74738-0

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

NO. 74738-0-I

COMMUNITY TREASURES d/b/a CONSIGNMENT TREASURES, a Washington not for profit corporation, JOHN EVANS and BONITA BLAISDELL, on behalf of themselves and all others similarly situated,

Appellants,

v.

SAN JUAN COUNTY, a political subdivision of the State of Washington,

Respondent.

BRIEF OF RESPONDENT

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Appendix A: San Juan County Ordinance 14-2013

Appendix B: SJCC 18.80.020(C)(4)

I. INTRODUCTION

This is an appeal of the amount of the fee paid as a condition to issuance of a building permit. The determination of the amount of the fee is based upon the project requiring the permit and the payment of the fee is a requirement for issuance of the permit. The permit fee is an intrinsic part of the permit itself. The fee cannot be separated from the permit. It cannot be addressed independently.

In San Juan County, appeals of all issues pertaining to building and land use permits are heard by the hearing examiner. The decision of the hearing examiner is a "land use decision" appealable under the Land Use Petition Act. Plaintiffs failed to comply with the San Juan County Code and with the Land Use Petition Act. This appeal should be denied and the decision of the superior court upheld.

II. RESTATEMENT OF ISSUES RELATED TO ASSIGNMENT OF ERROR

Is a determination of the price charged for a building permit application an integral part of a "land use decision" subject to LUPA which becomes final if not timely appealed?

III. STATEMENT OF THE CASE

On March 18, 2015, the Plaintiffs filed suit to obtain for themselves, and sought a class action for others to obtain, a partial refund of the fee paid

in connection with their application for each of permits issued by the San Juan County Department of Community Development. CP 001-016.

With respect to the building permit of Plaintiff Bonita Blaisdell (BUILDG 13-0192), the trial court found that the Ms. Blaisdell did not pay for the building permit, and therefore did not have standing to seek a partial refund. CP 219 and CP 221. With respect to the conditional use permit of Frank and Patricia Penwell, Trustees and Consignment Treasures LLC, the trial court found the conditional use permit was paid for by Consignment Treasures LLC, which was not a party, and not related to Plaintiff Community Treasures. CP 220 and CP 222. Therefore no party had standing to seek a partial refund on those two permits. CP 219 and CP 222. These trial court rulings regarding lack of standing have not been appealed. No assignment of error has been made with respect to the Blaisdell and the Penwell permits, therefore these two permits are not in issue and will not be discussed further.

Four permits remain, three in which the total price paid for each permit was $109.50 and one in which the total price paid was $763.60. The trial court was presented with planning department records and was therefore able to make specific findings and conclusions with respect to each of these permits. CP 218-221

One permit, an owner-builder permit number OWNBPX-12-0100, was applied for by John Evans on April 12, 2012 and a fee of $109.50 was paid, and the permit was issued, on April 25, 2012. CP 136. A total of 1061 days elapsed between the date the fee was paid and the permit issued, and the date this lawsuit was commenced. CP 218.

The second permit, a building permit number BUILDG-13-0197, was applied for by Frank and Patricia Penwell Trustees, on September 19, 2013, and a fee of $753.60 was paid on February 26, 2014. CP 136. The fee was paid for by CT Recycling, which at the time was the trade name for Plaintiff Community Treasures. CP 219. The permit was also issued on February 26, 2014. CP 136. A total of 376 days elapsed between the date the fee was paid and the permit issued, and the date this lawsuit was commenced. CP 219.

The third permit, a change of use building permit number BUILDG-13-0198 was applied for by Frank and Patricia Penwell Trustees on September 19, 2013 and a fee of $109.50 was paid on November 22, 2013. CP 136. The fee was paid by CT Recycling, which at the time was the trade name for Plaintiff Community Treasures. CP 219. The permit was also issued on November 22, 2013. CP 136. A total of 472 days elapsed after the date the fee was paid and the permit issued, and the date this lawsuit was commenced. CP 219.

The fourth permit, a change of use building permit number BUILDG-13-0199, was applied for by Frank and Patricia Penwell Trustees, on September 19, 2013 and a fee of $109.50 was paid on November 23, 2013. CP 136. The fee was paid by CT Recycling, which at the time was the trade name for Plaintiff Community Treasures. CP 219. The permit was also issued on November 23, 2013. CP 136. A total of 472 days elapsed after the date the fee was paid and the permit issued, and the date this lawsuit was commenced. CP 220.

The Complaint did not allege or state what portion of the fee was the amount of the overcharge with respect to any of the permits. In this appeal Plaintiffs acknowledge that the alleged amount is "very small." (Brief of Appellant at p. 24).

San Juan County responded to the Amended Complaint with an Answer, a Request for Discovery and a Partial Motion to Dismiss pursuant to CR 12(c). The purpose of the Motion to Dismiss was to obtain a court ruling regarding the applicability of the Land Use Petition Act, Chapter RCW 36.70C (LUPA), to the relief requested by each of the Plaintiffs.

In the Amended Complaint, Plaintiffs did not allege why the price paid for any one permit was more than the County's cost to process the permit and related environmental review as authorized by RCW 82.02.020. Instead Plaintiffs simply made allegations referencing budgeting documents

of the San Juan County Department of Community Development. Plaintiffs' complaint therefore is not with the amount charged on any single permit, but rather with how the revenue collected was spent.

No facts were developed regarding the cost to process permits as none were necessary at this stage of the case. The County rejects the Plaintiff' contention that the decision of the Court of Appeals in *Home Builders Association of Kitsap County v. City of Bainbridge Island* supports the proposition that proof of overcharge can be based upon the general accounting of the Department of Community Development. 137 Wn. App. 338, 350, 153 P.3d 231 (2007). In that case, the Court held that the trial court erred when it reached its decision on the reasonableness of the city's permit fees based on general accounting and cost allocation principles and the city's costs of regulation, instead of focusing on evidence of costs the legislature specifically allowed in RCW 82.02.020. Plaintiffs must show on a permit by permit basis that the amount charged does not cover the cost of processing the permit reviewing plans and conducting necessary environmental review. *Id.*

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IV. ARGUMENT

A. The Issues Have Been Narrowed by Plaintiffs' Failure to Appeal (Assign Error to) the Ruling that Community Treasures and Bonita Blaisdell Lack Standing.

It is well settled law that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error. *Avellaneda v. State*, 167 Wn. App. 474, 485 n. 5, 273 P.3d 477 (2012). Additionally, unchallenged findings of fact are verities on appeal. *State v. Kaiser*, 161 Wn. App. 705, 724, 254 P.3d 850 (2011).

The superior court held that Plaintiff Bonita Blaisdell did not pay for permit No. BUILDG-13-0192 and Plaintiff Community Treasures did not pay for permit PCUP00-13-0008 and therefore Community Treasures and Blaisdell each lack standing to challenge or claim refund to the amount paid. CP 221-222. Plaintiffs have not challenged the court's findings and provide no argument or citation to authority addressing the issue of standing. As such, the Court need not consider any issues relating to standing of Blaisdell or Community Treasures with respect to the Conditional Use Permit.

B. Standard of Review

The County was able to meet the high burden of CR 12(c) because Plaintiffs acknowledge that they have not made an administrative appeal and timely filed for judicial review of each building permit within the short

time limit require by LUPA. Knowing of this defect Plaintiffs ask this Court to rule that LUPA does not apply to the fee portion of a building permit application.

The application of LUPA to the allegations in a complaint goes to the subject matter jurisdiction of the court and is properly decided as a matter of law. *Stafne v. Snohomish County*, 156 Wn. App. 667, P.3d 225 (2010) *aff'd*, 174 Wn.2d 24, 271 P.3d 868 (2012) (Complaint and LUPA Petition dismissed for failure to exhaust administrative remedy by filing appeal to Growth Board).

The court will review questions of statutory interpretation de novo. *Berrocal v. Fernandez,* 155 Wn.2d 585, 590, 121 P.3d 82 (2005). In doing so, the court will attempt to determine and give effect to the legislature's intent and purpose in creating the statute. *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dept of Ecology v. Campbell & Gwinn LLC,* 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). To determine whether the fees charged are subject to the jurisdiction of the court under LUPA, the court should begin its analysis with the characterization of the fee, next examine the statutory framework and then consider similar cases.

C. Even if Incorrect, the Price Charged to Process a Building Permit Would be an "Overcharge" Not a "Tax", therefore Tax Law Jurisprudence Does Not Apply in this Case.

This case is properly characterized as a lawsuit for the refund of an alleged "overcharge" of regulatory permit fees. The characterization of an alleged overpayment as a "tax" is incorrect, as a matter of law.

The fact and amount of payment for each of the four permits at issue is not in dispute. Three permits paid the minimum flat-rate fee charge under the statute: $109.50. The fourth permit, a building permit, was charged and paid without protest based upon the valuation of the improvements. There is no allegation that there was an error in the computation of the improvements, or that an incorrect basis of value, formula or calculation was made.

To begin, the Plaintiffs' own characterization of the charge in the Amended Complaint uses the word "fee" -- every time it is mentioned. (See, Amended Complaint ¶¶ 1, 2, 11, 12, 15, 18, 24, 25, 28, 38, and Prayer for Relief ¶¶ 1 and 2, CP 15, 16).

Moreover, the Amended Complaint at ¶ 3 admits that the fees on building permits and land development are statutorily authorized by the third paragraph of RCW 82.02.020(3), which expressly allows reasonable fees to cover the costs the government incurs while approving permits,

processing applications, reviewing plans and preparing environmental statements. CP 2, 3. The relevant part of RCW 82.02.020(3) states:

> Nothing in this section prohibits cities, towns, counties, or other municipal corporations from collecting reasonable fees from an applicant for a permit or other governmental approval to cover the cost to the city, town, county, or other municipal corporation of processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW, including reasonable fees that are consistent with RCW 43.21C.420(6), 43.21C.428, and beginning July 1, 2014, RCW 35.91.020.

The meaning of RCW 82.02.020 is a question of law reviewed de novo. *Isla Verde Int'l Holdings, Inc. v. City of Camas,* 146 Wn.2d 740, 757, 49 P.3d 867 (2002). In the late 1970s, several counties authorized the imposition of fees on new development to pay for, among other things, parks, schools, roads, police, and fire services. Developers and homeowners who paid the fees sued, challenging the counties' authority to impose the fees. The Washington Supreme Court held that the fees were really taxes and that no statute granted local governments the authority to impose taxes. *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 650 P.2d 193 (1982).

In response to *Hillis Homes*, the legislature amended RCW 82.02.020, adding the third paragraph of RCW 82.02.020(3), quoted above. *See*, *R/L Assocs., Inc. v. City of Seattle,* 113 Wn.2d 402, 780 P.2d 838 (1989). The County readily acknowledges that as amended, the first paragraph of RCW

82.02.020 prohibits local governments from imposing direct or indirect taxes, fees, or charges on the development, subdivision, classification, or reclassification of land. However, Plaintiffs' attempt to invoke tax law jurisprudence by citing to *Hillis Homes* fails. *Hillis Homes* is no longer good law. Because that case has been superseded by the very statute the County relies upon for its authority to impose the fee, the Court must look to the statute, not *Hillis Homes*.

The Washington Supreme Court recognized the status of *Hillis Homes* in *R/L Associates Inc. v. City of Seattle* when it held:

> In fact, the cases implicitly recognized the importance of the statute [RCW 82.02.020] as a source of local government's authority to economically burden development, but gave the statute a narrow construction and limited application. However, in the light of the Legislature's clear intent as embodied in the statute's language, and the circumstances surrounding its enactment, we find that such a construction is not warranted, and will apply the statute according to its plain and unambiguous terms.

R/L Associates, Inc., 113 Wn.2d at 409.

In *R/L Associates* the Court reviewed cases invalidating charges by local government. Id. at 408-409. There is no case in which a small charge for a building permit at the minimum rate of $109.50 or a rate based upon value of the improvement has been found to be unlawful. Instead the types of charges cited by Plaintiffs that have been found unlawful, are charges for general revenue purposes unrelated to the permit sought by the property

owner. *See e.g. Margola Associates v. City of Seattle,* 121 Wn.2d 625, 640, 854 P.2d 23 (1993) (citing the principle that a governmentally imposed fee constitutes a tax rather than a regulatory fee when those paying the fee are not directly benefited by the services funded by the fee).

When the legislature uses different words within the same statute, it is presumed that a different meaning was intended. *Simpson Inv. Co. v. State, Dep't of Revenue,* 141 Wn.2d 139, 160, 3 P.3d 741 (2000). RCW 82.02.020 consists of two parts: in the first paragraph, a prohibition on certain "taxes, fees and charges," and then later in the third paragraph an express authorization for certain "fees." The fact that taxes are only mentioned in the prohibition portion of the statute and "fees" are authorized in the third paragraph, should be the end of the discussion, and demonstrate that a reasonable fee is allowed and it is not a "tax."

The statute expressly authorizes, and the ordinance provides, that the same people who require special attention and regulatory oversight due to their building and land use activity, should pay the costs for that work. This is in contrast to a uniform tax. As one commentator has put it, application fees are "charges to people who ask the government to pay them special attention, or whose activities give rise to special regulatory oversight." *Hugh D. Spitzer, Taxes vs. Fees: A Curious Confusion,* 38 Gonz. L. Rev.

335, 340 (2003) In this case, the charges collected for each of the four permits are the classical "regulatory fee." *Id.* at 363.

Plaintiffs do not quarrel with the County's authority to impose a fee in connection with building permits, instead they question the amount of the fee and they allege in the Amended Complaint that in certain years the fees amounted to an "unreasonable ... fee" or "overcharge." (See, Amended Complaint ¶¶ 2, 18, 31, 43). But that allegation, whether true or false, does not change the character of the fee. Collection of a lawfully imposed fee that exceeds a statutory general guideline in dollar amount does not convert or transform the fee into a tax. If a fee (or fee formula) does not meet the standards set out in RCW 82.020.020 in dollar amount, it is simply "excessive" and perhaps subject to correction, but it does not make the fee invalid or change its purpose or character as a "tool of regulation." See, e.g., *Teter v. Clark County,* 104 Wn.2d 227, 239-240, 704 P.2d 1171 (1985).

The precise way that fees are charged, collected and ultimately used by the County is not of importance, so long as fees collected are reasonable and used to pay the "cost of ... processing applications, inspecting and reviewing plans, etc." as required by RCW 82.02.020. In *United States v. Sperry Corp.*, the Supreme Court upheld a flat two-percent deduction from all awards made by the Iran-United States claim tribunal as a "user fee" even though the funds were not used to fund the tribunal, but were deposited

directly into the "United States Treasury." 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989). The Court noted that a user fee collected by a government agency only needs to be "a fair approximation of the cost of benefits supplied" and not "precisely calculated" with "billable hours." *Id.*

> This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied."

United States v. Sperry Corp., 493 U.S. at 60.

While *Sperry* has not been used in a case interpreting RCW 82.02.020, the ruling is consistent with *Teter v. Clark County,* where the Court held that a fee does not require "mathematical precision" among each category or class of user, and fees can be based upon "a practical basis," or "averages." 104 Wn.2d 227. Moreover, *Sperry* has been followed by the Washington Supreme Court in a lawsuit examining the practice of using a portion of money that a prison inmate received from relatives to pay for the cost of incarceration and payment of restitution. *Dean v. Lehman,* 143 Wn.2d 12, 32-33, 18 P.3d 523 (2001).

Absolute uniformity in rates is not required. See *Morse v. Wise,* 37 Wn.2d 806, 226 P.2d 214 (1951). The rates for each class must be internally uniform, but different classes may be charged different rates. *Morse,* at 812.

Further, only a practical basis for the rates is required, not mathematical precision. *Teter*, 104 Wn.2d at 240.

The fees in question in the present case were charged and collected pursuant to this statute and by the authority of a lawfully adopted ordinance (most recently, San Juan County Ordinance 14-2013) (copy attached). Plaintiffs acknowledge, as they must, that the purpose of the fees was to help pay the cost to the County in reviewing the permit application and making inspections. (See, Amended Complaint ¶¶ 30, 38 CP 10, 13). With these admissions the characterization of the charge as a classic regulatory fee is established.

Plaintiffs' statement that RCW 4.16.080(3) is the applicable three year limitation period is based upon a case involving impact fees that has been superseded by LUPA. (Brief of Appellant p. 9). Plaintiffs cite to *Henderson Homes v. City of Bothell,* 124 Wn.2d 240, 877 P.2d 176 (1994), but in *James v. Kitsap County* the decision in *Henderson Homes* was recognized as being superseded by the enactment of the Land Use Petition Act in 1995 and is no longer good law:

> In *Henderson Homes*, we held that a three-year statute of limitations applies to actions to recover invalid taxes under RCW 4.16.080(3) and "[t]he same principle applies to fees or charges, direct or indirect, on the subdivision of land when they do not comply with RCW 82.02.020." 124 Wash.2d at 248, 877 P.2d 176. We applied the three-year statute of limitations under RCW 4.16.080(3) prior to LUPA when no uniform procedure

> was in place to challenge the legality of impact fees. This conclusion is no longer viable in the wake of LUPA, which establishes uniform procedures and by its own terms is the "*exclusive* means of judicial review of land use decisions." RCW 36.70C.030(1) (emphasis added). Since we find that the County's imposition of impact fees as a condition on the issuance of a building permit is a land use decision, it necessarily follows that the procedures established by LUPA to challenge that decision dictate.

154 Wn.2d 574, 587, 115 P.3d 286 (2005) (Emphasis added) (discussed in detail, *infra*).

Plaintiffs mistakenly construe *Home Builders Association of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 153 P.3d 231 (2007) for the notion that they can show a discrepancy between budgeted revenues and budgeted expenditures in the Community Development Department to make out a claim of "overcharged" fees. But the approach of using general accounting numbers was expressly rejected in *Home Builders* with instructions to go back and follow the statute, which states the fees is allowable to cover the costs of "processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW." *Id.* at 350. This means that the approach alleged in the Complaint of an overall budget shortfall is not the right approach, instead there must be allegations and evidence that the fee charged to each person was an overcharge.

In *Home Builders*, the court examined a ten percent surcharge on building permit applications and a 100 percent increase in the planning review fee under RCW 82.02.020 using the jurisprudence of regulatory fees, not the jurisprudence of taxes. The Court of Appeals, Division 2 took a strict statutory approach and remanded the case to the trial court, requiring the city to show that the fee is "reasonable" and that the fee category captured the "specific costs included in the fees" that are allowed by RCW 82.02.020:

> Thus, the trial court erred when it reached its decision on the reasonableness of the City's permit fees based on general accounting and cost allocation principles and the City's costs of regulation, instead of focusing on evidence of costs the legislature specifically allowed in RCW 82.02.020.
> ...
> We have held that the burden is on the City to show that the fees it imposes are fully within the statutory exceptions and are reasonable and remand the matter for retrial. During that process, evidence of the specific costs included in the fees will be before the court. If the trial court is persuaded that the City is in compliance with the legislature's limitations on these costs and fees, the City may present evidence relating to the reasonableness of the calculations and the resulting fees.

Id. at 350-51 (emphasis added).

Notably, the court in *Home Builders* did not declare any part of the fee to be a tax. And the decision relied heavily on *Isla Verde International Holdings v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) which was

also based upon RCW 82.02.020, and holds that a challenge to conditions of a permit are subject to LUPA. *Id.*

D. The Statutory Framework of LUPA Applies to All Parts of the "Land Use Decision," Including the Computation and Imposition of the Application Fee.

LUPA grants the superior court *exclusive jurisdiction* to review a local jurisdiction's land use decisions, with the exception of decisions subject to review by bodies such as the Growth Boards. RCW 36.70C.030(1)(a)(ii). The legislature's purpose in enacting LUPA was to "establish[ ] uniform, expedited appeal procedures and uniform criteria for reviewing [land use] decisions [by local jurisdictions], in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. *Woods v. Kittitas County.*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007).

The County agrees that the place the Court should start is with the definition of "land use decision" in RCW 36.70C.020(1). Plaintiffs' edited quotation is written in a way that artificially limits the scope of a "land use decision" contrary to the statute. (Brief of Appellant pp. 12-13).

The statute provides that a "land use decision" is:

> [A] final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:
>
> (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer

> streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses.

RCW 36.70C.020(1).

The San Juan County Code expressly describes the 19 elements of a complete "application." Element number 4 is the "applicable fee." SJCC 18.80.020(C)(4) (copy attached). Thus the payment of the fee is part and parcel of the application, just like the name of the applicant or description of the real property, detailed environmental reports and consideration of critical areas.

Each of the four building permits in this case is a permit required before land "may be improved" and hence each falls squarely in the definition of a "land use decision" under RCW 36.70C.020.

E. The Land Use Decision Includes All Parts of the Decision on the Permit.

Every building permit or land development permit has many integral steps or parts that are ultimately subject to review. Some intermediate decisions that are made during the processing of a permit include: (1) the selection of the permit type; (2) a determination of the proper fee; (3) calculation of the fee based upon the value of the project or time spent by staff; (4) a determination of whether an application is complete; or (5) a decision on whether to issue the permit with or without conditions.

Plaintiffs want to separate the application fee on each building permit from the building permit itself. Plaintiffs' approach defies common sense and the legislature's intent.

In *Samuel's Furniture, Inc. v. Dep't of Ecology*, the Washington Supreme Court used the analogy to court proceedings and refers to these smaller decisions in the permit process as "interlocutory" decisions, and explained they are part of the permit when the permit is issued and they are subject to review when the application process is terminated by the local government. 147 Wn.2d 440, 452-453, 63 P.3d 764 (2002). A local jurisdiction's decision concerning a building permit application is final for purposes of LUPA if a party "receive[s] the relief it had requested" and "[n]o additional issues remain[ ]." *Samuel's Furniture,* 147 Wn.2d at 453 (citing *Reif v. LaFollette,* 19 Wn.2d 366, 370, 142 P.2d 1015 (1943)).

The Plaintiffs' attempt to trivialize the importance of this landmark decision by omitting it from their briefing and writing that this analogy is something that originated from the County. (Appellant's Brief p.17).

An interlocutory decision is one that is not final, but is instead intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy. *Samuel's Furniture*, 147 Wn.2d at 452. This definition fits well the action

taken on the calculation of the fee for a building permit. It is a decision that is made after the application is filed, but before the permit is issued.

Plaintiffs write that "not all 'interlocutory decisions are subject to LUPA'" and in doing so suggest that those interlocutory decisions are not subject to appeal, ever. (Brief of Appellant at p. 17). That is not the holding of the case cited, *Pacific Rock Environmental Enhancement Group v. Clark County,* 92 Wn. App. 777, 964 P.2d 1211 (1998). That case held that LUPA provides for review only of "land use" decisions and because discovery orders are not included in the definition of "land use" decisions, the superior court had no jurisdiction under LUPA to review the hearing examiner's discovery order. *Id.* at 779.

As was further explained later by the Supreme Court in *Samuel's Furniture*, these interlocutory decisions will become final and subject to appeal when no additional decisions are to be made. 147 Wn.2d 440. In other words, it's a matter of timing and whether the decision is "final" not whether the decision is a "land use decision." The interlocutory decisions that are made during the course of processing a permit will become appealable when the building permit is issued.

It makes no sense to separate one part of the application from another for purposes of appeal. Analytically, the decision as to the proper fee to apply and the calculation of that fee is no different from other decisions that

are must wait until the final decision is made at which time it is subject to appeal. *See, e.g., Heller Bldg., LLC v. City of Bellevue,* 147 Wn. App. 46, 56, 194 P.3d 264 (2008) (holding that a city's stop work order that did not indicate specific code violations as required by local law was not a final land use decision); *Harrington v. Spokane County,* 128 Wn. App. 202, 212, 114 P.3d 1233 (2005) (holding that initial rejections of permit applications were not final appealable orders where county ultimately granted modified application for permit); *WCHS, Inc. v. City of Lynnwood,* 120 Wn. App. 668, 679, 86 P.3d 1169 (2004) (holding that a city letter denying a building permit, absent express language that the decision was final, constituted an interlocutory decision not subject to LUPA review); *Pacific Rock Environmental Enhancement Group v. Clark County,* 92 Wn. App. 777, 781–82, 964 P.2d 1211 (1998) (holding that a prehearing discovery order was not subject to appeal under LUPA); and *Stientjes Family Trust v. Thurston Cty.*, 152 Wn. App. 616, 624, 217 P.3d 379 (2009) (holding that a remand of a construction site plan was not a final decisions under LUPA because it did not conclusively determine the rights of the parties by settling the challenging party's entitlement to relief.).

As stated above, it is the legislature's strong statement of finality that guides this decision. LUPA's requirement of finality comports with the principle that judicial review on a piecemeal basis is generally disfavored.

See Fox v. Sunmaster Prods., Inc., 115 Wn.2d 498, 503–04, 798 P.2d 808 (1990); *State ex rel. Stone v. Superior Court, Spokane County,* 97 Wash. 172, 176, 166 P. 69 (1917). Indeed, courts have "long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions" before courts of law review administrative decisions of local jurisdictions. *James v. Kitsap County,* 154 Wn.2d 574, 589, 115 P.3d 286 (2005). In tandem with LUPA's exhaustion of administrative remedies requirement, RCW 36.70C.060(2)(d), the finality requirement, prevents a party from needlessly turning to a court for judicial relief when a local authority may still provide the requested relief. *See South Hollywood Hills Citizens Ass'n for Preservation of Neighborhood Safety & Env't v. King County,* 101 Wn.2d 68, 73–74, 677 P.2d 114 (1984) (discussing exhaustion of remedies requirement in context of challenge to plat approval for subdivision construction). In short, the finality requirement of LUPA eliminates "premature judicial intrusion into land use decisions." *Grandmaster Sheng–Yen Lu,* 110 Wn. App. 92, 101, 38 P.3d 1040 (2002).

To conclude, the application fee is part of the application that results in a land use decision and the appeal route of the application fee follows the same route as any other part of the application.

F. Case Law Shows that LUPA is Applied to a Wide Variety of Intermediate Land Use Decisions in Connection with Permits.

A review of other cases confirms that LUPA has been applied to many types of intermediate decisions made in the course of reviewing an application for building or land development permits. *See, e.g. Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014) (building permit decision subject to review by hearing examiner before LUPA proceeding – failure to exhaust administrative appeal is bar to LUPA action); *Knight v. Yelm,* 173 Wn.2d 325, 267 P.3d 973 (2011) (LUPA applies to action regarding preliminary plat under Chapter 58.17 RCW); *Sundquist Homes v. County of Snohomish*, 166 F.Appx. 903 (9th Cir. 2006) (LUPA applies to school impact fees); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) (LUPA applies to extensions of time for land user permits); *Tapps Brewing Co. v. City of Sumner*, 482 F.Supp. 1218, 1232-1233 (2007) (challenge under RCW 82.02.020 to upgrade to larger storm water pipes in exchange for granting permit and waiving certain permit fees barred by LUPA); *James v. Kitsap County*, 154 Wn.2d 574, 583-89, 115 P.3d 286 (2005) (challenge to impact fees assessed pursuant to RCW 82.020.020 as part of land use decision and barred by LUPA, which applies rather than three year limitations in RCW 4.16.080(3)); *Brotherton v. Jefferson County*, 160 Wn. App. 699, 249 P.3d 666 (2011) (denial of waiver for sewage

system requirement subject to LUPA deadline); *See also*, *Wells Fargo Bank v. Dept. of Revenue*, 166 Wn. App. 342, 360, 271 P.3d 268 (2012) (denial of interest on tax refund was "agency action"; strict compliance with administrative appeal procedures required by administrative procedures act with analogy to LUPA deadline as the exclusive means of review).

1. *James v. Kitsap County* – Impact fees are analogous to application fees.

The most analogous case is where the Washington Supreme Court held that LUPA applied to an action seeking refund of a mitigation impact fee assessed under the authority of RCW 82.20.020. *James v. Kitsap County,* 154 Wn.2d 574, 587–89, 115 P.3d 286 (2005). In *James*, the Court held that the refund request was subject to the 21–day time limitation of LUPA and declined to apply the typical three year statute of limitation. *Id.* at 587. The Court said that because, "the imposition of impact fees as a condition on the issuance of a building permit is a land use decision, it necessarily follows that he procedures established by LUPA to challenge that decision dictate." *Id.*

Even the dissent in *James* recognized that the majority decision holds that "*all* actions arising from a "land use decision" as defined in RCW 36.70C.020 are subject to LUPA," *Id.* at 591, Sanders, J., dissenting (emphasis in original). By the words used in the Amended Complaint the

Plaintiffs ***admit*** that the application fee is allegedly paid is a "threshold matter that allows a later land use decision to be made." (Amended Complaint paragraphs 24, 25, 28 and 29; CP 9, 10, Plaintiffs' Brief p. 14). This admission confirms the linkage between the payment of the fee and permit that is the land use decision.

Plaintiffs ask this Court to be the first to hold that the application fee is an exception to the rule that *all* actions arising from a land use decision are subject to LUPA. *James v. Kitsap County* is helpful because it is a decision of the Washington Supreme Court that involves a fee authorized by a different paragraph of RCW 82.20.020. The decision reflects the culmination of two decades of case law in state and federal courts that developed after the adoption of LUPA. These cases confirm the comprehensive scope of LUPA and its application to *all intermediate actions* in the land use decision process.

Plaintiffs point out that many application fees are assessed with little discretion other than the determination of the proper fee and the calculation of the fee according to the size or characteristic of the proposed development. (Plaintiffs' Brief p.14). But since 2002, the ministerial nature of the fee has no bearing on the applicability of LUPA. *See, Chelan County v. Nykreim,* 146 Wn.2d 904, 927-929, 52 P.3d 1 (2002) (holding "a plain

reading of the language of LUPA leads to a conclusion that it applies to both ministerial and quasi-judicial land use decisions").

Plaintiffs also seek to distinguish *James v. Kitsap County* noting that RCW 82.02.070 contains provisions specific to impact fees. Plaintiffs contend that the additional statutory provision for impact fees in RCW 82.02.070 such as separate accounts, spending within 10 years, and payment under protest means that these types of fees should be treated differently. (Plaintiffs' Brief p. 27-29). But the legislature only required that impact fees have some appeal process and that the appeal process "may follow the process for the underlying development approval" or may be resolved by "a separate appeals process" or "by arbitration." RCW 82.02.070(5). The phrase "underlying development approval" is a way to say that if a permit is subject to LUPA, then the process would follow the same as the underlying permit. This is exactly what is done in San Juan County. The fact that the legislature gave local jurisdictions options for dealing with impact fees has no bearing on the law with respect to the applicability of LUPA to challenges of application fees. In the absence of a specific statute, the actions taken with respect to the application fees are subject to the appeals process in the underlying application for development.

Plaintiffs' attempt to distinguish *James v. Kitsap County* by discussing unremarkable differences between impact fees and application fees such as

the argument that the calculation and assessment of the application fee is unlike an "impact fee" because it is not a "land use decision" because it is not "identified to a specific impact of development. (Brief of Appellants p. 16) This narrow reading of the law is made without citation to any case.

This Court can recognize that Plaintiffs have shown that impact fees and permit fees have different characteristics, but it should demand that Plaintiffs show that the difference has a legal significance. For purposes of applying LUPA, there is no significant difference. The application fees are an integral part of the land use decision. Moreover, the policies and purposes of bringing finality to land use decisions are only satisfied by applying LUPA to legal challenges of application fees.

2. A final land use decision must be appealed in a timely manner.

Plaintiffs admit that they did not make a timely challenge under LUPA and that if LUPA applies the trial court was right to dismiss the appeal. (Brief of Appellant p. 4, fn. 1) To be challenged in court a "final" decision is required. This was most recently confirmed with respect to decisions on building permits in *Durland v. San Juan County*:

> But where the permitting authority creates an administrative review process, a building permit does not become "final" for purposes of LUPA until administrative review concludes. Only then is there a final land use decision that can be the subject of a LUPA petition. *Ferguson v. City of Dayton,* 168 Wash.App. 591, 277 P.3d 705 (2012) (no land use decision prior to final

> determination by planning commission, which was entity with the last word on the permit). This comports with the plain reading of the statute, which requires that the "final determination" come from the "officer with the highest level of authority..., including those with authority to hear appeals." RCW 36.70C.020(2).

182 Wn.2d 55, 64-65.

In San Juan County, to obtain a final land use decision on an application for a building or land use permit a person must first pursue administrative remedies by filing an appeal with the hearing examiner. SJCC 18.80.140(B). Plaintiffs agree that they did not make this appeal in a timely manner.

The legislature has specified that LUPA is to be the the exclusive means of judicial review of land use decisions. RCW 36.70C.030(1). The Washington Supreme Court in *James* observed that "where statutes prescribe procedures for the resolution of a particular type of dispute, state courts have required substantial compliance or satisfaction of the spirit of the procedural requirements before they will exercise jurisdiction over the matter." 154 Wn.2d at 588.

A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served. RCW 36.70C.040(2). Plaintiffs' claims are barred.

3. Reimbursement of an overcharge is not an action for "monetary damages or compensation" excluded from LUPA.

The fact that the application fee is a monetary charge or the fact that Plaintiffs are requesting a partial refund (instead of invalidation of the entire permit, invalidation of the entire application fee or a redirection of expenditures) does not change the conclusion that LUPA applies in this case. The cases relied upon by Plaintiffs address allegations of negligence and damages claims caused by delays in the way the permit is handled which are distinctly different from challenges to any decisions on the permit itself. *Cf, Woods View II, LLC v. Kitsap County.*, 188 Wn. App. 1, 24-25, 352 P.3d 807 *review denied,* 184 Wn.2d 1015, 360 P.3d 818 (2015).

The issuance of a permit is a land use decision and as such all of the small decisions that go into issuance (or denying) a permit, are subject to LUPA. In this case the decision being challenged is the assessment and calculation of the applicable fee which must be paid as a condition to issuance of the permit. The case law plainly states that even "[c]laims for damages based on a LUPA claim must be dismissed if the LUPA claim fails." *Mercer Island Citizens for Fair Process v. Tent City,* 156 Wn. App. 393, 405, 232 P.3d 1163 (2010). In *Asche v. Bloomquist,* the plaintiff's damages claim for public nuisance was barred by LUPA where the "public nuisance claim depend[ed] entirely upon finding the building permit

violate[d] the zoning ordinance." 132 Wn. App. 784, 801, 133 P.3d 475 (2006).

This rule applies the statute of limitations in LUPA and if a LUPA petition is untimely, then a claim for damages based on that LUPA claim must likewise be dismissed. *Tent City,* 156 Wn. App. at 405, 232 P.3d 1163. It follows that if a claim for damage based on a LUPA claim is subject to LUPA, so too does LUPA apply in this situation.

Plaintiffs correctly state that LUPA does not apply to "claims provided by any law for monetary damages or compensation." RCW 36.70C.030(1)(c). But a claim for refund of an overcharge whether it is applied at the application stage or the impact fee stage is not a "claim for monetary damages or compensation." Here again the decision in *James v. Kitsap County* is controlling. There Justice Sanders, in dissent, strenuously argued that a builder seeking a refund of impact fees was seeking a claim for "monetary damages or compensation" which would be excepted under the provisions of RCW 36.70C.030(1)(c). *Id.* at 594. The majority rejected that approach and Sanders' dissenting opinion does not make law. This Court must follow the majority opinion, which declined to recognize Sanders' argument.

There is no basis to distinguish between a request for a refund of a portion of the application fees and a request for refund of impact fees. Both

fees are paid as a condition of approval. Both fees are specifically authorized within the same statute, RCW 82.02.020. Both fees are regulatory fees and reflect an important way to share the cost of the activity that benefits the applicants. While impact fees may be used to pay for capital development and application fees cover the costs of reviewing plans and making inspections, these activities are part of an integrated system of land use and development for which LUPA provides the exclusive means of review.

Similarly, in *Muffett v. City of Yakima*, the federal district court held that LUPA bars a cause of action for damages under RCW 64.40.020 because the statute necessarily relies on the validity of the land use decision. 2011 WL 5417158, at 3-4 (E.D. Wash. Nov. 9, 2011). This case confirms that even collateral claims that require proof that some part of the decision is wrong, are barred by LUPA's exclusive means of review. In this way, the failure to abide LUPA's filing deadline has served to bar a party from collaterally challenging the land use decision via different causes of action in state court, including claims brought under 42 U.S.C. § 1983.

G. The Policies of LUPA are Only Satisfied by Applying LUPA to Application Fees.

Plaintiffs contend that an applicant has no "reasonable recourse to recover overcharged processing fees." (Plaintiffs Brief p. 24). LUPA was

enacted for the purpose of establishing uniform and expedited judicial review of local land use decisions. *Twin Bridge Marine Park, L.L.C. v. State, Dep't of Ecology*, 162 Wn.2d 825, 844, 175 P.3d 1050 (2008). In accordance with that provision, Washington state courts have consistently held that if the aggrieved party fails to appeal within LUPA's 21-day deadline a land use decision becomes final, and is therefore unreviewable by courts. *See, e.g., Habitat Watch.*, 155 Wn.2d 397. ("[E]ven illegal decisions must be challenged in a timely, appropriate manner").

LUPA's policy of having a short limitations period applies equally to the interest of the property owner as it does to the interest of the local jurisdictions that rely upon application fees to cover the costs of administering its regulatory program. In the context of analogous impact fees the Washington Supreme Court explained:

> As we stated in *Nykreim*, this court has long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions. 146 Wash.2d at 931–32, 52 P.3d 1. The purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property. Additionally, and particularly with respect to impact fees, the purpose and policy of chapter 82.02 RCW in correlation with the procedural requirements of LUPA ensure that local jurisdictions have timely notice of potential impact fee challenges. Without notice of these challenges, local jurisdictions would be less able to plan and fund construction of necessary public facilities. Absent enforcement of the requirements under chapter 82.02 RCW and LUPA, local jurisdictions would alternatively be faced with delaying necessary capacity improvements until the

> three-year statute of limitations for challenging impact fees had run.

James v. County of Kitsap, 154 Wn.2d at 589, 115 P.3d 286 (2005).

Similarly, local jurisdictions have a need to plan for the use of the revenue from their regulatory fees just as they plan for public facilities paid for with impact fees.

The Washington Supreme Court has recognized the harsh reality of LUPA without making exceptions. Most recently in *Durland v. San Juan County.*, 182 Wn.2d 55, 67-68 the Court declined to recognize equitable exceptions to LUPA's exhaustion requirement because the exhaustion requirement furthers LUPA's stated purposes of promoting finality, predictability, and efficiency.

V. CONCLUSION

This Court's ruling should acknowledge the well-settled law that LUPA is the exclusive means for seeking review of all actions taken in connection with land use decisions. When applied to the Amended Complaint, each fee paid by Plaintiffs was made in connection with a "land use decision." The decision of the superior court should be affirmed.

Respectfully submitted this 1st day of June 2016.

Randall K. Gaylord, WSBA #16080
Attorney for San Juan County

Appendix A

ORDINANCE NO. 14-2013

AN ORDINANCE SETTING FEES FOR SERVICES PROVIDED BY THE SAN JUAN COUNTY COMMUNITY DEVELOPMENT AND PLANNING DEPARTMENT AND REPEALING PORTIONS OF ORDINANCE NOS. 28-2011, 34-2010, 43-2009, 4-2009, AND 54-2008

BACKGROUND

A. The Community Development and Planning Department ("CD&P") collects fees for services in accordance with fee schedules established and adopted by Ordinance Nos. 34-2010 and 28-2011.

B. The County desires to amend the land use and building fee schedules for CD&P by ordinance and does not wish to codify these fee schedules in the San Juan County Code.

C. The fees subject to amendment by this ordinance pertain to fees imposed for land use appeals to the hearing examiner, interpretation of the building code, and application to the current use open space program.

D. Copies of the proposed fees in this ordinance were made available to the public in accordance with RCW 36.32.120.

E. A hearing notice was published in conformance with RCW 36.32.120.

F. On September 10, 2013, the County Council held a public hearing at which time it accepted public testimony.

G. After due consideration of the materials provided by staff and public testimony made, the Council adopted the fee schedules as set forth in the attached exhibit.

NOW, THEREFORE, BE IT ORDAINED by the County Council of San Juan County, Washington, the following fee changes are made and adopted:

Section 1. Repealer. San Juan County Ordinance Nos. 28-2011 § 1, 34-2010 § 1, 43-2009 § 1, 4-2009 § 1, and 54-2008 § 4 are each repealed.

Section 2. Repealer. San Juan County Ordinance Nos. 34-2010 § 2, 43-2009 § 2, 4-2009 § 2, and 54-2008 § 5 are each repealed.

Section 3. Building Fees. Building Fees shall be charged and collected in accordance with the attached Exhibit A.

Section 4. Land Use Fees. Planning and Land Use Fees shall be charged and collected in accordance with the attached Exhibit B.

Section 5. Severability. If any provision of this ordinance or its application to any person is held invalid or the effectiveness delayed for any reason, the remainder of the ordinance or the application to other persons or circumstances will not be affected.

Section 6. Survival. In the event that any fee in Exhibit A or B is found invalid or its application to any person is delayed, then the applicable fees set forth in Ordinance Nos. 34-2010 and 28-2011 shall be revived and effective.

Section 7. Savings Clause. This ordinance shall not affect any pending lawsuit or proceeding, or any rights acquired, or liability or obligation incurred under the sections amended or repealed, nor shall it affect any proceeding instituted under those sections. All rights and obligations existing prior to adoption of this ordinance shall continue in full force and affect.

Section 8. Codification. This ordinance shall not be codified.

Section 9. Effective Date. This ordinance is effective on the 10th working day after adoption.

ADOPTED this 10TH day of September 2013.

ATTEST: Clerk of the Council

9.10.2013
Ingrid Gabriel, Clerk Date

REVIEWED BY COUNTY MANAGER

8/29/13
Michael J. Thomas Date

RANDALL K. GAYLORD
APPROVED AS TO FORM ONLY

By: 8/27/13
Date

COUNTY COUNCIL
SAN JUAN COUNTY, WASHINGTON

Jamie Stephens, Chair
District 3

Bob Jarman, Member
District 1

Rick Hughes, Vice Chair
District 2

Exhibit A

BUILDING FEES

<table>
<tr><th>SERVICE</th><th>FEE</th></tr>
<tr><td>Conventional Building Permit</td><td>BUILDING PERMIT FEE TABLE
<table>
<tr><th>BUILDING VALUATION*</th><th>FEE</th></tr>
<tr><td>$1 to $2,000</td><td>$69</td></tr>
<tr><td>$2,001 to $40,000</td><td>$69 for the first $2,000; plus $11 for each additional $1,000 or fraction thereof, to and including $40,000</td></tr>
<tr><td>$40,001 to $100,000</td><td>$487 for the first $40,000; plus $9 for each additional $1,000 or fraction thereof, to and including $100,000</td></tr>
<tr><td>$100,001 to $500,000</td><td>$1,027 for the first $100,000; plus $7 for each additional $1,000 or fraction thereof, to and including $500,000</td></tr>
<tr><td>$500,001 to $1,000,000</td><td>$3,827 for the first $500,000; plus $5 for each additional $1,000 or fraction thereof, to and including $1,000,000</td></tr>
<tr><td>$1,000,001 to $5,000,000</td><td>$6,327 for the first $1,000,000; plus $3 for each additional $1,000 or fraction thereof, to and including $5,000,000</td></tr>
<tr><td>$5,000,001 and over</td><td>$18,327 for the first $5,000,000; plus $1 for each additional $1,000 or fraction thereof</td></tr>
</table></td></tr>
<tr><td>Conventional Plan Review</td><td>65% of Building Permit Fee**</td></tr>
<tr><td>Annual Permit Fee</td><td>$56/yr.</td></tr>
<tr><td>Owner/Builder Fees
Building Permit</td><td>57.5% of Conventional Permit Fee, $69 minimum</td></tr>
<tr><td>Plan Review</td><td>75% of Conventional Plan Review Fee**</td></tr>
<tr><td>Annual Permit Fee</td><td>$56/yr.</td></tr>
<tr><td>Subsequent Life Safety Inspection for sale, lease or rental</td><td>$111</td></tr>
<tr><td>Mobile/ Manufactured Home Permits</td><td>$222/unit</td></tr>
<tr><td>Modular Permits (Residential or Commercial)</td><td>$222 (foundation) + $222/unit</td></tr>
<tr><td>Temporary Certificate of Occupancy</td><td>$222</td></tr>
</table>

Replacement of Building Permit/Inspection Record Card	$25
Plumbing Permits Assoc. with Building Permit	$34 + $11.00 per fixture
Sprinkler system on one meter, including backflow device	$17
Non-atmospheric backflow protection device ≤ 2"	$17
Non-atmospheric backflow protection device >2"	$22
Stand Alone Plumbing Permit	$69 minimum
Mechanical and Fuel Gas Permits Assoc. with Building Permit	$34 base fee
HVAC-Boiler-Air Handler	$20
Non-electric floor/wall heater including zero clearance fireplace	$20
Kitchen hood/ ductwork – residential	$17
Kitchen hood/ ductwork – commercial	$105
Source specific exhaust fans & ductwork	$8
Clothes dryer	$12
Wood, pellet stove, fireplace insert	$17
Wood stove piping	$8
LPG or fuel oil tank	$12
Underground LPG or fuel oil piping	$12
Interior Gas Piping	$12
Oil/ Kerosene Heater	$12
Stand Alone Mechanical and Fuel Gas Permit	$69 minimum
Stormwater Review & Inspection	$70/hr, $245 minimum
Demolition Permit/ Inspection	$105
Work begun without required permit Conventional Permit	Double permit and plan review fees
Owner Builder Permit	Fee Equal to Conventional permit and plan review fees in addition to applicable Owner Builder Fees
Reactivation of expired permit after construction started	½ original total permit fee plus annual renewal fee for each year following expiration
Change of occupancy, use or classification (in addition to any other required permits or fees)	$105
Title Elimination	$34.00
Plan recheck, research, inspection, re-inspection, site visit or other professional service	$70/hr, ½ hr minimum
State Building Codes Council fee	as required by State
Plan review by third party	Cost plus 15%
Written Construction Code Interpretation	$95/hr.

Appeal to Hearing Examiner***	$600
Clerical Services	$35./hr, ½ hr minimum
Black and White Copies	
Up to 8 ½" x 14"	$0.15
11" x 17"	$1
Color Copies	
Up to 8 ½" X 14"	$1.50
Black and White or Color Copies	
18" x 24"	$5.00
24" x 36"	$6.50
36" x 48"	$8.00
FAX	$2 + $1 each additional page

***Building Valuation** is determined by the Building Official or Fire Code Official, based on the current International Code Council Building Valuation Data with a cost modifier of 1.3, and/or local valuation information.

****Plan Review Deposit.** An estimated non-refundable deposit of the Plan Review Fee, as calculated by CD&P, shall be collected at time of permit application.

*****Appeal Fee.** If the appellant is the prevailing party in an appeal of a code or administrative determination, and the County chooses not to appeal the decision, the County shall refund the Appeal Fee. Appeals pursuant to SJCC 18.100.140 of a notice of violation, stop work order, or the suspension or revocation of a permit shall not be assessed a fee.

Exhibit B

PLANNING AND LAND USE FEES

SERVICE	FEE
Land Division Applications	
Long Subdivision, Binding Site Plan, PUD, Plat Alteration with Division	$4,600
Preliminary	$2,350
Final	$2,800
Plat Alteration without land division	
Short Subdivision or Plat Alteration with Division	
Preliminary	$2,150
Final	$750
Plat Alteration without land division	$1,025
Simple Land Division	$1,025
Boundary Line Modification	$500
Plat Vacation	
Long Plat	$2,550
Short Plat	$1,250
Land Use Applications	
Conditional Use and Essential Public Facility CUP	
$0-$4,999 value of improvement	$2,300
$5,000-$49,999 value of improvement	$2,700
$50,000-$100,000 value of improvement	$3,100
> $100,000 value of improvement	$3,500
Provisional Use	$1,000
Site Specific Map Re-designation	$3,900 + $95/hr over 40 hrs
Re-Designation Mapping Fee	$275
Shoreline Applications	
Shoreline Exemption	
Mooring Buoy	$350
General	$1,200
Substantial Development and/or CUP	
$0-$4,999 value of improvement	$3,300
$5,000-$49,999 value of improvement	$3,700
$50,000-$100,000 value of improvement	$4,100
> $100,000 value of improvement	$4,500

Other	
Variance	$2,500
Shoreline Variance	$3,500
Time Extension	$475
ADU Permit♦	Same as Stormwater review fee
Revision of approved shoreline permit	$475
Clearing and Grading Permit	$450
Stormwater Review & Inspection	See building fees
SEPA Checklist Review	$450
Residential Site Plan Review	$400
Open Space	
Current Use Open Space	$2,030
Timber Open Space Review	$3,150
Shoreline Tree Removal Plan Review	$105
Owner Builder Exemption Review	$105
Work begun without required permit	Double permit fee
COHP (conversion option harvest plan)	$475
Appeal to Hearing Examiner♦♦	$600
Plan recheck, research, inspection, site visit or other professional service	$70/hr, ½ hr minimum
Determination of Essential Public Facility	$400 + hard costs (postage, room rental, publishing etc.)
Siting of Essential Public Facility	$ 800 + hard costs (postage, room rental, publishing etc.)
Plan Review by Third Party	Cost plus 15%
Property sales report (dependent on available time)	$140
Reasonable Use Exception (for >2,500 s.f. wetlants/ FWHCAs add hourly rate for each hour over 15)	Base fee same as Provisional
Public agency/ utility exception	Provisional + $95/hr > 15 hrs
Site Visit	$150
Additional Advertising Fee♦♦♦	
Project Permit Table	$75
Small Legal Ad	$35
Publications and Maps	
UDC	$23
Comp Plan	$23
Eastsound Sub-Area Plan	$7
Open Space & Conservation Plan	$16
Sign Boards	$7
Small Comp Plan Map	$7
Large Comp Plan Map	$23
Postage and handling for mailing signs, documents and maps	$11.50 or cost for special delivery

Written Code Interpretation	$95/hr
Clerical Services	$35/hr, ½ hr minimum
Black and White Copies	
Up to 8 ½" x 14"	$.15
11" x 17"	$.1.00
Color Copies	
Up to 8 ½" x 14"	$1.50
Black and White or Color Copies	
18" x 24"	$5.00
24" x 36"	$6.50
36" x 48"	$8.00
FAX	$2 + $1 each additional page
Audio Reproduction	$23

*__ADU Permit__. The ADU Permit fee is the same as the stormwater review fee per Ord. 51-2008

**__Appeal Fee.__ If the appellant is the prevailing party in an appeal of a code or administrative determination, and the County chooses not to appeal the decision, the County shall refund the Appeal Fee. Appeals pursuant to SJCC 18.100.140 of a notice of violation, stop work order, or the suspension or revocation of a permit shall not be assessed a fee.

***__Additional Advertising Fee.__ Fee for rescheduling of hearing at applicants request or due to applicant error.

__Affordable Housing.__ All "Planning and Land Use Fees" under this Ordinance shall be waived when:

a. The development or owner-occupied dwelling is intended for occupancy by very low income, low income, and moderate income families, as defined by Section 1 of the Housing Needs Assessment for San Juan County, Appendix 5 of the Comprehensive Plan; or
b. The applicant is classified by the Internal Revenue Service as a 501(C) non-profit organization and the development is intended for occupancy by very low income, low income, and moderate income families, as defined by Section 1 of the Housing Needs Assessment for San Juan County, Appendix 5 of the Comprehensive Plan.

Appendix B

36.70B.020(4) and 36.70B.140). (See "development permit" in SJCC 18.20.040.) Procedures for building and development permits that do not trigger a requirement for a project permit are found in SJCC 18.80.070 (procedures for "Yes" uses). The procedures in this subsection are enacted to provide consistent evaluation of project permit applications and to protect nearby properties from the possible negative impacts of such requests by:

1. Providing clear criteria on which to base a decision;

2. Recognizing the effects of unique circumstances upon the development potential of a property;

3. Avoiding the granting of special privileges;

4. Providing criteria which emphasize compatibility with legally existing land uses in the same land use designation;

5. Requiring that the design, scope, and intensity of development are in keeping with the physical aspects of a site and adopted land use policies for the area;

6. Providing criteria which emphasize the rural and small-village character of the County;

7. Combining the environmental review process with the procedures for review of project permit applications; and

8. Providing no more than one open-record hearing, except as provided in Chapters 36.70B and 43.21C RCW.

B. Director's Responsibilities.

1. Responsibilities. The director shall provide for the review of all project permit applications, conducting such field inspections as necessary, to determine whether or not the proposal meets the requirements specified in this code.

a. If, upon application for a development permit, the director determines that a project permit is required, the applicant shall be so informed immediately. Upon receipt of an application for a project permit, the director shall conduct a review as specified in this section.

b. All applications for project permits shall be reviewed by the director for compliance with this code regardless of whether a development permit is required. No development permit which involves a change or alteration of existing uses shall be issued until any required project permit has been issued according to the provisions in this chapter.

2. Upon receipt of a project permit application, the director shall review the proposal, conduct or require such field inspections as necessary to determine whether or not the proposal complies with the purpose and intent of this section and this code. The director may require additional information from the applicant sufficient to make a determination. (Ord. 26-2012 § 22; Ord. 11-2011 § 6; Ord. 15-2002 § 1; Ord. 2-1998 Exh. B § 8.1)

18.80.020 Project permit applications – Procedures.

A. Nonbinding Preapplication Conferences and Site Inspections. Preapplication conferences and site inspections are optional, but strongly encouraged, and will be conducted on a time-available basis. Any fee assessed for such a preapplication conference and site inspection shall be refunded upon submission of a permit application.

1. Preapplication conferences and site inspections are recommended to provide a prospective applicant and the County the opportunity to discuss the property owner's plans; review available critical area maps; examine unique site characteristics; discuss stormwater management and low impact development options; determine if and how County regulations may apply; and to encourage the applicant to consider the effect of County regulations in designing the project.

2. Recognizing that project plans are typically incomplete at the preapplication stage, that more information is typically obtained prior to filing a project permit application, and that new regulations may be enacted prior to submission of a project permit application, preliminary discussions at a preapplication meeting shall not be binding on either the County or the potential applicant.

B. Determination of Proper Type of Project Permit.

1. Determination by Director. The director shall determine the proper type of project permit. Table 8.1 summarizes the steps in the review process for each type of project permit.

2. Consolidated Permit Processing. For a proposal that involves two or more shoreline permits and/or other project permits, such applications shall be consolidated under the "highest" procedure (i.e., the rightmost applicable column in Table 8.1) required for such permits or processed individually under each of the procedures identified by this code. The applicant may request the consolidation of hearings with other local, state, regional, federal, or other agencies in accordance with RCW 36.70B.090 and 36.70B.110. (See also SJCC

18.80.110(D)(1), shoreline permits consolidated permit processing, and SJCC 18.80.140.)

C. Project Permit Application – Forms. Applications for project permits shall be submitted on forms approved by the director. An application must (1) consist of all materials required by the applicable development regulations; (2) be accompanied by plans and appropriate narrative and descriptive information sufficiently detailed to clearly define the proposed project and demonstrate compliance with applicable provisions of this code; and (3) except for project permit applications for temporary uses, include the following:

1. A completed project permit application form;

2. If the applicant is not the owner of the subject property, a notarized statement by the owner(s) that (a) the application has been submitted with the consent of all owners of the subject property, and (b) identification of the owner's authorized agent or representative;

3. A legal description of the site and any other property description required by the applicable development regulations;

4. The applicable fee;

5. Evidence of available and adequate water supply as required by SJCC Title 8; see also SJCC 18.60.020;

6. Evidence of sewer availability or septic approval or suitability as required by SJCC Title 8;

7. A plot plan to scale at no smaller than one inch equals 40 feet for a plot larger than one acre, and no smaller than one inch equals 20 feet for a plot one acre or smaller;

8. Graphic depiction of the following:

a. Compass direction and graphic scale;

b. Corner grades and, if required by the director, existing contours of topography at five-foot contour intervals;

c. Proposed developments or use areas;

d. Existing structures and significant features on the subject property and on adjacent properties;

e. Property lines, adjoining streets, and immediately adjoining properties and their ownerships;

f. Location and dimensions of existing and proposed improvements on public rights-of-way, such as roads, sidewalks, and curbs;

g. Existing and proposed grades and volume and deposition of excavated material;

h. Natural drainage direction and storm drainage facilities and improvements;

i. Locations of all existing and proposed utility connections;

j. Parking spaces and driveways;

k. Proposed landscaping;

l. Wetlands and other critical areas; and

m. All easements (recorded or unrecorded) must be shown. If recorded, the recording number must be shown;

9. The applicant shall provide a list showing the name and addresses of the owners of property within 300 feet of the boundaries of the property subject to the project permit application. For purposes of this chapter, the owners of property within 300 feet of the boundaries of the subject property are those whose names are shown on the tax assessment rolls on the date the project permit application is submitted;

10. Photographs of the site depicting existing and proposed development areas and areas where vegetation is proposed to be removed.

11. Critical Areas (CAs).

a. All project permit applications shall include sufficient information about the site and the proposed project to demonstrate consistency with SJCC 18.35.020 through 18.35.140.

b. Critical Area Review Process. All plans for development of commercial, industrial, institutional and public facilities must undergo review for compliance with groundwater protection requirements for critical aquifer recharge areas (SJCC 18.35.080). The department shall review the application, available maps, and information and if requested by the property owner, shall conduct a site inspection prior to determining whether the proposed project may affect or be affected by a wetland, fish and wildlife habitat conservation area, frequently flooded area, or geologically hazardous area. If the area proposed for development or vegetation removal is not in a frequently flooded area; is more than 200 feet from a geologically hazardous area; is more than 300 feet from a wetland; is more than 200 feet from a fish and wildlife habitat conservation area; is more than 1,000 ft. from any golden eagle nests; and is more than one-quarter mile from any peregrine falcon or great blue heron nests, the department shall rule that the critical area review is complete with regard to those types of critical areas. Otherwise, the department will notify the applicant and provide them with a list of any report(s) or application materials required by SJCC 18.35.020 through 18.35.140. If required, these reports and materials must be

received before an application will be deemed complete.

c. Critical Area Reports.

i. Detailed requirements for critical area reports are identified in SJCC 18.35.020 through 18.35.140.

ii. If the director finds that a report does not accurately reflect site conditions, is inadequate to determine compliance, or does not meet the requirements of this title, the director shall contact the qualified professional who prepared the report to discuss the issues and, if necessary, shall have the report reviewed by a third party qualified professional.

12. Frequently Flooded Areas. Project permit applications shall include the location of any frequently flooded areas or special flood hazard area on the subject property, and an elevation certificate if required by the director. No use or development shall be undertaken or approved within any area of special flood hazard except in compliance with the provisions of SJCC Titles 15 and 18. Elevation certificates shall include certification by a land surveyor, licensed civil engineer or architect authorized by law to certify elevation information. Elevation certificate forms shall be provided by the director;

13. Additional Application Information for Divisions of Land and Boundary Line Modifications. The application for a division of land shall meet the requirements of this subsection and the requirements in Chapter 18.70 SJCC;

14. Additional Application Information for Binding Site Plans. The application for a binding site plan shall meet the requirements of this subsection, SJCC 18.70.090, and the requirements in SJCC 18.80.170;

15. Additional Application Information for Planned Unit Developments. A planned unit development application is part of the application for a subdivision or a binding site plan; additional information requirements are summarized in SJCC 18.80.160. The application for a planned unit development shall meet the requirements of this subsection and the requirements in SJCC 18.80.160;

16. Additional Application Information for Rural Residential Cluster Development. The application for a rural residential cluster development shall meet the requirements of this subsection, SJCC 18.60.230 and 18.80.180, and shall also include the following:

a. The floor plan and elevations for each proposed residential structure, at a scale of not less than one-quarter inch equals one foot;

b. A list, diagram and samples showing exterior materials and finishes for all structures, fences, and other constructed features of the project;

c. The plot plan prepared under this subsection shall also show the location and species of any existing trees greater than six inches in diameter at breast height on the property, except in areas proposed for open space preservation or forest resource management;

d. A list showing the floor area and use of each structure to be constructed on the site, and the total floor area of structures, and the area of the site devoted to residences, residential yards, circulation spaces, other uses, and open space; and

e. A narrative description indicating how the project responds to the requirements of SJCC 18.60.230, including the minimum standards of SJCC 18.60.230(C), the separation requirements of SJCC 18.60.230(F), and the design guidelines of SJCC 18.60.230(G);

17. Additional Information. The director may require additional information necessary for review and evaluation or demonstration of project consistency with this code;

18. Director's Waiver. The director may waive specific submittal requirements determined to be unnecessary for review of a project permit application required by this code; and

19. Temporary Use Permit Applications. All project permit applications for a temporary use shall be submitted to the director in writing and contain sufficient information for the director to make a decision (see SJCC 18.80.060). The director shall determine what information is necessary for review of such applications.

D. Project Permit Applications – Determination of Completeness, Modification, Referral and Review.

1. Determination of Completeness. Within 28 days after receiving a project permit application, the director shall determine if a project permit application is complete and notify the applicant in writing that either:

a. The application is complete; or

b. The application is incomplete. If such application is incomplete, the director shall specify what information is necessary to make the application complete.

2. Identification of Other Agencies with Jurisdiction. To the extent known by the County, other agencies with jurisdiction over the project permit application shall be identified.

3. Additional Information.

a. A project permit application is complete for purposes of this chapter when it meets the submittal requirements in this section and any submittal requirements contained in applicable development regulations.

b. If the submittal requirements have not been met, the director may determine that the application is complete and, at the same time, require that additional information or studies be provided within a time specified.

c. Nothing in this section precludes the director from requesting additional information or studies at any time if new information is determined to be necessary due to the complexity of the plans, apparent errors, or where there are substantial changes in the proposal.

d. If the applicant fails to submit the requested information or studies within the time specified, or within a longer period if agreed to by the director, the application shall lapse and the applicant shall forfeit the application fee.

4. Incomplete Applications.

a. If the director notifies the applicant that an application is incomplete, the applicant shall have 90 days to submit the necessary information to the director. Within 14 days after an applicant has submitted the additional information, the director shall again make the determination described in subsection (D)(1) of this section, and notify the applicant. If the applicant submits the required information to the director within the 90-day period and the director determines that the application is now complete, the project permit application will be considered complete as of the date the project permit application was originally submitted; however, the 120-day processing period in SJCC 18.80.130 will be tolled during the 90-day resubmittal period.

b. If the applicant fails to submit additional information, or does not within such 90-day period request additional time to submit the required information, the application shall lapse and the applicant shall forfeit the application fee.

5. Director's Failure to Provide Determination of Completeness. A project permit application shall be deemed complete under this section if the director does not timely notify the applicant that the application is incomplete.

6. Modifications to Applications. An applicant-initiated modification to an application which is not in response to technical review, a change requiring a new public notice, a change of land use(s), or a mitigation measure under SEPA may require a new application. A change requiring a new public notice establishes a new vesting date for that application.

7. Referral and Review of Project Permit Applications. Within 14 days of determining that a project permit application is complete, the director shall transmit a copy of the application, or appropriate parts of the application, to each affected agency and County department for review and comment, including those responsible for determining compliance with state and federal requirements. Applications for shoreline permits shall also be circulated to the director of the University of Washington Friday Harbor Laboratories for comment as a reviewing agency. The affected agencies and County departments shall have 20 days to comment. The referral agency or County department is presumed to have no comments if comments are not received within the specified time period. The director shall grant an extension of time where unusual circumstances are present.

Table 8.1. Summary of Project Permit Notice, Hearing, Decision and Appeals Processes. (1)

Project Permit Application	Boundary Line Modification; Simple Land Division	Provisional Use; Short Subdivisions; BSP to 4 Lots; Temporary Use Permits (Level II)	Conditional Use and/or Variance	Shoreline Permits (Substantial Development, Conditional Use or Variance)	Subdivisions; BSP for More than 4 Lots
	Administrative		Quasi-Judicial		
Public Notice of Application	no	yes	yes	yes	yes

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

COMMUNITY TREASURES d/b/a CONSIGNMENT TREASURES, a Washington not for profit corporation, JOHN EVANS and BONITA BLAISDELL, on behalf of themselves and all others similarly situated, Appellants, v. SAN JUAN COUNTY, a political subdivision of the State of Washington, Respondent.	NO. 74738-0-I CERTIFICATE OF SERVICE

Elizabeth Halsey declares and states:

That I am now, and at all times hereinafter mentioned was, a citizen of the United States and a resident of San Juan County, state of Washington, over the age of 18 years, competent to be a witness in the above-entitled proceeding and not a party thereto; that on June 1, 2016, I caused to be

delivered in the manner indicated below a true and correct copy of San Juan County's Brief of Respondent in the above-entitled cause to:

Stephen A. Brandli
PO Box 850
Friday Harbor, WA 98250
steve@brandlilaw.com

Via e-mail

I make the foregoing statement under penalty of perjury of the laws of the state of Washington.

Dated this 1st day of June 2016, at Friday Harbor, Washington.

Elizabeth Halsey
Legal Assistant
San Juan County Prosecutor's Office
350 Court Street
Friday Harbor, WA 98250
(360)378-4101