IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

NO. 94463-6

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.

SAN JUAN COUNTY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Frank Penwell for Community Treasures and John Evans (Plaintiffs) applied for, and obtained building permits after completing an application and paying the appropriate fees ranging from $105.00 to $749.10.[1] Just under three years later, the Plaintiffs filed suit claiming the fee each paid was an overcharge, and requesting a refund for an unspecified portion of the application fee. The Plaintiffs also considered themselves representatives of a class of others who paid building permit fees in the previous three years. No ruling was made on a motion for class certification.

The County moved to dismiss on the pleadings because it is undisputed that each Plaintiff failed to follow the administrative appeal process for land use decisions and also failed to file in court in the time limit required by the Land Use Petition Act (LUPA), RCW 36.70C. (CP 111). The trial court, Honorable Donald Eaton, agreed with the County, and dismissed the case and issued a written ruling that addressed each of the topics presented to this court (CP 216). On appeal, the Court of Appeals, Division I, upheld the trial court in a unanimous, unpublished opinion, which also addressed each of the arguments made to the court.

[1] Frank Penwell, for Community Treasures, also paid $2,700 for a conditional use permit, but that permit was not discussed in the decision of the Court of Appeals.

II. ISSUE FOR THE PETITION FOR REVIEW

Does a claim of overpayment of several small building permit fees paid by two property owners in San Juan County present a question of substantial public interest that supports review of a unanimous unpublished Court of Appeals decision?

III. FACTUAL BACKGROUND

The County accepts the neutral statement of facts set forth in the decision of the Court of Appeals. Plaintiffs John Evans and Community Treasures (through the property owner Frank Penwell, trustee) applied for building permits. As part of the permit process, an application was completed and a fee was paid. A fee of $105.00 was paid on each of three permits. One permit had a fee of $749.10. John Evans paid a fee on April 25, 2012, and Community Treasures paid its fees in November 2013 and February 2014. No objection to any part of the permit decision was made part of the file, and no effort was made to challenge the fee or any other part of the permit process to the San Juan County Hearing Examiner using the administrative appeal process set out in San Juan County Code Section 18.100.140(B)(11). This lawsuit was filed seeking relief as individuals and as a class on March 18, 2015, which is more than the 21 days for judicial review of land use decision set out in LUPA. RCW 36.70C.040(3).

IV. ARGUMENT

A. Plaintiffs Have Received Adverse Written Rulings in the Trial Court and Court of Appeals and Now Seek Review Under RAP 13.4(a).

Plaintiffs base their petition on the ground that this case involves a substantial public interest under RAP 13.4(b), which states:

> **(b) Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only:
>
> ...
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.
>
> RAP 13.4

B. Plaintiffs are Seeking Refund of Fees for Themselves, Not a Remedy to a Statewide Problem.

This case is only about alleged "overpayment portion" of small building permit fees paid by one individual and one not-for-profit organization in San Juan County. The narrow question that led to the dismissal on the pleading was whether the plaintiff had followed the strict time limits for challenging the land use decision of the building permit. (CP 221). This case does not have widespread influence. Building fees are often based upon size of the building, number of fixtures or appliances and other such items that vary from one application to the next. As the Court of Appeals noted, this is not a challenge to the ordinance

establishing the fees, which was adopted with notice and right to comment. (Slip Opinion at 8).

Rather, the Plaintiffs have attempted to make a case for a "statewide problem" relying on a report prepared by a contractor for the Washington State Auditor in 2009. (Petition p. 4). That report concerned counties other than San Juan County. The State Auditor report was not relied upon by the trial court in its ruling, and it is not a part of the record below. This court has said before: "[W]e also decline to consider facts recited in the briefs but not supported by the record. *Cf.* RAP 10.3(a)(5), 13.4(c)." *Sherry v. Fin. Indem. Co.*, 160 Wn. 2d 611, 615, 160 P.3d 31, 33 fn. 1 (2007). Therefore, this Court should not consider the State Auditor Report.[2]

Plaintiffs also attempt to demonstrate a widespread problem by aggregating three years of expenditures and revenues from the county budget. The trial court, however, made no ruling on the usefulness or accuracy of the data alleged in the complaint. Perhaps more importantly at this stage, the Court of Appeals confirmed that it has rejected the use of "general accounting and cost allocation principles and the costs of

[2] It is disingenuous for Plaintiffs to cite to the 2009 Auditor's Report for eight other counties when a report specific to individual building fees in San Juan County for the years at issue has been prepared by the financial analysis firm FCS Group and discussed by the County Council at a public session during the pendency of this appeal. The FSC Group's report is not part of the trial record.

regulation" as a proper basis to determine the reasonableness of the City's permit fees. (Slip Opinion at 7, citing *Home Builders v. City of Bainbridge Island*, 137 Wn. App. 338, 350, 153 P.3d 231 (2007)). Permits should be evaluated individually, not through a general cost accounting methodology as attempted on page 6 of the Petition for Review. *See Home Builders v. City of Bainbridge Island*, 137 Wn. App. at 350.

The budget numbers offered are incomplete because they do not include outstanding liability for work in progress – that is work for which the application fee was paid in advance, but the permit was not issued. The numbers offered by the Plaintiffs are too incomplete and unreliable for the Court to determine that there is a "substantial public interest" in this case.

Finally, the amount at issue is small. The Plaintiffs have carefully avoided describing that number, but for a permit of $105.00, such as three of the four permits at issue, the amount that could possibly be claimed is only a small portion, a point that the Plaintiffs recognize. (Petition p.7).

C. Allegations in the Complaint for Class Action Do Not Make a "Substantial Public Interest."

Plaintiffs also contend that "substantial public interest" is shown by the fact that the complaint includes allegations for handling the case as a class action pursuant to CR 23. (Petition p.8). The class action was not a

state-wide class action; it sought only to add those who applied for other types of permits in San Juan County during the three years preceding the filing of this lawsuit, and to create a fund to be used to pay attorney fees. Under any reading of the Amended Complaint, there is no basis for deciding that this case will answer a "statewide problem of significant magnitude." (Petition p.4).

If a party could make a case of substantial public interest simply by making allegations for a class action, this court would encourage the widespread use of class action allegations merely to meet the standard of RAP 13.4. At the very least, a Plaintiff must be required to follow the procedure of CR 23 and obtain a trial court ruling certifying the Plaintiffs as the appropriate representatives of a class and that class counsel is qualified. Because those rulings were not made, they are mere allegations neither at issue on review, nor a basis for finding that this case presents a substantial public interest.

This court should also reject the notion that the procedural requirements of LUPA should be set aside to provide a "reasonable recourse." (Petition p.7). Due to the nature of the allegations, Plaintiffs invite the court to set aside LUPA and allow this case to proceed with a three-year statute of limitations on equitable principles. (Petition p.7-8). The Plaintiffs complain that there is a substantial public interest in

disregarding LUPA because the recovery would be small, the decision on the application fee may occur at a different time, because of proof issues, seeming complexity, and no recovery for attorney fees.

The Court of Appeals rejected this contention by examining the San Juan County Code and observing that the Plaintiffs had an administrative (and judicial) remedy that they did not follow. The Court of Appeals wrote on page 8:

> Evans claims that even if the payment of fees for a building permit application is governed by LUPA, a building permit applicant has no recourse to challenge an overcharge of the fee. We disagree. Under the SJCC [San Juan County Code] building permit applicants have the right to appeal a decision on a building permit application to the hearing examiner. SJCC 18.80.140(B)(11).

(Slip Op. p. 8, footnote omitted).

The Supreme Court has previously been asked to reject seemingly harsh outcomes of LUPA and fashion another "reasonable recourse" for applicants who fail to abide by the strict requirement. Most recently in *Durland v. San Juan County*, the court, which was unanimous on this issue, explained:

> We decline to recognize equitable exceptions to LUPA's exhaustion requirement because the exhaustion requirement furthers LUPA's stated purposes of promoting finality, predictability, and efficiency. This is in keeping with our LUPA case law; generally, we have required parties to strictly adhere to procedural requirements that promote LUPA's stated purposes.

> For example, we require strict compliance with LUPA's bar against untimely or improperly served petitions.
>
> 182 Wn.2d 55, 67, 340 P.3d 191, 198 (2014).

Hence, it does not matter the basis of the equitable exception, the trial court and Court of Appeals properly declined to disregard the remedy available to Plaintiff's under LUPA.

D. A Land Use Decision Includes Intermediate Decisions on the Application Fee.

In this section of the Petition for Review, Plaintiffs steer away from showing a substantial public interest under RAP 13.4 and argue that the trial court and Court of Appeals were wrong to conclude that imposition of building fees is not a "land use decision." The Court of Appeals decision is short and to the point.

> Evans does not dispute that there is a final decision on the building project permits. Evans claims the building permit fee does not constitute a determination on "'[a]n application for a permit.'" We disagree. RCW 36.70C.020(2)(a) unambiguously defines "land use decision" as a final determination on an "application for a project permit." SJCC governs project permit applications. The plain and unambiguous language of SJCC 18.80.020(c)(c1) states a completed application shall include the applicable permit fee. SJCC 18.80.020 states in pertinent part:
>
> 18.80.020 Project permit applications – Procedures.
>
> ...
>
> 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 application for temporary uses include the following:
>
> 1. Completed project permit application form;
> ....
> 4. The applicable fee.
>
> Because the fee is a mandatory requirement for a completed permit application, LUPA applies to a challenge to the building permit application fees.

Plaintiffs criticize this "plain language" analysis and attempt to separate the fee from the decision on the application. The Plaintiffs' approach is contrary to LUPA, which expressly refers to the "application" and is inconsistent with the County code which inextricably makes the application fee part and parcel of the application. (Slip Opinion at 4-5).

Plaintiffs try to parse out the application and its various components, stating that decisions "that affect the use of land" are subject to LUPA, but a decision on fees are not. But, by their own words in the Amended Complaint, the Plaintiffs ***admit*** that the application fee is paid as a "threshold matter that allows a later land use decision to be made." (Amended Complaint paragraphs 24, 25, 28 and 29; CP 9, 10). This admission articulates the inextricable linkage of the fee and the decision on the application.

The application and the fee are inextricably tied by local ordinance, past decisions of this court and good policy. In *Samuel's Furniture, Inc. v. Dep't of Ecology*, the Washington Supreme Court analogized the relationship to court proceedings, referring to smaller decisions in the permit process as "interlocutory" decisions, and explaining that they are part of the permit when the permit is issued and are subject to review when the application process is terminated by the local government. 147 Wn.2d 440, 63 P.3d 764 (2002). This approach fits well with 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. 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[ ]." *Id.* at 453 (citing *Reif v. LaFollette,* 19 Wn.2d 366, 370, 142 P.2d 1015 (1943)).

Plaintiffs urge the court to apply LUPA to one part of the application, and a three-year statute to the other aspects of the application because "there is no urgency to finalize the correct size of an application fee." (Petition pp. 13-14). Analytically, the selection of the fee to apply, and the calculation of that fee, is no different from other decisions that must wait until the final decision on the application is made and then together, are 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).

Curiously, Plaintiffs cite to *James v. Kitsap County*, 154 Wn. 2d 574, 115 P.3d 286 (2005) in an effort to narrow the definition of "land use decision," but the holding in *James* aids the County, not Plaintiffs. In *James*, the Washington Supreme Court held that LUPA applied to an

action seeking refund of a mitigation impact fee assessed under the authority of RCW 82.02.020. *Id. at* 587–89. 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 the procedures established by LUPA to challenge that decision dictate." *Id.* This language plainly states that decisions on fees connected to a land use matter are inextricably tied to the land use decision. *See id.*

If LUPA applies to mitigation impact fees assessed as part of the application, it certainly applies to the application fee itself. 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).

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. (Petition p.13-14). The decision in *James* reflects the culmination of two decades of case law in state and federal courts that construe a primary purpose of LUPA to be achieving prompt finality to

issues arising under its purview. These cases confirm the comprehensive scope of LUPA and its application to *all intermediate actions* in the land use decision process.

E. The "Monetary Damages Or Compensation" Exception Does Not Apply To An Incorrect Charge For A Land Use Application.

Relying upon the dissent of Justice Sanders in *James v. Kitsap County*, Plaintiffs seek to revisit the limitations on the type of monetary claims or compensation that are not subject to LUPA. (Petition p. 15).

LUPA does have an exception for "claims provided by any law for monetary damages or compensation" RCW 36.70C.030(1)(c). However, the application of this provision has been limited to claims for damages or compensation that are distinct and independent from the application and permit decision. Only the dissent in *James* expressed an expansive view that included fees incidental to the permit. The majority did not take such an approach. 154 Wn.2d at 590.

The cases relied upon by Plaintiffs were declared by the Court of Appeals to be "inapposite." (Slip Opinion at 8, fn. 7). The cases address allegations of inverse condemnation, negligence and damages claims caused by delays, each of which is distinctly different from challenges to any decisions on the application or permit itself. *See Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 24-25, 352 P.3d 807 *review denied,*

184 Wn.2d 1015 (2015) (negligence claim for delay in processing permit application); *Lakey v. Puget Sound Energy Inc.*, 176 Wn.2d 909, 296 P.3d 869 (2013) (inverse condemnation claim for monetary damages).

Moreover, the courts have said that "[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). *See also Asche v. Bloomquist*, 132 Wn. App. 784, 801, 133 P.3d 475 (2006) (holding that plaintiff's damages claim for public nuisance are barred by LUPA where the "public nuisance claim depend[ed] entirely upon finding the building permit violate[d] the zoning ordinance."). If a LUPA petition is untimely, a claim for damages based upon on that LUPA claim must be dismissed. *See Mercer Island Citizens for Fair Trial Process v. Tent City*, 156 Wn. App. at 405, 232 P.3d 1163 (2010).

There is no basis to distinguish a request for a refund of a portion of the application fees from a request for refund of impact fees. Both fees are paid as a condition of approval and are specifically authorized within the same statute, RCW 82.02.020. Additionally, both fees are regulatory, 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 integral system of land use and development for which LUPA provides the exclusive means of review.

In *Muffett v. City of Yakima*, 2011 WL 5417158, at 3-4 (E.D. Wash. Nov. 9, 2011), 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. 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. *See id.*

V. CONCLUSION

Plaintiffs John Evans and Community Treasures/Frank Penwell have received well-written rulings at the trial court and on appeal based upon clearly written statutes enacted in the 1990s and familiar legal principles. This case boils down to a small claim for refund of a portion of a building permit application fee. It does not involve matters of substantial public interest or widespread applicability. Plaintiffs failed to avail themselves of the opportunities to challenge the fee in a timely manner before the County Hearing examiner or superior court by following the rule of LUPA. The Court of Appeals correctly analyzed the facts and the law. The Petition for Review should be denied.

Respectfully submitted this 1st day of June 2017.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

By: _____
Randall K. Gaylord, WSBA #16080
Prosecuting Attorney
Attorney for San Juan County

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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, Respondents.	NO. 94463-6 CERTIFICATE OF SERVICE

Tamara Greene 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, 2017, I caused to be delivered in the manner indicated below a true and correct copy of San Juan County's Answer to Petition for Review in the above-entitled cause to:

Stephen A. Brandli
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By Email

Nicholas Power
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By Email

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

Dated this 1st day of June 2017, at Friday Harbor, Washington.

Tamara Greene
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SAN JUAN COUNTY PROSECUTING ATTORNEY

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