NO. 94452-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC and PORT OF TACOMA,

Respondents,

vs.

THURSTON COUNTY;

Petitioner.

MEMORANDUM OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

In *Maytown Sand and Gravel LLC v. Thurston County*, 198 Wn. App. 560, 395 P.3d 149 (2017), the owner of a gravel mine (Maytown Sand and Gravel LLC) and a former owner (The Port of Tacoma) sued Thurston County for damages.[1] The plaintiffs claimed that the County had delayed commencement of mining operations by requiring proposed amendments to the existing special use permit (SUP) be determined in the hearing examiner process. The hearing examiner found that the County had property placed the SUP amendments before the examiner.

Instead of appealing that portion of the decision, Maytown elected to pursue a damages action against the County for its land use decision without exhausting administrative appeal remedies or filing an appeal under the Land Use Petition Act, ch. 36.70C RCW (LUPA). The County sought summary judgment based on plaintiffs' failure to exhaust administrative remedies and to comply with LUPA's exclusive remedy provisions. The County's motion was denied, and the jury was allowed to assess damages against the County based on plaintiffs' central argument that the County improperly required Examiner approval of SUP amendments. Local governments throughout the State of Washington, and the attorneys who represent them, urge this Court to accept review and reverse the trial court and Court of Appeals in order to maintain stability and consistency in Washington law.

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[1] Maytown sought damages on a variety of bases, including alleged violations of chapter 64.40 of the Revised Code of Washington (RCW), but did not include a petition under the Land Use Petition Act (LUPA), per Chapter 36.70C RCW.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Washington State Association of Municipal Attorneys (WSAMA) is a nonprofit Washington corporation whose membership is comprised of the attorneys who represent cities and towns in this state, and that provides education and training in the areas of municipal law to its members. Important among them are administrative procedures and the crucial need for exhaustion of administrative remedies as a prerequisite to subsequent litigation. Every city and town in this state depends upon the requirement that administrative remedies are to be exhausted before pursuing matters in the Superior Court, particularly in the area of land use. For this reason, WSAMA submits this brief as *amicus curiae* and asks this Court to accept review and reverse the Court of Appeals.

III. STATEMENT OF THE CASE

WSAMA adopts the Statement of Facts provided and described by Thurston County in its Petition for Review.

IV. ARGUMENT

Thurston County has capably represented its arguments to this Court in connection with this case and the issues warranting its pursuit of review. Many of those arguments are fact specific and may not always affect other jurisdictions. However, all municipalities and local government entities are affected by a published opinion that enables parties to sidestep the requirement that administrative remedies must be exhausted before seeking judicial relief from a land use decision. In this case, the Court of Appeals mentions "failure to exhaust administrative

remedies" only twice, and does so only in passing.[2] No other explanation was provided or discussion was included that mentioned why Maytown should be excused for its undisputed failure to exhaust administrative remedies. In so doing, the Court of Appeals' published decision now clouds Washington law and erodes this Court's longstanding recognition that a person or entity claiming to be aggrieved by a land use decision must exhaust administrative remedies before turning to the courts. Consequently, the denial of the County's motion for summary judgment was in error and should have been corrected by the Court of Appeals. Review by this Court is now needed to provide the clarity that was lost.

The Court of Appeals appears to have accepted plaintiffs' argument that they "won" every issue before the Examiner, thereby leaving nothing to appeal administratively:

> The trial court granted summary judgment on Maytown's LUPA petition and reinstated the hearing examiner's decision from December 30, 2010. The trial court also ruled that the disposition of the LUPA petition did not render Maytown's complaint for damages moot.
>
> Maytown filed an amended complaint for damages.... The [amended] complaint excluded the LUPA petition *because Maytown deemed the issue resolved.*

Maytown, 198 Wn. App. at 573-74, ¶¶ 29-30 (emphasis added). But Maytown pressed its tort theories on the premise that relief was needed from the hearings examiner's subsequent April 2011 decision, which "did not approve any other amendments" to the SUP. *Id.* at 570, ¶ 16. To be

[2] *See Maytown*, 198 Wn. App. at 574, ¶ 32 ("The County pleaded some affirmative defenses and defenses, including ... failure to exhaust remedies ...."); *id.* at 577-78, ¶ 47. ("The County argues that ... [Maytown] failed to exhaust their administrative remedies.").

sure, this was the basis for the Court of Appeals holding LUPA served as no bar: "the portion of the hearing examiner's April 2011 decision that discussed the procedure for amendment review by the County was not a land use decision." *Id.* at 580, ¶ 57. Undermining the Court of Appeals' conclusion, however, is what appears to be undisputed: Plaintiffs were so unhappy with the Examiner's decision on the amendment process issue that they initially decided to appeal to the Board of County Commissioners (BOCC) but ultimately elected not to because an adverse decision by the BOCC and in a LUPA appeal "*would make our damage case more difficult.*" Ex. 449 (emphasis added), *reproduced at* Pet. for Rvw., Appx. 2; *see also* Ex. 446 at 30-31 (Hearing Examiner's April 2011 decision, rejecting Plaintiffs' claim that the Staff erred in referring the amendment issues to the hearing examiner for resolution), *reproduced at* Pet. for Rvw., Appx. 5.

In short, plaintiffs were improperly allowed to seek a jury verdict premised on a theory that was rejected by the hearings examiner, but which plaintiffs did not appeal administratively or judicially under LUPA.

This was error and mandates reversal.

A. Review by this Court is warranted to correct the Court of Appeals' mistaken disregard of when administrative remedies must be exhausted in the land use context.

This Court will grant discretionary review:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)(1), (2), (4). Review is appropriate under all three of these subsections. The Court of Appeals, in this case, sidestepped the issue of exhaustion of administrative remedies, and in so doing ignored and created a conflict with decisions of this Court that speak so strongly to the requirement of exhausting administrative remedies before seeking judicial relief of land use decisions. *See, e.g.*, *Durland v. San Juan County*, 182 Wn.2d 55, 65-69, 340 P.3d 191 (2014); *James v. County of Kitsap*, 154 Wn.2d 574, 588-89, 115 P.3d 289 (2005). This conflict with decisions of this Court warrants review per RAP 13.4(b)(1). *See also infra* Part IV.B.

Additionally, as argued below, *infra* Part IV.C, the Court of Appeals' decision cannot be squared with Division One's opinion in *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010), *rev. granted*, 170 Wn.2d 1020, *petition dismissed*, 247 P.3d 421 (2011). Because the Court of Appeals' decision below cannot be reconciled with *Mercer Island Citizens*, review is necessary to resolve that conflict. RAP 13.4(b)(2); *see also State v. Taylor*, 140 Wn.2d 229, 235, 996 P.2d 571 (2000) ("We granted review because there is a conflict between decisions of Divisions One and Two on this issue.").

Finally, preserving local governments' reliance on exhaustion requirements is not limited to only municipal attorneys representing cities and towns; it also affects the state of Washington and any other governmental or quasi-governmental entity that may have administrative procedures. This case thus involves an issue of substantial public interest,

important to each and every city, town, county, political subdivision, and department of the state. The importance of this issue thus extends to all within this State's boundaries, and therefore warrants review in this Court. RAP 13.4(b)(4).

B. The Court of Appeals erred in disregarding the exhaustion requirement when the party seeking relief premised its theory of recovery on an adverse holding by a hearings examiner that was not administratively appealed.

This Court has long applied "the general rule that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene." *Wright v. Woodard*, 83 Wn.2d 378, 381, 518 P.2d 718 (1974) (citing *State ex rel. Ass'n of Wash. Indus. v. Johnson*, 56 Wn.2d 407, 353 P.2d 881 (1960)). Professor Louis L. Jaffe of the University of Buffalo School of Law and Harvard Law School aptly explained the reasons why exhaustion is so important:

> Exhaustion has its analogue in the usual requirement of finality as a condition of review by an upper court of the rulings of a lower court. The traditional finality rule covers a variety of hypothetical situations and is a rough compromise of the competing considerations which differ in their balance from case to case … It can be seen from the analysis that an absolute rule of finality would be far too crude a resolution of these competing considerations and that in any case the requirement of finality is a rough compromise, a kind of slapdash presumption as to the net saving of money and time..

Louis L. Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFF. L. REV. 327, 327 (1962). If the party seeking relief has an administrative

remedy and did not pursue the remedy before turning to the court, the trial court commits error by entertaining the action. *Wright*, 83 Wn.2d at 381.

The exhaustion rule confirms the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997); *S. Hollywood Hills Citizens Ass'n for Preservation of Neighborhood Safety & Env't v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984).

LUPA expressly requires that parties exhaust administrative remedies with respect to land use permit decisions before turning to the courts. Under LUPA, the petitioner must exhaust all available administrative remedies and file an appeal in superior court within 21 days of the final decision. RCW 36.70C.020(2), 36.70C.040(3), 36.70C.060(2)(d); *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 185 Wn.2d 594, 602, 374 P.3d 151 (2016). To this end, *Durland* provides a useful analysis of the precepts under which LUPA was created:

> The legislature enacted LUPA in 1995 to replace the writ of certiorari as the exclusive means of appealing a local land use decision. RCW 36.70C.030. LUPA's purpose is to ensure uniform and expedited judicial review of land use decisions. RCW 36.70C.010.

Durland, 182 Wn.2d at 64. In that case, Durland skipped San Juan County's administrative appeals process and filed a land use petition directly in superior court. This Court held that the Superior Court did not have jurisdiction to hear the appeal where a failure to exhaust

administrative remedies deprived the superior court of a land use decision.[3] *Durland* also held that there are no equitable exceptions to the exhaustion requirements. *Id.* at 60.

In this case, the Plaintiffs attempted to avoid not only administrative appeal to the BOCC, but also judicial review under LUPA of the Examiner's April 2011 conclusion that the referral of SUP amendments to the examiner was appropriate.

> Both MSG and the Port argue that the changes entailed in the instant proposal to amend SUPT-02-0621 could have been handled administratively via enforcement authority and that no amendment application (administrative or quasi-judicial) was required. The [Thurston County Resource Stewardship] Department decided otherwise and its decision has several sources of support....
>
> While it may arguably have been in accordance with County Code for the Applicant's technical non-compliance with water monitoring deadlines to be handled as an enforcement action, changes to the nature and number of required monitoring sites fall less clearly within the scope of enforcement. Because the County Code does not explicitly state criteria stablishing whether SUP amendments are administrative or quasi-judicial, the Department exercised discretion in deciding which process applied. Its decision is due substantial deference....

Ex. 446 at 30-31. Under a straightforward application of the exhaustion rule, the Plaintiffs should not have been allowed to press a theory of

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[3] "A superior court hearing a LUPA petition acts in an appellate capacity and has only the jurisdiction conferred by law." *Durland*, 182 Wn.2d at 64; *see also* RCW 36.70C.020(2). Superior court review is limited to land use decisions, as defined in LUPA. RCW 36.70C.010, RCW 36.70C.040(1); *Post v. City of Tacoma*, 167 Wn.2d 300, 309, 217 P.3d 1179 (2009). A "land use decision" is defined as "a *final* determination by a local jurisdiction's body or officer with the highest level of authority to make the termination... on... [a]n application for a project or permit." *Durland*, 182 Wn.2d at 64; RCW 36.70C.020(2) (emphasis added).

recovery premised on the alleged error of the above conclusion by the hearings examiner that the Plaintiffs did not administratively appeal. This should have been held to be a bar to any action seeking damages based on the very theory rejected by the Examiner, and the Court of Appeals misapplied precedent by reaching the contrary result.

The Court of Appeals clearly erred when it accepted plaintiffs' misreading of *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013), and concluded that all actions for damages in the land use permitting context may proceed irrespective of LUPA's "exclusive remedy" provisions, even where the plaintiff seeks a jury verdict directly contrary to a quasi-judicial conclusion of an examiner. *Lakey* says the opposite: LUPA does not apply when the plaintiff is "making a claim that [it] could not make before the hearing examiner." *Lakey*, 176 Wn.2d at 927. But where, as here, a plaintiff premises a damages claim on argument it "could" and in fact *did* "make before the hearing examiner," LUPA's exclusivity provisions control and mandate exhaustion before turning to the judiciary. *See James*, 154 Wn.2d at 583-86; *Applewood Estates Homeowners Ass'n v. City of Richland*, 166 Wn. App. 161, 169-70, 269 P.3d 388 (2012). Review is warranted because the Court of Appeals misapplied *Lakey* and distorted its holding beyond what was intended. RAP 13.4(b)(1).

Again, if a developer does not substantially comply with the procedural requirements of the statutes governing LUPA, the Superior Court cannot exercise original jurisdiction. *James*, 154 Wn.2d at 588-89. In this case, the requirement to exhaust administrative remedies was not

met. This Court should accept review to ensure that the exhaustion requirements of LUPA remain intact to avoid premature resort to the courts and disregard for decisions by local governments throughout the State of Washington.

C. The Court of Appeals' decision also conflicts with a published decision this Court agreed to review years ago, but never did, which provides an even stronger argument in support of review now.

Mercer Island Citizens held several years ago that failing to challenge a land use decision via LUPA "bars any further claims challenging that decision, including challenges to the process for approving that decision." *Mercer Island Citizens*, 156 Wn. App. at 395. More specifically, that court upheld the dismissal of a plaintiff's claims that "challenged [the government's] approval process." *Id.* at 401. This holding by Division One is contrary to what Division Two held below. *Mercer Island Citizens* has been cited once in a Washington published decision, and was done so favorably. *See Lakey*, 176 Wn.2d at 926 n.11. And notably, this Court found *Mercer Island Citizens* important enough to review, but the petitioner there withdrew the matter from consideration. 170 Wn.2d 1020. This Court should take up the issue again.

V. CONCLUSION

For the reasons set forth above, and as requested by Thurston County, WSAMA respectfully requests this Court grant review of the Court of Appeals' decision in this matter and restore the clarity in Washington's exhaustion jurisprudence that the Court of Appeals eroded.

RESPECTFULLY SUBMITTED this 30th day of June, 2017.

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Comments:

Because this case is at the petition stage, the "brief" being filed is a Memorandum. See RAP 13.4(h).

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