74738-0

No. 74738-0

COURT OF APPEALS, DIVISION I
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,

Respondent.

BRIEF OF APPELLANTS

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III. INTRODUCTION

At stake in this case is the citizenry's ability to hold local government accountable for illegal taxation in the form of excessive fees charged for the review of proposed building and land-use projects. The trial court found that a local government's decision to charge a processing fee is a "land use decision" subject to the Land Use Petition Act, Chapter 36.70C RCW. This finding closes all practical avenues for recovery of these excessive fees, handing local governments the ability to tax permit applicants illegally for the benefit of the general fund.

The legislature has created a network of laws governing how local jurisdictions are funded. *See* Hugh D. Spitzer, Taxes vs. Fees: A Curious Confusion, 38 Gonz Law R 335, 346 (2003). These laws authorize general taxation in several forms. *Id.* at 338. However, in some specific instances where government provides special services to a subset of its citizens, the legislature has determined that burdening the general population with the costs of these special services is unfair. In those specific instances, the legislature has authorized government to recover the costs of providing those services by charging the subset of citizens who seek or benefit from those services . *Id.* at 343.

This case involves one of those instances. The legislature has authorized local government to recover the cost of processing applications

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for permits or other governmental approvals related to real estate development. *See* RCW 82.02.020. This authorization limits what local governments may charge for these services to the amount necessary to recover the costs of processing the applications. *Id.* Any overcharge beyond what is reasonably necessary to recover these costs is an illegal tax. *Hillis Holmes, Inc. v. Snohomish Cty*, 97 Wn.2d 804, 810–811, 650 P.2d 193 (1982).

Plaintiffs all paid fees to San Juan County in order to have their applications for permits processed by the County. The County has overcharged Plaintiffs and all other citizens paying similar fees. This overcharge amounts to approximately one million dollars over the three years ending when Plaintiffs filed this action in March of 2015. Plaintiffs seek to recover these overcharged fees from San Juan County on behalf of themselves and the class of persons having paid these excessive fees for the past three years.

San Juan County successfully asserted below that Plaintiffs' claims are barred under the Land Use Petition Act, Chapter 36.70C RCW (LUPA). The legislature enacted LUPA in 1995 to "reform the process for judicial review of *land use decisions* made by local jurisdictions . . . ." RCW 36.70C.010 (emphasis added). The trial court found that LUPA applies to Plaintiffs' claims even though San Juan County's decisions on

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what processing fees to charge are not land-use decisions—i.e. decisions on how land may be developed—but rather are revenue decisions intended to collect the costs of reviewing land-use proposals.

LUPA has strict requirements including exhaustion of administrative remedies, RCW 36.70C.060(2)(d), and a 21-day limitations period, RCW 36.70C.040(3). Application of LUPA to Plaintiffs' claims would preclude any reasonable recourse against a local government, such as San Juan County, who overcharges permit applicants to the benefit of the general fund.

The trial court's finding that LUPA applies to Plaintiffs' claims should be reversed, for three reasons: (1) The determination of a processing fee is not a "land use decision" under LUPA. *See* RCW 36.70C.020(2)(a). (2) Even if it is, a suit to recover overcharges of processing fees is a suit for "monetary damages or compensation" expressly excluded from LUPA applicability. *See* RCW 36.70C.030(1)(c). (3) If LUPA applies, there will be no recourse against illegal taxation through these excessive fees.

IV. ASSIGNMENTS OF ERROR

The trial court made the following errors:

1. The trial court erred by granting partial judgment on the pleadings to San Juan County on August 7, 2015, finding that Appellants'

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purely monetary claim that San Juan County overcharged for fees to process permit applications and perform subsequent reviews, in violation of RCW 82.02.020, were land use decisions to which the Land Use Petition Act applied.

2. The trial court erred by granting summary judgment to San Juan County on February 10, 2016, only in that it relied upon its prior finding that LUPA applies to Plaintiffs' claims.[1]

V. STATEMENT OF THE CASE

Plaintiffs challenge the trial court's order granting partial judgment on the pleadings, pursuant to CR 12(c). Entry of judgment by the trial court was appropriate if it appeared beyond doubt that Plaintiffs could prove no set of facts, consistent with the complaint, which would entitle Plaintiffs to relief. *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 189, 252 P.3d 914 (2011). Consequently, the facts recited here are based on the First Amended Complaint and facts Plaintiffs expect to be able to prove consistent with the Complaint.

Plaintiffs all applied for building and land use permits in San Juan County. CP 5–6. Each Plaintiff paid fees required by San Juan County to

[1] Appellants concede that, if LUPA applies to their claims, the trial court did not err.

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pay the costs of processing Plaintiffs' applications and the costs of subsequent reviews. *Id.*

During the times relevant to the Complaint, San Juan County had a single department that processed the applications at issue in this case. CP 8. This department is now called Community Development and Planning (CDP). *Id.* An applicant seeking a permit completes and submits an application for that permit to CDP. *Id.* With the application, the applicant pays a "plan review fee."[2] CP 9. Once the review of the application is complete, a determination is made whether to grant the permit and whether to place conditions on that permit. *Id.* If the permit is granted, and the applicant decides to proceed with the project, the applicant must pay an additional fee or fees to pay for subsequent reviews and inspections during the lifetime of the project. *Id.* An applicant also pays fees to review any amendments to the project that he applies for, and for permit renewals, which extend the lifetime of the permit. *Id.*

All processing fees are paid prior to the reviews for which they are charged. These processing fees are set by the San Juan County Council by ordinance.

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[2] This fee has various names including the "plan review fee" and the "building plan check deposit." The First Amended Complaint terms this fee to be a "deposit," using the term employed by the County. However, the amount paid is not refundable even if the permit is ultimately not granted.

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During the three years at issue in this case, the San Juan County Council required fees to be charged in excess of those that are reasonable to pay for the costs of application processing and subsequent reviews. CP 2. In the years 2012 through 2014, the Building Division of CDP, which handles building permits and related reviews, had the following revenues and expenses:

Year	Revenue	Expenses
2012	$858,181	$609,733
2013	$749,552	$677,607
2014	$933,535	$766,628
TOTAL	$2,541,238	$2,053,968

CP 10–11. In addition, of these $2,053,968 in expenses, the Building Division expended $509,922 on activities not related to processing applications, inspecting and reviewing plans, or preparing detailed statements as allowed under RCW 82.02.020. CP 11. Thus, the Building Division took in $2,541,238 to pay for $1,544,046 in allowed expenses—a 64.6% surplus. Similar although smaller numbers apply to the Current Planning Division of CDP. CP 13–14. This surplus violates RCW 82.02.020.

Plaintiffs filed their First Amended Complaint on March 18, 2015, seeking refund of this surplus. CP 1. Plaintiffs seek certification of a class consisting of persons who paid processing fees to San Juan County in the three years prior to the filing of the Complaint. CP 4.

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On June 11, 2015, San Juan County filed a motion for partial judgment on the pleadings, pursuant to CR 12(c), alleging that LUPA applies to Plaintiffs' claims. CP 49. The trial court granted this motion on August 7, 2015. CP 109. On February 10, 2016, the trial court granted San Juan County's motion on summary judgment, finding without opposition that Plaintiffs have not complied with the procedural requirements of LUPA. CP 216.

VI. ARGUMENT

The only issue on appeal is whether the Land Use Petition Act applies to challenges to the fees charged by a local jurisdiction to cover the costs of processing applications, inspections, plan reviews, and SEPA statement preparation. *See* RCW 82.02.020. An appellate court reviews a trial court's judgment on the pleadings, pursuant to CR 12(c), de novo. *P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012).

A. San Juan County's imposition of building and land use-related processing fees above its processing costs is an illegal tax.

San Juan County's ability to charge fees for the processing of applications for building permits and other land use approvals, and for performing related reviews, is limited by RCW 82.02.020. The statute begins with a categorical bar:

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> Except as provided in RCW 64.34.440 and 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land.

RCW 82.02.020; *see also Home Builders Assoc. of Kitsap County v. City of Bainbridge*, 137 Wn. App. 338, 344–45, 153 P.3d 231 (2007) (applying RCW 82.02.020 to building permit application fees). However, the statute contains a number of exceptions, one of which applies to building and land use-related processing fees:

> 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.

RCW 82.02.020. RCW 82.02.020 requires strict compliance with its terms. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 755, 49 P.3d 867 (2002).

None of the statutes referenced in the two paragraphs quoted *supra* applied to Plaintiffs' applications. Therefore, RCW 82.02.020 prohibited charging fees that exceeded those necessary to cover the costs to San Juan

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County of processing Plaintiffs' applications and performing related review work.

A charge in violation of RCW 82.02.020 is an unauthorized tax. *Hillis Holmes*, 97 Wn.2d at 810–811. Suits to recover invalid taxes must be brought within three years. *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 248, 877 P.2d 176 (1994). A three-year period applies since such suits arise out of implied liabilities to repay money unlawfully received. *Id.*[3] Thus, Plaintiffs' claims are timely if brought within three years of payment of the applications fees.[4]

Only one reported case addresses the applicability of RCW 82.02.020 to the overcharging of processing fees such as that alleged in Plaintiffs' complaint: *Home Builders Assoc. of Kitsap County v. City of Bainbridge*, 137 Wn. App. 338, 153 P.3d 231 (2007). The plaintiffs in *Home Builders*, representing a class of fee payors like the putative class

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[3] The trial court held that *Henderson Homes* is no longer applicable to application fees. *See* CP 106. This holding is discussed *infra*.

[4] Below, San Juan County argued that the application fees are not taxes. CP 95 There is some lack of clarity in Washington on the exact delineation of a tax versus a fee and other type of charge. *See* Spitzer, *supra*, at 335. There is authority for the proposition that overcharged fees are invalid taxes. *See Margola Assoc. v. City of Seattle*, 121 Wn.2d 625, 640, 641, 854 P.2d 23 (1993). However, the classification of the application fees in question is not important to the issue on appeal: RCW 82.02.020 restricts "any tax, *fee, or charge*." (emphasis added). Moreover, the rationale behind the three-year limitations period for invalid taxes applies as readily to fees in violation of RCW 82.02.020 because both involve "money unlawfully received." *See Henderson Homes*, 124 Wn.2d at 248.

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here, made the same essential claim made by Plaintiffs: that Kitsap County overcharged for fees to process permit applications and to perform related reviews, exceeding reasonable fees to cover the processing costs.[5] *Id.* at 343–44. The Court of Appeals held that the City had the burden of proving that the fees were reasonable, *id.* at 348, that the City could not include certain cost allocations in its expenses, *id.* at 350, and that the City violated RCW 82.02.020 if its fees were not "reasonable" rather than not "grossly disproportionate" as the trial court found, *id.* at 351. The appellate court remanded to determine if the fees that the City charged were reasonable. *Id.* at 341.

Home Builders demonstrates the legal validity of Plaintiffs' claims including Plaintiffs' class certification request. As in *Home Builders*, Plaintiffs did not bring their claim under LUPA. San Juan County now asserts, and the trial court below agreed, that a claim to recover unreasonable processing fees is a challenge to a land use decision to which LUPA applies. Presumably, the County and the trial court believe that,

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[5] The plaintiffs originally challenged an ordinance that increased the building permit fees in order to support an affordable housing project, arguing that the ordinance violated RCW 82.02.020 as a matter of law. *Home Builders*, 137 Wn. App. at 343. The trial court granted summary judgment to the City on that issue. *Id.* at 343–44. The matter then went to trial on the reasonableness of the fees charged and paid. *Id.* at 344. The plaintiffs only appealed the trial issues and not the trial court's earlier dismissal of their ordinance claim. *Id.* Nevertheless, the trial court in the case at bar cited the *Home Builder* plaintiffs' challenge of the ordinance to distinguish *Home Builders* with the case at bar. *See* CP 107.

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had the City of Bainbridge Island asserted an affirmative defense under LUPA, the plaintiffs in *Home Builders* would not have prevailed.

B. LUPA does not apply to Plaintiffs' claims.

San Juan County asserts that LUPA applies to Plaintiffs' claims. The trial court erred when it agreed. *See* CP 104.

In 1995, the legislature passed LUPA "to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." Laws of 1995, c. 347, § 702 (codified as RCW 36.70C.010). LUPA replaced the writ of certiorari for appeal of land use decisions to be the exclusive means for obtaining judicial review of these decisions with certain exceptions. RCW 36.70C.030(1). Land use decisions to which LUPA applies must be appealed to the Superior Court within 21 days of the decision. RCW 36.70C.040(3). Only "final" land use decisions may be appealed. RCW 36.70C.020(2). A decision is final if it is made "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." *Id.*

Plaintiffs have conceded that they did not utilize any administrative process to appeal the processing fees that they were

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charged, and did not file their complaint in Superior Court within 21 days of any conceivable "final decision" under LUPA. Thus, Plaintiffs' claims are barred if LUPA applies. However, LUPA does not apply to Plaintiffs' claims for two reasons.

1. The decision to charge the processing fees paid by Plaintiffs are not "land use decisions" to which LUPA applies.

LUPA does not apply to Plaintiffs' claims because decisions to impose processing fees are not "land use decisions" as that term is defined under LUPA. LUPA applies to an imposition of a processing fee if that fee is:

> *a determination on [a]n 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(2)(a) (emphasis added).[6] The statute includes within its scope the government's decision whether to grant the "project permit or

[6] LUPA applies to three types of decisions enumerated in RCW 36.70C.020(2). The other two are:

> (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

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other governmental approval" that is being applied for. *See id.* The statute also includes within its scope the determination of conditions imposed on a permit or other approval. *See, e.g., James v. County of Kitsap*, 154 Wn.2d 574, 590, 115 P.3d 286 (2005) (impact fees); *Isla Verde*, 146 Wn.2d at 751 (open space dedications).

But the statute's language does not include in its scope those fees imposed prior to, and to pay for, the processing of the application and the other reviews performed during the project. The decision to impose a processing fee is not a "determination *on* an application." *See* RCW 36.70C.020(2)(a) (emphasis added). Rather, it is a determination made prior to the work being performed. An applicant must submit a fee with his application in order for the application to be considered, and must submit fees prior to the performance of the other reviews required for the project. The amounts to be paid are based on a schedule that depends on what type of permit is being applied for and the value of the project and not based on the contents of the application.

> (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020(2). Plaintiffs did not seek an interpretative or declaratory decision and were not involved in an enforcement action. Consequently, this memorandum does not discuss these two types of "land use decisions" further.

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This distinction between land use decisions and processing fees arises from more than a fine parsing of the statute. The purpose of a processing fee is not the same as the determinations made "on an application," which are subject to LUPA. The government requires review of permit applications and subsequent inspections to manage development and mitigate its impacts. The government determines whether the permit being applied for complies with applicable building and land use code and what conditions must be placed on the permit to maintain the project's compliance with that code, including those conditions required to mitigate the impact of the proposed development. Statutes and case law require conditions placed on permits (such as impact fees) to relate to the impact of the proposed development. *See* RCW 82.02.020; *Isla Verde*, 146 Wn.2d at 759–60.

In contrast, the government determines what processing fees are required based on what type of permit the applicant seeks and the scope of the proposed project. The amount of the fee must be calculated to pay the government's processing cost. *Home Builders*, 137 Wn. App. at 349. An application for a permit must pay the application fee whether the government denies the application, issues the permit, or issues the permit with conditions. The applicant must pay fees for further project reviews regardless of the outcome of those reviews. These fees are independent of

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the government's "determination on [the] application." RCW 36.70C.020(2)(a).

In this way, processing fees are qualitatively dissimilar to the permit conditions imposed in *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005). The *James* court held that, like the decision to issue a building permit, the decision to impose an impact fee "as a condition of the issuance of the building permit" is a "land use decision" to which LUPA applies. *Id.* at 586. The court noted that impact fees are "a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development." *Id.* at 581 (quoting RCW 82.02.090(3)). The impact fees at issue in *James* could be spent only for certain public utilities and only in conformance with the capital facilities element of the comprehensive plan. *Id.* The court observed that the impact fees "must be tied to a specific, identified impact of a development on a community." *Id.* at 586 (quoting *Isla Verde*, 146 Wn.2d at 761); *see also* RCW 82.02.050(2) (listing restrictions on impact fee imposition).

> Thus, identification of the specific impact of a development on a community, assessment of the public facilities necessary to serve that development, and determination of the amount of impact fees needed to aid in financing construction of the facilities at the time a county issues a building permit inextricably links the impact fees imposed to the issuance of the building permit.

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Id.

Unlike impact fees, processing fees are not identified to a specific impact of a development. They are not imposed as a condition of the permit but rather as a prerequisite to the processing of the permit application and the performance of other required reviews. They are not designed to mitigate the impact of a proposed development but rather are designed to mitigate the regulatory cost of the application processing. As such, the logic in *James* does not apply to application fees.

This distinction is important when considering the policy behind LUPA. The *James* court observed that,

> 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, 154 Wn.2d at 589. No such policy concerns apply to processing fees. The government is allowed to charge only reasonable fees to cover its costs of processing applications and other reviews. No challenge to processing fees can rob the government of money to cover its costs. So, in

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the case of processing fees, there is no equivalent concern with the three-year statute of limitations that applies to overcharges of taxes.

San Juan County argued to the trial court that LUPA applies to any decision related to a permit application. CP 55–56. The County analogized the decision on what application fee to charge to an "interlocutory decision," and that since the decision on what application fee to charge is "inextricably tied to the permit decision," LUPA should apply. CP 56. But not all "interlocutory decisions" are subject to LUPA. In *Pacific Rock Environmental Enhancement Group v. Clark County*, the Court of Appeals considered whether LUPA applied to a discovery order entered by a hearing examiner. 92 Wn. App. 777, 779, 964 P.2d 1211 (1998). The Court held that such a decision is not a "land use decision" in part because it "was not a determination on an application for government approval of land use." *Id.* at 781. Consequently, not all decisions "inextricably tied" to the permit process are "land use decisions."

In its decision, the trial court cited San Juan County's memorandum listing cases that the County claimed were "intermediate decisions" like the decision on what application fee to impose. CP 105. However, all of the cases cited by the County in its memorandum are examples of land use decisions made "on an application"—decisions that aim to control and mitigate development. *See Durland v. San Juan*

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County, 182 Wn.2d 55, 340 P.3d 191 (2014) (building permit issuance); *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011) (preliminary plat approval); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) (conditional use permit extension); *Tapps Brewing Inc. v. City of Sumner*, 482 F.Supp.2d 1218, 1233 (W.D.Wash 2007) (permit condition); *see also Brotherton v. Jefferson County*, 160 Wn. App. 699, 249 P.3d 666 (2001) (enforcement decision under RCW 36.70C.020(2)(c)). There may be multiple "land use decisions" in a development project. *See, e.g., Knight*, 173 Wn.2d at 335 (discussing preliminary and final plat approvals). However, the determination of a processing fee is not simply a determination that comes before a determination on the application. It is not a land use decision at all.

In deciding that LUPA applies to Plaintiffs' claims rather than the three-year statute of limitations on tax overcharge claims, as held in *Henderson Homes*, the trial court quoted *James* when it stated that the holding in *Henderson Homes* "is no longer viable in the wake of LUPA." CP 106 (quoting *James*, 154 Wn.2d at 587). However, the *James* court observed that *Henderson Homes*, like *James*, concerned a challenge to impact fees. *James*, 154 Wn.2d at 587. The *James* court's comment regarding *Henderson Homes* was limited to impact fees, not all conceivable fees related to buildings and land use charged under RCW

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82.02.020. *See id.* The trial court's application of *James* to Plaintiffs' claims stretches LUPA's scope too far.

The language of LUPA manifests a legislative intent to cover governmental decisions "on an application" for approval of a proposed project, not on the fee assessed to process the application itself. Therefore, LUPA does not apply to a government's decision to impose a fee to pay for the costs of processing a permit application or other governmental approval.

2. Plaintiffs' suit for reimbursement of San Juan County's processing fee overcharges is a claim for monetary damages or compensation expressly excluded from LUPA.

Even if the decision to impose a processing fee is a "land use decision" as defined under LUPA, the suit to recover that fee is expressly excluded from LUPA's scope. LUPA does not apply to "[c]laims provided by any law for monetary damages or compensation." RCW 36.70C.030(1)(c). Monetary claims are not traditionally brought using the writ of certiorari, which LUPA was enacted to replace. *James*, 154 Wn.2d at 591–92 (Sanders J., dissenting); *see also* RCW 36.70C.030 ("LUPA replaces the writ of certiorari for appeal of land use decisions.").

A monetary claim must be brought under the LUPA procedure if the claim is based on a challenge to a land use decision. In *Asche v. Bloomquist*, the plaintiffs challenged a neighbor's building permit and also

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made a claim for nuisance, alleging damages caused by the improperly granted permit. 132 Wn. App. 784, 788–89, 133 P.3d 475 (2006). The Court of Appeals held that the challenge to the permit itself was barred under LUPA. *Id.* at 796. Importantly, it held that the nuisance claim was barred under LUPA as well. *Id.* at 801 (public nuisance); *id.* at 802 (private nuisance). The court, citing RCW 36.70C.030(1)(c), noted that not all nuisance claims are subject to LUPA. *Id.* at 800. However, when a claim for damages depends on a finding that a permit was improperly issued—which is the type of challenge to which LUPA applies—then LUPA must apply to the damages claim as well. *Id.* at 801; *see also Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 405, 232 P.3d 1163, 1169 (2010) (damages claim barred under LUPA where dependent on allegation of improperly issued temporary use permit).

In contrast is *Woods View III, LLC v. Kitsap County*, 188 Wn. App. 1, 352 P.3d 807 (2015). The plaintiff, a developer, brought a claim for damages resulting from Kitsap County's delays in processing several permit applications. *Id.* at 7–8. The Court of Appeals noted that LUPA applies to a claim for damages if the claim "is dependent on an interpretative decision regarding the application of a zoning ordinance" or if the claim challenges the conditions placed on the issuance of a permit.

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Id. at 24–25 (citing *Asche*, 132 Wn. App. at 801 and *James*, 154 Wn.2d at 590). Since the plaintiff was only challenging the delay in receiving permits, not the permits themselves, LUPA did not apply to its claim for damages. *Id.* at 25; *see also Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 926–27, 296 P.3d 860 (2013) (holding LUPA does not apply to inverse condemnation claim based on the granting of variances when not challenging those variances).

Plaintiffs here do not challenge any of the permits and other approvals granted to them. Rather, they challenge the fees imposed to review their applications for these permits and approvals. Because their claims do not depend on a challenge to these permits or approvals, their claims for damages are expressly excluded from LUPA's scope. *See* RCW 36.70C.030(1)(c).

The trial court held, without independent analysis, that Plaintiffs' claims do not fall under the above-quoted exception to LUPA's requirements. *See* CP 106. It based its decision on the *James* majority's treatment of this issue. The five-justice majority stated, "At no time have the Developers argued they are not subject to the procedural requirements of LUPA because their claims fall within one of the exceptions enumerated in RCW 36.70C.030(1)." *James*, 154 Wn.2d at 586–87. The majority did not specifically refer to the exception for monetary damages,

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RCW 36.70C.030(1)(c), did not state that this exception or any exception did not apply, did not provide any citation or analysis on any exception, and indeed did not make any comment on this or any other exception enumerated in RCW 36.70C.030(1) at all. The four-justice dissent based that dissent in part on the applicability of the monetary exception set forth in RCW 36.70C.030(1)(c). *See id.* at 590–96 (Sanders J., dissenting with three justices); *id.* at 596 (Chambers, J., concurring with dissent but only with respect to plaintiffs who paid impact fee under protest pursuant to RCW 82.02.070(4)). The trial court decided that the *James* majority must have considered the issue. CP 106.

Appellate courts do not review issues not argued, briefed, or supported with citation to authority. *Christian v. Tohmeh*, 191 Wn. App. 709, 728, 366 P.3d 16 (2015). Statements made by appellate courts on issues not before the court do not announce a rule. *State ex rel. Johnson v. Funkhouser*, 52 Wn.2d 370, 373–74, 325 P.2d 297 (1958); *see also Peterson v. Hagan*, 56 Wn.2d 48, 53, 351 P.2d 127 (1960) ("In considering such statements made in the course of judicial reasoning, one must remember that general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved."); *State v. Rudolph*, 141 Wn. App. 59, 70, 168 P.3d 430 (2007) ("[W]e

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should not treat as dispositive [the Supreme Court's] rulings that do not answer the questions presented in the case at bar.") (annotations added, quotation marks omitted).

The respondents in *James* did not argue the applicability of any of the LUPA exceptions enumerated in RCW 36.70C.030(1). *James*, 154 Wn.2d at 586–87. Although the *James* majority observed this fact, it did not discuss the applicability of any of these exceptions. Consequently, *James* did not hold that RCW 36.70C.030(1)(c) did not apply to the respondent's claims in that matter. *James* is not binding precedent or even helpful guidance with regard to the applicability of RCW 36.70C.030(1)(c) to Plaintiff's claims.

Even if the thin statement from the *James* majority, coupled with Justice Sanders' dissent, is construed as stating that the monetary damages exception does not apply to impact fees, this holding is limited to express conditions of the permit itself. This limitation to the holding is consistent with the line of cases, discussed *supra*, that hold LUPA applicable to damages claims that are based upon a challenge to a land use decision, and not applicable to damages claims not based on a land use decision challenge. Any other interpretation would foreclose damages claims even remotely related to a land use decision, such as the claim made in *Woods View III* based on delayed permit application processing, and the inverse

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condemnation claim in *Lakey*. The monetary exception in RCW 36.70C.030(1)(c) would be superfluous. *State v. Pannell*, 173 Wn.2d 222, 230, 267 P.3d 349 (2011) (construing statute such that no clause is superfluous).

Consequently, Plaintiffs' claims in the Superior Court do not fall under LUPA.

C. As a practical matter, requiring applicants who are overcharged a processing fee to comply with LUPA will foreclose all such suits.

A permit applicant who has been overcharged for processing fees has no reasonable recourse if the applicant must comply with LUPA. As a result, there will be no one to hold governments to the legislative mandate to charge only a reasonable amount to cover the costs of processing the applications.

There are several reasons why a single applicant does not have a reasonable recourse to recover overcharged processing fees:

1. The amount that an applicant may recover is typically very small. The processing fees themselves are small. For example, the fees for building permits paid by Plaintiffs range from $2700 to $109.50. CP 218–19. Plaintiffs allege that in the years 2012 through 2014, Plaintiffs were overcharged by 64.6%. See *supra* at 6. Thus, the recovery for Plaintiffs would range from $1741.50

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down to $70.63. Some members of the putative class proposed by Plaintiffs have paid even smaller fees.

2. A project may involve a number of processing fees paid at different times, for example when the project is amended. Under LUPA, each charge would trigger a new exhaustion requirement and a new 21 day limitation period. As a practical matter, not even a single project's fees could be appealed in one action.

3. Proof of an overcharge cannot be made based on the cost of processing a single application. Proof that a fee is unreasonable requires calculating the aggregate revenue from all processing fees and the permissible expenses that may be charged against those fees. *See Home Builders*, 137 Wn. App. at 349–50. Thus, any case to recover an overcharged permit fee requires extensive discovery.

4. Even after calculation of the relevant revenues and expenses, there is no well-defined formula for what is a "reasonable" application fee structure. Litigation of this issue is complex.

5. There is no recovery of attorney fees for successful single-party challengers of a processing fee.

As a result of these facts, a single applicant who is overcharged a processing fee has no reasonable recourse.

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While the actual loss to each applicant is relatively small, in aggregate the total unauthorized tax may be quite large. Plaintiffs allege a three-year overcharge of one million dollars on building permits alone. A Washington State Auditor's report from 2009, which audited eight counties to determine if they were complying with RCW 82.02.020 when they set their processing fees, found that most did not comply with state law. Performance Audit Report: Eight Counties' Building Permit and Inspection Fees, Washington State Auditor Report No. 1002634 (December 29, 2009), *available at*, http://leg.wa.gov/Senate/Committees/GOS/documents/BuildingPermitFeesAudit.pdf. According to the firm that performed the audit, "[R]evenues received from permit fees in many of [the eight audited counties] have, in the past, been greater than expenses associated with the permitting process. These additional funds have been used to help support other county services." *Id.*

The solution lies in a class-action lawsuit.

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

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Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980). "The smaller the stakes to each victim of unlawful conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather than (without a class action) probably nothing." *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013) (Posner, J.); *see also Brown v. Brown*, 6 Wn. App. 249, 256–57, 492 P.2d 581 (1971) (stating class action litigation "saves members of the class the cost and trouble of filing individual suits [and] frees the defendant from the harassment of identical future litigation.").

However, class actions cannot feasibly be prosecuted if each person in the proposed class must meet LUPA's appeal requirements. Each person of the class would have to exhaust administrative remedies. *See* RCW 36.70C.060(2)(d). Each person must then appeal within 21 days. RCW 36.70C.040(3). If there were a class—consisting of all persons having obtained a "final determination" within 21 days—that class would be very small, losing the economies of scale that class action suits provide.

It is worth noting that most land use decisions falling under LUPA are not amenable to class action treatment. These decisions are individualized enough that they escape any attempt to find a common

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legal or factual issue within a large enough class. *See, e.g. Admasu v. Port of Seattle*, 185 Wn. App. 23, 31–32, 340 P.3d 873 (2014) (holding individualized determinations of value diminution caused by airport noise precluded class certification in inverse condemnation suit). Most conditions imposed on permits are non-monetary conditions to which class actions suits apply with difficulty. But even monetary conditions, such as impact fees, require individualized determinations. *See, e.g.*, RCW 82.02.060(5) (requiring impact fee ordinance to allow adjustment of standard fee for "unusual circumstances in special cases").

That the legislature did not intend challenges to processing fees to be made under LUPA can perhaps be seen in its treatment of impact fees, discussed in *James*. Jurisdictions are allowed to charge impact fees on development for the financing of public facilities. RCW 82.02.050(2). The legislature imposed several conditions on these impact fees, basically requiring them to relate closely to the development on which the fees are charged. RCW 82.02.050(3).

Unlike for application fees, the legislature created specific process designed to protect the payor of an impact fee. Impact fees paid are to be kept in a separate account for each type of public facility being funded. RCW 82.02.070(1). In most cases, the impact fees must be spent within 10 years of receipt. RCW 82.02.070(3). If the fees are not spent, the

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payor may request a refund. RCW 82.02.080. Jurisdictions are to create an administrative appeals process to challenge impact fees. RCW 82.02.070(5). An applicant can obtain a permit while challenging the impact fee by paying that fee under protest. RCW 82.02.070(4). No such legislatively-created process exists to protect the application fee payor.

Given the impossibility of challenging processing fees one fee at a time, the legislature could not have intended to include challenges to processing fees when it enacted LUPA.

VII. CONCLUSION

Local governments do not have free rein to impose on their citizens obligations to pay money. In order to avoid a disproportionate impact of special services provided to a small set of citizens, the legislature has, in specific cases, authorized local governments to charge for those special services rather than to pay for those services from general taxation. *See* Spitzer, *supra*, at 343 (citing as examples RCW 35.92.010 (city water rates) and RCW 35.87A.010 (special assessments for parking and business improvements)). The type of fees that San Juan County charged Plaintiffs is an example of this sort of legislative authorization, allowing San Juan County to recover the costs of processing building and land use-related applications for permits and other governmental approvals

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deemed necessary to manage development and mitigate its impacts. *See* RCW 82.02.020.

The legislative mandate to recover these processing costs includes the restriction that the fees charged be reasonable to cover those costs. *Id.* When a local government overcharges, the government illegally taxes disproportionately those citizens who seek the special services. San Juan County has overcharged applications for permits in a recent three year period to the tune of one million dollars.

The law must provide recourse to prevent this disproportionate taxation. That recourse is not available if challenges to these processing fees must comply with the Land Use Petition Act. The legislature did not intend for LUPA to apply to these processing fees. A decision to charge these fees is not a "land use decision" under LUPA. *See* RCW 36.70C.020(2). Further, a suit to recover overcharges of these fees is specifically excluded from LUPA as a suit for "monetary damages or compensation." *See* RCW 36.70C.030(1)(c). LUPA does not bar Plaintiffs' claims.

This court should reverse the trial court's grant of partial judgment finding that LUPA applies to Plaintiffs' claims, reverse the trial court's subsequent dismissal, and remand for a decision on class certification and a trial on Plaintiffs' claims.

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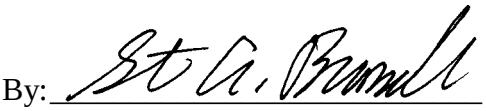
Respectfully submitted,

BRANDLI LAW PLLC

Dated: April 1, 2016

By: 

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No. 74738-0

COURT OF APPEALS, DIVISION I
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, Respondent.	DECLARATION OF DELIVERY

I declare under penalty of perjury under the laws of the State of Washington that on the date signed below I delivered by hand the following documents:

Brief of Appellant
This Declaration of Delivery

to the following person(s):

Randall Gaylord
San Juan County Prosecutor
PO Box 760
Friday Harbor, WA 98250-0760

at the office of the same.

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In Friday Harbor, WA

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