a state agent” does not violate substantive due process, *id.* (quoting *Vazquez v. City of Hamtramck*, 757 F.2d 771, 773 (6th Cir. 1985)). But forcing a property owner to pay a bribe to vindicate his property rights is far more than “petty harassment.” And even the cases relied upon by the County reject the outré notion that official bribery does not violate substantive due process. *See, e.g., Nestor Colon Medina*, 964 F.2d at 47 (substantive due process would be violated if “officials were bribed or threatened by the political leaders”).

V. CROSS-APPEAL: THE PORT AND MSG ARE ENTITLED TO AN AWARD OF ATTORNEYS FEES AS DAMAGES

A. Assignments Of Error

The trial court erred in granting the County’s Motion in Limine excluding evidence of attorneys’ fees, expended in the effort to preserve the SUP and avoid additional damages, as damages. RP 547:24-548:24.

B. Issues

1. Tortfeasors are liable for all reasonably foreseeable damages proximately caused by their torts. The County’s intentional interference forced Plaintiffs to spend money on attorneys, separate from this damages action, to repair harm and prevent additional damage. Should Plaintiffs be allowed to recover those fees as damages? **Yes.**

C. Legal Authority And Argument

As an exception to the general rule that a tortfeasor is liable for all

harm flowing naturally from their torts, the American Rule “cuts the causal chain” at attorneys’ fees incurred in an action for damages. However, the American Rule does not apply to damages such as doctor bills, mechanic bills, or any other professional fees incurred repairing the harm caused by a defendant’s tortious actions. Similarly, it should not apply to attorneys’ fees incurred repairing damage to intangible property such as a land use entitlement. Here, Plaintiffs did their best to repair the damage the County did to the SUP, spending more than \$1.5M in an effort to limit the damages to the \$12M the jury awarded. These are recoverable as damages, no different from any other professional expenses necessary to fix the harm caused by a tort.

Nevertheless, relying on the American Rule, the trial court granted the County’s motion in limine excluding evidence of Plaintiffs’ attorneys’ fees as damages. RP 547:24-548:24. For the reasons explained below, Plaintiffs therefore respectfully request the Court to remand the limited question of damages Plaintiffs incurred in the form of attorneys’ fees paid to defend their permits against improper County interference.

1. The American Rule Bars Awards of Attorneys’ Fees Incurred in Damages Actions, Not in Separate Legal Actions Proximately Caused by the Tort

Tortfeasors are liable for all damages proximately caused by their torts, which includes those that flow naturally from the tort and are

reasonably foreseeable at the time of the tort. Thus, when a driver runs down a pedestrian, the driver is liable for compensating for the victim for his pain, but also for all the medical bills the victim incurs. It is also reasonably foreseeable that a torted party will hire a lawyer to sue for damages, but American courts have decided that public policy demands the torted party bear her own attorneys' fees spent recovering tort damages. Those fees are *costs* in the damages action, and the logic behind the American Rule extends only to costs. *Damages*, even attorneys' fees caused by the tort, should remain recoverable.

The California Supreme Court succinctly summarized the difference between attorneys' fees-as-damages and the fees-as-costs-addressed by the American Rule:

When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss – damages – proximately caused by the tort. These fees must be distinguished from recovery of attorney's fees qua attorney's fees, such as those attributable to the bringing of the bad faith action itself. **What we consider here is attorney's fees that are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action.**

Brandt v. Superior Court, 37 Cal. 3d 813, 817, 693 P.2d 796 (1985)
(emphasis added).

While we have not located a Washington case directly on point,

several Washington cases analyzing equitable limitations to the American Rule employ the same logic as *Brandt*. These decisions allow recovery of fees proximately caused by the defendant's tort but spent in legal actions separate from, or even prerequisite to, a damages action. For example, in *Rorvig v. Douglas*, the Supreme Court reversed an 85-year-old rule and allowed recovery of attorneys' fees spent clearing a property title in a slander of title claim. 123 Wn.2d 854, 873 P.2d 492, 862 (1994). In doing so, the Court identified a common theme in other Washington decisions allowing recovery of attorneys' fees incurred in earlier actions necessitated by the defendant's intentional torts, including malicious prosecution and wrongful attachment and garnishment actions:

It is the defendant who by intentional and calculated action leaves the plaintiff with only one course of action: that is, litigation.

Id. at 862. There, as here, "the defendants actually know their conduct forces the plaintiffs to litigate." *Id.* Indeed, had Maytown and the Port not made the effort they did to preserve the SUP, the doctrine of avoidable consequences would likely bar recovery of damages in negligence. *See Cobb v. Snohomish County*, 86 Wn. App. 223, 230, 935 P.2d 1384 (1997) ("The doctrine of avoidable consequences, also known as mitigation of damages, prevents recovery for damages the injured party could have avoided through reasonable efforts.").

Similarly, Washington courts allow, as damages, recovery of attorneys' fees spent dissolving a wrongful injunction. *See, e.g., Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154 (1997); *accord Cecil v. Dominy*, 69 Wn.2d 289, 293-94, 418 P.2d 233 (1966). Finally, Washington courts, like the California court quoted above, award attorneys' fees to insured parties who sue to compel their insurance companies to provide coverage or defend lawsuits. *See, e.g., Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991). If defendant's actions force the plaintiff into litigation separate from the damages action, the fees incurred in the other action are recoverable.

2. The Washington Supreme Court Affirmed an Award of Fees-As-Damages in an Improper Permitting Action.

Consistent with the recognized limitations of the American Rule discussed above, the Washington Supreme Court affirmed an award of damages for tortious interference in *Pleas v. City of Seattle, supra*, that included attorneys' fees expended in an earlier action that challenged the propriety of the city's permitting actions. The *Pleas* fees were the same as those Plaintiffs seek to recover as damages here: costs Plaintiffs had to incur to defend their permit against tortious action by the regulator. Here, as in *Pleas*, the American Rule simply does not apply.

The facts of *Pleas* are reported in *Parkridge v. City of Seattle*, 89

Wn.2d 454, 573 P.2d 359 (1978).²² A developer sought to construct an apartment building in Seattle, and project opponents sought to downzone the property. *Id.* at 457. The City approved the downzone, *id.*, and refused to process the building permit application, *id.* at 458-59. Parkridge sued for a writ of certiorari reversing the rezone and a writ of mandate compelling the City to process the building permit. *Id.* at 459.²³ The superior court granted both, and the Supreme Court affirmed. *Id.* at 456.

Later, in *Pleas*, the Parkridge partners sued the City seeking damages in tortious interference. As the Supreme Court wrote:

As a result of the City's tortious interference, the court determined that Parkridge had been damaged in the total amount of \$969,468, which included . . . **attorney fees**.

112 Wn.2d at 799 (emphasis added). The Court of Appeals explained that the superior court's judgment included "attorney fees and costs incurred in *Parkridge v. Seattle*, supra." *Pleas v. City of Seattle*, 49 Wn. App. 825, 832, 746 P.2d 823 (1987) (*rev'd on other grounds*, 112 Wn.2d 794).

The damages in *Pleas* included attorneys' fees incurred litigating the regulator's illegal land use actions and refusal to cooperate. Although the American Rule was not argued, *Pleas* implicitly acknowledges that

²² Parkridge was a partnership owned in part by Riley and Nancy Pleas. *See Pleas*, 112 Wn.2d 794, 774 P.2d 1158 (1989) (caption).

²³ *Parkridge* arose before the adoption of LUPA, which replaced the writ of certiorari in the land use context. But the parallel to this case still holds, as Parkridge was forced to take legal action to reverse illegal land use decisions.

attorneys' fees incurred as a proximate result of tortious activity in the permitting context are recoverable in tort.

This case squares with *Pleas*. The County's intentional torts caused Plaintiffs to take legal action to defend the SUP and appeal arbitrary and capricious decisions affecting the SUP. The resulting attorneys' fees were reasonably foreseeable at the time of the tort, and they were spent repairing or minimizing the damage that flowed from the tort. They are recoverable as damages in this tort action.

3. Even If the American Rule Applies, Plaintiffs Can Recover Their Fees Due to the County's Bad Faith

Plaintiffs should be allowed to recover their attorneys' fees under the "bad faith" exception to the American Rule.²⁴ *See, e.g., Rogerson-Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927-28, 982 P.2d 131 (1999). Under this exception, the element most relevant to this case is "prelitigation misconduct," or what the court referred to as "'obdurate or obstinate conduct that necessitates legal action' to enforce a clearly valid claim or right." *Id.* (quoting Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 632-46 (1983)). Here, the jury concluded that County staff and elected officials

²⁴ This exception allows an aware of both the pre-litigation attorneys' fees discussed above (as damages) *and* the attorneys' fees incurred in the damages action (costs), although Plaintiffs seek only the former.

intentionally interfered to prevent mining, knowingly violating the foundational principles of Washington land use law in the effort to defeat the business interest. The trial court ruled that the BOCC acted arbitrarily and capriciously, and the jury determined that other actions of staff were similarly culpable. This is exactly the sort of bad faith that should support an equitable award of attorneys' fees.

In sum, this case is on all fours with *Pleas*, in which the court awarded, as damages, attorneys' fees incurred seeking to reverse improper land use decisions and compel the regulator's compliance with land use law. Plaintiffs here had no choice but to incur legal fees defending the SUP against attacks from FORP, BHAS, and the County itself – attacks that would not have occurred but for the County's intentional, negligent, and otherwise culpable acts. Fees incurred in such actions are recoverable as damages, and the trial court erred when it concluded otherwise.

VI. CONCLUSION

For these reasons, the Court should: (1) uphold the jury verdict in favor of Plaintiffs all respects; (2) reverse the trial court's decision to deny Plaintiffs damages in the form of attorneys' fees incurred to fight the County's abusive campaign to destroy their property rights and remand for the limited purpose of determining the amount of these damages; (3) award costs and attorneys' fees in accordance with 42 U.S.C. §§ 1983 &

1988 and RAP 18.1; and, (4) award cost of appeal to Plaintiffs in accordance with RAP 14.

RESPECTFULLY SUBMITTED this 12th day of October, 2015.

s/Steven J. Gillespie

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