NO. 96837-3

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals, Division II No. 45476-9-II

TED SPICE AND PLEXUS DEVELOPMENT, LLC,

Petitioners

v.

PIERCE COUNTY, a political subdivision, and
CITY OF PUYALLUP, a municipal corporation

Respondents

PETITIONERS' PETITION FOR REVIEW BY THE SUPREME COURT

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I. IDENTITY OF PETITIONERS

Petitioners Ted Spice ("Spice") and Plexus Inc. ("Plexus") (collectively "Spice" or "Plexus") hereby ask for the relief designated in Part II. Petitioners are represented by the Goodstein Law Group PLLC.

II. RELIEF REQUESTED

Petitioners ask the Supreme Court to accept review of the following: November 21, 2017 decision of the Court of Appeals, Division II in Case No. 45476-9-II ("Ruling") (**Appendix 1**), Appeals Court Order dated November 27, 2018 which granted Petitioners' (First) Motion for Reconsideration (**Appendix 2**), but which by Appeals Court Decision dated November 28, 2018 again denied Petitioners' appeal ("2018 Ruling") (**Appendix 3**),
Appeals Court Order dated January 10, 2019 which denied Petitioners' (Second) Motion for Reconsideration (**Appendix 4**), ("Decisions"). The Decisions meet all the criteria of RAP 13.4(b). This Supreme Court should accept review and reverse the Division II Decisions.

III. COURT OF APPEALS DECISIONS

The Decisions of the Court of Appeals, Division II subject of this Petition are attached as Appendix 1-4.

IV. ISSUES PRESENTED FOR REVIEW

A. The Division II Decisions conflict with the recent *Maytown* decision of this Washington Supreme Court which recognizes that RCW 64.40 and tort damage claims are causes of action independent of appeals of

LUPA determinations. RAP 13.4(b) (1). Error! Bookmark not defined.

B. The Division II Decisions conflict with decisions of this Washington Supreme Court and other divisions of the Court of Appeals. RAP 13.4(b) (1) and (2).

C. Petitioners present a significant question under the Federal and Washington Constitution as Petitioners were deprived of due process because their right to seek RCW 64. 40 and tort damages were improperly terminated contrary to the Supreme Court's holding in *Maytown*. RAP 13.4(b) (3).

D. The Division II Decisions which had the effect of allowing a public entity to breach its duty to provide water service based on arbitrary and capricious acts and omissions and to evade the resulting damages actions are founded on a fundamentally wrong basis and is an issue of substantial public interest that should be determined by this Supreme Court. RAP 13.4(b)(4).

V. STATEMENT OF THE CASE

Petitioners accept the Statement of Facts as contained in the Appeals Court 2018 Decision, as supplement herein.

VI. SUMMARY

This Court should accept Review because the Decisions of the Appeals Court below directly conflict with this Supreme Court's recent holding in *Maytown Sand and Gravel, LLC v. Thurston County*, No. 94452-1. ("Maytown").[1] In that very recent ruling, this Supreme Court expressly held that Chapter 64.40 RCW claims, which address tortious acts by a permitting body, are wholly independent from Chapter 36.70C RCW Land Use

[1] *Maytown Sand & Gravel, LLC v. Thurston Cty.*, 191 Wn.2d 392, 423 P.3d 223 (2018), Slip opinion attached as **Appendix 5.**

Petition Act ("LUPA") actions and lack of a LUPA claim does not bar related tort claims. Here, three Petitioners who had varying interests in a property sought relief under LUPA based on the city of Puyallup's failure to provide water service. These same Petitioners also pursued Chapter 64.40 RCW and tort damages based on Puyallup's delay and arbitrary and capricious acts/omissions in refusing to process Petitioners' water service, when Puyallup had a duty to so, and which resulted in damages accruing since 2004[2]. While this litigation was on-going, one of the three Petitioners died, ownership interest in the subject property was litigated, and ultimately at least one of the two surviving Petitioners retained an ownership interest, and the Estate of deceased Petitioner (Estate) also owned a percentage interest. CP 2659. The Trial Court ultimately determined that the Estate of the deceased Petitioner did not wish to be a party to the present LUPA and tort damages action[3]. As a result, the Trial Court dismissed not just the LUPA action, but also the RCW 64.40 and tort actions of all parties, based

[2] Damages from Puyallup's breach of this duty accrued from at least 2004 until 2011, when Puyallup dropped its improper requirement that annexation was a condition of water service. The facts of this case are near identical to those in *Stanzel v. Puyallup, Stanzel v. City of Puyallup* 150 Wash.App. 835, 209 P.3d 534, Wash. App. Div. 2 ,2009 case, copy attached as **Appendix 6** where the COA found Puyallup had a duty to serve landowner similarly situated to these Petitioners. In fact, Petitioners Plexus and Spice are expressly mentioned I the COA Decision. These Petitioners had paused their litigation to await the outcome of the *Stanzel* case on appeal.

[3] The Estate of the deceased Petitioner was first managed by a surviving daughter; however, the overseeing Probate Court took away her testamentary powers. The Trial Court in this subject action nonetheless accepted the daughter's position that the Estate did not wish to be a party to the LUPA action. CP 988-990, 5298-9.

on CR 19, failure to join a necessary party. The Trial Court found, and the Court of Appeal Decisions upheld that the Estate was a necessary party as to all causes of action, because generally "a landowner is an indispensable party in a case that would affect the use of the landowner's property," citing *Ahmad v. Town of Springdale,* 178 Wn. App. 333, 341, 314 P.3d 729 (2013).[4] But by upholding the dismissal of the RCW 64.40 and tort damages claims in addition to the LUPA claim, the Appeals Court acted in direct conflict with this Courts *Maytown* ruling, by failing to acknowledge that the remaining Petitioners' tort and Chapter 64.40 damages claims are separate and distinct from LUPA, for which each individual Petitioner had their own causes of action to assert, and for which the Estate was not a CR 19 necessary party.[5] This Supreme Court should accept review because surviving Petitioners' RCW 64.40 and tort-based damages claims should not have been dismissed when the LUPA action was dismissed pursuant to CR 19.

VII. WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the following grounds for review of appellate

[4] 2018 Ruling at 19, ("the holding in *Ahmad* applies broadly to "landowners" and LUPA applies to determinations affecting the use of real property. RCW 36.70C.020(2)(a)-(c)")," Emphasis added.

[5] The *Maytown* case was decided after the main briefing was completed in this case. The Petitioners filed Reconsideration to bring Maytown to the attention of the Appeals Court, which was denied by its 2018 Ruling. See Petitioner's Second Motion for Reconsideration on file dated December 12, 2018.

decisions:

> A petition for review will be accepted by the Supreme Court only:
>
> (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 decision by another division of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This case should be considered under all four prongs of this Rule.

E. The Division II Decisions conflict with the recent *Maytown* decision of this Washington Supreme Court which recognizes that RCW 64.40 and tort damage claims are causes of action independent of appeals of LUPA determinations. RAP 13.4(b)(1).

1. Trial and Appeals Court Rulings with Conflict Supreme Court's Recent *Maytown* case, by Failing To treat RCW 64.40 and Tort Claims Separate & Distinct from Land Use LUPA claims.

In the present case, Petitioners sought a change in water service supplied by City of Puyallup from residential to commercial. CP 1-4. When Puyallup refused to process the application,[6] Petitioners exhausted their administrative appeal CP122, 124, 130-131, and then filed a LUPA appeal as well as damages actions under Chapter 64.40 for Puyallup's delay

[6] CP 124, 129, 11008, 120, 281, 122, 627-8, 1108

/arbitrary and capricious acts, and tort claims, for Puyallup's breach of its duty to provide water service. The Trial Court below dismissed the LUPA action after the Estate for one of the three Petitioners, now deceased, expressed unwillingness to be a party; the remaining Petitioners asserted the tort actions were independent of LUPA and should survive. The Trial Court below disagreed and dismissed all claims per CR 19 for failure to join a necessary party. The Appeals Court upheld dismissal. Review is needed as this Supreme Court has expressly held that Chapter 64.40 RCW claims, which address tortious acts by a permitting body, are wholly independent from Chapter 36.70C RCW Land Use Petition Act (LUPA) actions, and that lack of a LUPA claim does not bar a tort action.[7]

In the very recent *Maytown* case, this Washington Supreme Court ruled that the absence of a LUPA claim does not bar an action based on an agency's tortious acts committed during the land use permitting processes.[8]

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[7] In *Maytown*, this Court found that LUPA's distinct processes were adopted to address the need for accelerated processing and uniformity in land use "determinations"; and that those same considerations are not critical to tort claims. "Tortious acts committed during the land use decision-making process are not similar or comparable to *determinations* on a permit application, on the applicability of land use ordinances or regulations to property, or on how ordinances and regulations should be enforced. Construing "determination" in this limited manner is consistent with LUPA's stated purpose, which is to provide landowners with an expedited and uniform process for obtaining and appealing local land use decisions." *Maytown*, quoting, RCW 36.70C.010; *Wash. State Office of Fin. Mgmt., Governor's Task Force on Regulatory Reform: Final Report* 51 (Dec. 20, 1994). This Supreme Court found that, "That rationale does not apply to intentional torts committed during that land use decision-making process." *Maytown* at Slip Opinion 41.

[8] See *Maytown Slip Opinion,* ***Appendix 5*** attached. "They [Maytown and the Port] argue that LUPA's exhaustion requirement applies only to actions challenging the validity of a permit or the interpretation of a land use statute or ordinance. They argue that a different

> We therefore hold that LUPA's administrative exhaustion requirement does not apply to the tort claims raised here. *Accord Woods View II, LLC v. Kitsap County, 188 Wn. App. 1,* 24-25, 352 P.3d 807 (2015) (holding LUPA's exhaustion requirement does not bar tort claims arising from improper governmental delay in processing permits); *Libera v. City of Port Angeles, 178 Wn. App. 669, 675 n.6, 316 P.3d 1064 (2013)* (holding the same rule applies to a tort claim alleging intentional interference with a business expectancy*).*[9]

This Court should accept review because the Decisions below directly conflict with the *Maytown* Ruling. In the present case, Petitioners sought a change in water service supplied by City of Puyallup from residential to commercial. When Puyallup refused to process the application, Petitioners exhausted their administrative appeal, and then filed a LUPA appeal as well as damages actions under Chapter 64.40 for Puyallup's delay /arbitrary and capricious acts, and tort claims, for

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rule applies where, as here, the plaintiffs challenge an agency's tortious acts committed during the land use permitting process, rather than the land use decision itself. See *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 556, 166 P.3d 813 (2007) (distinguishing between actions challenging the validity of a land use decision and actions challenging the government's bad faith delay in issuing that decision…. **We agree with Maytown and the Port**." *Slip Opinion* at 40. Further, in *Maytown*, this Court found that LUPA's distinct processes were adopted to address the need for accelerated processing and uniformity in land use "determinations"; and that those same considerations are not critical to tort claims. "Tortious acts committed during the land use decision-making process are not similar or comparable to determinations on a permit application, on the applicability of land use ordinances or regulations to property, or on how ordinances and regulations should be enforced. Construing "determination" in this limited manner is also consistent with LUPA's stated purpose, which is to provide landowners with an expedited and uniform process for obtaining and appealing local land use decisions. RCW 36.70C.010; *Wash. State Office of Fin. Mgmt., Governor's Task Force on Regulatory Reform: Final Report* 51 (Dec. 20, 1994). ***That rationale does not apply to intentional torts committed during that land use decision-making process***." *Id* at 41-42.

[9] Id., *Slip Opinion* 42-43.

Puyallup's breach of its duty to provide water service. Petitioners seek review of the Appeals Court Decisions which uphold dismissal of Petitioners' Land Use Petition Act and tort damages lawsuit, where trial court found that when one of the three original Petitioners passed away, the Estate of deceased was a CR 19 necessary party, and when the Estate decline to participate, the LUPA and tort damages actions all must be dismissed for failure to join a necessary party.[10] The two remaining Petitioners, consistent with *Maytown*, assert that each have independent tort and RCW 64.40 claims for damages, which are separate from the LUPA claim, that those tort claims survived and could be and were properly pursued by their attorney. Petitioners' LUPA cause of action seeks relief regarding the use of the property.[11] Petitioners' Chapter 64.40 RCW tort causes of action and breach of tort duty[12] claims seek monetary

[10] The Estate remains a party to the suit. At no time has the estate moved to dismiss the deceased petitioner or to substitute as a party. CP 2659.

[11] *CP 668*, CP 1-28.

[12] 3.1 **Puyallup has breached its duty** to provide water service to Plexus pursuant to Puyallup's Service Area Agreement, the CWSP, and Chapter 70.116 RCW upon which these agreements are founded, and an independent duty pursuant to RCW 43.260. **Puyallup had breached** its duties as exclusive water service provider pursuant to RCW 70.116, the Pierce County Water System Plan, Puyallup's Standard Service Area Agreement, RCW 43.20, and Puyallup's DOH approved water system plan.
3.3 **Puyallup has breached a duty** recognized by Washington Courts. The Courts recognize a duty to provide service where a city "holds itself out" (1) as willing to supply sewer or water service to an area, or (2) where a city is the exclusive supplier of sewer or water service in a region extending beyond the borders of the city. See: *Mt Development LLC, et al., vs. City Of Renton, et al*, Court of Appeals Division I, 59002-2-I, (**Aug. 27, 2007)**. CP 8-9.

relief for the damages inflicted by Puyallup during the permit process.[13] This Supreme Court should accept review because surviving Petitioners' RCW 64.40 and tort-based damages claims should not have been dismissed when the LUPA action was dismissed pursuant to CR 19.

2. Chapter 64.40 RCW and breach of water service duty are tort, not a land use, causes of action.

In *Maytown*, this Supreme Court found that "Tortious acts committed during the land use decision-making process are not similar or comparable to *determinations* on a permit application, on the applicability of land use ordinances or regulations to property, or on how ordinances and regulations should be enforced. Construing "determination" in this limited manner is consistent with LUPA's stated purpose, which is to provide landowners with an expedited and uniform process for obtaining and appealing local land use decisions. RCW 36.70C.010; *Wash. State Office of Fin. Mgmt., Governor's Task Force on Regulatory Reform: Final*

[13] CP 1004: 2-3. The remedies sought by Petitioners included monetary damages, beginning in at least 2004:

3. The actions of the City of Puyallup in denying the request of Petitioners for additional water service and refusing to sign the Water Availability Letter required by Pierce County for construction on their property caused damage to Petitioners within the meaning of RCW 64.40**Error! Bookmark not defined.**.030(4).

4. These damages include the inability to use their property for uses permissible under the law and County zoning, reasonable expenses and losses, and do not include speculative losses or profits.

5. These damages were incurred between the time Petitioners were first denied a Water Availability Letter through and including the time of trial in this matter. The exact amount of damages will be calculated before the time of trial.*CP_10-11* Dec of Ethan Offenbecker. CP 991-1002.

Report 51 (Dec. 20, 1994). That rationale does not apply to intentional torts committed during that land use decision-making process." [14] This *Maytown* analysis spotlights why this Court found tort actions are distinct and independent of LUPA determinations. The Appeals Court's Decision impermissibly conflict with *Maytown*, in allowing the LUPA and tort claims to be improperly bundled, such that when the LUPA claim was dismissed for failure to join what the trial court considered a necessary party [the Estate], the independent tort-based claims were wrongly also dismissed.

3. Each Petitioner had Independent Tort Claims.

Even if one accepts that CR 19 defeats a LUPA case[15], there is no such similar requirement that all owners of property must join in seeking tort or RCW 64.40 claims. Separate from the LUPA claim, *Maytown* affirms that each Petitioner had an independent cause of action under RCW 64.40, whereby each sought money damages, and not a contested "use" of land. RCW 64.40.020 creates a damages cause of action for "owners of **a property interest"** to obtain relief from relief from [an agency's] failure to act within time limits established by law:

> Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief

[14] *Maytown* at Slip Opinion 41.
[15] Ruling at 18. Petitioners do not concede this issue.

from a failure to act within time limits established by law.

The statute defines a property interest as "**any interest** or **right in real property in the state**." See RCW 64.40.010(3)(emphasis added). The statute does not limit its scope to property owners, but instead to any person or entity with "any interest or right in real property." Here all Petitioners had an interest in the Property and or were applicants for development. Applicants for development rights have a constitutionally cognizable property right. *See Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, P.2d 250 (1998).[16] The record of this case unequivocally shows Petitioners here established chapter 64.40 damages as follows:

- Petitioners all held an interest in the Property[17]

[16] In *Mission Springs,* the Washington State Supreme Court held that a developer had a constitutional property right in the grading permit it sought:
Mission Springs had a constitutionally cognizable property right in the grading permit it sought. **The right to use and enjoy land is a property right**. *State ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654 (1928); *963 *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *West Main Assocs. v. City of Bellevue*, 106 Wash.2d 47, 50, 720 P.2d 782 (1986) (" '**Although less than a fee interest, development rights are beyond question a valuable right in property**.' ") (quoting *Louthan v. King County*, 94 Wash.2d 422, 428, 617 P.2d 977 (1980)); *Ackerman v. Port of Seattle*, 55 Wash.2d 400, 409, 348 P.2d 664, 77 A.L.R.2d 1344 (1960) ("'**Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal**.' "(Citations omitted.)) (*quoting Spann v. City of Dallas*, 111 Tex. 350, 355, 235 S.W.513, 19 A.L.R. 1387 (1921)).
Id. at 962-963 (emphasis added).

[17] From at least February 28, 2004 (execution of the DPOA) through August 29, 2007, the date of filing the LUPA 2 Appeal, Petitioners had various interests in the Subject Property, including:
- Ms. Mathews' initial ownership of the Subject Property, and Mr Spice held a 33% interest holder in the subject property, by Quit Claim Deed dated December 1, 2007 and recorded June 3, 2009. By that Deed, Ms. Mathews deeded a one-third interest to Ted Spice in the property which is subject to this LUPA and damages claim. CP 4879.
- By Quit Claim Deed dated June 9, 2009 and recorded December 21. 2009, Ms.

- Puyallup "**failed to act"** (provide Petitioners' water service)[18]
- "**within the time a state statute or a local ordinance requires**" (The Pierce County Coordinated Water System Plan defines "timely service" as receiving a commitment to provide service within 120 days of the request. Clearly more than 120 days have passed. *Id.)* [19]

Mathews deeded the remaining two thirds interest to Ted Spice in the property which is subject to this LUPA and damages claim. CP 4880.

- Mr. Spice's as managing partner status per the Plexus Investments, LLC Operating Agreement (authority to "oversee any current projects or going concerns"),
- As a member of Plexus Investments, LLC, Mr Spice also held title to the property, ("Members shall have authority to act on behalf of company,"), and
- Mr. Spice had been granted broad powers to act as Ms. Mathews' attorney-in-fact through the February 28, 2004 DPOA. The DPOA includes the express power to sue to enforce Mr. Mathews' property rights.

[18] 5. It is **undisputed** that the city of **Puyallup is the exclusive water provider** for this particular parcel.
3. …Clearly **timely water service is not being provided by the City of Puyallup given that they have not to this day agreed to provide water service**.
(Decision) "**Puyallup is unwilling to provide timely and reasonable water service to the Applicant's parcel**."
HE 2005 Finding 5, Conclusions 3 and Decision CP 122-124.

[19] The County Utility Staff charged with administering the Regional Water Plan Dispute Resolution Process supported Appellants' efforts, as the following Hearing Examiner Decision summary of testimony attests:
Appearing was SUSAN CLARK who presented the Public Works and Utilities Staff Report. She submitted previous water dispute decisions and attached them to the staff report. **She provided the background for this dispute**. **The Public Water System Coordination Act requires water systems to establish service areas.** The City of Puyallup is the designated service area for this particular parcel. The applicant is required to obtain water service from the City of Puyallup. **They are the exclusive provider. They City of Puyallup is required to offer timely and reasonable service to the applicant.** The site is currently used in a residential capacity, but it is zoned for commercial use in the Employment Center zone classification. The applicant intends to redevelop the property and wants the City of Puyallup to continue to provide water to the site. **The applicant requested water service from the City of Puyallup. On or about June 2004, the applicant attended a pre-application meeting. He was eventually told in August that the City could not issue a water availability letter until his property was in the process of being annexed. There have not been enough signatures from property owners within the immediate area to proceed with annexation, thus the City would not issue a water service availability letter**. The Pierce County Coordinated Water System Plan defines "timely service" as receiving a commitment to provide service within 120 days of the request. Clearly more than 120 days have passed. The City of Puyallup has elected not to provider water. The applicant has requested approval to provide water by well. Staff recommends that the applicant be allowed to pursue other options for water service. Planning Staff is also asking that the Examiner rule that other applicants in the same position be allowed to pursue other options.
CP 120. Emphasis added.

- Petitioners pursued and **exhausted their administrative** remedies under appropriate PCC Water dispute process *per Stanzel v. Puyallup, Stanzel v. City of Puyallup* 150 Wash.App. 835, 209 P.3d 534, Wash. App. Div. 2,2009:

  - Petitioners sought out the proper remedy dictated by the Regional Water Plan, to which at that time, Puyallup was bound.[20]

  - Petitioners applied to the Pierce County Hearing Examiner, the office ***precisely*** designated by the Regional Water Plan to arbitrate and remedy disputes between purveyors and customers. See then applicable Pierce County Code Ch. 19D. 140.[21]

- Any claimed failure to exhaust remedies by filing City application is barred, as it would have been futile to do, in light of the City's declared unwillingness to provide service.[22]

- Petitioners timey filed their ch.64.40 RCW actions in conjunction with their LUPA Petition. CP 1-28.

- Petitioners made an offer of proof to show damage due to delay as defined by *Parkridge*: **ascertainable damages for lost profits, loss of favorable financing, increased construction costs due to inflation[23]**

- No internal City process can defeat the state law remedy afforded by either the Water System requirements for service under ch. 70 RCW or for delay damages relief under ch.64.40 RCW.

This Court should accept review and find that the remaining two

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[20] The Regional Water Plan was at that time implemented by provisions of Pierce County Code Ch. 19D. 140, which provisions included a dispute resolution process at §19D.140.090.

[21] The premise of Puyallup's (redundant) Second Summary Judge met Motion response and its "failure to exhaust administrative remedies argument is that Puyallup should have both the role of **adversary** and **arbitrator** to a water service dispute. This is precisely the un-even situation the regional Plan sought to avoid.

[22] 8/3/2004 Colleen Harris Memo to File: Puyallup refusal to provide water. 8/16/2004-Colleen Email to Spice Denying water Service CP 120, 122, 627-628, 1108, and the HE's determined of Puyallup's denial of water service, which are verities.

[23] Dec of Ethan Offenbecker. CP 991-1002.

Petitioners' tort and damages claims survive the passing of one Petitioner.

4. The Estate is Not an Indispensable Party to Remaining Petitioners' torts based on Puyallup duty to serve water and Chapter 64.40 tort claims.

Tort claims seeking damages are not claims affecting "use of land".[24] Because Petitioners' breach of duty tort and Chapter RCW 64.40 damages claims are tort actions and not decisions affecting the use of land, the Appeals Court conflicts with *Maytown* when it agreed that the Estate of the deceased Petitioner, which declined to participate, is an indispensable party that required dismissal of the remaining Petitioners' damages claims. The purpose of CR 19 is to serve "'complete justice'" by permitting disputes to go forward only when all parties are present to defend their claims.[25] The Estate was not a defendant tortfeasor which is defending a claim, and further, there is no need for all tortfeasors to be joined in an action for tort damages.[26] Nor are plaintiffs required to join additional parties whose presence will be permissive rather than essential to the litigation.[27] In general, CR 19 dismissal should be ordered only when a

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[24] Ruling at 18. "Spice's argument that this case is distinguishable because it involves a LUPA action is not persuasive, since the holding in Ahmad applies broadly to "landowners" and LUPA applies to determinations affecting the use of real property. RCW 36.70C.020(2)(a)-(c)."

[25] *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 2233, 285 P.3d 52 (2012).

[26] *Brown v. Spokane County Fire Prot. Dist. No. 1*, 21 Wn. App. 886 (Div III 1978).

[27] *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888 (Nov 20, 2014).

defect cannot be cured, and serious prejudice or inefficiency will result.[28] Because the damages action sought here were individualized damages claims, the Estate could have been dismissed at its choice, if it determined not to pursue its damages claims."[29] A trial court's CR 19 decision regarding joinder of indispensable parties is reviewed for abuse of discretion.[30] Here, dismissal was an abuse of discretion. Even if one accepts that CR 19 defeats the LUPA claim[31], there is no such similar requirement that all injured parties must join in seeking tort or RCW 64.40 claims.

> Ms Lake: Now, the next large issue in this case was is there an indispensable party. Here's the post-death issue that the City argue, they argue all parties have to join in and seek damages or all property owners have to seek damages, or none of them can. It's like saying three people are in a car wreck and if you don't all agree to get damages, none of them can.
>
> ***

[28] *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, Oct 26, 2006.

[29] CR 19(a) involves a three-step analysis. First, the court determines whether absent persons are "necessary" for a just adjudication. If the absentee parties are "necessary," the court determines whether it is feasible to order the absentee's joinder. "If joining a necessary party is not feasible, the court then considers whether, 'in equity and good conscience,' the action should still proceed without the absentees under CR 19(b) *Auto. United Trades Org.*, 175 Wn.2d at 222.

[30] Discretion is abused when it is exercised on untenable grounds or for untenable reasons. An indispensable party is one who is both necessary to a litigation in the sense that relief cannot be afforded without the party and it will be inequitable to proceed without the absent party. *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888 (Nov 20, 2014). An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Id*.

[31] 2018 Ruling at 18. "Spice's argument that this case is distinguishable because it involves a LUPA action is not persuasive, since the holding in Ahmad applies broadly to "landowners" and LUPA applies to determinations affecting the use of real property. RCW 36.70C.020(2)(a)-(c)." Petitioners do not concede this issue,

> The Court: "Here's what I hear you saying, and I don't want to belabor this, but what you're saying is the 64.40 part of this is a bit like that automobile accident with the three different people that are injured."[32]

Further, "[d]ismissal under CR 12(b)(7) for failure to join an indispensable party is a 'drastic remedy' and should be ordered only when the defect cannot be cured and significant prejudice to the absentees will result."[33] RCW 64.40 actions have a short window for filing suit on this

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[32] 9/25/15 TR 46:1-7 & 17-21. And, 9/25/15 TR 45:8- 46: 21: Ms Lake: "The next major issue was the issue of 64.40 damages action. The City argued, well, you have to win LUPA to bring the 64.40 damages action. Our responses were many, but number one, we did win LUPA, despite the City recasting of the history of this case. And, number two, 64.40 damages is a completely independent cause of action from the LUPA matter. And those damages accrued on the date that Puyallup denied these plaintiffs water service back in 2004. Those damages started in 2004 and they continued to accrue to2008, and then they still are accruing here today. We pointed out that the trial Court's order which remanded the LUPA, but in the same order set the 64.40 damages action for trial, was proof that that trial Court understood 64.40 is a totally independent basis. And that's important because 64.40 is the one that says any owner of a property interest has the right for damages, all three of these plaintiffs did. Now, the next large issue in this case was is there an indispensable party. Here's the post-death issue that the City argue, they argue all parties have to join in and seek damages or all property owners have to seek damages, or none of them can. It's like saying three people are in a car wreck and if you don't all agree to get damages, none of them can. It's also contrary to the law that we argued, and we had a good faith basis for arguing. No matter when you would have raised that issue of indispensable party, if it had been in 2009 when Ms. Mathews didn't even own the property, if it had been in October 2012 when the probate court granted her 75 percent, we would have still made exactly these same arguments because it's been our position all along that plaintiffs Plexus, Spice, and Ms. Mathews all had independent causes of action and independent damages."

[33] *Auto. United Trades Org.*, 175 Wn.2d at 222-23 (citing *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) (citing 7 *Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice And Procedure* § 1609, at 130 (3d ed. 2001)). Here, the "defect" of the Estate incurring attorney fees could have been easily cured. Either the Estate or the Trial Court could have dismissed the Estate from this action, removing any potential for "harm," and the tort and damages action should "proceed in favor of or against the surviving parties," exactly as CR 25 provides. Yet, at no time, even today has the Estate moved to substitute or dismiss Ms. Mathews as a party, some 8 years later. And in fact that cure ultimately occurred, albeit circuitously and much delayed, when the Court vacated the original attorney fee award and re-issued to parties other than the Estate.

claim (30 days), which was timely accomplished in Petitioners' combined Complaint /LUPA petition. However, the Trial Court's CR 19 dismissal of the entire case left Petitioners no ability to re-file to obtain relief because that abbreviated 30-day window required to file for Chapter 64.40 RCW damages had long ago closed. Thus, this Court should accept review to find that CR 19 does not support dismissal of Spice's independent tort claims under RCW 64.40 and based on Puyallup's breach of its duty to provide water service since 2004.

5. The Court should Accept Review and vacate the CR 11 sanctions.

Because the Trial Court found the remaining two Petitioners had no claims that survived the death of one of the three, the Trial Court imposed CR 11 sanctions against legal counsel who continued to pursue the damages claims for the two remaining Petitioners.[34] Throughout the case, Petitioners presented facts and law to show that each of the three had their own right of action to pursue damages. Thus, the passing of one of the three did not bar the damages case of the remaining two from continuing forward. The Trial and Appeals Court disagreed; nonetheless Petitioners' position is not

[34] Puyallup's attorneys admitted that they found no law which supported their CR 11 Motion. CP 5259- 5260. Law School Ethics Professor John Strait filed a Declaration in support of Appellant's legal counsel and in opposition to the CR 11 Motion. CP4702-4722.

"baseless", as is required to support CR 11 sanctions.[35] The sole law in Washington which proscribes the duty or action to be taken by an attorney upon the passing of one of three plaintiffs to a claim, when each party under law has an independent claim, provides that "In the event of the death of one or more of the plaintiffs …the action does not abate. The death shall be suggested upon the record and **the action shall proceed in favor of or against the surviving parties**" CR 25.[36] Here, legal counsel represented three Petitioners, and, under a fair reading of RCW 64.40, each had an independent claim for damages under RCW 64.40. When one died, the duty to continue to represent the remaining two lived on. Petitioners' counsel reasonably believed she had a continuing duty to those remaining two. When imposing CR 11 sanctions, "any and all doubts must be resolved in favor of the signer.[37]

F. Petitioners present a significant question under the

[35] *Bryant v. Joseph Tree, Inc.* 119 Wn.2d 210, 829P.2d 1099 (1992).

[36] CR 25: (a) Death.
(1) Procedure. If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided by rule 5 for service of notices, and upon persons not parties in the manner provided by statute or by rule for the service of a summons. If substitution is not made within the time authorized by law, the action may be dismissed as to the deceased party.
(2) Partial Abatement. I**n the event of the death of one or more of the plaintiff**s or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, **the action does not abate**. **The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.**

[37] *Saldivar v. Momah*, 145 Wash.App. 365, 186 P.3d 1117 (2008), as amended, review denied 165 Wash.2d 1049, 208 P.3d 555.

Federal and Washington Constitution as Petitioners were deprived of due process because their right to seek RCW 64. 40 and tort damages were improperly terminated contrary to the Supreme Court's holding in *Maytown*. RAP 13.4(b)(3).

"No private property shall be taken or damaged for public or private use without just compensation having been first made."[38] "[N]or shall private property be taken for public use, without just compensation."[39] The Fourteenth Amendment to the U.S. Constitution guarantees, "No State shall... deprive any person of life, liberty, or property, without due process of law."[40] "No state shall ... deprive any person of life, liberty, or property, without due process of law."[41] Here Petitioners were deprived of due process by Puyallup's delay /refusal to accept their water service application and to provide water. In *Mission Springs, Inc. v. City of Spokane* [42] this Supreme Court upheld damages resulting from a local land use tort claim brought under the Washington law Chapter 64.40 and its federal version 42

[38] Article I, section 16 of the Washington Constitution
[39] The Fifth Amendment to the United States Constitution.
[40] U.S. Const. amend. 14, § l**Error! Bookmark not defined.Error! Bookmark not defined.**.
[41] The due process clause of the fourteenth amendment of the federal constitution.
[42]See *Mission Springs, Inc. v. City of Spokane,* 134 Wash. 2d 947, 952-54, 954 P.2d 250, 252-53 (1998). The court in *Mission Springs* upheld a finding that RCW 64.40.020 was violated as well as 1983. The court awarded attorney fees, which constituted the bulk of Mission Springs's, recovery without distinguishing between the rights provided by the respective statutes. See *Mission Springs*, 134 Wash. 2d at 972, 954 P.2d at 262.

U.S.C. § 1983[43] ("Section 1983"). This Court held that decision to delay issuance of Mission Springs's building and grading permits violated Mission Springs's federal substantive due process rights,[44] that Mission Springs had a constitutionally protected property right in the permits it sought,[45] that property rights are created whenever limits are placed on a decisionmaker's discretion to deny a permit or license,[46] and that the right

[43] 42 U.S.C. § 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Section 1983 was intended to provide a federal cause of action against persons attempting to use state law to deprive others of rights guaranteed by the federal constitution. *See Mission Springs*, 134 Wash. 2d at 979, 954 P.2d at 265-66. Section 1983 does not itself confer additional substantive rights, but rather serves as a vehicle by which individuals can seek redress for the violation of federal constitutional rights elsewhere conferred. See U.S. Const. amend. XIV, 1 ("nor shall any State deprive any person of life, liberty, or property without due process of law"). The application of 1983 to land use issues is made possible by the Fourteenth Amendment's requirement that individuals not be deprived of liberty or property without due process. The Due Process Clause not only mandates adherence to minimum procedures when government action infringes upon property or personal liberty, but also contains a substantive component that prohibits certain types of arbitrary or unreasonable government conduct no matter what procedures are used. See *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1220 (6th Cir. 1992) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). Land use claims brought under 1983 usually involve allegations that arbitrary application of local zoning laws violated a property owner's substantive due process rights. See *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982).

[44] See id. at 950, 954 P.2d 250.

[45] See id. at 958-59 n.12, 954 P.2d at 255 n.12 (quoting Wash. Rev. Code 58.17.033: "A proposed division of land … shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval… has been submitted....").

[46] See id. at 963, 954 P.2d at 257 (citing *Jacobsen v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980)).

to use and develop property free from arbitrary conduct in the permitting process is itself a property right worthy of Fourteenth Amendment protection. [47] Washington state's RCW64.40.020 is a 'state version" of the federal 1983 cause of action, as it empowers parties to seek damages against permitting authorities for conduct that is "arbitrary, capricious, unlawful, or exceeds lawful authority."[48] The arbitrary or capricious standard embodied in RCW 64.40.020 explicitly guards against the type of conduct at issue in *Mission Springs*[49], and at issue here against Puyallup.

G. The Division II Decisions conflict with decisions of this Washington Supreme Court and other divisions of the Court of Appeals. RAP 13.4(b) (1) and (2).

1. Decisions Conflict with Court of Appeals Division I *Citizens to Preserve Pioneer Park v. City of Mercer Island,* 106 Wn. App. 461, 470, 24 P.3d 1079 (2001) because the Appeals Court Did Not Accept Unchallenged Hearing Examiner Findings & Conclusions as Verities on Appeal Which Would Have Resulted in Grant of Spice' Requested Relief.

In considering Spice's claims on Summary Judgement in 2008, the Trial and Appeals Court should have reviewed the administrative record

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[47] See id. at 962, 954 P.2d at 257 (citing *Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928) ("The right to use and enjoy land is a property right.")).

[48] Wash. Rev. Code 64.40.020(1) (1998). While RCW 64.40.020 does not authorize damages against decisionmakers in their individual capacities, it does provide for the award of attorney fees to the prevailing party. Wash. Rev. Code 64.40.020(2) (1998).

[49] See *Mission Springs, Inc. v. City of Spokane*, 134 Wash. 2d 947, 952-54, 954 P.2d 250, 252-53 (1998). The court in *Mission Springs* upheld a finding that RCW 64.40.020 was violated as well as 1983. The court awarded attorney fees, which constituted the bulk of Mission Springs's, recovery without distinguishing between the rights provided by the respective statutes. *See Mission Springs*, 134 Wash. 2d at 972, 954 P.2d at 262.

before the body or officer in the local jurisdiction authorized to make the final determination.[50] The Trial Court and Appeals Court Decisions conflict with Division I's holding in *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001). The Court of Appeals should have reviewed, **not** the trial court decision, but instead the facts in the record before the hearing examiner.[51] Puyallup did not challenge the operative Hearing Examiner findings of fact and conclusions.[52] As to both damages causes of action, the Pierce County HE made findings of fact on all criteria necessary to grant Spice's requested damages relief. Puyallup did not challenge any of the Hearing Examiner's findings of fact and did even appear at the 2005 Hearing Examiner administrative hearing.[53] This Court should accept review and disregard Puyallup's tardy attempt to challenge any of these core facts, [54] and should consider the unchallenged HE Findings of Fact as verities on appeal.[55]

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[50] *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001).
[51] *Thornton Creek Legal Del Fund v. City of Seattle*, 113 Wn.App. 34, 47, 52 P.3d 522 (2002).
[52] *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn, 2d 169, 176, 4 P.3d 123 (2000).
[53] CP 102, 123.
[54] A simple read the Examiner's Decisions makes clear that the Examiner did not "rule in favor of Puyallup", as Puyallup repeatedly claims. While the Examiner did not grant Spice all that they wanted, the HE's unchallenged findings of fact directly establish all the elements required to prevail on the damages and declaratory judgement actions, including that Puyallup failed to timely provide water service.
[55] *Anderson v. Pierce County*, 86 Wn.App. 290, 307 n .9, 936 P.2d 432 (1997).

2. Decisions Also Conflict with Supreme Court Opinion *Van Sant v. City of Everett,* 849 P.2d 1276 (Wash. Ct. App. 1993) Which Ruled that Following Remand Order is Not a Prerequisite to Appealing the Remand Order.

Division II found that that in order to appeal a Remand Order, Petitioners had to ***first comply*** with the Remand Order. This ruling conflicts with the Supreme Court's Ruling in *Van Sant*[56]. Here, after the 2008 Trial Court Remand Order issued, Petitioners waited until 2013 when a final decision had been made in <u>all the issues</u> in the case via Summary Judgement and other Orders, and properly appealed pursuant to RAP 2- <u>without first complying with the remand order.</u> This Court should accept review and find Petitioners were not required to comply with the 2008 Remand Order, as a condition of appealing the Remand order.

H. The Division II Decisions which had the effect of allowing a public entity to breach its duty to provide water service based on arbitrary and capricious acts and omissions and to evade the resulting damages actions are founded on a fundamentally wrong basis and is an issue of substantial public interest that should be determined by this Supreme Court. RAP 13.4(b)(4).

The denial of the state-imposed duty to provide water service is a question of substantial public interest. The HE correctly applied state and county law to rule that Puyallup breached its duty to provide water service to the Petitioners.[57] Further, the HE also found in his 2007 ruling

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[56] *Van Sant v. City of Everett*, 849 P.2d 1276 (Wash. Ct. App. 1993).
[57] CP 97, 100, 106, 108, 119, 120, HE 2005 Decision CP 122-24. CP 129-131, 341-366, CP 367-435.

that Puyallup is bound by these prior Decisions.[58] It is undisputed that Puyallup did not appeal any of the HE Decisions in this matter. The undisputed and un-appealed facts established that the Petitioners' property is within Puyallup's retail service area, as established by Puyallup's Department of Health-approved Water Service Plan. Puyallup had a duty to serve Petitioners pursuant to RCW 43.260. Thus, Puyallup breached its duties owed to Petitioners as exclusive water service provider pursuant to RCW 70.116, the Pierce County Water Plan[59], Puyallup's Standard Service Area Agreement, RCW 43.20, and Puyallup's DOH approved water system plan. This Court should accept review and determine that that Puyallup breached its duty to provide water to Petitioners, and as a result Petitioners were damaged.[60]

VIII. CONCLUSION

This Court is asked to (1) accept review, (2) find as a matter of law Puyallup breached its duties to provide water service to Petitioners, (3) reverse Rulings which upheld dismissal of surviving Petitioners' RCW

[58] CP 101-2.

[59] Municipalities further agree that <u>if they identify a service area outside of their existing municipal corporate boundaries, the municipality will assume full responsibility for providing water service equivalent to the level of service provided for their customers inside the city limits</u> with similar service requirement and must also meet or exceed Pierce County's minimum design standards. CP 586-661 at 651 and 649. Emphasis added.

[60] CP341-366.

64.40, Declaratory Judgment and tort claims, and any resulting Judgements which flow from the reversal, (3) remand for trial on damages and attorney fees, and (4) reverse the CR 11 Order for Sanctions

Respectfully submitted this 13th day of February 2019.

GOODSTEIN LAW GROUP, PLLC

s/Carolyn A. Lake
Carolyn Lake, WSBA #13980
Attorneys for Petitioners Spice and Plexus

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 13th day of February 2019, at Tacoma, Washington.

s/Carolyn A. Lake
Carolyn A. Lake

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TED SPICE; PLEXUS DEVELOPMENT, LLC, Appellants, DORIS E. MATHEWS, Plaintiff, v. PIERCE COUNTY, a political subdivision; CITY OF PUYALLUP, a municipal corporation, Respondents.	No. 45476-9-II UNPUBLISHED OPINION

BJORGEN, C.J. — In a series of appeals, Ted Spice appeals from the superior court's (1) grant of summary judgment to the city of Puyallup (City) on his claims against it relating to the provision of water service, (2) imposition of CR 11 sanctions against his attorney, and (3) award of reasonable attorney fees and costs to the City.

We hold that the superior court properly granted summary judgment to the City, did not abuse its discretion by imposing CR 11 sanctions against Spice's attorney, and did not err by granting the City's request for reasonable attorney fees and costs at trial. Consequently, we affirm the superior court.

FACTS

2004

In June 2004, Spice began the process of applying for water services from the City. At the time, Spice intended to redevelop property for commercial use consistently with the property's zoning classification of "Employment Center." Clerk's Papers (CP) at 283. The

property is located within the City's exclusive water service provider area, but is outside of the city limits. Under former Puyallup Municipal Code (PMC) 14.22.010 (2004), an applicant for a utility extension or connection must demonstrate that "they have initiated or are part of an ongoing annexation process which would bring the [subject] property . . . into the [City] limits." CP at 338.

On August 3, Spice attended a pre-application meeting with officials from the City, where he was informed that an annexation must be in place before water availability letters can be issued. On August 16, the City's Development Services Support Manager, Colleen Harris, informed Spice by e-mail that

> [PMC 14.22.010] specifically states that you have to be part of an ongoing annexation – the City does not have enough signatures from properties within your area to commence annexation, and until we do, you cannot apply for a pre-annexation agreement.

CP at 1108. Under Pierce County Code (PCC) 19D.140.060(F), "[i]f the applicant accepts the conditions of service prescribed by the water purveyor . . . the purveyor shall provide the applicant a signed certificate of water availability prior to Pierce County's issuance of the required approval/permit."

2005

Spice initiated the dispute resolution process under PCC 19D.140.090 and appeared on behalf of Plexus Investments LLC (Plexus) before the Pierce County Hearing Examiner (Examiner) on March 10, 2005. The Examiner considered "whether or not the City is allowed to refuse water service to properties within the water service area and not allow, or not consent to allowing, other water service options," and issued an order on May 19. CP at 285. The Examiner determined that

> [t]he [City] is unwilling to provide timely and reasonable water service to [Spice]'s parcel. Therefore, [Spice]'s parcel is hereby removed from the [City]'s water service area. [Spice] is allowed to proceed with his plans to develop a Group A well water system as an alternative to obtaining service from the [City].

CP at 285. Before this ruling, Spice had not been able to drill a well on his parcel because he required the City's consent, which it had refused.

2006

Plexus and Pierce County each submitted motions for reconsideration to the Examiner. On January 12, 2006, the Examiner issued its ruling on reconsideration and modified its May 19, 2005 decision as follows:

> The [City] is unwilling to provide timely and reasonable water service to the applicant's parcel. Therefore, the applicant's parcel is hereby removed from the [City's] water service area. The applicant is allowed to pursue with [sic] his plans to develop a Group A well water system as an alternative to obtaining service from the [City]. In addition, the applicant may request to obtain water service from any other available source. If either the Group A well water system or any other water source is not feasible for the applicant, then the applicant can request from the [Examiner] that the [City] be required to provide water to the site. All other properties located outside the [City] that are not undergoing the process of annexation and are in the water service area of the [City] may seek other water service options if the [City] does not agree to provide service within 120 days of application.

CP at 291.

On February 2, Spice filed his first petition in Pierce County Superior Court under the Land Use Petition Act (LUPA), chapter 36.70C RCW, for judicial review of the Examiner's May 19, 2005 order and January 12, 2006 order on reconsideration. On November 17, 2006, Spice withdrew this petition in order to "seek alternative, supplemental relief," as set out in the Examiner's January 12 order on reconsideration. CP at 522.[1] Also on November 17, Spice

[1] In *Spice v. Pierce County*, 149 Wn. App. 461, 467-68, 204 P.3d 254 (2009), we determined that the withdrawal of this petition more than 21 days after the Examiner's decision extinguished the statutory right to judicial review of the challenged decision.

submitted a "request for follow up hearing consistent with examiner's ruling." CP at 295 (emphasis omitted).

Before withdrawing his first LUPA petition, Spice attempted to develop a well on his property for the purpose of water supply. On June 22, 2006, Spice received a letter from the state Department of Health informing him that he would need the adjacent property owner, in this case the state Department of Transportation, to agree to various restrictive covenants before developing the well. On June 26, the state Department of Transportation informed Spice that it would not agree to the proposed restrictive covenants.

2007

On April 7, 2007, the City, Pierce County (County), and Spice appeared before the Examiner on Spice's request "to compel the [City] to provide water service to [his] site." CP at 97, 102. On August 7, the Examiner issued an order denying Spice's request, because PCC 19D.140.090(h) did not provide authority for the Examiner to require the City to provide water services to Spice's parcel.

During the interim between the hearing and the Examiner's decision, Spice also attempted to secure water services from other water providers. On April 10, Spice received a letter from Valley Water District informing him that it could not provide water services to his property because his "parcel lies within the service area of another water purveyor," and the property was too far away for a feasible connection. CP at 277. Similarly, on April 10 the Mt. View-Edgewood Water Co. informed Spice that it would not provide water service because Spice's parcel was located within the City's water service area.

On August 29, 2007 Spice filed his second LUPA petition in superior court, seeking judicial review of the Examiner's August 7, 2007 decision (Cause number 07-2-11635-0). The

LUPA petition listed Spice, Plexus, and Doris Mathews as petitioners.[2] Spice argued that the Examiner erred by not requiring the City to provide water services, requested a declaratory judgment that the City was required to provide water services, and sought damages under RCW 64.40.020(1)[3] for the City's failure to provide water. In his conclusion, Spice asked the court to grant his appeal, remand the case to the Examiner with direction to the City to provide water services, or in the alternative, enter a declaratory judgment requiring the City to provide water services, and for the court to award damages and attorney fees. On November 30, Spice filed a motion for summary judgment, which asked the court to determine that neither the County nor the City could contest the unchallenged findings and conclusions in the Examiner's 2006 order on reconsideration, and that the Examiner had authority to require the City to provide water services.

2008

At its hearing on January 25, 2008, the superior court made findings and conclusions and remanded the case back to the Examiner for further action. On September 12, the court issued an order based on the January 25 hearing that contained the following rulings:

> 1. The court affirms the August 7, 2007 decision of the [Examiner], to wit: The [Examiner] does not have the power to compel the City of Puyallup to provide water service to [Spice]'s property. However, the [Examiner] does have the power to determine what reasonable pre-conditions the City of

[2] For simplicity, we refer to the petitioners collectively as "Spice" unless otherwise indicated.

[3] RCW 64.40.020(1) states:

> Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

> Puyallup may place upon the furnishing of water (Puyallup concedes that [Spice is] within its water service area) including whether Puyallup may require annexation of [Spice's] real property into the City as a pre-condition of providing commercial water service to [Spice] and/or to processing an appropriate application for water service or changes in water service (whether commercial or residential) in accord with pertinent Puyallup Municipal Code.
>
> 2. This matter is remanded to the [Examiner] for proceedings consistent with this ruling.
>
> 3. If [Spice does] continue to pursue a change in [his] existing water service from the [City], [he has] to comply with the application process set forth in pertinent [City] Code, except insofar as the Code is inconsistent with this order.
>
> 4. This Department retains jurisdiction over this matter in the event of issues that bring this matter back before the superior court.
>
> 5. With the entry of this order as to the LUPA matter[,] the Declaratory Judgment action is moot.
>
> 6. [Spice's] cause of action for damages and attorney fees pursuant to RCW 64.40 shall be bifurcated from the LUPA appeal and set for trial.

CP at 667-68. Spice did not appeal this judgment.

2009

On December 8, 2009, Doris Mathews passed away.

2010

On November 9, 2010, the Pierce County Council enacted ordinance 2010-88s, which became effective on January 1, 2011. In part, the ordinance removed the authority of the Examiner to resolve water service disputes under PCC 19D.140.090.

2011

On July 5, 2011, the City adopted ordinance 2983, which repealed and replaced the entirety of PMC 14.22 and became effective on July 18. In part, the ordinance eliminated the

former requirement that applicants for water services outside the City's limits be in the process of annexation.

2013

On February 27, 2013, attorney Stephen Hansen filed a notice of association with Spice's attorney, Carolyn Lake, for the same cause number as Spice's second LUPA petition. The notice of association listed only Spice and Plexus as petitioners.

Also on February 27, about four and half years after the superior court's ruling on Spice's second LUPA petition, Hansen filed in superior court a note for the motion and assignment docket to set the trial date on Spice's remaining claims. On March 22, the court declined to set a trial date because it found that the case was not yet at issue, and ordered the City, County, and Spice to appear on May 3 for a review hearing.

On March 29, the City filed a motion for summary judgment requesting that the court dismiss Spice's claims with prejudice and award attorney fees. Before the court ruled on the summary judgment motion, Spice and the County entered into a stipulated order of dismissal with prejudice as to the County. That order stated in part that the LUPA action had "been fully adjudicated" and that Spice's damages claim was only against the City. CP at 1003-04. On June 21, the superior court granted the City's motion for summary judgment, dismissing all of Spice's claims and causes of action and awarding fees to the City under RCW 64.40.020(2).[4] Although Mathews was not listed in the caption as a party, the order expressly mentions Mathews as a petitioner. On July 1, Spice filed a motion for reconsideration, which the court denied on

[4] RCW 64.40.020(2) states, "The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees."

September 10. On September 24, the court awarded the City $132,790.65 in attorney fees and costs.

On October 10, about two weeks after the superior court's ruling granting attorney fees and costs to the City, Spice filed his first notice of appeal in this case, appealing the September 12, 2008 superior court order, the June 21, 2013 order granting summary judgment to the City, and the September 10, 2013 order on reconsideration. Although Mathews was listed as an appellant in the notice of appeal's caption, the notice also contained a footnote announcing for the first time in our record that "[p]etitioner before the Trial Court below Doris Mathews is now deceased." CP at 1369. On December 13, the superior court filed an order granting the City reasonable attorney fees in the amount of $132,790.65 jointly and severally against Spice, Plexus, and Mathews, as well as its judgment in the case. On December 30, Spice filed his second notice of appeal, appealing the superior court's December 13 award of attorney fees and costs and the final judgment.[5]

2014

On February 14, 2014, the City submitted a motion to our court arguing that the death of Mathews voided all the orders entered by the superior court after her death and asking us to dismiss Spice's appeal and remand it to superior court for further proceedings. On June 4, we issued an order "remanding judgments for further proceedings," which stated, in part:

> The [City] appears to be correct that the judgments are void but has not demonstrated that this appeal should be dismissed. This court concludes that the superior court should conduct further proceedings, readdressing the 2013 judgments in light of the fact of [Mathews'] 2009 death. Accordingly, it is hereby
>
> ORDERED that the 2013 judgments are remanded to the superior court for further proceedings as addressed above. It is further

[5] The second notice of appeal also included Doris Mathews as an appellant in the caption, but states that "[t]he Parties seeking review are specified: Appellants Ted Spice and Plexus." CP at 2593.

> ORDERED that upon entry of amended judgments by the superior court, jurisdiction will return to this court, and the Clerk of this court will issue an amended perfection schedule.

CP at 2632-33 (emphasis omitted).

After the remand to superior court, the City filed three motions on October 9, 2014. First, the City filed a motion to vacate all orders and the final judgment entered after the death of Mathews. Second, the City submitted a motion for summary judgment asking the superior court to dismiss the case due to Spice's failure to join the Estate of Doris Mathews (Estate) as a necessary and indispensable party to the litigation. Third, the City presented a motion for CR 11[6] sanctions against Spice, Hansen, and Lake, and for reasonable attorney fees and costs.

2015

On January 9, 2015, the City, County, and Spice appeared before the superior court in order to determine how to proceed on remand. The court stated that it would not grant the motion to dismiss at that time, because a dismissal on remand appeared to contradict the remand order's directive to conduct further proceedings. On remand, the superior court interpreted our order as a direction to determine whether the Estate desired to participate in the litigation between Spice and the City, and if not, whether the litigation could proceed in absence of the Estate's participation. Additionally, despite the prior 2013 stipulation, the trial court ruled that the County was a party to the appeal, apparently in reliance on our remand order.

[6] CR 11(a)(1) states in part:

> The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is well grounded in fact.

The superior court also questioned attorney Lake about her knowledge of the death of Mathews:

> [Court]: Let me ask you this, when did you first learn that Ms.Mathews had passed?
>
> [Lake]: You know, I can't recall an exact date. . . . [W]hat difference does it make[?] Because in our situation, Plexus existed, Mr. Spice had property rights that went forward, and based on all the documents that we had, Mr. Spice was the managing member of Plexus.

Verbatim Report of Proceedings (VRP) (Jan. 9, 2015) at 27.

On June 5, 2015, Spice, the City, County, and Estate attended a hearing before the superior court. Attorney Ryan Hanis represented Donna Dubois in her capacity as personal representative of the Estate, and attorney Long represented Dubois in her individual capacity. In keeping with the proposed approach at the January 9 hearing, the superior court asked the Estate whether it intended to participate in the litigation. Hanis and Long both replied that the Estate was opposed to participating in the lawsuit.

Having determined that the Estate did not want to participate in the litigation, the superior court proceeded to consider whether the 2013 judgment was valid:

> All right. As I indicated to you, the next question that I'm going to attempt to answer here concerns the validity of the [2013] Judgment.
>
> . . . .
>
> And my conclusion is [the judgment is] void, that the [E]state is not a party, doesn't want to be a party. . . .
>
> [The Estate] can't be forced, to my reading of the law, as a party [sic], and they will not substitute Ms. Mathews and I can't do that nor would I. And I can't substitute the PR, I can't substitute Ms. Dubois.

VRP (June 5, 2015) at 25, 29-30.

The superior court granted the City's October 9, 2014 motion to vacate all orders and judgments entered after the death of Mathews and prior to our remand, as well as the City's

October 9, 2014 motion for summary judgment, dismissing all of Spice's claims with prejudice for failure to join the Estate as a necessary and indispensable party. On July 20, 2015, the superior court entered written findings and orders based on its oral ruling on June 5.

Spice filed his third notice of appeal on August 17, 2015, appealing the superior court's July 20 order granting summary judgment to the City. On September 25, the City, County, and Spice attended a hearing on whether CR 11 sanctions should be imposed on Lake, Hansen, and/or Spice. On December 11, the court granted the City's motion for CR 11 sanctions and explained its reasoning as follows:

> Sanctions are not appropriate merely because an action's factual basis ultimately proves deficient or a party's view of the law proves incorrect. So what we see with CR 11 is a party can take an extreme position and can notify the court of that extreme position and move forward knowing that that in and of itself is not necessarily going to be a CR 11 violation given the candid representation to the court of what they're doing. Sanctions, impositions of sanctions, the court has to carefully evaluate an attorney's inquiry into the law and that the facts – that [their] inquiring into the law and the facts was reasonable. And the reasonableness of an attorney's prefiling inquiry or filing during the course of litigation inquiry is the reasonableness under the circumstances.
>
> . . . .
>
> Now, Washington courts and I retain broad discretion to tailor, if I find a violation, appropriate sanction to determine against whom the sanction should be imposed. . . . This can even be nonmonetary sanctions in some instances. CR 11 sanctions are not designed to be a fee shifting mechanism. They cannot be a fee shifting mechanism. . . . When the trial court awards the attorney fees as a sanction, it must limit those fees to the amounts reasonably expended in responding to the improper pleadings.
>
> . . . .
>
> I find no evidence anywhere in this file to – I don't find any evidence to support the proposition that Ms. Lake conceived a plan to hide this [information] from the court, but there was a point when she did not engage in a reasonable inquiry. And I still don't know why. . . . And I still don't know why when Ms. Lake knew of the death of Ms. Mathews. And I've asked that question on the record. And to this point in time, I've received no response. But I'm satisfied that Ms. Lake knew, or should have known after a reasonable inquiry in 2012, particularly, when Mr. Hansen associated in this case *following his lawsuit against the [E]state of Doris Mathews* that Ms. Lake knew or should have known. And this was significant. It was significant to the City. It was significant to all the litigants. It was significant to the court. It mattered. It was important. This court awarded nearly $132,000

> judgment for attorneys' fees against a named plaintiff who was dead and had been dead for roughly four years before that award. And that dead plaintiff was jointly and severally liable for $132,000. And the bottom line is that the plaintiff's lawyer knew she was dead. This had an effect. This is serious. Now, I find that that was a violation of CR 11.
>
> . . . .
>
> Now, I've indicated to you how I calculate. The City has asked for $312,000. I think that if I was to entertain something like that, that would be on all fours with the fee shifting that we see the courts saying, no, you can't do it, particularly the federal courts.
>
> . . . .
>
> I'm imposing CR 11 sanctions in the amount of $45,000. It's never easy to know what sanctions should be, and I have no barometer, I have no litmus test for this. But I think that is a reasonable figure given the nature and the extent of this litigation and how far it was allowed to go before this information was divulged. And I think the reasonable inquiry would have resulted in it being divulged earlier than it was.

VRP (Dec. 11, 2015) at 12-14, 25, 27-30 (emphasis added).

The superior court did not find a basis to impose CR 11 sanctions on Spice or Hansen.

2016

On January 28, 2016, the City submitted a motion to the superior court asking the court to amend the July 20, 2015 judgment and the December 13, 2013 judgment so as to apply only to Spice and Plexus, or in the alternative, for the court to consider the motion as a renewed motion for attorney fees under chapter 64.40 RCW.

On April 15, the superior court filed its findings of fact, conclusions of law, and order imposing CR 11 sanctions against attorney Lake. Also on April 15, the superior court entered an order awarding the City reasonable attorney fees and costs under chapter 64.40 RCW. On that date Spice filed his fourth notice of appeal in our court, appealing the April 15 order imposing CR 11 sanctions on attorney Lake and the April 15 order granting the City reasonable attorney fees and costs.

On May 20, the superior court filed the final judgment for both the CR 11 sanctions and the award of attorney fees under chapter 64.40 RCW. On May 24, Spice filed his fifth notice of appeal in this case, appealing the May 20 judgments for the CR 11 sanction award and the award of attorney fees under chapter 64.40 RCW.

ANALYSIS

I. SCOPE AND STANDARD OF REVIEW

A. Legal Standards

We review a grant of summary judgment de novo. *Dean v. Fishing Co. of Alaska, Inc.*, 177 Wn.2d 399, 405, 300 P.3d 815 (2013). Summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). When reviewing an order of summary judgment, we engage in the same inquiry as the superior court. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

B. Scope of Review

To reiterate, on July 20, 2015, the superior court voided the June 21, 2013 order granting summary judgment and its December 13, 2013 final judgment. Spice's first and second appeals were in response to these 2013 judgments. Therefore, when the superior court voided the orders that these notices of appeal purported to appeal, the first and second notices of appeal similarly became nullities, because there was no longer anything for either notice to appeal. As such, this appeal consists of the issues preserved by Spice's third, fourth, and fifth notices of appeal.

In its July 20, 2015 order granting summary judgment, the superior court ruled that summary judgment was appropriate "due to the absence of the Estate as a necessary and indispensable party to this litigation." CP at 5389. The superior court also imposed CR 11

sanctions on attorney Lake and awarded attorney fees and costs to the City. Consequently, the specific issues for review in this case consist of the superior court's determination that (1) the Estate is a necessary and indispensable party, without whom the litigation may not in good conscience proceed, (2) the imposition of CR 11 sanctions, (3) the award of attorney fees and costs to the City, and (4) the City's request for attorney fees on appeal.

For the reasons set out below, we affirm the superior court's grant of summary judgment, dismissing Spice's claims with prejudice for failure to join the Estate as a necessary and indispensable party. Therefore, we do not reach Spice's arguments regarding: (1) whether the trial court erred by not finding that the City breached a duty to provide water service, (2) whether the superior court erred by not granting Spice declaratory relief, and (3) whether the superior court erred by granting the City's 2013 motion for summary judgment.

C. Assignments of Error

Before we reach Spice's arguments on appeal listed above, we first address his numerous assignments of error in this appeal. In his briefing, Spice assigns error to 77 of the superior court's findings or conclusions, in addition to the orders associated with three separate superior court rulings. We review challenged findings of fact for substantial evidence, which is evidence sufficient to persuade a fair-minded person the premise is true. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). We review de novo whether the findings of fact support the superior court's challenged conclusions of law. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 341, 308 P.3d 791 (2013). We consider unchallenged findings as verities on appeal. *In re Estate of Muller*, 197 Wn. App. 477, 486, 389 P.3d 604 (2016).

Spice does not provide argument as to why any of the challenged findings or conclusions are erroneous beyond a reference to them by number in his assignments of error. Our Supreme Court has explained that it is not the appellate court's "obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings." *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). We have previously held that a party waives its challenge to a finding by failing to properly assign error to the finding, although we may waive technical violations of this rule as long as the appellant makes the nature of the challenge clear in the opening brief. *In re Muller*, 197 Wn. App. at 487.

Therefore, Spice has waived his objections to the challenged findings and conclusions by failing to provide specific arguments and citations to the record. These findings, consequently, are verities on appeal. *In re Muller*, 197 Wn. App. at 486. However, 18 of Spice's assignments of error are associated with the superior court's "findings and conclusions" contained in the July 20, 2015 summary judgment order. Br. of Appellant at 8. Findings of fact "are superfluous on appeal from an order of summary judgment because of the de novo nature of our review." *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wn. App. 1, 14-15, 329 P.3d 83 (2014). Therefore, we do not consider the assignments of error to the findings in the summary judgment order. Instead, consistently with CR 56, we consider whether there are genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law.

II. MOOTNESS

Absent an exception, we will not review issues that are moot or involve abstract propositions. *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988). An issue is moot if "a court can no longer provide effective relief." *Orwick v. City of Seattle*,

103 Wn.2d 249, 253, 692 P.2d 793 (1984). Our Supreme Court has identified an exception to the doctrine of mootness that permits review if a moot case presents "issues of continuing and substantial public interest." *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004).

On November 9, 2010, the Pierce County Council enacted ordinance 2010-88s, which became effective on January 1, 2011. In part, the ordinance removed the authority of the Examiner to resolve water service disputes under PCC 19D.140.090. On July 5, 2011, the City of Puyallup Council adopted ordinance 2983, which repealed and replaced the entirety of PMC 14.22 and became effective on July 18. In part, the ordinance eliminated the former requirement that applicants for water services outside the City's limits be in the process of annexation.

In his briefing, Spice raises several arguments regarding the authority of the Examiner to compel the City to provide water service to Spice and further contends that the superior court erred by not requiring the City to provide water services to his property. In addition to being outside the scope of review for this appeal, Spice's arguments are moot because the Examiner no longer has authority to resolve water service disputes, annexation is no longer a prerequisite to provision of water services, and Spice did not appeal the January 12, 2008 order holding that his declaratory judgment action was moot. Therefore, we decline to review these issues

III. SUMMARY JUDGMENT

Spice contends that the superior court erred by dismissing his lawsuit on summary judgment on the grounds that the Estate was a necessary and indispensable party. Spice argues that the court erred in deciding this issue under CR 19 because CR 25 controls, and that he has complied with the requirements of CR 25(a)(2).[7] Although Spice may be correct that CR 25 did

[7] CR 25(a)(2) states:

> (2) Partial Abatement. In the event of the death of one or more of the plaintiffs or one or more of the defendants in an action in which the right sought to

have a role to play in this litigation, he does not explain how the operation of CR 25 otherwise modified or excused any of the requirements under CR 19. Because Spice does not explain why CR 25 operates to the exclusion of CR 19, his argument fails.

Spice also claims that the superior court erred by finding that he had a duty to substitute the Estate after Mathews died. He argues that under RCW 11.40.110,[8] he had no duty to substitute after the death of Mathews. However, this argument does not address the issue on appeal, whether or not dismissal under CR 19 for failure to join was appropriate. Therefore this argument fails.

Spice asserts that he has always had sufficient authority to litigate this dispute. However, Spice's authority as a party is not the issue. The superior court dismissed this case because it found that it could not proceed without the Estate as a necessary and indispensable party. Therefore, this argument fails.

Spice contends that his ownership interest in the subject property in this case establishes that he is an owner of a "property interest" who may seek damages under RCW 64.40.020. Br. of Appellant at 65. Although Spice may have a property interest, he does not explain how that fact affects the superior court's determination that the Estate was a necessary and indispensable party under CR 19. Therefore, this argument fails.

> be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

[8] RCW 11.40.110 states:

> If an action is pending against the decedent at the time of the decedent's death, the plaintiff shall, within four months after appointment of the personal representative, serve on the personal representative a petition to have the personal representative substituted as defendant in the action. Upon hearing on the petition, the personal representative shall be substituted, unless, at or before the hearing, the claim of the plaintiff, together with costs, is allowed.

Spice argues that all property owners are not indispensable parties in land use cases and by extension that the superior court erred by determining that the Estate was a necessary and indispensable party to the litigation. He supports this by arguing that all of the cases relied upon by the City are either pre-LUPA cases or non-LUPA writ cases. We agree with the superior court that the Estate was a necessary and indispensable party for two reasons. First, the presence of the Estate is necessary to avoid further collateral damage to the Estate in the event that Spice does not prevail at trial, which occurred in this case when the superior court imposed attorney fees against Mathews jointly and severally in its award of attorney fees to the City on December 13, 2013. Second, generally "a landowner is an indispensable party in a case that would affect the use of the landowner's property." *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 341, 314 P.3d 729 (2013). Spice's argument that this case is distinguishable because it involves a LUPA action is not persuasive, since the holding in *Ahmad* applies broadly to "landowners" and LUPA applies to determinations affecting the use of real property. RCW 36.70C.020(2)(a)-(c).[9] For these reasons, the superior court properly determined that the Estate was a necessary and indispensable party to the litigation and did not err in granting summary judgment dismissing Spice's claims on that basis.

IV. CR 11

Spice claims that the superior court erred by imposing CR 11 sanctions on attorney Lake. We disagree.

[9] Spice filed his second LUPA petition in 2007. RCW 36.70C.020(2) was amended by *Laws of* 2009, chapter 419, section 1, and by *Laws of* 2010, chapter 59, section 1. However, neither of these amendments changed the provisions establishing that LUPA applies to determinations affecting the use of real property.

Generally, CR 11 "deals with two types of filings: those lacking factual or legal basis (baseless filings), and those made for improper purposes." *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883, 912 P.2d 1052 (1996). A baseless filing is one that is not well grounded in fact or not warranted by existing law or a good faith argument for the alteration of existing law. *Id.* at 883-84. A court may not impose CR 11 sanctions for a baseless filing unless it also finds that the attorney who signed and filed the particular document failed to conduct a reasonable inquiry into the factual and legal basis of the claim. *Id*. at 884. We use an objective standard to determine whether a reasonable attorney in like circumstances could believe that his or her action was factually and legally justified. *Id*.

We review both the determination whether CR 11 was violated and the appropriateness of a sanction under it for an abuse of discretion. *In re Guardianship of Lasky*, 54 Wn. App. 841, 852, 854, 776 P.2d 695 (1989). A court abuses its discretion if its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *Id*. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, reaches an outcome that is outside the range of acceptable choices, such that no reasonable person could arrive at that outcome. *Id*.

The superior court found that the attorney's filings on behalf of Mathews after her death were neither well-grounded in fact nor legally justified. The court observed that under our holding in *Stella Sales, Inc. v. Johnson*, once a party dies, that party's attorney loses legal authority to act on the deceased's behalf. 97 Wn. App. 11, 18, 985 P.2d 391 (1999) The superior court also determined that as of 2012 when attorney Hansen associated with attorney

Lake in this litigation after participating in a lawsuit against the Estate of Mathews, attorney Lake knew or reasonably should have known that her client was dead. Consequently, the superior court determined that attorney Lake had filed documents "without reasonable cause or inquiry," because she had neither a factual nor legal basis to file pleadings on behalf of Mathews after her death, which Lake knew or reasonably should have known about in 2012. CP at 7474.

Spice's briefing on the CR 11 issue contains 15 subsections. We address each one separately.

1. Spice argues that the superior court abused its discretion by imposing CR 11 sanctions when two viable plaintiffs with an identical cause of action remained following the death of Mathews. However, the superior court sanctioned the attorney for submitting signed documents to the court "without reasonable cause or inquiry" in violation of CR 11 because she had neither a reasonable factual nor legal basis to file documents on behalf of Mathews after her death. CP at 7474, 7476. The presence of other plaintiffs does not call this holding by superior court into question.

2. Spice contends that the superior court abused its discretion by imposing CR 11 sanctions because it was mistaken regarding the ownership interest in the subject property at different points in the chronology of this litigation. However, the superior court sanctioned the attorney for submitting signed documents to the court "without reasonable cause or inquiry" in violation of CR 11 because she had neither a reasonable factual nor legal basis to file documents on behalf of Mathews after her death. CP at 7474, 7476. The ownership of the subject property does not alter the attorney's obligations under CR 11.

3. Spice also asserts that the superior court's language in the order imposing CR 11 sanctions that "Petitioners' counsel has never offered explanation for her failure to advise the

Court or defendants of the death of her client, Ms. Mathews," is "untrue and unfair." Br. of Appellant at 75. Assuming Spice intended to challenge the above statement as a factual finding, it is supported by substantial evidence in the record. When asked by the superior court when she discovered the death of her client Mathews, attorney Lake responded, "You know, I can't recall an exact date. . . . [W]hat difference does it make[?]" VRP (Jan. 9, 2015) at 27. Furthermore, the explanation offered in Spice's briefing, that there was still a viable cause of action with regard to Spice and Plexus, does not explain why attorney Lake never disclosed Mathews' death. Moreover, Spice's focus on the propriety of the attorney's actions with regard to Spice and Plexus ignores the superior court's concern regarding continued representation *of Mathews* after her death. Therefore, this argument fails.

4. Spice claims that the superior court erred by imposing CR 11 sanctions because Mathews' death was noted on the record in compliance with CR 25. However, Spice does not explain how compliance with CR 25 necessarily satisfies an attorney's obligations under CR 11. Moreover, Spice's assertion that "as soon as the litigation turned from seeking ***affirmative relief*** for Petitioners to the potential of an ***adverse*** monetary ruling as to Petitioners, Petitioners noted on the record the passing of one of the three Petitioners," is not well taken. Br. of Appellant at 78. In this case, attorney Lake allowed an adverse ruling on attorney fees to be made against her deceased client *before* she informed the court that Mathews had died. Furthermore, because RCW 64.40.020(2) authorizes attorney fees for the *prevailing party*, there was a possibility of an adverse monetary ruling from the beginning of the litigation because there is always a risk that one will not prevail at trial. Therefore, this argument fails.

5. Spice further argues that the City failed to provide adequate legal authority for the premise that one violates CR 11 sanctions by failing to disclose that her client died despite

continued representation. Spice also contends that his attorneys complied with RCW 10.40.110. However, Spice does not explain how compliance with RCW 10.40.110 necessarily satisfies an attorney's obligations under CR 11. Furthermore, the superior court sanctioned the attorney for submitting signed documents to the court "without reasonable cause or inquiry" in violation of CR 11 because she had neither a reasonable factual nor legal basis to file documents on behalf of Mathews after her death. CP at 7474, 7476. In its motion for CR 11 sanctions, the City cited to *Stella Sales* for the proposition that an attorney loses authority to file on behalf of a client after the client dies. 97 Wn. App. 11. Therefore, the City provided sufficient legal authority for the court to conclude that the attorney's filings were "without reasonable cause or inquiry." CP at 7474. This argument thus fails.

6. Spice next asserts that the superior court's CR 11 sanction lacks legal support. CR 11 "authorizes a trial court to impose appropriate sanctions if a party's filing is not well grounded in fact, or not warranted by existing law or a good faith argument to alter existing law." *Lee v. Kennard*, 176 Wn. App. 678, 690-91, 310 P.3d 845 (2013). Spice argues that the attorney's filings were not baseless because "[p]etitioners presented factual and legal support that Plexus LLC and or Ted Spice or both had ownership and management authority . . . sufficient to maintain the suit." Br. of Appellant at 81. However, the superior court imposed CR 11 sanctions because the submissions to the court with regard to Mathews were not well grounded in fact or law because Mathews had died. Therefore, this argument fails.

7. Spice maintains that the City has not met its burden to show that CR 11 sanctions are appropriate. Specifically, Spice claims that "[t]he burden is on the movant to justify the request for CR 11 sanctions," citing *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). Br. of Appellant at 82 (emphasis omitted). In this case, the trial court's order specified that CR 11

sanctions were imposed for filing court documents on behalf of Mathews after her death "without reasonable cause or inquiry within the meaning of CR 11." CP at 7474. This basis satisfies any burden to justify imposition of the sanctions.

8. Spice contends that the superior court abused its discretion in imposing CR 11 sanctions because there is no legal authority for the proposition that when an LLC and its members are involved in litigation and one of its members dies, the litigation must cease and that consequently there was no "offending conduct." Br. of Appellant at 82. However, the superior court's sanction was based on the attorney's submission of signed documents to the court "without reasonable cause or inquiry" in violation of CR 11 in the absence of a reasonable factual or legal basis to file documents on behalf of Mathews after her death. CP at 7474, 7476. Spice claims that the order must identify which pleadings violated CR 11. Assuming that to be correct, the court's order, read as a whole and in context, reasonably identifies those pleadings, filings, and motions filed on behalf of Mathews "[b]etween December 9th 2009 and October of 2013." CP at 7468. Therefore, this argument fails.

9. Spice also asserts that the City has not demonstrated that the attorney's filings were "baseless," because "Plaintiff presented facts and law in support [of] Petitioner's position that at all times [were] relevant." Br. of Appellant at 83-84 (emphasis omitted). To repeat, the sanction was based on the submission of signed documents to the court "without reasonable cause or inquiry" in violation of CR 11 because there was no reasonable factual nor legal basis to file documents on behalf of Mathews after her death. CP at 7474, 7476. Therefore, this argument fails.

10. Spice claims that Plexus and Spice had authority to pursue the litigation after Mathews' death and "[t]hat is all [that] is required to defeat a CR 11 Motion." Br. of Appellant

at 84. Spice does not cite to any authority for this premise. This court does not consider conclusory arguments unsupported by citation to authority or rational argument. *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). Therefore, we decline to consider this argument.

11. Spice asserts that the superior court erred by imposing CR 11 sanctions because the attorney relied on CR 25 and RCW 4.20.046. However, Spice does not explain how reliance on either of these points of authority satisfies an attorney's obligations under CR 11. Therefore, because this argument is unresponsive to the CR 11 issue on appeal, this argument fails. *See Mason*, 170 Wn. App. at 384.

12. Spice further contends that the City's request for over $300,000 in sanctions is not quantified with precision and is not the least severe sanction. However, Spice does not explain how the City's *requested* sanction affects this court's review of the superior court's imposition of CR 11 sanctions. Therefore, this argument fails.

Spice also argues that the $45,000 sanction is "all the more disproportionate since the [superior] court was aware that . . . Legal Counsel had received no compensation since 2008." Br. of Appellant at 87. Spice, however, does not cite to any authority for the proposition that a court must consider if or how much an attorney has been paid prior to imposing CR 11 sanctions on that attorney. More to the point, Spice does not explain how the $45,000 sanction was an abuse of discretion under all the circumstances. Thus, this argument fails.

13. Spice claims that under CR 11, all doubts must be resolved in favor of the nonmoving party. This statement is true. *Saldivar v. Momah*, 145 Wn. App. 365, 404, 186 P.3d 1117 (2008). But there is no doubt that Mathews died on December 8, 2009, and that the attorney continued to file and sign documents on behalf of Mathews after her death. With these well-established facts, the need to resolve doubts in favor of the nonmoving party has little scope

in the decision. In any event, it does not suggest that the superior court abused its discretion. Therefore, this argument fails.

14. Spice contends that the superior court abused its discretion in imposing CR 11 sanctions because the sanctions would have an impermissible chilling effect. He argues that "[b]ecause Rule 11 sanctions have a potential chilling effect, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success." Br. of Appellant at 89. As noted, *Stella Sales* explained that "[w]hen a party to a lawsuit dies . . . the action must be continued by or against the deceased party's representatives or successors in interest," and that "[t]he attorney for the deceased party may no longer represent her interests." 97 Wn. App. at 18. Thus, the only action that would be chilled by this award is the unauthorized representation of a deceased person, conduct that should be discouraged. Consequently, this argument fails.

15. Spice asserts that the City attempted to impermissibly use CR 11 as a fee shifting mechanism. However, the superior court's oral ruling made it clear that it was not using CR 11 as a fee shifting mechanism when it imposed sanctions on attorney Lake. Therefore, this argument fails.

Because none of Spice's individual arguments are meritorious, we hold that the superior court did not abuse its discretion by imposing CR 11 sanctions.

V. ATTORNEY FEES

A. Superior Court Award of Fees

Spice claims that the superior court erred by granting attorney fees to the City. We disagree.

Spice argues that there is no basis in law for the superior court to award fees to the City. Typically a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). In its April 15, 2016 order granting fees to the City, the superior court concluded that "[u]nder RCW 64.40.020, the prevailing party is entitled to an award of reasonable attorneys' fees and costs." CP at 7491. Although Spice points out that the City did not cite to chapter 64.40 RCW in its October 2014 motion for summary judgment, this observation ignores the fact that the City's motion of January 28, 2016 for attorney fees expressly relied on chapter 64.40 RCW. Furthermore, Spice does not explain how failure to cite to legal authority in an opening motion precludes an award of attorney fees where authority for such a fee in fact exists. Rather, Spice's argument appears to be that this court "should find . . . that there was no legal basis for awarding attorney fees by statute, under contract, or in equity and that the [superior] court abused its discretion," by awarding fees. Br. of Appellant at 93-94. Because RCW 64.40.020 provides authority for an award of attorney fees in this case, this argument fails.

Spice also asserts that the City's CR 59 request for fees is untimely and barred. However, the City did not submit a request for fees under CR 59; it attempted to seek fees under CR 54 and CR 60. The superior court determined that the City's CR 60 motion to amend was not meritorious, but found that the City's motion for fees under CR 54(d)(2) was meritorious.[10] Although the superior court acknowledged that the motion was untimely, it concluded that a CR 54(d)(2) motion was not waived due to untimeliness unless the opposing party could demonstrate

[10] CR 54(d)(2): Attorney's Fees and Expenses: Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

prejudice. Therefore, because this argument does not address the grounds on which the superior court granted attorney fees, CR 54(d)(2), it fails.

Spice further contends that the City's request for attorney fees is barred by judicial estoppel. We disagree.

Judicial estoppel is an equitable doctrine that prevents a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The doctrine aims to preserve respect for judicial proceedings and avoid inconsistency, duplicity, and squandering of time. *Id*. This court considers three factors to determine whether application of judicial estoppel is appropriate,

> (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 538-39 (internal quotation marks omitted) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

Spice claims that the City's January 28, 2016 motion to amend the December 13, 2013 judgment and July 20, 2015 order to reflect an award of attorney fees to the City as against only Spice and Plexus is inconsistent with the City's request to vacate the December 13, 2013 judgment. However, the superior court did not grant this motion, instead granting the City's alternative relief sought under CR 54(d)(2).[11] The City's renewed request for attorney fees in

[11] In its ruling, the superior court explained, "The City's motion for fees based on the July 20, 2015 summary judgment and RCW 64.40.020 should be granted," and did not amend the December 13, 2013 judgment. CP at 7501.

2016 under CR 54(d)(2) is consistent with its earlier position in the litigation in 2013 when it was awarded the same amount of attorney fees. Therefore, because the City's request for fees is consistent with its earlier position in the litigation, this argument fails.

B. Appellate Fees

The City requests attorney fees and costs on appeal pursuant to RAP 18.1(a).[12] The City argues that attorney fees and costs are appropriate under RCW 4.84.370, CR 11, and RCW 64.40.020. We hold that attorney fees and costs on appeal are authorized under RCW 64.40.020 with limitations.

Our Supreme Court has held that a prevailing party in an action under chapter 64.40 RCW is also entitled to recover attorney fees it incurred on appeal under RCW 64.40.020(2). *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 128, 829 P.2d 746 (1992). The City is the substantially prevailing party with respect to the action for damages under RCW 64.40.020 and therefore is entitled to reasonable attorney fees under RCW 64.40.020. However, RCW 64.40.020(1) and (2) authorize the recovery of attorney fees in only a limited situation: by the prevailing party in an action by certain permit applicants "for damages to obtain relief from [certain] acts of an agency." This does not authorize the recovery of attorney fees in other circumstances. Therefore, the City is entitled to recover attorney fees on appeal which are reasonably attributable to its arguments in favor of upholding the dismissal of Spice's claim under chap. 64.40 RCW. It is not entitled to attorney fees on appeal relating to other issues, including CR 11.

[12] RAP 18.1(a) states: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court."

CONCLUSION

We affirm the superior court's grant of summary judgment, imposition of CR 11 sanctions, and award of attorney fees to the City. We also award attorney fees to the City on appeal subject to limitations.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, C.J.

We concur:

WORSWICK, J.

JOHANSON, J.

Filed
Washington State
Court of Appeals
Division Two

November 27, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TED SPICE; PLEXUS DEVELOPMENT, LLC, Appellants, DORIS E. MATHEWS, Plaintiff, v. PIERCE COUNTY, a political subdivision; CITY OF PUYALLUP, a municipal corporation, Respondents.	No. 45476-9-II ORDER GRANTING MOTION FOR RECONSIDERATION AND WITHDRAWING OPINION

The Appellant has filed a motion for reconsideration of the unpublished opinion filed on November 21, 2017. After review, the court finds it necessary to withdraw the filed opinion. Thus, it is hereby

ORDERED that the motion for reconsideration is granted. It is further

ORDERED that the unpublished opinion filed on November 21, 2017, is hereby

APPENDIX 2

withdrawn. The court's new unpublished opinion will be filed.

Bjorgen, J.

We concur:

Worswick, P.J.

Johanson, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TED SPICE; PLEXUS DEVELOPMENT, LLC, Appellants, DORIS E. MATHEWS, Plaintiff, v. PIERCE COUNTY, a political subdivision; CITY OF PUYALLUP, a municipal corporation, Respondents.	No. 45476-9-II UNPUBLISHED OPINION

BJORGEN, C.J. — In a series of appeals, Ted Spice appeals from the superior court's (1) grant of summary judgment to the city of Puyallup (City) on his claims against it relating to the provision of water service, (2) imposition of CR 11 sanctions against his attorney, and (3) award of reasonable attorney fees and costs to the City. Spice also filed an appeal of the 2008 superior court order affirming the decision of the Pierce County Hearing Examiner (Hearing Examiner) and remanding the case for further proceedings through his first notice of appeal.

We hold that the superior court properly granted summary judgment to the City, did not abuse its discretion by imposing CR 11 sanctions against Spice's attorney, and did not err by granting the City's request for reasonable attorney fees and costs at trial. We also hold against Spice's appeal of the 2008 decision.

Accordingly, we affirm the superior court.

APPENDIX 3

FACTS

A. 2004

In June 2004, Spice began the process of applying for water services from the City. At the time, Spice intended to redevelop property for commercial use consistently with the property's zoning classification of "Employment Center." Clerk's Papers (CP) at 283. The property is located within the City's exclusive water service provider area, but is outside of the city limits. Under former Puyallup Municipal Code (PMC) 14.22.010 (2004), an applicant for a utility extension or connection must demonstrate that "they have initiated or are part of an ongoing annexation process which would bring the [subject] property . . . into the [City] limits." CP at 338.

On August 3, Spice attended a pre-application meeting with officials from the City, where he was informed that an annexation must be in place before water availability letters can be issued. On August 16, the City's Development Services Support Manager, Colleen Harris, informed Spice by e-mail that

> [PMC 14.22.010] specifically states that you have to be part of an ongoing annexation – the City does not have enough signatures from properties within your area to commence annexation, and until we do, you cannot apply for a pre-annexation agreement.

CP at 1108. Under Pierce County Code (PCC) 19D.140.060(F), "[i]f the applicant accepts the conditions of service prescribed by the water purveyor . . . the purveyor shall provide the applicant a signed certificate of water availability prior to Pierce County's issuance of the required approval/permit."

B. 2005

Spice initiated the dispute resolution process under PCC 19D.140.090 and appeared on behalf of Plexus Investments LLC (Plexus) before the Hearing Examiner on March 10, 2005.

The Hearing Examiner considered "whether or not the City is allowed to refuse water service to properties within the water service area and not allow, or not consent to allowing, other water service options," and issued an order on May 19. CP at 285. The Hearing Examiner determined that

> [t]he [City] is unwilling to provide timely and reasonable water service to [Spice]'s parcel. Therefore, [Spice]'s parcel is hereby removed from the [City]'s water service area. [Spice] is allowed to proceed with his plans to develop a Group A well water system as an alternative to obtaining service from the [City].

CP at 285. Before this ruling, Spice had not been able to drill a well on his parcel because he required the City's consent, which it had refused.

C. 2006

Plexus and the County each submitted motions for reconsideration to the Hearing Examiner. On January 12, 2006, the Hearing Examiner issued its ruling on reconsideration and modified its May 19, 2005 decision as follows:

> The [City] is unwilling to provide timely and reasonable water service to the applicant's parcel. Therefore, the applicant's parcel is hereby removed from the [City's] water service area. The applicant is allowed to pursue with [sic] his plans to develop a Group A well water system as an alternative to obtaining service from the [City]. In addition, the applicant may request to obtain water service from any other available source. If either the Group A well water system or any other water source is not feasible for the applicant, then the applicant can request from the [Examiner] that the [City] be required to provide water to the site. All other properties located outside the [City] that are not undergoing the process of annexation and are in the water service area of the [City] may seek other water service options if the [City] does not agree to provide service within 120 days of application.

CP at 291.

On February 2, Spice filed his first petition in Pierce County Superior Court under the Land Use Petition Act (LUPA), chapter 36.70C RCW, for judicial review of the Hearing Examiner's May 19, 2005 order and January 12, 2006 order on reconsideration. On November

17, 2006, Spice withdrew this petition in order to "seek alternative, supplemental relief," as set out in the Hearing Examiner's January 12 order on reconsideration. CP at 522.[1] Also on November 17, Spice submitted a "request for follow up hearing consistent with examiner's ruling." CP at 295 (emphasis omitted).

Before withdrawing his first LUPA petition, Spice attempted to develop a well on his property for the purpose of water supply. On June 22, 2006, Spice received a letter from the state Department of Health informing him that he would need the adjacent property owner, in this case the state Department of Transportation, to agree to various restrictive covenants before developing the well. On June 26, the state Department of Transportation informed Spice that it would not agree to the proposed restrictive covenants.

D. 2007

On April 7, 2007, the City, the County, and Spice appeared before the Hearing Examiner on Spice's request "to compel the [City] to provide water service to [his] site." CP at 97, 102. On August 7, the Hearing Examiner issued an order denying Spice's request, because PCC 19D.140.090(h) did not provide authority for the Hearing Examiner to require the City to provide water services to Spice's parcel.

During the interim, between the hearing and the Hearing Examiner's decision, Spice also attempted to secure water services from other water providers. On April 10, Spice received a letter from Valley Water District informing him that it could not provide water services to his property because his "parcel lies within the service area of another water purveyor," and the property was too far away for a feasible connection. CP at 277. Similarly, on April 10 the Mt.

[1] In *Spice v. Pierce County*, 149 Wn. App. 461, 467-68, 204 P.3d 254 (2009), we determined that the withdrawal of this petition more than 21 days after the Hearing Examiner's decision extinguished the statutory right to judicial review of the challenged decision.

View-Edgewood Water Co. informed Spice that it would not provide water service because Spice's parcel was located within the City's water service area.

On August 29, 2007 Spice filed his second LUPA petition in superior court, seeking judicial review of the Hearing Examiner's August 7, 2007 decision (Cause No. 07-2-11635-0). The LUPA petition listed Spice, Plexus, and Doris Mathews as petitioners.[2] Spice argued that the Hearing Examiner erred by not requiring the City to provide water services, requested a declaratory judgment that the City was required to provide water services, and sought damages under RCW 64.40.020(1)[3] for the City's failure to provide water. In his conclusion, Spice asked the court to grant his appeal, remand the case to the Hearing Examiner with direction to the City to provide water services, or in the alternative, enter a declaratory judgment requiring the City to provide water services, and for the court to award damages and attorney fees. On November 30, Spice filed a motion for summary judgment, which asked the court to determine that neither the County nor the City could contest the unchallenged findings and conclusions in the Hearing Examiner's 2006 order on reconsideration, and that the Hearing Examiner had authority to require the City to provide water services.

[2] For simplicity, we refer to the petitioners collectively as "Spice" unless otherwise indicated.

[3] RCW 64.40.020(1) states:

> Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

E. 2008

At its hearing on January 25, 2008, the superior court made findings and conclusions and remanded the case back to the Hearing Examiner for further action. On September 12, the court issued an order based on the January 25 hearing that contained the following rulings:

> 1. The court affirms the August 7, 2007 decision of the [Examiner], to wit: The [Examiner] does not have the power to compel the City of Puyallup to provide water service to [Spice]'s property. However, the [Examiner] does have the power to determine what reasonable pre-conditions the City of Puyallup may place upon the furnishing of water (Puyallup concedes that [Spice is] within its water service area) including whether Puyallup may require annexation of [Spice's] real property into the City as a pre-condition of providing commercial water service to [Spice] and/or to processing an appropriate application for water service or changes in water service (whether commercial or residential) in accord with pertinent Puyallup Municipal Code.
>
> 2. This matter is remanded to the [Examiner] for proceedings consistent with this ruling.
>
> 3. If [Spice does] continue to pursue a change in [his] existing water service from the [City], [he has] to comply with the application process set forth in pertinent [City] Code, except insofar as the Code is inconsistent with this order.
>
> 4. This Department retains jurisdiction over this matter in the event of issues that bring this matter back before the superior court.
>
> 5. With the entry of this order as to the LUPA matter[,] the Declaratory Judgment action is moot.
>
> 6. [Spice's] cause of action for damages and attorney fees pursuant to RCW 64.40 shall be bifurcated from the LUPA appeal and set for trial.

CP at 667-68.[4] On October 10, 2013 Spice filed an appeal of this decision through his first notice of appeal.

[4] Because this decision involved requests for declaratory judgment and damages under chapter 64.40 RCW, as well as a LUPA petition, we refer to it as the 2008 decision.

E. 2009

On December 8, 2009, Doris Mathews passed away.

F. 2010

On November 9, 2010, the Pierce County Council enacted ordinance 2010-88s, which became effective on January 1, 2011. In part, the ordinance removed the authority of the Hearing Examiner to resolve water service disputes under PCC 19D.140.090.

G. 2011

On July 5, 2011, the City adopted ordinance 2983, which repealed and replaced the entirety of PMC 14.22 and became effective on July 18. In part, the ordinance eliminated the former requirement that applicants for water services outside the City's limits be in the process of annexation.

H. 2013

On February 27, 2013, attorney Stephen Hansen filed a notice of association with Spice's attorney, Carolyn Lake, for the same cause number as Spice's second LUPA petition. The notice of association listed only Spice and Plexus as petitioners.

Also on February 27, about four and half years after the superior court's ruling on Spice's second LUPA petition, Hansen filed in superior court a note for the motion and assignment docket to set the trial date on Spice's remaining claims. On March 22, the court declined to set a trial date because it found that the case was not yet at issue, and ordered the City, County, and Spice to appear on May 3 for a review hearing.

On March 29, the City filed a motion for summary judgment requesting that the court dismiss Spice's claims with prejudice and award attorney fees. Before the court ruled on the summary judgment motion, Spice and the County entered into a stipulated order of dismissal

with prejudice as to the County. That order stated in part that the LUPA action had "been fully adjudicated" and that Spice's damages claim was only against the City. CP at 1003-04. On June 21, the superior court granted the City's motion for summary judgment, dismissing all of Spice's claims and causes of action and awarding fees to the City under RCW 64.40.020(2).[5] Although Mathews was not listed in the caption as a party, the order expressly mentions Mathews as a petitioner. On July 1, Spice filed a motion for reconsideration, which the court denied on September 10. On September 24, the court awarded the City $132,790.65 in attorney fees and costs.

On October 10, about two weeks after the superior court's ruling granting attorney fees and costs to the City, Spice filed his first notice of appeal in this case, appealing the September 12, 2008 superior court order, the June 21, 2013 order granting summary judgment to the City, and the September 10, 2013 order on reconsideration. Although Mathews was listed as an appellant in the notice of appeal's caption, the notice also contained a footnote announcing for the first time in our record that "[p]etitioner before the Trial Court below Doris Mathews is now deceased." CP at 1369. On December 13, the superior court filed an order granting the City reasonable attorney fees in the amount of $132,790.65 jointly and severally against Spice, Plexus, and Mathews, as well as its judgment in the case. On December 30, Spice filed his second notice of appeal, appealing the superior court's December 13 award of attorney fees and costs and the final judgment.[6]

[5] RCW 64.40.020(2) states, "The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees."

[6] The second notice of appeal also included Doris Mathews as an appellant in the caption, but states that "[t]he Parties seeking review are specified: Appellants Ted Spice and Plexus." CP at 2593.

I. 2014

On February 14, 2014, the City submitted a motion to our court arguing that the death of Mathews voided all the orders entered by the superior court after her death and asking us to dismiss Spice's appeal and remand it to superior court for further proceedings. On June 4, we issued an order "remanding judgments for further proceedings," which stated, in part:

> The [City] appears to be correct that the judgments are void but has not demonstrated that this appeal should be dismissed. This court concludes that the superior court should conduct further proceedings, readdressing the 2013 judgments in light of the fact of [Mathews'] 2009 death. Accordingly, it is hereby
>
> ORDERED that the 2013 judgments are remanded to the superior court for further proceedings as addressed above. It is further
>
> ORDERED that upon entry of amended judgments by the superior court, jurisdiction will return to this court, and the Clerk of this court will issue an amended perfection schedule.

CP at 2632-33 (emphasis omitted).

After the remand to superior court, the City filed three motions on October 9, 2014. First, the City filed a motion to vacate all orders and the final judgment entered after the death of Mathews. Second, the City submitted a motion for summary judgment asking the superior court to dismiss the case due to Spice's failure to join the Estate of Doris Mathews (Estate) as a necessary and indispensable party to the litigation. Third, the City presented a motion for CR 11[7] sanctions against Spice, Hansen, and Lake, and for reasonable attorney fees and costs.

[7] CR 11(a)(1) states in part:

> The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is well grounded in fact.

J. 2015

On January 9, 2015, the City, County, and Spice appeared before the superior court in order to determine how to proceed on remand. The court stated that it would not grant the motion to dismiss at that time, because a dismissal on remand appeared to contradict the remand order's directive to conduct further proceedings. On remand, the superior court interpreted our order as a direction to determine whether the Estate desired to participate in the litigation between Spice and the City, and if not, whether the litigation could proceed in absence of the Estate's participation. Additionally, despite the prior 2013 stipulation, the trial court ruled that the County was a party to the appeal, apparently in reliance on our remand order.

The superior court also questioned attorney Lake about her knowledge of the death of Mathews:

> [Court]: Let me ask you this, when did you first learn that Ms. Mathews had passed?
>
> [Lake]: You know, I can't recall an exact date. . . . [W]hat difference does it make[?] Because in our situation, Plexus existed, Mr. Spice had property rights that went forward, and based on all the documents that we had, Mr. Spice was the managing member of Plexus.

Verbatim Report of Proceedings (VRP) (Jan. 9, 2015) at 27.

On June 5, 2015, Spice, the City, County, and Estate attended a hearing before the superior court. Attorney Ryan Hanis represented Donna Dubois in her capacity as personal representative of the Estate, and attorney Long represented Dubois in her individual capacity. In keeping with the proposed approach at the January 9 hearing, the superior court asked the Estate whether it intended to participate in the litigation. Hanis and Long both replied that the Estate was opposed to participating in the lawsuit.

Having determined that the Estate did not want to participate in the litigation, the superior court proceeded to consider whether the 2013 judgment was valid:

> All right. As I indicated to you, the next question that I'm going to attempt to answer here concerns the validity of the [2013] Judgment.
>
> . . . .
>
> And my conclusion is [the judgment is] void, that the [E]state is not a party, doesn't want to be a party. . . .
>
> [The Estate] can't be forced, to my reading of the law, as a party [sic], and they will not substitute Ms. Mathews and I can't do that nor would I. And I can't substitute the PR, I can't substitute Ms. Dubois.

VRP (June 5, 2015) at 25, 29-30.

The superior court granted the City's October 9, 2014 motion to vacate all orders and judgments entered after the death of Mathews. It also granted the City's October 9, 2014 motion for summary judgment, dismissing all of Spice's claims with prejudice for failure to join the Estate as a necessary and indispensable party. On July 20, 2015, the superior court entered written findings and orders based on its oral ruling on June 5.

Spice filed his third notice of appeal on August 17, 2015, appealing the superior court's July 20 order granting summary judgment to the City. On September 25, the City, County, and Spice attended a hearing on whether CR 11 sanctions should be imposed on Lake, Hansen, and/or Spice. On December 11, the court granted the City's motion for CR 11 sanctions and explained its reasoning as follows:

> Sanctions are not appropriate merely because an action's factual basis ultimately proves deficient or a party's view of the law proves incorrect. So what we see with CR 11 is a party can take an extreme position and can notify the court of that extreme position and move forward knowing that that in and of itself is not necessarily going to be a CR 11 violation given the candid representation to the court of what they're doing. Sanctions, impositions of sanctions, the court has to carefully evaluate an attorney's inquiry into the law and that the facts – that [their] inquiring into the law and the facts was reasonable. And the reasonableness of an

attorney's prefiling inquiry or filing during the course of litigation inquiry is the reasonableness under the circumstances.

. . . .

Now, Washington courts and I retain broad discretion to tailor, if I find a violation, appropriate sanction to determine against whom the sanction should be imposed. . . . This can even be nonmonetary sanctions in some instances. CR 11 sanctions are not designed to be a fee shifting mechanism. They cannot be a fee shifting mechanism. . . . When the trial court awards the attorney fees as a sanction, it must limit those fees to the amounts reasonably expended in responding to the improper pleadings.

. . . .

I find no evidence anywhere in this file to – I don't find any evidence to support the proposition that Ms. Lake conceived a plan to hide this [information] from the court, but there was a point when she did not engage in a reasonable inquiry. And I still don't know why. . . . And I still don't know why when Ms. Lake knew of the death of Ms. Mathews. And I've asked that question on the record. And to this point in time, I've received no response. But I'm satisfied that Ms. Lake knew, or should have known after a reasonable inquiry in 2012, particularly, when Mr. Hansen associated in this case *following his lawsuit against the [E]state of Doris Mathews* that Ms. Lake knew or should have known. And this was significant. It was significant to the City. It was significant to all the litigants. It was significant to the court. It mattered. It was important. This court awarded nearly $132,000 judgment for attorneys' fees against a named plaintiff who was dead and had been dead for roughly four years before that award. And that dead plaintiff was jointly and severally liable for $132,000. And the bottom line is that the plaintiff's lawyer knew she was dead. This had an effect. This is serious. Now, I find that that was a violation of CR 11.

. . . .

Now, I've indicated to you how I calculate. The City has asked for $312,000. I think that if I was to entertain something like that, that would be on all fours with the fee shifting that we see the courts saying, no, you can't do it, particularly the federal courts.

. . . .

I'm imposing CR 11 sanctions in the amount of $45,000. It's never easy to know what sanctions should be, and I have no barometer, I have no litmus test for this. But I think that is a reasonable figure given the nature and the extent of this litigation and how far it was allowed to go before this information was divulged.

> And I think the reasonable inquiry would have resulted in it being divulged earlier than it was.

VRP (Dec. 11, 2015) at 12-14, 25, 27-30 (emphasis added).

The superior court did not find a basis to impose CR 11 sanctions on Spice or Hansen.

K. 2016

On January 28, 2016, the City submitted a motion to the superior court asking the court to amend the July 20, 2015 judgment and the December 13, 2013 judgment so as to apply only to Spice and Plexus, or in the alternative, for the court to consider the motion as a renewed motion for attorney fees under chapter 64.40 RCW.

On April 15, the superior court filed its findings of fact, conclusions of law, and order imposing CR 11 sanctions against attorney Lake. Also on April 15, the superior court entered an order awarding the City reasonable attorney fees and costs under chapter 64.40 RCW. On that date Spice filed his fourth notice of appeal in our court, appealing the April 15 order imposing CR 11 sanctions on attorney Lake and the April 15 order granting the City reasonable attorney fees and costs.

On May 20, the superior court filed the final judgment for both the CR 11 sanctions and the award of attorney fees under chapter 64.40 RCW. On May 24, Spice filed his fifth notice of appeal in this case, appealing the May 20 judgments for the CR 11 sanction award and the award of attorney fees under chapter 64.40 RCW.

ANALYSIS

I. SCOPE AND STANDARD OF REVIEW

A. Legal Standards

We review a grant of summary judgment de novo. *Dean v. Fishing Co. of Alaska, Inc.*, 177 Wn.2d 399, 405, 300 P.3d 815 (2013). Summary judgment is appropriate if "there is no

genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). When reviewing an order of summary judgment, we engage in the same inquiry as the superior court. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

B. Scope of Review

To reiterate, on July 20, 2015, the superior court voided all orders, decisions and judgments made by the trial court after the death of Mathews on December 8, 2009. This order does not affect the 2008 decision by the trial court or Spice's first notice of appeal to the extent it challenges that 2008 decision. The July 20, 2015 order does vacate the June 21, 2013 order granting summary judgment, the September 10, 2013 order denying Spice's motion for reconsideration, and the December 13, 2013 final judgment and order awarding attorney fees to the City. Spice's first notice of appeal also challenged the June 21 and September 10, 2013 orders. Because those orders were vacated, Spice's appeal of them in his first notice of appeal is without effect. Spice's second notice of appeal challenged the December 13, 2013 order awarding attorney fees. Because that order was also vacated, Spice's appeal of it is also without effect. As such, this appeal consists of the challenges to the 2008 decision in Spice's first notice of appeal and the issues preserved by Spice's third, fourth, and fifth notices of appeal.

In its July 20, 2015 order granting summary judgment, the superior court ruled that summary judgment was appropriate "due to the absence of the Estate as a necessary and indispensable party to this litigation." CP at 5389. The superior court also imposed CR 11 sanctions on attorney Lake and awarded attorney fees and costs to the City. Consequently, the specific issues for review in this case consist of the superior court's determination that (1) the Estate is a necessary and indispensable party, without whom the litigation may not in good

conscience proceed, (2) the imposition of CR 11 sanctions, (3) the award of attorney fees and costs to the City, and (4) the City's request for attorney fees on appeal. Also before us is Spice's challenge to the 2008 decision made in his first notice of appeal.[8]

For the reasons set out below, we affirm the superior court's grant of summary judgment, dismissing Spice's claims with prejudice for failure to join the Estate as a necessary and indispensable party. We also hold against Spice's appeal of the 2008 decision.

C. Assignments of Error

Before we reach Spice's arguments on appeal listed above, we first address his numerous assignments of error in this appeal. In his briefing, Spice assigns error to 77 of the superior court's findings or conclusions, in addition to the orders associated with three separate superior court rulings. We review challenged findings of fact for substantial evidence, which is evidence sufficient to persuade a fair-minded person the premise is true. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). We review de novo whether the findings of fact support the superior court's challenged conclusions of law. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 341, 308 P.3d 791 (2013). We consider unchallenged findings as verities on appeal. *In re Estate of Muller*, 197 Wn. App. 477, 486, 389 P.3d 604 (2016).

Spice does not provide argument as to why any of the challenged findings or conclusions are erroneous beyond a reference to them by number in his assignments of error. Our Supreme Court has explained that it is not the appellate court's "obligation to comb the record with a view

[8] On reconsideration, the parties presented argument based on timeliness and other matters as to whether Spice's appeal of the 2008 decision in fact was effective and remains before us. In resolving this appeal, we assume without deciding that Spice's appeal of the 2008 decision is properly before us.

toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings." *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). We have previously held that a party waives its challenge to a finding by failing to properly assign error to the finding, although we may waive technical violations of this rule as long as the appellant makes the nature of the challenge clear in the opening brief. *In re Muller*, 197 Wn. App. at 487.

Therefore, Spice has waived his objections to the challenged findings and conclusions by failing to provide specific arguments and citations to the record. These findings, consequently, are verities on appeal. *In re Muller*, 197 Wn. App. at 486. However, 18 of Spice's assignments of error are associated with the superior court's findings and conclusions contained in the July 20, 2015 summary judgment order. Findings of fact "are superfluous on appeal from an order of summary judgment because of the de novo nature of our review." *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wn. App. 1, 14-15, 329 P.3d 83 (2014). Therefore, we do not consider the assignments of error to the findings in the summary judgment order. Instead, consistently with CR 56, we consider whether there are genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law.

II. MOOTNESS

Absent an exception, we will not review issues that are moot or involve abstract propositions. *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988). An issue is moot if "a court can no longer provide effective relief." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). Our Supreme Court has identified an exception to the doctrine of mootness that permits review if a moot case presents "issues of continuing and substantial public interest." *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004).

On November 9, 2010, the Pierce County Council enacted ordinance 2010-88s, which became effective on January 1, 2011. In part, the ordinance removed the authority of the Hearing Examiner to resolve water service disputes under PCC 19D.140.090. On July 5, 2011, the City of Puyallup Council adopted ordinance 2983, which repealed and replaced the entirety of PMC 14.22 and became effective on July 18. In part, the ordinance eliminated the former requirement that applicants for water services outside the City's limits be in the process of annexation.

In his briefing, Spice raises several arguments regarding the authority of the Hearing Examiner to compel the City to provide water service to Spice and further contends that the superior court erred by not requiring the City to provide water services to his property. Spice's arguments on the authority of the Hearing Examiner are moot because the Hearing Examiner no longer has authority to resolve water service disputes and annexation is no longer a prerequisite to provision of water services. Spice's argument that the City is under a duty to provide service is discussed below.

III. SUMMARY JUDGMENT

Spice contends that the superior court erred by dismissing his lawsuit on summary judgment on the grounds that the Estate was a necessary and indispensable party. Spice argues that the court erred in deciding this issue under CR 19 because CR 25 controls, and that he has complied with the requirements of CR 25(a)(2).[9] Although Spice may be correct that CR 25 did

[9] CR 25(a)(2) states:

> (2) Partial Abatement. In the event of the death of one or more of the plaintiffs or one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

have a role to play in this litigation, he does not explain how the operation of CR 25 otherwise modified or excused any of the requirements under CR 19. Because Spice does not explain why CR 25 operates to the exclusion of CR 19, his argument fails.

Spice also claims that the superior court erred by finding that he had a duty to substitute the Estate after Mathews died. He argues that under RCW 11.40.110,[10] he had no duty to substitute after the death of Mathews. However, this argument does not address the issue on appeal, whether or not dismissal under CR 19 for failure to join was appropriate. Therefore this argument fails.

Spice asserts that he has always had sufficient authority to litigate this dispute. However, Spice's authority as a party is not the issue. The superior court dismissed this case because it found that it could not proceed without the Estate as a necessary and indispensable party. Therefore, this argument fails.

Spice contends that his ownership interest in the subject property in this case establishes that he is an owner of a "property interest" who may seek damages under RCW 64.40.020. Br. of Appellant at 65. Although Spice may have a property interest, he does not explain how that fact affects the superior court's determination that the Estate was a necessary and indispensable party under CR 19. Therefore, this argument fails.

Spice argues that all property owners are not indispensable parties in land use cases and by extension that the superior court erred by determining that the Estate was a necessary and

[10] RCW 11.40.110 states:

> If an action is pending against the decedent at the time of the decedent's death, the plaintiff shall, within four months after appointment of the personal representative, serve on the personal representative a petition to have the personal representative substituted as defendant in the action. Upon hearing on the petition, the personal representative shall be substituted, unless, at or before the hearing, the claim of the plaintiff, together with costs, is allowed.

indispensable party to the litigation. He supports this by arguing that all of the cases relied upon by the City are either pre-LUPA cases or non-LUPA writ cases. We agree with the superior court that the Estate was a necessary and indispensable party for two reasons. First, the presence of the Estate is necessary to avoid further collateral damage to the Estate in the event that Spice does not prevail at trial, which occurred in this case when the superior court imposed attorney fees against Mathews jointly and severally in its award of attorney fees to the City on December 13, 2013. Second, generally "a landowner is an indispensable party in a case that would affect the use of the landowner's property." *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 341, 314 P.3d 729 (2013). Spice's argument that this case is distinguishable because it involves a LUPA action is not persuasive, since the holding in *Ahmad* applies broadly to "landowners" and LUPA applies to determinations affecting the use of real property. RCW 36.70C.020(2)(a)-(c).[11] For these reasons, the superior court properly determined that the Estate was a necessary and indispensable party to the litigation and did not err in granting summary judgment dismissing Spice's claims on that basis.

IV. APPEAL OF THE 2008 DECISION

The elements of the 2008 decision relevant to this appeal are:

1. The Hearing Examiner does not have the power to compel the City to provide water service to Spice's property;

2. The Hearing Examiner does have the power to determine what reasonable conditions the City may place upon the furnishing of water;

3. The declaratory judgment action is moot;

[11] Spice filed his second LUPA petition in 2007. RCW 36.70C.020(2) was amended by *Laws of* 2009, chapter 419, section 1, and by *Laws of* 2010, chapter 59, section 1. However, neither of these amendments changed the provisions establishing that LUPA applies to determinations affecting the use of real property.

> 4. Spice's cause of action for damages and attorney fees pursuant to RCW 64.40 shall be bifurcated from the LUPA appeal and set for trial.

As noted in Part II of our Analysis above, ordinances were adopted in 2011 that removed the authority of the Hearing Examiner to resolve water service disputes under PCC 19D.140.090 and that eliminated the requirement that applicants for water services outside the City limits be in the process of annexation. Therefore, any challenge to the first two elements of the 2008 decision is moot.

Turning to Spice's request for declaratory judgment, to the extent Spice requests a declaration that the Hearing Examiner had authority to compel the City to provide water service, that the Hearing Examiner must compel the City to provide water service, and/or that annexation cannot be required as a prerequisite to service, those claims are moot for the reasons given above. To the extent Spice argues that the City itself is under a duty to provide service, that claim is not moot.

However, the 2008 decision remanded "[t]his matter" to the Hearing Examiner and stated that

> [i]f [Spice does] continue to pursue a change in [his] existing water service from the [City], [he has] to comply with the application process set forth in pertinent [City] Code, except insofar as the Code is inconsistent with this order.

CP at 667-68. This allows Spice to request water service from the City. Because the annexation requirement has been rescinded, Spice's property no longer needs to be in the process of annexation. The Hearing Examiner found that "[i]n June, 2004, the applicant submitted an application for water service to the City of Puyallup." CP at 122. Spice, however, has not shown that he has submitted a request for water service that satisfied the requirements of Puyallup's city code as required by the remand order in the 2008 decision. Satisfying these

requirements was a prerequisite to the provision of water service by the City under the 2008 decision. Therefore, Spice's request for declaratory judgment fails.

Finally, the 2008 decision bifurcates the damages claim under chapter 64.40 RCW and states that it shall be set for trial. This is one of the claims that was dismissed by the trial court on July 20, 2015 for failure to join a necessary and indispensable party. Above, we affirm that decision. Therefore, the claim under chapter 64.40 RCW remains dismissed.

V. CR 11

Spice claims that the superior court erred by imposing CR 11 sanctions on attorney Lake. We disagree.

Generally, CR 11 "deals with two types of filings: those lacking factual or legal basis (baseless filings), and those made for improper purposes." *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883, 912 P.2d 1052 (1996). A baseless filing is one that is not well grounded in fact or not warranted by existing law or a good faith argument for the alteration of existing law. *Id.* at 883-84. A court may not impose CR 11 sanctions for a baseless filing unless it also finds that the attorney who signed and filed the particular document failed to conduct a reasonable inquiry into the factual and legal basis of the claim. *Id*. at 884. We use an objective standard to determine whether a reasonable attorney in like circumstances could believe that his or her action was factually and legally justified. *Id*.

We review both the determination whether CR 11 was violated and the appropriateness of a sanction under it for an abuse of discretion. *In re Guardianship of Lasky*, 54 Wn. App. 841, 852, 854, 776 P.2d 695 (1989). A court abuses its discretion if its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for

untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *Id*. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, reaches an outcome that is outside the range of acceptable choices, such that no reasonable person could arrive at that outcome. *Id*.

The superior court found that the attorney's filings on behalf of Mathews after her death were neither well-grounded in fact nor legally justified. The court observed that under our holding in *Stella Sales, Inc. v. Johnson*, once a party dies, that party's attorney loses legal authority to act on the deceased's behalf. 97 Wn. App. 11, 18, 985 P.2d 391 (1999) The superior court also determined that as of 2012, when attorney Hansen associated with attorney Lake in this litigation after participating in a lawsuit against the Estate, attorney Lake knew or reasonably should have known that her client was dead. Consequently, the superior court determined that attorney Lake had filed documents "without reasonable cause or inquiry," because she had neither a factual nor legal basis to file pleadings on behalf of Mathews after her death, which Lake knew or reasonably should have known about in 2012. CP at 7474.

Spice's briefing on the CR 11 issue contains 15 subsections. We address each one separately.

1. Spice argues that the superior court abused its discretion by imposing CR 11 sanctions when two viable plaintiffs with an identical cause of action remained following the death of Mathews. However, the superior court sanctioned the attorney for submitting signed documents to the court "without reasonable cause or inquiry" in violation of CR 11 because she had neither a reasonable factual nor legal basis to file documents on behalf of Mathews after her death. CP at 7474, 7476. The presence of other plaintiffs does not call this holding by superior court into question.

2. Spice contends that the superior court abused its discretion by imposing CR 11 sanctions because it was mistaken regarding the ownership interest in the subject property at different points in the chronology of this litigation. However, the superior court sanctioned the attorney for submitting signed documents to the court "without reasonable cause or inquiry" in violation of CR 11 because she had neither a reasonable factual nor legal basis to file documents on behalf of Mathews after her death. The ownership of the subject property does not alter the attorney's obligations under CR 11.

3. Spice also asserts that the superior court's language in the order imposing CR 11 sanctions that "Petitioners' counsel has never offered explanation for her failure to advise the Court or defendants of the death of her client, Ms. Mathews," is "untrue and unfair." Br. of Appellant at 75. Assuming Spice intended to challenge the above statement as a factual finding, it is supported by substantial evidence in the record. When asked by the superior court when she discovered the death of her client Mathews, attorney Lake responded, "You know, I can't recall an exact date. . . . [W]hat difference does it make[?]" VRP (Jan. 9, 2015) at 27. Furthermore, the explanation offered in Spice's briefing, that there was still a viable cause of action with regard to Spice and Plexus, does not explain why attorney Lake never disclosed Mathews' death. Moreover, Spice's focus on the propriety of the attorney's actions with regard to Spice and Plexus ignores the superior court's concern regarding continued representation *of Mathews* after her death. Therefore, this argument fails.

4. Spice claims that the superior court erred by imposing CR 11 sanctions because Mathews' death was noted on the record in compliance with CR 25. However, Spice does not explain how compliance with CR 25 necessarily satisfies an attorney's obligations under CR 11. Moreover, Spice's assertion that "as soon as the litigation turned from seeking *affirmative relief*

for Petitioners to the potential of an *adverse* monetary ruling as to Petitioners, Petitioners noted on the record the passing of one of the three Petitioners," is not well taken. Br. of Appellant at 78 (emphasis omitted). In this case, attorney Lake allowed an adverse ruling on attorney fees to be made against her deceased client *before* she informed the court that Mathews had died. Furthermore, because RCW 64.40.020(2) authorizes attorney fees for the *prevailing party*, there was a possibility of an adverse monetary ruling from the beginning of the litigation because there is always a risk that one will not prevail at trial. Therefore, this argument fails.

5. Spice further argues that the City failed to provide adequate legal authority for the premise that one violates CR 11 sanctions by failing to disclose that her client died despite continued representation. Spice also contends that his attorneys complied with RCW 10.40.110. However, Spice does not explain how compliance with RCW 10.40.110 necessarily satisfies an attorney's obligations under CR 11. Furthermore, the superior court sanctioned the attorney for submitting signed documents to the court "without reasonable cause or inquiry" in violation of CR 11 because she had neither a reasonable factual nor legal basis to file documents on behalf of Mathews after her death. CP at 7474, 7476. In its motion for CR 11 sanctions, the City cited to *Stella Sales* for the proposition that an attorney loses authority to file on behalf of a client after the client dies. 97 Wn. App. 11. Therefore, the City provided sufficient legal authority for the court to conclude that the attorney's filings were "without reasonable cause or inquiry." CP at 7474. This argument thus fails.

6. Spice next asserts that the superior court's CR 11 sanction lacks legal support. CR 11 "authorizes a trial court to impose appropriate sanctions if a party's filing is not well grounded in fact, or not warranted by existing law or a good faith argument to alter existing law." *Lee v. Kennard*, 176 Wn. App. 678, 690-91, 310 P.3d 845 (2013). Spice argues that the attorney's

filings were not baseless because "[p]etitioners presented factual and legal support that Plexus LLC and or Ted Spice or both had ownership and management authority . . . sufficient to maintain the suit." Br. of Appellant at 81. However, the superior court imposed CR 11 sanctions because the submissions to the court with regard to Mathews were not well grounded in fact or law because Mathews had died. Therefore, this argument fails.

7. Spice maintains that the City has not met its burden to show that CR 11 sanctions are appropriate. Specifically, Spice claims that "[t]he burden is on the movant to justify the request for CR 11 sanctions," citing *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). Br. of Appellant at 82 (emphasis omitted). In this case, the trial court's order specified that CR 11 sanctions were imposed for filing court documents on behalf of Mathews after her death "without reasonable cause or inquiry within the meaning of CR 11." CP at 7474. This basis satisfies any burden to justify imposition of the sanctions.

8. Spice contends that the superior court abused its discretion in imposing CR 11 sanctions because there is no legal authority for the proposition that when an LLC and its members are involved in litigation and one of its members dies, the litigation must cease and that consequently there was no "offending conduct." Br. of Appellant at 82. However, the superior court's sanction was based on the attorney's submission of signed documents to the court "without reasonable cause or inquiry" in violation of CR 11 in the absence of a reasonable factual or legal basis to file documents on behalf of Mathews after her death. CP at 7474, 7476. Spice claims that the order must identify which pleadings violated CR 11. Assuming that to be correct, the court's order, read as a whole and in context, reasonably identifies those pleadings, filings, and motions filed on behalf of Mathews "[b]etween December 9th 2009 and October of 2013." CP at 7468. Therefore, this argument fails.

9. Spice also asserts that the City has not demonstrated that the attorney's filings were "baseless," because "Plaintiff presented facts and law in support [of] Petitioner's position that at all times [were] relevant." Br. of Appellant at 83-84 (emphasis omitted). To repeat, the sanction was based on the submission of signed documents to the court "without reasonable cause or inquiry" in violation of CR 11 because there was no reasonable factual nor legal basis to file documents on behalf of Mathews after her death. CP at 7474, 7476. Therefore, this argument fails.

10. Spice claims that Plexus and Spice had authority to pursue the litigation after Mathews' death and "[t]hat is all [that] is required to defeat a CR 11 Motion." Br. of Appellant at 84. Spice does not cite to any authority for this premise. We do not consider conclusory arguments unsupported by citation to authority or rational argument. *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). Therefore, we decline to consider this argument.

11. Spice asserts that the superior court erred by imposing CR 11 sanctions because the attorney relied on CR 25 and RCW 4.20.046. However, Spice does not explain how reliance on either of these points of authority satisfies an attorney's obligations under CR 11. Therefore, because this argument is unresponsive to the CR 11 issue on appeal, this argument fails. *See Mason*, 170 Wn. App. at 384.

12. Spice further contends that the City's request for over $300,000 in sanctions is not quantified with precision and is not the least severe sanction. However, Spice does not explain how the City's *requested* sanction affects our review of the superior court's imposition of CR 11 sanctions. Therefore, this argument fails.

Spice also argues that the $45,000 sanction is "all the more disproportionate since the [superior] court was aware that . . . Legal Counsel had received no compensation since 2008."

Br. of Appellant at 87. Spice, however, does not cite to any authority for the proposition that a court must consider if or how much an attorney has been paid prior to imposing CR 11 sanctions on that attorney. More to the point, Spice does not explain how the $45,000 sanction was an abuse of discretion under all the circumstances. Thus, this argument fails.

13. Spice claims that under CR 11, all doubts must be resolved in favor of the nonmoving party. This statement is true. *Saldivar v. Momah*, 145 Wn. App. 365, 404, 186 P.3d 1117 (2008). But there is no doubt that Mathews died on December 8, 2009, and that the attorney continued to file and sign documents on behalf of Mathews after her death. With these well-established facts, the need to resolve doubts in favor of the nonmoving party has little scope in the decision. In any event, it does not suggest that the superior court abused its discretion. Therefore, this argument fails.

14. Spice contends that the superior court abused its discretion in imposing CR 11 sanctions because the sanctions would have an impermissible chilling effect. He argues that "[b]ecause Rule 11 sanctions have a potential chilling effect, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success." Br. of Appellant at 89. As noted, *Stella Sales* explained that

> "[w]hen a party to a lawsuit dies . . . the action must be continued by or against the deceased party's representatives or successors in interest," and that "[t]he attorney for the deceased party may no longer represent her interests.

97 Wn. App. at 18. Thus, the only action that would be chilled by this award is the unauthorized representation of a deceased person, conduct that should be discouraged. Consequently, this argument fails.

15. Spice asserts that the City attempted to impermissibly use CR 11 as a fee shifting mechanism. However, the superior court's oral ruling made it clear that it was not using CR 11

as a fee shifting mechanism when it imposed sanctions on attorney Lake. Therefore, this argument fails.

Because none of Spice's individual arguments are meritorious, we hold that the superior court did not abuse its discretion by imposing CR 11 sanctions.

VI. ATTORNEY FEES

A. Superior Court Award of Fees

Spice claims that the superior court erred by granting attorney fees to the City. We disagree.

Spice argues that there is no basis in law for the superior court to award fees to the City. Typically a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). In its April 15, 2016 order granting fees to the City, the superior court concluded that "[u]nder RCW 64.40.020, the prevailing party is entitled to an award of reasonable attorneys' fees and costs." CP at 7491. Although Spice points out that the City did not cite to chapter 64.40 RCW in its October 2014 motion for summary judgment, this observation ignores the fact that the City's motion of January 28, 2016 for attorney fees expressly relied on chapter 64.40 RCW. Furthermore, Spice does not explain how failure to cite to legal authority in an opening motion precludes an award of attorney fees where authority for such a fee in fact exists. Rather, Spice's argument appears to be that this court "should find . . . that there was no legal basis for awarding attorney fees by statute, under contract, or in equity and that the [superior] court abused its discretion," by awarding fees. Br. of Appellant at 93-94. Because RCW 64.40.020 provides authority for an award of attorney fees in this case, this argument fails.

Spice also asserts that the City's CR 59 request for fees is untimely and barred. However, the City did not submit a request for fees under CR 59; it attempted to seek fees under CR 54 and CR 60. The superior court determined that the City's CR 60 motion to amend was not meritorious, but found that the City's motion for fees under CR 54(d)(2) was meritorious.[12] Although the superior court acknowledged that the motion was untimely, it concluded that a CR 54(d)(2) motion was not waived due to untimeliness unless the opposing party could demonstrate prejudice. Therefore, because this argument does not address the grounds on which the superior court granted attorney fees, CR 54(d)(2), it fails.

Spice further contends that the City's request for attorney fees is barred by judicial estoppel. We disagree.

Judicial estoppel is an equitable doctrine that prevents a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The doctrine aims to preserve respect for judicial proceedings and avoid inconsistency, duplicity, and squandering of time. *Id*. We consider three factors to determine whether application of judicial estoppel is appropriate:

> "(1) whether a party's later position is clearly inconsistent with its earlier position;
>
> (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and
>
> (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

[12] CR 54(d)(2): Attorney's Fees and Expenses: Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

Id. at 538-39 (internal quotation marks omitted) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

Spice claims that the City's January 28, 2016 motion to amend the December 13, 2013 judgment and July 20, 2015 order to reflect an award of attorney fees to the City as against only Spice and Plexus is inconsistent with the City's request to vacate the December 13, 2013 judgment. However, the superior court did not grant this motion, instead granting the City's alternative relief sought under CR 54(d)(2).[13] The City's renewed request for attorney fees in 2016 under CR 54(d)(2) is consistent with its earlier position in the litigation in 2013 when it was awarded the same amount of attorney fees. Therefore, because the City's request for fees is consistent with its earlier position in the litigation, this argument fails.

B. Appellate Fees

The City requests attorney fees and costs on appeal pursuant to RAP 18.1(a).[14] The City argues that attorney fees and costs are appropriate under RCW 4.84.370, CR 11, and RCW 64.40.020. We hold that attorney fees and costs on appeal are authorized under RCW 64.40.020 with limitations.

Our Supreme Court has held that a prevailing party in an action under chapter 64.40 RCW is also entitled to recover attorney fees it incurred on appeal under RCW 64.40.020(2). *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 128, 829 P.2d 746 (1992). The City is

[13] In its ruling, the superior court explained, "The City's motion for fees based on the July 20, 2015 summary judgment and RCW 64.40.020 should be granted," and did not amend the December 13, 2013 judgment. CP at 7501.

[14] RAP 18.1(a) states: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court."

the substantially prevailing party with respect to the action for damages under RCW 64.40.020 and therefore is entitled to reasonable attorney fees under RCW 64.40.020. However, RCW 64.40.020(1) and (2) authorize the recovery of attorney fees in only a limited situation: by the prevailing party in an action by certain permit applicants "for damages to obtain relief from [certain] acts of an agency." This does not authorize the recovery of attorney fees in other circumstances. Therefore, the City is entitled to recover attorney fees on appeal which are reasonably attributable to its arguments in favor of upholding the dismissal of Spice's claim under chapter 64.40 RCW. It is not entitled to attorney fees on appeal relating to other issues, including CR 11.

CONCLUSION

We affirm the superior court's grant of summary judgment, imposition of CR 11 sanctions, and award of attorney fees to the City. We deny Spice's appeal of the 2008 decision. We also award attorney fees to the City on appeal subject to limitations.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.

BJORGEN, J.

We concur:

Worswick, J.

WORSWICK, J.

Johanson, J.

JOHANSON, J.

Filed
Washington State
Court of Appeals
Division Two

January 10, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TED SPICE; PLEXUS DEVELOPMENT, LLC, Appellants, DORIS E. MATHEWS, Plaintiff, v. PIERCE COUNTY, a political subdivision; CITY OF PUYALLUP, a municipal corporation, Respondents.	No. 45476-9-II ORDER DENYING MOTION FOR RECONSIDERATION

The appellant has filed a motion for reconsideration of the opinion filed on November 28, 2018. After review, it is hereby

ORDERED that the motion for reconsideration is denied.

Jjs. Bjorgen, Worswick, Johanson

FOR THE COURT:

Worswick, P.J.

APPENDIX 4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC,

Respondent,

v.

THURSTON COUNTY,

Petitioner,

BLACK HILLS AUDUBON SOCIETY and FRIENDS OF ROCKY PRAIRIE,

Additional Defendants,

PORT OF TACOMA, a Washington special purpose district,

Respondent.

PORT OF TACOMA, a Washington special purpose district,

Respondent,

v.

THURSTON COUNTY,

Petitioner,

BLACK HILLS AUDUBON SOCIETY and FRIENDS OF ROCKY PRAIRIE,

Additional Defendants,

MAYTOWN SAND AND GRAVEL LLC,

Respondent.

No. 94452-1

EN BANC

Filed AUG 0 9 2018

APPENDIX 5

GORDON McCLOUD, J.—The Land Use Petition Act (LUPA), chapter 36.70C RCW, bars parties from challenging a local land use decision in state court if the parties fail to exhaust the administrative process. RCW 36.70C.030. The central issue in this case is (1) whether that administrative exhaustion rule applies to all tort claims that arise during the land use decision-making process. The other issues are (2) whether there was sufficient evidence to support the jury's finding of a substantive due process violation under 42 U.S.C. § 1983 (Section 1983); (3) whether an aggrieved party can recover prelitigation, administrative fora attorney fees intentionally caused by the tortfeasor under a tortious interference claim; and, lastly, (4) whether the Court of Appeals erred in awarding a request under RAP 18.1(b) for appellate attorney fees that was not made in a separate section devoted solely to that request.

We affirm the Court of Appeals on all but the third issue. We hold that (1) LUPA's administrative exhaustion requirement does not bar all tort claims, (2) there was sufficient evidence to support the jury's finding that Maytown Sand & Gravel LLC's (Maytown) substantive due process rights were violated under Section 1983, (3) the tortious interference claims pleaded in this case do not authorize recovery of prelitigation, administrative fora attorney fees, and (4) the Court of Appeals did not

err in awarding appellate attorney fees under RAP 18.1(b). We therefore affirm in part and reverse in part.

I. FACTS AND PROCEDURAL HISTORY

In late 2009, Maytown purchased real property in Thurston County from the Port of Tacoma (Port) for the express purpose of operating a mine. The property came with an approved 20-year special use permit (permit) from Thurston County (County) for mining gravel.

That permit was originally issued in 2005 to the previous owner, Citifor, after protracted negotiations with numerous community stakeholders and extensive environmental studies. Because the proposed mining site is located adjacent to one of Washington's largest tracts of prairie-oak-wetland habitat, the proposed project stirred significant opposition from nearby residents, Indian tribes, and environmental conservationists. Trial Ex. (Ex.) 303. The lead environmental group opposing the mine back then was the Black Hills Audubon Society (BHAS). Citifor and BHAS eventually reached an agreement balancing Citifor's mining interest with BHAS's environmental concerns. In exchange for BHAS dropping its opposition to the mine, Citifor agreed to significantly reduce the amount of gravel it originally planned to excavate, to reclaim the property as a wetland once the reduced gravel amount was

excavated, and to sell over 800 acres of other property it owned to the state for wildlife conservation. Ex. 429.

But in 2006, the year after the permit was issued and before mining activities began, Citifor sold the property with the permit to the Port. The issues in this case arose four years later when Maytown and the Port sought to use the permit. Even though BHAS had signed off on the permit, other conservation groups and local residents remained opposed to the mine. Maytown and the Port claim that the County's board of commissioners (Board) succumbed to political pressure from these mine opponents and directed the County's Resource Stewardship Department (Department) to impose unnecessary procedural hurdles meant to obstruct and stall the mining operation.

Although Maytown already had a permit to mine the property, the Department remained involved because four key issues needed to be addressed. First, the Friends of Rocky Prairie (FORP), an environmental conservation group, was challenging the validity of the permit. Second, two missed water quality testing deadlines listed in the permit needed to be addressed. Third, there was a discrepancy between the water quality monitoring requirements listed in the permit and the corresponding groundwater monitoring plan that needed to be clarified. Fourth, the permit was due for its five-year review before the hearing examiner.

Because the property had been designated by the County as "mineral land of long term commercial significance," the County was obligated to balance the protection of the mineral land with the protection of critical areas. Ex. 429, at 46. As discussed below, the Department's decisions as to each of the four key issues were generally favorable to Maytown and the Port but came after significant delay and expense.

A. FORP's Claim That the Permit Had Lapsed Due to Inactivity or Noncompliance with the Permit's Water Quality Monitoring Conditions

Sometime in early 2009, local environmental conservationists learned that the Port was planning to sell the property that it had purchased from Citifor as a permitted gravel mine. These individuals formed a group, FORP, to stop the mine. FORP informed the Department that it believed the permit was no longer valid due to three years of nonuse and missed water testing deadlines. Ex. 140, at 1-2 (citing THURSTON COUNTY CODE (TCC) 20.54.040(4)(A); TCC 17.20.150(C)). FORP acknowledged that the Port had engaged in some activities during those three years but argued that none of those activities counted as use. According to FORP, those activities did not count because the Port was operating outside of its geographical region and outside the scope of its interlocal agreement with the Port of Olympia, the governmental body that had geographical jurisdiction over the property. *Id.*

The Department dismissed FORP's claim as untimely. The Department explained that it had already ruled the year before, in 2008, that the permit was valid despite the missed testing deadlines and the long period of inactivity. Exs. 141, 143. Because FORP failed to challenge that decision within the time frame for such appeals, the Department determined that FORP was time barred from doing so now.

After this legal challenge failed, FORP decided to put political pressure on the mine instead. FORP informed the Port of Olympia Commission of its belief that the Port was acting outside the scope of the interlocal agreement between the two ports. Olympia Port Commissioner George Barner Jr. agreed with FORP that the Port was acting outside the scope of the interlocal agreement and shared his assessment with the Board. Clerk's Papers (CP) at 255-56. FORP also met privately with the Board's three commissioners to discuss the gravel mine. Exs. 98A, 98B; CP at 2213.

Around the same time as these private meetings, one of the Board's commissioners, Karen Valenzuela, indicated interest in evaluating whether the permit could be revoked either because of the reasons raised by FORP or for some other yet-to-be-identified reason. Ex. 114A. Valenzuela also advised Sharron Coontz (FORP's president) about the evidence that she believed was needed to persuade the Board's two other commissioners to agree to reexamine the validity of the permit. Ex. 74.

As discussed in more detail in the five-year review section *infra* Section I.C, the Board ultimately agreed with the Department that the issue of permit validity was closed and could not be reopened by FORP. CP at 106-10.

B. Maytown's Journey To Extend the Permit's Water Testing Deadlines and To Clarify the Scope of the Water Quality Monitoring Requirements

Even though the Department had already ruled in 2008 that the gravel mining permit had not lapsed entirely due to inactivity or missed water testing deadlines, there was still the issue of how to address those missed deadlines.

When the permit was originally issued in 2005 to Citifor, that company had planned to start mining immediately. As a result, the permit contained deadlines that assumed an immediate start date. Specifically, condition 6A required field testing of 4 off-site supply wells "[p]rior to any mining activity and *within one-year* of final issuance of the [permit]," and condition 6C required the mine operator to collect "water levels, temperature, and water quality, including measurement of background conditions" data from 17 wells "*within 60 days* of the final issuance by the County of the [permit]." Ex. 302 (emphasis added). Because Citifor changed its mind and decided not to pursue the mine soon after it received the permit, Citifor never conducted that field testing and never collected that water quality data.

Significant debate arose in 2009 about whether those two deadlines needed to be formally extended and what water quality metrics and data collection points needed to be monitored.

1. The Department Assured the Port That the Permit Was Valid and That the Port Had Complied with All Water Quality Requirements

As discussed, the Port purchased the property from Citifor in 2006. The Port purchased the property in partnership with the Port of Olympia for use as a rail-served, intermodal logistics center (i.e., a freight transfer center) for the south Puget Sound region. That meant the Port did not have immediate plans to mine the property, so the Port did not conduct field testing or collect water quality data right away.

But the Port's plan to use the property as a freight transfer center fell through. In 2008, two years after purchasing the property, the Port sought to recoup its losses by selling the property as a permitted gravel site. The Port prepared the property for mining by removing 20 million tons of soil that was contaminated due to Citifor's decades of artillery manufacturing and explosives testing on the property. Additionally, the Port sought assurances from the Department that the permit remained valid despite the missed water testing deadlines and lack of mining activity.

The Department assured the Port that the permit remained valid. Ex. 85. But the Department also informed the Port that no on-site activities could begin until the Department received condition 6A and 6C's field testing water quality data. *Id.* The Port immediately collected the data and submitted it to the Department the following month. Upon receipt of that data, the Department confirmed that "all information requested . . . has been submitted" and informed the Port that "[i]t is the property owners' responsibility to ensure the property remains in compliance with all adopted . . . conditions i.e. continual monitoring of the groundwater . . . as required by the [permit]." Ex. 83.

Based on the Department's express assurance that the permit was still valid and its implicit approval to start mining, Maytown agreed to buy the property from the Port. However, before the sale was completed, Maytown sought further assurances from the Department that mining activities could commence quickly after completion of the sale. Maytown presented testimony that Mike Kain, the County's planning manager, verbally reassured it that the permit remained valid, that there were no "skeletons in the closet," and that Maytown could commence mining activities within 30 to 60 days. 10 Verbatim Report of Proceedings (VRP) (June 27, 2014) at 2227. Kain disputes ever telling Maytown that mining activities could commence immediately. Rather, Kain testified that he said the average lead time

for the Department to process a request to proceed with mining would take approximately 30 to 60 days. 15 VRP (July 8, 2014) at 3163.

That meeting between Kain and Maytown occurred in late October 2009, around the same time that FORP (the environmental conservation group formed to stop the mine) began meeting in earnest with the Board's three commissioners to invalidate the permit.

2. After Nearly Two Years, the Department Suddenly Notified the Port That a "Letter to Proceed" Was Required before Mining Activities Could Commence

Shortly after the meeting between Maytown and Kain, the Department informed the Port—for the first time in two years of communications about the anticipated mine—that the Port needed to obtain a "letter to proceed" from the Department confirming that all permit conditions had been satisfied before any mining activities could begin. Ex. 361. The Department further stated that once the Port submitted a request for such a letter, "review will not be initiated" until FORP had the opportunity to "outlin[e] their view of . . . compliance with conditions." *Id.* The Department approximated that review of such a request to proceed would "typically be 30 to 60 days." *Id.*

The Port questioned the sudden need for a letter to proceed, especially since it already had a letter in 2008 that implied the Port had complied with all permit

conditions and was authorized to start mining. When the Port questioned the County about the letter to proceed requirement, the County's attorney explained that the requirement was authorized under TCC 17.20.160(A). CP at 1154. That ordinance, however, requires only that gravel extraction miners "submit to either an inspection or . . . a conference before commencing the extraction of mineral resources." TCC 17.20.160(A). The ordinance does not mention anything about a written letter to proceed requirement.

Although the Port remained skeptical about the need for a letter to proceed, it nevertheless submitted a request for that letter two months later on January 4, 2010. CP at 1204-34.

The Department denied the request on February 16, 2010. Ex. 382.

The Department explained that it could not issue a letter to proceed because the Port had not complied with all permit conditions. Ex. 383. The Department identified two main noncompliance issues. The first issue was the missed deadlines for field testing and water data collection under conditions 6A and 6C. Those deadlines, the Department explained, could be easily extended by amending the permit. Because the "minor timeline change" did not "rise to the Hearing Examiner level to attain compliance," it "may be approved by staff." Ex. 383, at 3-4; Ex. 382, at 1. The second issue was the Port's allegedly deficient water data collection. Ex.

383. Back in 2008 when the Department first informed the Port that it needed to perform water quality monitoring, the Port collected only *2 data points* (water level and temperature) from *14 wells*. However, condition 6C expressly requires the collection of *4 data points* ("water level, temperature, water quality and background conditions") from "*17* [*wells*]." *Id.* at 3-4 (emphasis added). The Department explained that a "*full* baseline data set" consisting of 4 data metrics from 17 wells was required before mining activities could commence. *Id.* at 4 (emphasis added). Additionally, the County's hydrogeologist recommended that the Port perform additional, more comprehensive and costly, water testing of over 160 other pollutants for at least one year before mining. Ex. 63.

The Port disagreed with the Department's findings of noncompliance and refused to do any additional testing. Ex. 386. It appealed the findings and recommendations to the Board. *Id.* The Port argued that the Department was misreading condition 6C's data collection requirements to require more than was intended. *Id.* The Port acknowledged that the express language of condition 6C could be interpreted to include 4 data metrics from 17 wells but argued that that interpretation produced impossible and costly monitoring requirements that have nothing to do with any possible environmental impacts caused by gravel mining. *Id.*

Moreover, the Port argued, such additional testing could delay the mining project for over a year due to Washington's rainy season. *Id.*

The Department explained that the additional comprehensive pollutant testing was needed to test for historical pollutants deposited on the property by Citifor's decades of artillery and ammunitions manufacturing and testing.

Whether the Port's or the Department's interpretation of the scope of condition 6C's water quality monitoring requirements was correct was never resolved because the Port withdrew its appeal to the Board a few months later on July 1, 2010. Ex. 50. The Port withdrew the appeal because Maytown, the company that was buying the property, had agreed under protest to collect the additional 2 data metrics from more wells (but not "17 wells") and agreed to conduct the additional, comprehensive pollutant testing. Maytown agreed to do this additional testing to allow mining to begin.

3. *Even though Maytown Agreed to Comply with All of the Department's Recommended Tests, the Department Still Required Formal Amendment of the Permit and Hearing Examiner Approval of the Formal Amendment before Mining Could Commence*

Like the Port, Maytown did not agree with the County's interpretation of the scope of water quality testing required under the permit. Before Maytown eventually agreed to comply with the County's interpretation, Maytown sought to

amend six permit conditions. Regarding conditions 6A and 6C's field and water quality testing, Maytown sought to extend the missed deadlines, reduce the data collection points from 4 to 2 data points, and clarify that the reference to 17 "wells" in the permit was really shorthand for a combination of 17 underground wells and aboveground stations. Ex. 59. In addition to amending conditions 6A and 6C, Maytown sought to amend four other permit conditions relating to the construction of a freeway turn pocket (condition 5), the installation of a noise berm (condition 15), the management of stormwater and erosion (conditions 23 H and I), and the notice requirements to nearby well owners (condition V). *Id.* Maytown submitted its proposed amendments to the Department on April 22, 2010.

Maytown claims that before submitting those six proposed amendments to the Department, it had obtained reassurances from Kain at the Department that the proposed amendments would be treated as minor adjustments and therefore would be reviewed administratively by department staff without referral to a hearing examiner for a quasi-judicial public hearing. 5 VRP (June 20, 2014) at 1354. Kain acknowledged having that conversation with Maytown but testified that he said each of those six amendments would probably qualify individually as minor amendments. 16 VRP (July 9, 2014) at 3312-14. He denied ever saying that those six amendments when proposed together, like Maytown did, would qualify as minor. *Id.*

The critical difference between treating an adjustment as minor rather than major is that ground disturbing activities can begin once the Department approves a *minor* adjustment, regardless of whether FORP or any other environmental group appeals the adjustment. Appellant's Pet. for Review at 4. Conversely, if an amendment is classified as a *major* adjustment, all ground disturbing activities must be stayed until all appeals are resolved, which could—and in this case did—result in significant delay. Ex. 55.

On June 17, 2010, two months after Maytown submitted its proposed amendments, the Department informed Maytown that the six proposed amendments were "substantial" and therefore needed to be referred to a hearing examiner. *Id.* at 1.

Maytown tried to expedite the amendment process by withdrawing piecemeal most of its proposed amendments. As mentioned above, by July 1, 2010, Maytown had agreed to comply with all of the Department's data collection requirements and recommendations and had withdrawn every amendment except those related to conditions 6A and 6C. Ex. 50. Maytown did not withdraw its proposed 6A and 6C amendments because it was impossible for Maytown to comply with conditions 6A and 6C as written. 4 VRP (June 19, 2014) at 1156-58. The deadlines for both conditions had passed, and condition 6C's data collection requirements were

impossible to satisfy because they required collecting water data from a nonexistent 17th well.

Maytown's withdrawals and concessions occurred too late. By the time Maytown made these concessions, the Board's attorney had already informed the Department that the Board would no longer allow the Department to administratively grant any adjustments to special use permits—not even minor adjustments. 16 VRP (July 9, 2014) at 3297-300. Kain, the County's planning manager, testified that until that point he had been approving minor adjustments to special use permits—like the one at issue here—for over 22 years. *Id.* at 3301-02.

Approval of Maytown's proposed amendments was further delayed by the Department's determination that a limited SEPA[1] review was necessary before the proposed amendments could be considered by the hearing examiner. Ex. 55. The Department explained that because condition 6A and 6C were SEPA conditions, a limited SEPA review was necessary to amend them. This limited review required Maytown to submit a SEPA checklist. *Id.* Maytown's primary complaint with having to undergo limited SEPA review is that it delayed approval of the proposed amendments even more. Before the proposed amendments could be sent to the

[1] State Environmental Policy Act, ch. 43.21C RCW.

hearing examiner for consideration, the Department had to issue SEPA findings. The Department issued those SEPA findings on January 19, 2011—nearly 5 months after Maytown submitted its SEPA checklist and nearly 9 months after Maytown initially submitted its request for amendments.[2]

Notably, Maytown's attorney agreed with the Department that a limited SEPA review was probably required. He argued, instead, that any SEPA finding should have been issued as an *addendum* rather than as a new *threshold* determination. Ex. 405. The critical difference between an addendum and a threshold determination is that a threshold determination is subject to an open public comment period, whereas an addendum is not. WAC 197-11-502(3)(b).

The Department issued a *threshold* determination of mitigated nonsignificance on January 19, 2011. Ex. 446.

[2] The County argues that this nine-month gap between Maytown's submission of its request for amendments and the Thurston County Community Planning Division's decision was caused in part by Maytown's piecemeal withdrawal of some of its initial six proposed amendments mid-notice period, which required public notice each time. Resp't/Cross-Appellants' Joint Resp. & Opening Br. at 19. Maytown partially withdrew proposed amendments on July 1 and October 29, 2010. Ex. 446.

4. The Hearing Examiner Ruled That Formal Amendments Were Necessary and That Limited SEPA Review Was Appropriate, but Ruled That the Issuance of a SEPA Threshold Determination Was Inappropriate

Both Maytown and FORP (the environmental conservation group opposed to the mine) appealed different aspects of the Department's SEPA determinations. *Id.* Maytown agreed with the Department's finding of no significant environmental impact but argued that the finding should have been issued as an addendum, not a threshold determination. *Id.* FORP disagreed with the finding and argued that a full SEPA review, not a limited SEPA review, should have been conducted. *Id.* Thus, three matters were before the hearing examiner in March 2011: (1) FORP's SEPA appeal, (2) Maytown's SEPA appeal, and (3) Maytown's request to amend conditions 6A and 6C.

The hearing examiner rejected FORP's SEPA appeal and agreed with Maytown that a SEPA addendum (rather than a threshold finding) was the correct SEPA procedure. *Id.* But she questioned whether she had the authority to resolve that procedural dispute. *Id.* The hearing examiner also approved Maytown's proposed amendments. *Id.*

But before granting Maytown's proposed amendments, the hearing examiner addressed two other procedural complaints raised by Maytown: (1) that it should not have been required to formally amend conditions 6A and 6C because the issue could

have been dealt with as a noncompliance matter at the five-year review (discussed *infra* Section I.C) and (2) that even if it had to formally amend the conditions, the proposed amendments should have been treated as minor adjustments that the Department could grant administratively.

The hearing examiner disagreed with Maytown on these two procedural points. She ruled that a formal amendment was required and that it was within the Department's discretion to refer Maytown's proposed amendments to her given the scope of the proposed changes to condition 6C's data collection requirements.[3]

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[3] Because the hearing examiner's ruling on these two procedural matters are central to the County's LUPA administrative exhaustion argument and the parties disagree about the scope of that ruling, we quote it fully:

> 1. **A[] [permit] amendment was required.** Both [Maytown] and the Port argue that the changes entailed in the instant proposal to amend SUPT-02-0612 [(the gravel mining permit)] could have been handled administratively via enforcement authority and that no amendment application (administrative or quasi-judicial) was required. The Department decided otherwise and its decision has several sources of support. While there are no criteria for "special use amendment" identified in the code, TCC 20.54.030 expressly authorizes the review and approval of "amended special use authorizations." Pursuant to TCC 20.54.015(1), administrative review is allowed for a specified list of special uses. Pursuant to TCC 20.54.015(2), the hearing examiner is the approval authority for any special use not listed, and amended special use authorizations are not included in subsection (1). SUPT-02-0612 itself, at condition T, states that "any expansion or alteration" of the use would require submittal of a new or amended special use permit. Permission to mine was predicated on compliance with water monitoring conditions. Changes in the number and nature of monitoring sites specified in the

5. Only the Hearing Examiner's SEPA Rulings, Not Her Procedural Rulings regarding the Amendment Process, Were Appealed

FORP appealed the hearing examiner's refusal to order a full SEPA review to the Board. CP at 411-13.

Maytown did not appeal because Maytown received what it really wanted: amendments to conditions 6A and 6C. But Maytown did not appeal the hearing

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> conditions of permit approval, even if intended to increase consistency with the 2005 Plan [(the groundwater management plan that was drafted in conjunction with the permit)], are still "alterations" to the use as approved. Condition T also reserves to the Department the discretion to decide whether a given amendment requires administrative or quasi-judicial review. At the Five Year Review hearing, the Applicant characterized the proposed changes as "clerical" in nature. The County Code is silent as to clerical corrections to conditions in issued permits. Case law suggests that the County is bound by the permit as issued absent further process. *Chelan County v. Nykreim*, [146] Wn.2d 904[, 52 P.3d 1] (2002).
>
> 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 [at the five-year review], 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 establishing whether [permit] amendments are administrative or quasi-judicial, the Department exercised discretion in deciding which process applied. Its decision is due substantial deference because the ordinance is unclear, the Department is charged with administration of the ordinance, and the decision is within the Department's expertise. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007).

Ex. 446, at 30-31 (emphasis added).

examiner's arguably unfavorable rulings regarding the need for formal amendments and limited SEPA review.[4] As already discussed, though, Maytown mainly complained about the Department's decision to refer the proposed water quality amendments to the hearing examiner for review (rather than review them administratively) and the Department's decision to issue a SEPA threshold finding (rather than an addendum). On those points, the hearing examiner agreed with Maytown that those actions were unnecessary, though the hearing examiner did say

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[4] Maytown's attorney explained the decision not to pursue the appeal as follows:

> As we reviewed our options and the Examiner's Decision to outline the appeal I emailed you about on Saturday, we reconsidered our position. The way the Examiner wrote the Decision, she said the Code was unclear about the process and the County had the option to address the 6A and 6C timing issues either administratively or through the formal [permit] Amendment process. Her language leaves open to us the argument that the County staff, under pressure from FORP and the Commissioners, chose the most burdensome and lengthy approach—the formal [permit] Amendment process and its attendant SEPA process that has taken so long and cost so much. Remember that the record shows the County reversed itself on the process which is further evidence of capricious acts. If we appeal this part of the Examiner's Decision to the [Board], we know the [Board] will rule against us and would likely use language that said the formal [permit] Amendment process was REQUIRED. This would make our damage case more difficult so we have concluded we should not file an appeal of the Examiner's Decision.

Ex. 449.

that the Department acted within its discretionary authority when it referred the proposed amendments to her.

Thus, the only issue administratively appealed to the Board was FORP's challenge to the hearing examiner's decision against ordering a full SEPA review. The Board rejected FORP's challenge. CP at 411-13. FORP then filed a LUPA appeal in Thurston County Superior Court, which the superior court dismissed for lack of standing on October 13, 2011. CP at 479-84.

The entire amendment and limited SEPA process, including FORP's SEPA administrative and judicial appeals, took a year and a half. However, as mentioned above, *supra* note 2, some of that delay may have been caused by Maytown's withdrawal of proposed amendments midprocess, which required a new public notice to be issued each time.

C. The Permit's Five-Year Review

While Maytown's request for amendments was pending, the permit became due for a five-year review before the hearing examiner. That review took place on December 6-8, 2010, and the hearing examiner issued her decision on December 30, 2010. Because no mining activities had ever taken place during the first five years of the permit, the parties debated whether the laws of 2005 (the year the permit was issued) or 2010 (the current year) applied and what, if any, additional environmental

testing could be imposed on Maytown at this five-year juncture. The parties also debated whether the hearing examiner had the authority to amend conditions 6A and 6C under its enforcement authority at this preamendment hearing stage given that the remaining proposed amendments related to permit compliance matters.

FORP and other members of the public participated in the five-year review. At the review hearing, FORP re-raised the arguments that it had raised in 2009 that the permit had lapsed due to three years of inactivity and due to missed water quality monitoring deadlines.

1. The Hearing Examiner Did Not Address Whether She Had the Authority To Modify Conditions 6A and 6C through Her Enforcement Powers at the Five-Year Review

As detailed above, Maytown and the Port argued throughout the planning and administrative process that there was no need to formally amend conditions 6A and 6C's missed deadlines or formally clarify the scope of 6C's data collection requirements because the Port had already complied with the gist of those conditions. The Department implicitly acknowledged as much in its 2008 letter. Alternatively, Maytown and the Port argued that if formal amendments were necessary, the amendments should be classified as minor adjustments that could be administratively approved by the Department directly without referral to the hearing examiner. At the five-year review, Maytown raised a second alternative argument:

that the hearing examiner could modify those conditions during the five-year review through her permit enforcement powers rather than wait until the scheduled amendment hearing, which had not yet occurred.

The hearing examiner seemed to agree with Maytown that she could treat the water quality testing issue as a noncompliance matter and modify conditions 6A and 6C at the five-year review stage. Ex. 429. But she did not actually rule on that point, because Maytown and the County asked her not to do so. *Id.* They explained that the public had already been notified that a separate hearing would be held on the proposed amendments, so resolution of that issue at the five-year review could trigger procedural due process complaints by others, thereby fueling even more litigation by mine opponents.

Thus, no ruling on the amendment issue was made at the five-year review. As mentioned above, *supra* Section I.B.4, the hearing examiner eventually approved Maytown's proposed amendments three months later at the amendment hearing.

2. The Hearing Examiner Rejected FORP's Argument That the Delay in Collecting Water Quality Data Invalidated the Permit

The hearing examiner disagreed with FORP's argument that the lack of water quality testing in 2006 had frustrated the purpose of the permit, thereby rendering the permit invalid. The hearing examiner instead ruled that the delay was beneficial to the project because the County now had a fresh baseline, closer in time to mining,

against which to compare future water samples. She explained that if Citifor or the Port had collected water quality data in 2006, as the permit required, then that information would have grown stale by 2010 and would not have been able to provide the County with any useful baseline to assess ground and surface water changes caused by gravel mining activities. Ex. 429.

3. The Hearing Examiner Rejected the Department's Recommendation That a New Critical Areas Study Be Conducted

Most of the discussion at the five-year review focused on whether a new critical areas study should be conducted given the five-year delay in mining activities and, if so, which critical areas ordinance (CAO) should apply. When the gravel permit was initially approved in 2005, it was evaluated under the County's 2002 CAO,[5] which was the CAO applicable at the time. Since then, however, the County had amended the CAO—in 2009. The relevant difference between the two ordinances is that the 2009 CAO substantially expanded the definition of what land qualifies as protected prairies and oak habitats. *Id.* Notably, if the 2009 CAO applied, Maytown's permitted mine would be reduced in size by almost a third, from 284 acres to approximately 180 acres. *Id.*

[5] Although the ordinance in effect in 2005 was adopted in 1999, well before the 2002 designation, we use that 2002 designation because all the parties refer to it as such.

The Department recommended that the hearing examiner order a new critical areas survey under TCC 20.54.040(1). Exs. 14, 15. That provision requires application of current law to "proposed" special use sites. The Department classified Maytown's permitted-but-nonexistent mining operation as such a "proposed" use.

In contrast, Maytown argued that its mining operation was a "permitted" use, which had vested under the 2002 CAO. TCC 17.15.355(A) provides that "[a]uthorization to undertake regulated activities within critical areas or their buffers *shall normally be valid for a period of the underlying permit*," which in this case was 20 years. (Emphasis added.) The Department acknowledged that the 2009 CAO usually would not apply to an existing permit but argued that this case was uniquely different because no mining activities had ever occurred.

The hearing examiner agreed with Maytown that it was not required to redo its critical areas study under the 2009 CAO. She ruled that the Department's argument "lack[ed] common sense." Ex. 429, at 46. She explained that "[i]f adopted, the County's position would have the same effect as requiring mines to re-apply every five years. . . . The time and expense needed to acquire DNR [(Department of Natural Resources)] and DOE [(Department of Ecology)] approvals argues against the County's position. No mining could ever occur under such a

paradigm because no operator could afford the costs of reapplying every five years." *Id.*

The hearing examiner also rejected the Department's alternative recommendation that a new critical areas study be conducted under the 2002 CAO. The Department explained that it was concerned that some critical habitats may have been missed in 2005 when the permit was issued, or some may have developed in the area since then. *Id.* In support of its recommendation for a new critical areas study under the 2002 CAO, the Department cited a state forestry map that listed a possible seasonal stream on the property. Ex. 14.

The hearing examiner concluded that "[t]he record contains no evidence" to believe that any critical areas were missed during the 2005 critical areas study. Ex. 429, at 46. As for the possible seasonal stream, the hearing examiner relied on the testimony from a habitat biologist from the Department of Fish and Wildlife saying that he did not see any evidence of a seasonal stream during his site visit in October 2010. *Id.* at 28. Additionally, the hearing examiner relied on the 2005 SEPA mitigated determination of nonsignificance (MDNS) findings that were entered when the permit was originally issued. Those findings detailed the extensive environmental studies that were conducted on the site from 2002 to 2005 when Citifor initially proposed mining the property for gravel. *Id.* at 46. It was significant

to the hearing examiner that "[e]ven the conservation organizations supported the October 2005 MDNS" and "submitt[ed] letters stating that [the MDNS] addressed all their concerns about the . . . permit." *Id.* Moreover, the hearing examiner explained that even if any critical areas had been missed in the 2005 critical areas study, "the County and the Applicant [(Maytown)] [we]re equally bound by the issued permit." *Id.*

FORP, along with BHAS, appealed the hearing examiner's rulings to the Board. The Department did not appeal. The Board issued its decision two months later on March 14, 2011. CP at 106-10.

4. The Board Reversed the Hearing Examiner and Ordered a New Critical Areas Study Using the 2002 CAO

The Board rejected most of FORP's arguments, except one. *Id.* The Board rejected FORP's argument that the permit had lapsed. *Id.* The Board also rejected FORP's argument that the mining site was a "proposed" project and therefore subject to the 2009 CAO (which was the Department's primary argument for recommending a new critical areas study). *Id.* at 107. But the Board agreed with FORP (and the Department's alternative argument for a new critical area study) that the mining site should be reinspected for critical areas as defined under the 2002 CAO because there was "undisputed" evidence that critical habitats had developed on the property since the permit was issued. *Id.* The Board explained that reevaluation of critical areas

was authorized by the permit itself (rather than the TCC), which required that "'[t]he existing native outwash prairie, wetlands, riparian areas (including streams), and oak woodlands within the applicant's overall 1,613-acre ownership **will be completely avoided and buffered from the proposed activity**.'" *Id.* at 107-08 (alteration in original).

5. The Lewis County Superior Court Reversed the Board's Order for a New Critical Areas Study

Maytown and the Port objected to conducting a new critical areas study. They appealed the Board's decision to the Lewis County Superior Court. CP at 1-53. The superior court agreed with Maytown and the Port and dismissed the Board's order for a new critical areas study on July 20, 2011. CP at 111-16. The superior court held that the Board's order requiring a full redo of the critical areas study was arbitrary and capricious. CP at 2770.

Even though Maytown and the Port never had to conduct a new critical areas study, the administrative process and judicial appeal took five months and resulted in extra costs to Maytown and the Port in defending against the study at the five-year review hearing and throughout the administrative and judicial appeals.

D. Maytown's and the Port's Tort Claims against the County

After waiting nearly two years, Maytown finally received a letter to proceed from the Department on November 8, 2011. Ex. 1. Maytown began mining a few

months later, but the business venture failed not long thereafter. Because of the terms of their property sale agreement, the Port retained a reversionary interest in the property. The Port was unable to sell the property to any other mining company.

Maytown and the Port blamed the County for the mine's failure and lost property value and filed complaints for damages in Lewis County Superior Court. CP at 488-511 (Maytown), 163-86 (the Port). They argued that the nearly two-year delay in mining operations and the significant costs they incurred during the amendment process and five-year review were intentionally caused by the County. They alleged that the Department was operating under the direction of the Board to stop the mining project and that the Department complied with that direction by imposing onerous water quality testing demands and dragging out the amendment and five-year review processes.

Those efforts, they alleged, included (1) introducing a new "letter to proceed" requirement suddenly in 2009, (2) refusing to process the Port's request for a letter to proceed until after FORP had an opportunity to respond, (3) refusing to honor the Department's 2008 determination that the Port had already complied with all water quality testing requirements, (4) requiring Maytown to conduct extensive and costly water quality testing beyond the four data collection points listed under condition 6C, (5) requiring Maytown to formally amend conditions 6A and 6C, rather than

address its technical noncompliance through enforcement powers, (6) refusing to treat Maytown's proposed amendments as minor adjustments as the Department said it would, and even though the only amendments left at the end were unopposed by the Department, (7) issuing a SEPA threshold determination rather than an addendum, which triggered more appeals, (8) recommending that Maytown undergo a new, costly, and time-consuming critical areas study, which transformed what should have been a short compliance hearing into a protracted three-day hearing, and, lastly, (9) including language in the letter to proceed that Maytown finally received almost two years later stating that the Department could impose additional conditions on the permit at subsequent five-year reviews, which Maytown and the Port contend was meant to scare prospective mining companies away from the property.

Maytown and the Port alleged that together these actions resulted in significant expenses, prevented Maytown from bidding on supply contracts because it did not know when it would ever be able to start mining, delayed the start of mining to the point that the project was no longer economically feasible for Maytown's owners, and cast such a dark cloud over the property that the property was virtually unmarketable as anything other than an environmental conservation site. 13 VRP (July 2, 2014) at 2659-61. They further claimed that the Department's actions were

done intentionally at the behest of two board commissioners, Valenzuela and Sandra Romero, to stall and shut down Maytown's mining operation.

In support of these claims, Maytown's attorney, John Hempelmann, testified that when he approached Kain (the County's planning manager) during the amendment process to discuss the many procedural hurdles that the Department was imposing on the mine, Kain admitted that all of these hurdles were put into place at the direction of the Board. Those hurdles included requiring a letter to proceed and delaying review of that request so that FORP could review it, 6 VRP (June 23, 2014) at 1499; classifying Maytown's proposed amendments as major rather than minor adjustments, 4 VRP (June 19, 2014) at 1145-46; and recommending that Maytown redo the critical areas study, 5 VRP (June 20, 2014) at 1269. According to Hempelmann, the County's attorney (distinct from the Board's attorney) told him that both he and Kain were at risk of losing their jobs because they had tried to help the mining project proceed despite the commissioners' directives to stop the project. 4 VRP (June 19, 2014) at 1189.

Indeed, the Port's director testified that he was shocked by Commissioner Valenzuela's blatant desire to stop the mine. He testified that he was present during a board meeting where the mine was discussed. During that meeting, the Department informed the Board that the permitted mine could not be stopped unless there was

an emergency, such as evidence of an endangered butterfly species on the property. 2 VRP (June 17, 2014) at 801; 3 VRP (June 18, 2014) at 893. In response to that information, the director testified that he heard Valenzuela tell the Department to go "'find [her] an emergency.'" 3 VRP (June 18, 2014) at 893-94.

The County's manager, Jack Hedge, also observed that Commissioner Valenzuela had figuratively leaped at the possibility of being able to close the mine when she learned there might be a seasonal stream on the property. He testified that when he met with Valenzuela to discuss FORP's allegation of a seasonal stream, she had a "visceral" response to the allegation and pronounced the allegation as the evidence she needed to require the entire project to be reevaluated under SEPA. 15 VRP (July 8, 2014) at 3067-70. Valenzuela did not, however, seek to unilaterally reopen SEPA based on that allegation because the county manager informed her that he knew for a fact that there was no seasonal stream on the property. *Id.* at 3068-70. Notably, however, the Department raised the possibility of a seasonal stream on the property as a basis for redoing a SEPA review at the five-year review. Whether that basis was merely coincidental or raised at Valenzuela's request was a question of fact for the jury to decide.

Commissioner Valenzuela admitted at trial that she wanted to reopen SEPA review. 8 VRP (June 25 2014) at 1849-50. She also acknowledged that she wanted

the mining project to be classified as a "proposed," rather than a "permitted," use so that the 2009 CAO could be applied, *id.* at 1731. She acknowledged that she wanted to use the 2009 CAO even though she knew the ordinance could not be applied retroactively to permitted projects, *id.* at 1734-35; knew that the cost of a new critical areas study would be borne by Maytown and the Port; and knew that the study would probably result in approximately a 40 percent reduction in mineable property, *id.* at 1736-37. An e-mail that Valenzuela sent to a local resident also suggested that she was not against using the "letter to proceed" process to stall the mine. Ex. 60.

Meanwhile, at the same time the Department was evaluating Maytown's proposed amendments, Commissioner Romero directed staff to "[p]lease find out why staff does not agree with the FORP's attorney" since "[t]his may be key to the whole project." Ex. 47.

Additional evidence showed that neither Valenzuela nor Romero disclosed to the Port or to Maytown that they had signed FORP's 2007 petition to rezone the mine. Ex. 91; 8 VRP (June 25, 2014) at 1865. Both Valenzuela and Romero also presided over the appeals in this case without disclosing their membership in BHAS, the environmental conservation group that originally contested the mine when it was proposed in 2002 through 2005 and that joined FORP in many of its appeals and motions in this case. 8 VRP (June 25, 2014) at 1701, 1788-89, 1884-85. According

to Valenzuela, it was "meaningful to [her] that BHAS [was] objecting to the requested amendments, since they [were a] party to the settlement agreement" reached in 2005 that gave rise to conditions 6A and 6C. Ex. 31, at 2. Whether this statement proved Valenzuela was biased in favor of BHAS and against the mine was also a question of fact for the jury to decide.

E. The County's Motions for Summary Judgment and the Jury's Verdict

Thurston County moved for summary judgment dismissal several times throughout the case. The County argued that the case should be dismissed because Maytown and the Port had failed to exhaust their administrative remedies. CP at 222-23, 1381-1410, 1807-16, 1926-36. Additionally, the County argued that Maytown's Section 1983 due process claim should be dismissed because Maytown failed to prove that it was deprived of a constitutionally protected property interest or that the County had acted in a way that unconstitutionally "shocks the conscience." CP at 206-10, 1398-1401. The trial court disagreed and submitted the case to the jury. CP at 1950-53, 3050-56; 14 VRP (July 7, 2014) at 2882-83.

The jury ruled in favor of Maytown and the Port on all of their claims. The jury found that the County had (1) tortiously interfered with the real estate contract between the Port and Maytown, (2) tortiously interfered with Maytown's business expectancy, (3) made negligent misrepresentations to both the Port and Maytown,

(4) made express assurances to both the Port and Maytown giving rise to a special duty to both, and (5) violated Maytown's substantive due process rights in violation of Section 1983. CP at 6388-91. The jury further found that each of these actions caused damages and awarded a lump sum of $8 million to the Port and $4 million to Maytown. CP at 6391.[6] The award did not include the prelitigation attorney fees Maytown and the Port incurred trying to perfect the permit in the administrative fora. CP at 3622-24. But the trial court did award Maytown $1.1 million in litigation attorney fees for prevailing on its Section 1983 claim. CP at 7551-62.

The trial court reduced the jury verdicts to judgment. CP at 6392-94. The County then moved for judgment as a matter of law and a new trial, CP at 6399-422, which the trial court denied, CP at 7448-49.

F. The Court of Appeals Affirmed the Jury Verdicts and Remanded the Case for a Damages Trial on Prelitigation, Administrative Fora Attorney Fees

The County appealed from the judgment and the trial court's denial of its postjudgment motion. CP at 7469-79. In its opening brief, the County also assigned

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[6] Additionally, the trial court ruled that the County acted arbitrarily and capriciously in violation of RCW 64.40.020 in ordering Maytown to conduct a new critical areas study. CP at 2770. But no damages were awarded to Maytown for that claim because the parties agreed that those damages would duplicate damages awarded for other claims. Appellant's Opening Br. at 43.

error to the trial court's denial of its earlier summary judgment motions, arguing that the trial court should have dismissed the entire case because Maytown and the Port failed to exhaust the administrative process and because there was no evidence to support Maytown's Section 1983 claim.

Maytown and the Port cross appealed the trial court's exclusion of prelitigation, administrative fora attorney fees as damages. CP at 7482-95.

The Court of Appeals rejected the County's claim that LUPA's administrative exhaustion requirements applied to this tort action and found that Maytown had presented sufficient evidence to support its Section 1983 claim. *Maytown Sand & Gravel, LLC v. Thurston County*, 198 Wn. App. 560, 566-67, 395 P.3d 149 (2017). Regarding Maytown and the Port's request for prelitigation, administrative fora attorney fees, the Court of Appeals agreed that these fees were recoverable as damages and remanded the case for a trial on the amount of those fees. *Id.* at 567. The Court of Appeals also granted Maytown appellate fees and costs under RAP 18.1 and 42 U.S.C. § 1988 for prevailing on its Section 1983 claim. *Id.* at 592-93.

The County petitioned for review. We granted review without limitation. *Maytown Sand & Gravel, LLC v. Thurston County*, 189 Wn.2d 1015, 404 P.3d 480 (2017).

II. ISSUES

A. Whether LUPA's administrative exhaustion rule, RCW 36.70C.030, applies to all tort claims that arise during the land use decision-making process;

B. Whether there was sufficient evidence to support the jury's finding of a substantive due process violation under Section 1983 (42 U.S.C. § 1983);

C. Whether an aggrieved party may claim prelitigation, administrative fora attorney fees that the tortfeasor intentionally caused as damages in a tortious interference claim; and

D. Whether a request under RAP 18.1(b) for appellate attorney fees under 42 U.S.C. § 1988 must be made in a separate section devoted solely to that request.

III. ANALYSIS

A. LUPA's Administrative Exhaustion Requirement Does Not Bar All Tort Claims That Arise during the Land Use Decision-Making Process

A party challenging a local land use decision must exhaust local administrative processes before seeking review in the courts. RCW 36.70C.030. That rule is subject to four exceptions. One of those exceptions is for "[c]laims provided by any law for monetary damages or compensation." RCW 36.70C.030(1)(c); *e.g.*, *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 928, 296 P.3d 860 (2013) (holding LUPA's exhaustion requirement does not apply to inverse condemnation claims for compensation).

The County acknowledges that because Maytown and the Port seek only monetary damages in this case, their action arguably falls within the language of LUPA's damages exception. Appellant's Opening Br. at 54-56; Pet'r's Suppl. Br. at 8-11. The County, however, argues against construing that language so broadly as to allow parties, like Maytown and the Port, to circumvent LUPA's administrative exhaustion requirement simply by seeking damages. To allow a party to do so, the County argues, would create a loophole that completely undermines LUPA's statutory framework.

Maytown and the Port argue that we do not need to address the scope of LUPA's damages exception because they are not challenging a land use decision. They argue that LUPA's exhaustion requirement applies only to actions challenging the validity of a permit or the interpretation of a land use statute or ordinance.[7] They argue that a different rule applies where, as here, the plaintiffs challenge an agency's tortious acts committed during the land use permitting process, rather than the land

[7] *E.g.*, *Durland v. San Juan County*, 182 Wn.2d 55, 64-66, 340 P.3d 191 (2014) (dismissing a challenge to invalidate a building permit); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005) (dismissing a challenge to invalidate a land use deadline extension); *Chelan County v. Nykreim*, 146 Wn.2d 904, 939-40, 52 P.3d 1 (2002) (dismissing a challenge to invalidate a boundary line adjustment); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 172-73, 4 P.3d 123 (2000) (dismissing a challenge to invalidate a rezone decision); *Applewood Estates Homeowners Ass'n v. City of Richland*, 166 Wn. App. 161, 170-71, 269 P.3d 388 (2012) (dismissing a challenge to invalidate a land use permit amendment).

use decision itself. *See Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 556, 166 P.3d 813 (2007) (distinguishing between actions challenging the validity of a land use decision and actions challenging the government's bad faith delay in issuing that decision).

We review this statutory interpretation issue de novo. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009) (citing *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 87, 134 P.3d 1166 (2006)). We agree with Maytown and the Port.

LUPA's administrative exhaustion requirement applies to judicial review of "land use decisions." RCW 36.70C.020(1). 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 determination." RCW 36.70C.020(2) (emphasis added). Although the term "determination" is not statutorily defined, the legislature has provided an illustrative list of actions that could trigger such a "determination." That list includes (a) "[a]n application for project permits or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred or used," (b) "[a]n 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," or (c) "[t]he enforcement by a local jurisdiction of ordinances regulating the

improvement, development, modification, maintenance, or use of real property." RCW 36.70C.020(2)(a)-(c).

Where the legislature uses a general statutory term but provides a list of illustrative examples, we construe the term narrowly, consistent with those examples. Stated differently, "'general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or "comparable to" the specific terms.'" *State v. Larson*, 184 Wn.2d 843, 849, 365 P.3d 740 (2015) (quoting *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000) (quoting *John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883-84, 558 P.3d 1342 (1976))).

Applying that principle of statutory construction, we conclude that the term "determination" does not include tortious acts. Tortious acts committed during the land use decision-making process are not similar or comparable to determinations on a permit application, on the applicability of land use ordinances or regulations to property, or on how ordinances and regulations should be enforced. Construing "determination" in this limited manner is also consistent with LUPA's stated purpose, which is to provide landowners with an expedited and uniform process for

obtaining and appealing local land use decisions.[8] RCW 36.70C.010; WASH. STATE OFFICE OF FIN. MGMT., GOVERNOR'S TASK FORCE ON REGULATORY REFORM: FINAL REPORT 51 (Dec. 20, 1994). That rationale does not apply to intentional torts committed during that land use decision-making process.

We therefore hold that LUPA's administrative exhaustion requirement does not apply to the tort claims raised here. *Accord Woods View II, LLC v. Kitsap*

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[8] Maytown speculates that the legislature may have enacted LUPA in response to this court's decision in *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992). Answer to Mem. of Amicus Wash. State Ass'n of Mun. Att'ys in Supp. of Pet. for Review at 3. Maytown contends that LUPA was adopted to reverse the holding in *Lutheran Day Care*, which Maytown characterizes as having transformed every land use appeal into a full-blown liability action. *Id.* *Lutheran Day Care* held that when a court overturns or upholds a local land use decision under the old pre-LUPA writ of certiorari process, that court's decision had preclusive effect on all subsequent claims for damages. 119 Wn.2d at 116-17. As a result, Maytown argues, the writ process became extremely litigious because the process proved or foreclosed subsequent claims for damages.

We can find no evidence that the legislature adopted LUPA with the intent to reverse *Lutheran Day Care* and abolish any preclusive effect administrative land use decisions could have on subsequent actions. And Maytown has not provided us with any. Our research shows that LUPA was enacted in 1995 at the behest of then-Governor Mike Lowry. Governor Lowry identified a need for regulatory reform in land use decisions and created a task force to develop recommendations for such reform. Exec. Order No. 93-06 (Wash. Aug. 9, 1993), https://www.governor.wa.gov/sites/default/files/exe_order/eo_93-06.pdf [https://perma.cc/D7F5-NHLB]. In its report, the task force identified a complex and highly specialized legal landscape that required aggrieved parties to dispute a single land use decision before the administrative board and the courts simultaneously with different periods for filing an appeal. WASH. STATE OFFICE OF FIN. MGMT., GOVERNOR'S TASK FORCE ON REGULATORY REFORM: FINAL REPORT 51, App. A at 17 (Dec. 20, 1994). In order to provide more consistent, predictable, and timely review, the task force recommended a simplified superior court process and a uniform period for appeal. *Id.* Those recommendations were mostly adopted by the legislature.

County, 188 Wn. App. 1, 24-25, 352 P.3d 807 (2015) (holding LUPA's exhaustion requirement does not bar tort claims arising from improper governmental delay in processing permits); *Libera v. City of Port Angeles*, 178 Wn. App. 669, 675 n.6, 316 P.3d 1064 (2013) (holding the same rule applies to a tort claim alleging intentional interference with a business expectancy).

Our holding in this case that LUPA does not absolutely bar all tort claims that arise during the land use decision-making process does not necessarily mean that a hearing examiner's interpretation and application of land use statutes and ordinances will never have any preclusive effect on subsequent tort claims. That issue is not presently before us. Contrary to the County's assertion, neither Maytown nor the Port has challenged any of the hearing examiner's land use determinations. Indeed, Maytown and the Port *relied* on the hearing examiner's determination that it was up to the County's "*discretion*" whether to send Maytown's proposed amendments to her for review to support their claim that the County was not required to send the amendments to her. Resp't/Cross-Appellant's Joint Resp. & Opening Br. at 58 (emphasis added) (explaining that "even though the [h]earing [e]xaminer determined . . . that County staff had the discretion to require a hearing examiner amendment process, that determination says nothing about whether the County exercised its discretion for an improper purpose . . . ."). Although they did disagree with the

hearing examiner's conclusion that they were required to formally amend conditions 6A and 6C, the crux of their complaint was not about the need for amendments but, rather, about the need to send the proposed amendments to the hearing examiner for review and the need to issue a threshold determination that subjected the proposed amendments to an open public comment period and further appeals.

B. Maytown's Section 1983 Civil Rights Claim Was Supported by Sufficient Evidence

The Civil Rights Act, 42 U.S.C. § 1983, establishes a private cause of action for the deprivation of constitutional rights under color of state law. It is well established that acts occurring during the land use decision-making process can form the basis for Section 1983 claims. *E.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (partial plurality). Such Section 1983 land use claims typically allege either an unconstitutional taking or a substantive due process violation. Here, Maytown alleged a substantive due process violation.

The jury was instructed that a "Substantive Due Process Clause violation occurs when [the] government takes action against a person that is not rationally related to a legitimate government purpose." CP at 6376. It was also instructed that establishing such a violation "requires proof that Plaintiff Maytown Sand and Gravel was deprived of rights in a way that shocks the conscience or interferes with rights

that are implicit in the concept of ordered liberty." *Id.* The jury found in favor of Maytown on its Section 1983 claim. CP at 6390-91.

The County argues that we should reverse the jury verdict due to insufficient evidence. Specifically, the County argues that Maytown failed to prove that (1) it was deprived of a legally protected property right and (2) the County acted in a way that "shocks the conscience."

When reviewing a jury verdict for sufficient evidence, the court "must accept the truth of the nonmoving party's evidence and draw all favorable inferences that may reasonably be evinced." *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 243, 744 P.2d 605 (1987) (citing *Levy v. N. Am. Co. for Life & Health Ins.*, 90 Wn.2d 846, 851, 586 P.2d 845 (1978)). The jury's verdict will be upheld "[i]f there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict . . . ." *Levy*, 90 Wn.2d at 851. We hold that there was sufficient evidence to support the jury's Section 1983 verdict.

1. There Was Sufficient Evidence To Prove the County Deprived Maytown of a Constitutionally Protected Property Right

"'Property' under the Fourteenth Amendment encompasses more than tangible physical property." *Durland v. San Juan County*, 182 Wn.2d 55, 70, 340 P.3d 191 (2014) (citing U.S. CONST. amend. XIV; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982)). "Protected property

interests include all benefits to which there is a "'legitimate claim of entitlement'." *Id.* (quoting *Conard v. Univ. of Wash.*, 119 Wn.2d 519, 529, 834 P.2d 17 (1992) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972))). It necessarily follows that a permit to mine constitutes a protected property interest.

At trial, Maytown claimed that it had a vested right (and hence a protected property interest) in mining its property based on the 2005 permit and the County's many assurances from 2008 to 2010 that the permit was valid and that the expired water quality testing deadlines would be extended. The County acknowledged that Maytown had a valid permit to mine. But it claimed that that right to mine was conditioned on Maytown obtaining an extension of the permit's water quality testing deadlines. The County argued that Maytown had no property interest in its permit until that condition was satisfied. According to the County, unless and until that occurred, Maytown had no greater property interest in its permit than a land use applicant has in a requested permit.

But a requested permit does give rise to a cognizable property interest "when there are articulable standards that constrain the decision-making process." *Id.* at 71 (citing *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994)). In other words, a requested permit constitutes a constitutionally protected

property interest "if discretion [to deny the final issuance of the permit] is substantially limited." *Id.* (citing *Braswell v. Shoreline Fire Dep't*, 622 F.3d 1099 (9th Cir. 2010)). The County concludes that this rule does not apply because Maytown was not entitled to the requested extension of conditions 6A and 6C. Thus, according to the County, Maytown had no property right in its permit and no right to mine.

We agree with the County that because the permit contained expired premining conditions that had not been satisfied by those deadlines, the permit by itself was not enough to prove a constitutionally protected interest to mine.

But Maytown did not rely solely on the permit to establish its entitlement to mine. Maytown also relied on two letters from the County. The first letter informed the Port that the permit remained valid, despite the missed water testing deadlines. Ex. 85; CP at 1120. That letter stated, "[T]he Thurston County Development Services Department hereby considers the activities initiated to date to be sufficient to forestall expiration of the subject Special Use Permit at this time. . . . consistent with TCC 20.54.040(4)(a)." *Id.* Although this first letter also said that mining activities could not start "until the groundwater monitoring survey reports (Condition 6.C 10/24/05 MDNS) . . . have been submitted," a second letter said that that premining groundwater report condition had been satisfied. *Id.* Indeed, the

second letter confirmed that "all information requested" in the first letter had been received and explained that it was the Port's "responsibility to ensure the property *remains* in compliance with all adopted [h]earing [e]xaminer conditions . . . as required by the [permit]." Ex. 83 (emphasis added).

Those two letters could be interpreted either broadly, as an agency determination that the Port had complied with all of the permit's premining conditions (as Maytown argued), or narrowly, as mere confirmation of receipt of paper work (as the County argued). But we must view the evidence in the light most supportive of the jury's verdict. *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 206-07, 399 P.3d 1156 (2017). Those letters, when viewed in the light most favorable to the jury verdict for Maytown, constitute sufficient evidence that Maytown had a protected property right to mine as of 2008 when the Department determined that all premining conditions had been satisfied.

2. *Under Controlling Supreme Court Precedent, the Evidence Was Sufficient To Prove That the County's Acts "Shocked the Conscience"*

The County argues that even if Maytown had a constitutionally protected right to mine, it still did not prove a Section 1983 due process violation. According to the County, a due process violation requires governmental action that "shocks the conscience," which the County defines as governmental action lacking any

legitimate governmental purpose. Appellant's Consolidated Reply & Resp. Br. at 37-38. The County argues that this standard requires more than just arbitrary and capricious acts, *id.* at 36; instead, the "official conduct 'must amount to an "abuse of power" lacking any "reasonable justification in the service of a legitimate governmental objective,"'" *id.* at 38 (quoting *Shanks v. Dressel*, 540 F.3d 1082, 1088-89 (9th Cir. 2008) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998))). This standard, the County contends, requires evidence of corruption, bribery, or self-dealing. Pet'r's Suppl. Br. at 16-18.

Essentially, the County argues that Washington's Section 1983 case law is out of step with contemporary United States Supreme Court precedent and decisions from the federal circuit courts, particularly *Lewis*, 523 U.S. 833 (adopting the federal "shocks the conscience" standard); *Onyx Properties LLC v. Board of County Commissioners*, 838 F.3d 1039, 1049 (10th Cir. 2016) (requiring more than "[i]ntentionally or recklessly causing injury through the abuse or misuse of governmental power"), *cert. denied*, 137 S. Ct. 1815 (2017); and *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400-02 (3d Cir. 2003) (rejecting "improper motive" as too low of a standard because it would elevate all land use appeals to constitutional challenges since every disappointed developer complains of abuse of authority).

We reject the suggestion that Washington's Section 1983 case law is out of sync with the United States Supreme Court's decision in *Lewis*. In fact, Maytown's Section 1983 claim is highly analogous to the Section 1983 claim raised in *Del Monte Dunes*, 526 U.S. 687, decided one year after *Lewis*.

Like Maytown, Del Monte Dunes filed a Section 1983 due process[9] claim, arguing that a local land use agency had deprived it of economic use of its property and that the agency's actions were motivated by improper environmental and political concerns. Del Monte Dunes applied for a permit to develop 37.6 acres for new residential housing. Del Monte Dunes originally proposed building only 344 units, even though local zoning laws permitted up to 1,000 units. *Id.* at 695-96. The city denied the application but said it would accept a reduced proposal of 264 units. *Id.* at 696. But when Del Monte Dunes submitted an application for 264 units, that application was also denied. This time the city said it would approve 224 units. *Id.* But it turned out the city did not mean that either. When Del Monte Dunes reduced

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[9] We refer to the *Del Monte Dunes* case as a substantive due process case, even though the case actually involved a regulatory takings issue, because the United States Supreme Court treated the case as a substantive due process case and applied the rules governing substantive due process deprivations, not regulatory takings. We know this because the Court analyzed the claim using the "substantially advances" test, which is reserved for substantive due process claims. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). By contrast, regulatory takings challenges are governed mostly by the multifactor analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). *Lingle*, 544 U.S. at 538-39.

the size of its development a second time to 224 units, the city denied that application. *Id.* Del Monte Dunes appealed that denial to the city council, and the city council directed the city to consider 190 units instead. *Id.* But Del Monte Dunes' proposal for 190 units was also denied. *Id.* So, Del Monte Dunes appealed again to the city council. At this second appeal, the city council approved the plan, subject to a few conditions. *Id.* Even though Del Monte Dunes' development plans did not comply with all of the council's conditions, the city's architectural review committee nevertheless recommended that the plans be approved. *Id.* at 697. The city disagreed with the committee's recommendations and denied the plans. Del Monte Dunes appealed that decision to the city council. On Del Monte Dunes' third appeal, the council affirmed the city's denial. *Id.* The city council did not provide any explanation for upholding that denial and refused to extend the deadlines on the existing conditional permit so Del Monte Dunes could revise its plans. Thus, after five years of back and forth with the city, Del Monte Dunes was back to square one, or possibly worse because a sewer moratorium issued by another agency that was critical to the proposed housing development was expiring soon. *Id.* The United States Supreme Court upheld the trial court's decision to send Del Monte Dunes' Section 1983 claim to the jury, even though there was no evidence of corruption, bribery, or self-dealing. *Id.* at 694, 697-98.

Following *Del Monte Dunes*, the evidence in this case is also sufficient to support a Section 1983 claim.

3. *The County Is Also Barred from Claiming That Maytown Was Required To Prove the County's Acts "Shocked the Conscience" Because the Jury Instructions That It Requested and Obtained Stated a Different Standard*

Another problem with the County's Section 1983 argument is that it is inconsistent with the jury instructions that the County requested and obtained in this case. The trial court instructed the jury that a due process violation can be proved by showing "[Maytown] was deprived of rights in a way that shocks the conscience *or interferes with rights that are implicit in the concept of ordered liberty*." [10] CP at 6376-77 (jury instruction 24) (emphasis added). This means that the jury could have predicated its finding of a due process violation on actions that *either* shocked the conscience *or* interfered with ordered liberty.

The right to an impartial decision-maker is clearly a right "implicit in the concept of ordered liberty." The evidence, when viewed in the light most favorable to the jury verdict, establishes that two of the County's board commissioners deliberately interfered with the impartiality of the Department's decision-making

[10] The County does not challenge the jury instruction. Pet'r's Suppl. Br. at 15 ("The jury was correctly instructed . . . ."). That is probably because the County itself requested that instruction. CP at 6104-05.

process. For this additional reason, the record contains sufficient evidence to support the jury finding of a due process violation.

C. The American Rule Bars Maytown and the Port from Recovering Prelitigation, Administrative Fora Attorney Fees under a Tortious Interference Claim

The trial court barred Maytown and the Port from "introduc[ing] evidence or argument seeking recovery of attorneys' fees and litigation expenses as damages" at trial. CP at 3622-24. The trial court explained its evidentiary ruling was based on the American rule. VRP (June 12, 2014) (Pretrial hearing) at 547-48.

The American rule requires each party to bear its own litigation costs and fees. *King County v. Vinci Constr. Grands Projects/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 625, 398 P.3d 1093 (2017) (citing *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994)). The primary justification for adopting the American rule is that it encourages aggrieved parties to air their grievances in court. "[S]ince litigation is at best uncertain[,] one should not be penalized for merely defending or prosecuting a lawsuit, and . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967).

The American rule therefore bars courts from awarding attorney fees as *costs*, subject to certain statutory, contractual, and equitable exceptions. Maytown and the Port argue that the American rule does not apply here because they are seeking recovery of prelitigation, administrative fora attorney fees as *damages*, not costs. Alternatively, they argue that they are entitled to recover these fees under the bad faith exception to the American rule.[11]

We review the trial judge's evidentiary rulings for abuse of discretion. *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008) (citing *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997)). However the question of whether a party is entitled to an award of attorney fees is reviewed de novo. *Durland*, 182 Wn.2d at 76 (citing *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 285 P.3d 70 (2012)). We hold that the American rule generally bars recovery of such prelitigation, administrative fora attorney fees and that Maytown and the Port have failed to prove any of the exceptions to that general rule apply.

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[11] Maytown and the Port also argued before the trial court that the ABC exception applied. CP at 7502-05. Maytown and the Port appear to have abandoned that claim on appeal and for good reason. The County did not expose Maytown or the Port to litigation with others so the rule does not apply. *See LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123, 330 P.3d 190 (2014) (discussing the ABC exception).

1. Washington's American Rule Bars Recovery of Prelitgation, Administrative Fora Attorney Fees as Damages Except in a Narrow Set of Circumstances Not Applicable Here

Although "the traditional American rule relates to attorney fees as *costs*, at least two of the recognized equitable exceptions award attorney fees as *damages*." *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997) (listing example cases). Thus, the "more accurate statement of Washington's American rule" is that "attorney fees are not available as *costs or damages* absent a contract, statute, or recognized ground in equity." *Id.*

Maytown and the Port argue that they should have been allowed to present evidence of prelitigation, administrative fora attorney fees as damages because they would not have incurred those fees but for the County's deliberate abusive use of the administrative process. They argue this type of intentional, deliberate abuse of process sets their claim for prelitigation, administrative fora attorney fees apart from other tort claims.

We agree that prelitigation, administrative fora attorney fees may qualify as damages in certain types of abuse of process cases. For example, attorney fees are recoverable as special damages in malicious civil prosecution actions where the fees were necessitated by the defendant's intentional acts. *See Rorvig v. Douglas*, 123 Wn.2d 854, 862, 873 P.2d 492 (1994) (citing *Aldrich v. Inland Empire Tel. & Tel.*

Co., 62 Wash. 173, 176-77, 113 P. 264 (1911)). Attorney fees are also available in abuse of process cases. *E.g.*, *Bellevue Farm Owners Ass'n v. Stevens*, 198 Wn. App. 464, 478-79, 394 P.3d 1018, *review denied*, 189 Wn.2d 1038, 413 P.3d 565 (2017).

But Maytown and the Port did not bring those types of claims. They brought claims of tortious interference with a contract and business expectancy.[12] Whether the reasons for awarding attorney fees as damages in civil malicious prosecution and abuse of process claims extend to tortious interference claims is a question of first impression for this court, but our analysis is guided by prior precedent.[13]

Like malicious civil prosecution and abuse of process claims, a claim of tortious interference with a contractual or business relationship can involve the

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[12] Maytown and the Port brought other claims, including a Section 1983 claim, but they do not argue that those other claims form a basis for obtaining prelitigation, administrative fora attorney fees. CP at 7496-508.

[13] Maytown and the Port correctly observe that the trial court in *Pleas v. City of Seattle*, 112 Wn.2d 794, 799, 774 P.2d 1158 (1989), awarded prelitigation attorney fees to Pleas as damages for the city of Seattle's tortious interference in the land use permitting process and that we affirmed that award of attorney fees on appeal. But as Maytown and the Port also recognize, the issue of whether prelitigation attorney fees was available as damages for tortious interference claims was not at issue in *Pleas*. Resp'ts/Cross-Appellants' Joint Reply in Supp. of Cross-Appeal at 3. We therefore had no reason to address the issue. "'Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive . . . .'" *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (quoting *ETCO, Inc. v. Dep't of Labor & Indus.*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992)).

misuse of courts and administrative fora for improper purposes. *Pleas v. City of Seattle*, 112 Wn.2d 794, 803-04, 774 P.2d 1158 (1989) (citing *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 204, 582 P.3d 1365 (1978)). But malicious civil prosecution and abuse of process claims require more than a defendant's ill intent to support an award of attorney fees. "'[T]he mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process.'" *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 806, 699 P.2d 217 (1985) (quoting *Fite v. Lee*, 11 Wn. App. 21, 27-28, 521 P.2d 964 (1974)). Nor does it constitute malicious civil prosecution.[14] *Petrich v. McDonald*, 44 Wn.2d 211, 221-22, 266 P.2d 1047 (1954).

The tort of abuse of process requires misuse of a judicial proceeding to accomplish an act for which the process was not designed. *Sea-Pac*, 103 Wn.2d at 806 (quoting *Fite*, 11 Wn. App. at 27; RESTATEMENT (SECOND) OF TORTS § 682, at 474 (AM. LAW INST. 1977)). In other words, "'there must be an act after filing suit using legal process empowered by that suit to accomplish an end not within the

[14] "Malice," for purposes of a malicious prosecution claim, "'["]may be satisfied by proving that the prosecution complained of was undertaken from improper or wrongful motives or in reckless disregard of the rights of the plaintiff.["]'" *Orwick v. City of Seattle*, 103 Wn.2d 249, 257, 692 P.2d 793 (1984) (quoting *Bender v. City of Seattle*, 99 Wn.2d 582, 594, 664 P.2d 492 (1983) (quoting *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 502, 125 P.2d 681 (1942))).

purview of the suit.'" *Id.* (quoting *Batten v. Abrams*, 28 Wn. App. 737, 748, 626 P.2d 984 (AM. LAW INST. 1981)). The crucial inquiry in abuse of process claims is therefore "whether the judicial system's process, made available to insure the presence of the defendant or his property in court, has been misused to achieve another, inappropriate end." *Gem Trading Co. v. Cudahy Corp.*, 92 Wn.2d 956, 963 n.2, 603 P.2d 828 (1979) (citing *Gilmore v. Thwing*, 167 Wash. 457, 459, 9 P.2d 775 (1932); *Rock v. Abrashin*, 154 Wash. 51, 54, 280 P. 740 (1929)).

For that reason, as we explained in *Gilmore*, abuse of process claims are exceptionally rare. In *Gilmore*, we dismissed an abuse of process suit predicated on a prior suit for writ of garnishment despite evidence that the defendant had pursued the writ action out of a malicious desire to sully the plaintiff's reputation and undermine his business. 167 Wash. at 459. We explained that an abuse of process claim could not lie even if the jury found the writ was pursued with malice and for an improper purpose because "if the writ had been rightfully issued, its service upon the [plaintiff's] bank would have been rightful." *Id.* Thus, abuse of process claims are generally limited in Washington to unlawful, quid pro quo situations. An example of one such situation is where a judgment creditor uses the judicial system to sequester wages and property that the creditor knows are legally unattachable, but does so for the improper purpose of harassing and inducing the

debtor to pay the outstanding debt with property that is not legally subject to execution. *Rock*, 154 Wash. at 53.

Like abuse of process cases, claims for malicious civil prosecution are also narrowly circumscribed. A malicious civil prosecution claim in Washington requires proof of a "special injury," which is defined as an "'"*injury which is not the necessary result in such suits.*"'" *Petrich*, 44 Wn.2d at 217 (quoting *Manhattan Quality Clothes, Inc. v. Cable*, 154 Wash. 654, 657, 283 P. 460 (1929) (quoting *Abbott v. Thorne*, 34 Wash. 692, 694, 76 P. 302 (1904))).

We have previously acknowledged that other jurisdictions have abandoned the element of a special injury in order to broaden the circumstances in which a party may recover for malicious prosecution. *Gem Trading*, 92 Wn.2d at 964; *Petrich*, 44 Wn.2d at 219; *see also* RESTATEMENT (SECOND) OF TORTS § 674 (discussing the tort of wrongful use of civil proceedings).[15] But we declined to join those other jurisdictions and instead reaffirmed that Washington follows a "stricter" and more

[15] To the extent we suggested in *Davis v. Cox*, 183 Wn.2d 269, 292, 351 P.3d 862 (2015), that attorney fees may be recoverable as damages under the tort of wrongful use of civil proceedings described in *Restatement (Second) of Torts* § 674, we disavow that suggestion. The issue in *Davis* was the constitutionality of Washington's anti-SLAPP [strategic lawsuits against public participation] statute, RCW 4.24.525. We were not asked to determine whether Washington recognized the tort of wrongful use of civil proceedings; we therefore did not have to consider whether such approach would be consistent with our restrictive view on abuse of process and malicious civil prosecution claims.

"restrictive" approach in malicious civil prosecution cases. *Petrich*, 44 Wn.2d at 219; *Gem Trading*, 92 Wn.2d at 963-65.

Maytown and the Port's proposal that we expand the American rule to allow parties to seek prelitigation, administrative fora attorney fees as damages in tortious interference cases where the defendant misuses the administrative process to inflict economic harm conflicts with those controlling decisions because it would eliminate the quid pro quo or special injury elements of abuse of process and malicious civil prosecution tort claims. Maytown and the Port have not proved that those controlling decisions are incorrect and harmful. We are therefore bound by principles of stare decisis to apply that precedent. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). We hold that Maytown and the Port were not entitled to prelitigation, administrative fora attorney fees as damages for their tortious interference claims.

Having determined that prelitigation, administrative fora attorney fees are not available to Maytown and the Port as *damages*, we next address whether such fees are recoverable under the bad faith exception to the American rule. As discussed below, we hold that they are not.

2. *The Bad Faith Exception to the American Rule Does Not Apply to Prelitigation Attorney Fees*

The American rule permits a court to award attorney fees "when doing so is authorized by a contract provision, a statute, or a recognized ground in equity." *Vinci Constr.*, 188 Wn.2d at 625 (citing *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 325, 88 P.3d 395 (2004)). We have found equitable grounds in a variety of actions, including insurance coverage cases,[16] surety coverage cases,[17] the ABC rule (*supra* note 11),[18] actions by injured seamen for maintenance and cure payments,[19] and common fund actions.[20] We have also said that attorney fees "*could be awarded* if the prevailing party proved the opposing party acted in bad faith." *Clark v. Wash. Horse Racing Comm'n*, 106 Wn.2d 84, 93, 720 P.2d 831 (1986) (listing cases).

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[16] *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

[17] *Vinci Constr.*, 188 Wn.2d at 625-26.

[18] *LK Operating*, 181 Wn.2d at 123-24 (citing *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 358, 110 P.3d 1145 (2005)).

[19] *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 78-79, 272 P.3d 827 (2012) (citing *Vaughan v. Atkinson*, 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962)).

[20] *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 649-51, 272 P.3d 802 (2012).

Maytown and the Port argue that they are entitled to prelitigation, administrative fora attorney fees under the bad faith exception to the American rule.[21] Resp't/Cross-Appellants' Joint Resp. & Opening Br. at 97-98; Resp'ts/Cross-Appellants' Joint Reply in Supp. of Cross-Appeal at 5-11.

Whether attorney fees should be granted under the bad faith exception depends on "'[']the justice of the cause or the facts and circumstances of the particular case.[']'" *Clark*, 106 Wn.2d at 93 (quoting *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113, 111 P.2d 612 (1941) (quoting 14 AM. JUR. *Costs* § 22, at 16 (1938))). An award of attorney fees is proper under the bad faith exception when the fees were incurred as a result of the "intentional and calculated action" of the defendant that "[left] the plaintiff with only one course of action: that is, litigation." *Rorvig*, 123 Wn.2d at 862. In other words, where "the defendants actually know their conduct forces the plaintiff to litigate" and the ability of the plaintiffs to prove actual damages is difficult, an award for attorney fees may be

[21] The County argues that Maytown and the Port never raised the bad faith exception before the trial court. Pet'r's Suppl. Br. at 20 n.10. The County is incorrect. *See* CP at 7506 (Maytown and the Port's Joint Suppl. Br. responding to the County's motion in limine regarding recovery of attorney fees as damages) ("Washington Courts recognize that the bad faith of the defendant can justify an award of attorneys' fees as costs of the damages litigation.").

granted. *Id.* "Fairness requires the plaintiff to have some recourse against the intentional malicious acts of the defendant." *Id.*

But we have never applied the bad faith exception to *prelitigation* administrative forum attorney fees. Nor can we find any other jurisdiction that has applied the bad faith exception to that context. In fact, our research shows that all jurisdictions that have considered whether the bad faith exception to the American rule extends to recovery of prelitigation attorney fees have ruled that the answer is no. *E.g.*, *Ring v. Carriage House Condo. Owners' Ass'n*, 2014 VT 127, 198 Vt. 109, 125, 112 A.3d 754; *Lamb Eng'g & Constr. Co. v. Neb. Pub. Power Dist.*, 103 F.3d 1422, 1435 (8th Cir. 1997); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 73-74, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) (Kennedy, J., dissenting, joined by Rehnquist, C.J., and Souter, J.), *Chambers*, 501 U.S. at 60 (Scalia, J., dissenting). They hold that to the extent such prelitigation attorney fees are recoverable, they are recoverable only as *damages* under some type of abuse of civil proceedings claim, not as *costs* or *sanctions* under the bad faith exception.

We agree. The bad faith exception to the American rule arises out of a court's equitable power to regulate and manage the affairs of the court and the parties before it. *See Chambers*, 501 U.S. at 46. Sanctioning parties for prelitigation conduct that occurred *before* the court was involved and *before* litigation was initiated exceeds

the scope of that authority. Compensating aggrieved parties for harm caused by malicious, prelitigation conduct fits more naturally within the meaning of damages and is therefore limited to that context. *Ring*, 198 Vt. at 125. As discussed above, Washington limits the situations in which such prelitigation attorney fees can be recovered as damages, and those situations do not include the tortious interference claims raised in this case.

This limit on *prelitigation* attorney fees does not, however, affect Maytown's request for *appellate* attorney fees. As we discuss next, different rules apply to that request.

D. The Court of Appeals Did Not Err in Awarding Maytown's Request for Appellate Attorney Fees under RAP 18.1(b)

RAP 18.1 governs the award of appellate attorney fees. RAP 18.1(a) provides that "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in [RAP 18.1], unless a statute specifies that the request is to be directed to the trial court." When making a request for attorney fees, RAP 18.1(b) states, "[t]he party *must devote a section* of its opening brief to the request for the fees or expenses." (Emphasis added.)

Maytown's request for appellate attorney fees encompassed two sentences in its opening brief. Together, these two sentences state, (1) "Maytown is . . . entitled

to damages under 42 U.S.C. § 1983, and attorneys' fees and costs under 42 U.S.C. § 1988 because the County, acting 'under color of any statute, ordinance, regulation, custom, or usage, of any State' subjected Maytown to a 'deprivation of' Maytown's Constitutional right to substantive due process" and (2) "the Court should . . . award costs and attorneys' fees in accordance with 42 U.S.C. §§ 1983 & 1988 and RAP 18.1; and . . . award cost of appeal to Plaintiffs in accordance with RAP 14." Resp't/Cross-Appellants' Joint Resp. & Opening Br. at 78, 98-99.

The Court of Appeals granted Maytown's request for appellate attorney fees. *Maytown*, 198 Wn. App. at 593.

The County argues that Maytown's request for appellate attorney fees was procedurally defective because it did not include a separate section "devote[d]" entirely to the request for attorney fees. RAP 18.1(b).

Maytown argues RAP 18.1 does not apply to a request for attorney fees under Section 1983 and that even if the rule did apply, RAP 18.1 does not require a separate section devoted entirely and exclusively to the request. Alternatively, Maytown argues that the County waived any objection to the form of Maytown's request for appellate attorney fees when it failed to raise that objection in the Court of Appeals.

We review a grant of appellate attorney fees under RAP 18.1 for an abuse of discretion. *In re Marriage of Buecking*, 179 Wn.2d 438, 455, 316 P.3d 999 (2013). But "[t]he interpretation of a court rule presents a question of law that we review de novo." *State v. Stump*, 185 Wn.2d 454, 458, 374 P.3d 89 (2016) (citing *Jafar v. Webb*, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013)). We hold that RAP 18.1 applies to requests for appellate attorney fees under Section 1983 and that Maytown complied with RAP 18.1's requirements. Because we uphold the Court of Appeals' award of appellate attorney fees, we do not address Maytown's alternative argument about waiver.

*1. The Reverse-*Erie *Doctrine Does Not Bar State Courts from Applying RAP 18.1(b) to Requests for Appellate Attorney Fees under 42 U.S.C. §§ 1983 and 1988*

Maytown argues that RAP 18.1 does not apply to Section 1983 claims for appellate attorney fees. Suppl. Br. of Resp't Maytown Sand & Gravel, LLC at 15-16. Maytown argues that a state court reviewing claims under federal Sections 1983 and 1988 cmust apply federal law, including federal procedural rules. This argument requires us to evaluate the applicability of RAP 18.1(b) under the so-called Reverse-*Erie*[22] doctrine.

[22] "Erie" refers the United States Supreme Court decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

The primary concerns of the *Erie* and Reverse-*Erie* doctrines are threefold: encouraging judicial economy, deterring forum shopping, and protecting principles of federalism. "Under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64[, 58 S. Ct. 817, 82 L. Ed. 1188] (1938), when a *federal* court exercises diversity or pendent jurisdiction over *state*-law claims, 'the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.'" *Felder v. Casey*, 487 U.S. 131, 151, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) (emphasis added) (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)). The converse of that rule applies under the Reverse-*Erie* doctrine. "Just as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Id.* (alteration in original) (citation omitted) (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S. Ct. 246, 87 L. Ed. 239 (1942)).

Under the Reverse-*Erie* doctrine, state courts must apply federal proof standards[23] and federal waiver standards[24] to federal claims and defenses. State courts cannot impose state notice-of-claim requirements[25] or heightened state pleading requirements[26] that burden plaintiffs with having to prove more in state court than they would be required to prove had they brought their federal claims in federal court.

But a state court is generally allowed to apply state *procedural* rules, such as rules defining what trial court orders are immediately appealable, even if those state procedural rules conflict with federal procedural rules of general applicability. *Johnson v. Fankell*, 520 U.S. 911, 921, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997). A state procedural rule is generally applicable to federal claims if it is a neutral state rule regarding the administration of the courts that is not meant to interfere with a substantive federal right and allows a party to raise or defend against the federal claim as if in federal court. *Id.* at 919-21.

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[23] *Cent. Vt. Ry. Co. v. White*, 238 U.S. 507, 512, 35 S. Ct. 865, 59 L. Ed. 1433 (1915).

[24] *Garrett*, 317 U.S. at 249; *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361-62, 72 S. Ct. 312, 96 L. Ed. 398 (1952).

[25] *Felder*, 487 U.S. at 138.

[26] *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 298-99, 70 S. Ct. 105, 94. L. Ed. 100 (1949).

RAP 18.1(b) meets all three *Johnson* criteria. It is a neutral court rule governing the general administration of cases. It is not intended to interfere with or substantially alter a party's ability to seek appellate attorney fees in state courts. And it does not require a party to prove more or provide greater notice than that required under federal law. RAP 18.1(b) requires a party requesting appellate attorney fees to do so only in "a separate section" of its opening brief.

2. RAP 18.1(b) Does Not Require a Separate Section Devoted Entirely and Exclusively to the Request for Appellate Attorney Fees

The County argues that RAP 18.1 requires a separate section devoted entirely and exclusively to the request for appellate attorney fees. The Court of Appeals apparently disagreed, because it granted Maytown's attorney fees request, and we are loath to disturb that court's decision on attorney fees in that court.

That is particularly true here. The County's argument relies essentially on two cases: *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998), and *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 321 n.21, 103 P.3d 753 (2004).

Wilson involved a single sentence request, seeking "recover[y of] its costs and attorneys' fees on appeal," made without citation in the conclusion paragraph of the party's opening brief. Suppl. Br. of Resp't Wilson Court at 14, *Wilson Court Ltd.*

P'ship v. Tony Maroni's, Inc., No. 64766-6 (Wash.), *reprinted in* 13 Briefs 134 Wn.2d (1997). We held that that single, generic sentence in the conclusion paragraph of the brief was insufficient. *Wilson*, 134 Wn.2d at 710 n.4. We explained that "[a]rgument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees as costs." *Id.* at 711 n.4 (citing *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P.2d 404 (1994)). Here, Maytown provided more than a single, generic sentence at the end of its brief. Maytown provided two sentences, one at the end and another in the body of its brief. Maytown also provided a legal basis for its request.

The request for appellate attorney fees in *Zuver* more closely matches the request here. In *Zuver*, the request was not made in the conclusion paragraph, and it included the party's basis for seeking attorney fees. The request stated, that "If this Court affirms the trial court's decision, AirTouch requests that the Court award it fees in connection with this appeal pursuant to the Arbitration Agreement." Br. of Resp'ts at 50 n.38, *Zuver v. Airtouch Commc'ns, Inc.*, No. 74156-5 (Wash.), *reprinted in* 4 Briefs 153 Wn.2d (2004). But the request was made in a footnote rather than in the body of the brief. We held that the request was insufficient because "RAP 18.1(b) . . . requires that '[t]he party must devote a section of its opening *brief*

to the request for the fees or expenses.'" *Zuver*, 153 Wn.2d at 321 n.21 (emphasis added) (second alteration in original).

By contrast, Maytown's request for appellate attorney fees under Section 1983 was included in the body (not a footnote) of Maytown's opening brief before the Court of Appeals, in a separate section devoted entirely to arguments under that section, and included the legal basis for the request. The Court of Appeals was certainly entitled to conclude that that sufficed. The request sufficiently apprised the parties and the Court of Appeals of the nature of Maytown's request and the legal basis for it. We therefore affirm the Court of Appeals' award of appellate attorney fees.

IV. CONCLUSION

The Court of Appeals correctly held that LUPA's administrative exhaustion requirement does not bar the tort claims Maytown and the Port brought in this case. Maytown and the Port challenged the County's tortious acts committed *during* the land use decision-making process, not any particular land use decision itself. The appellate court also correctly held that there was sufficient evidence to support the jury's decision that the County violated Maytown's substantive due process rights. In addition, that court correctly awarded Maytown its appellate attorney fees for prevailing on its Section 1983 claim. The Court of Appeals, however, incorrectly

held that Maytown and the Port were entitled to recover prelitigation, administrative fora attorney fees as damages. We therefore affirm the Court of Appeals in part and reverse in part.

Because Maytown prevailed on its Section 1983 claim in this court, we also grant Maytown's request for appellate attorney fees and costs incurred before this court related to that claim. 42 U.S.C. § 1988; *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 675-76, 658 P.2d 653 (1983) (A prevailing plaintiff under a Section 1983 claim "'should ordinarily recover an attorney's fee [related to that claim] unless special circumstances would render such an award unjust.'" (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968))).

WE CONCUR:

150 Wn.App. 835 (Wash.App. Div. 2 2009), 37697-1, Stanzel v. City of Puyallup /**/ div.c1 {text-align: center} /**/

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150 Wn.App. 835 (Wash.App. Div. 2 2009)

209 P.3d 534

Michael STANZEL, Respondent,

Pierce County, a political subdivision, Respondent,

v.

CITY OF PUYALLUP, a municipal corporation, Appellant.

No. 37697-1-II.

Court of Appeals of Washington, Division 2.

June 16, 2009

[209 P.3d 535]

Kevin John Yamamoto, City of Puyallup, Puyallup, WA, for Appellant.

David Brian St. Pierre, Pierce County Office of Prosecuting Attorney-Civil, Tacoma, WA, J. Richard Aramburu, Aramburu & Eustis LLP, Seattle, WA, for Respondents.

BRIDGEWATER, P.J.

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¶ 1 The city of Puyallup (City) appeals the Pierce County Superior Court's denial of its motion to dismiss Michael Stanzel's land-use petition for failure to first exhaust his administrative remedies. The City further challenges the Pierce County Superior Court's determination that the Pierce County hearing examiner had authority to order the City to provide water service and a water service availability letter to Stanzel. We affirm.

FACTS

¶ 2 Stanzel owns real property at 6224 114th Avenue Court East in Pierce County, Washington, that he calls the " church property." VRP (June 20, 2007) at 31. The church property contains a church building, paintball fields, and a shed; it is zoned by the County as mixed use development or M.U.D. VRP (June 20, 2007) at 32, 56. Stanzel receives water service for the church property from the City because it sits within the City's water distribution zone although it is outside the City's corporate limits. The City classifies the service it provides to Stanzel as residential water service.

¶ 3 Stanzel sought to bring the church building up to code so that he could use it for church services. He also intended to add a game room and to add restrooms to the facilities.[1] In addition, Stanzel sought to upgrade the drain field on the property. Stanzel hired an engineer and submitted designs to the Pierce County Department of Health. Pierce County did not act on the submitted designs and related permit requests because Stanzel failed to provide Pierce County with a water availability letter from the City.

¶ 4 Stanzel went to the City's utilities department and asked for a commercial water availability letter. Stanzel brought with him a June 25, 2004 letter, describing his

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request. He delivered the letter along with the County's water availability form and presented it to

city employee Colleen Harris. Harris informed Stanzel that the. City was no longer providing water availability letters for property outside its city limits. Harris asked Stanzel what he planned to do with the property and he told her that it was really none of her business. Harris informed Stanzel that if he changed the property use from residential to commercial, the City would cut off his water service. Harris attempted to slide the letter back to Stanzel, stating that she would not accept it. Stanzel left the letter sitting on the counter in front of Harris.

¶ 5 On January 6, Stanzel returned to the utilities department and asked the City to stamp another letter because the City had not responded to his first letter. In response, Harris mailed Stanzel a copy of the Puyallup Municipal Code. Stanzel noted that the City had changed its code requirements, which now stated that the City would not provide fire flow or water availability letters unless there was an active annexation in the area and the property owner agreed to annexation. Stanzel testified that the property owners in the area, including the church property, had addressed the issue of annexation to the City in a recent election, ultimately deciding against annexation. Stanzel did not want to annex to the City.

¶ 6 Stanzel investigated other water service providers, including a water utility in nearby Edgewood. Edgewood informed Stanzel that it did not have distribution lines available to Stanzel's property and that all water service agreements are filed with Pierce County per Washington code. Stanzel considered buying a fire flow tank for the church property, but he quickly discovered that a 90,000 gallon tank would cost over $80,000. In contrast, Stanzel's water costs **[209 P.3d 536]** through the City ranged between $30 and $50 per month.

¶ 7 On August 9, Stanzel wrote another letter to the City again requesting water service, this time directed to Tom Heinecke. Again, the City did not respond.

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¶ 8 Stanzel brought a motion Before the Pierce County hearing examiner as a part of a separate case involving one of Stanzel's neighboring properties, a company named Plexus Investments, LLC, seeking an order that would compel the City to provide him with commercial water service and an availability letter. Over the City's jurisdictional objections, the hearing examiner heard Stanzel's case while acknowledging that Stanzel did not go through the City's normal dispute resolution process. The hearing examiner based the decision to hear Stanzel's motion on the hearing examiner's decision in the Plexus hearing, where the hearing examiner ruled that the Pierce County Code allowed property owners outside of the city limits to go directly to the hearing examiner to resolve disputes.

¶ 9 The hearing examiner heard Stanzel's motion to compel, ultimately determining that the City's preannexation requirement was unreasonable but denying Stanzel's request because the hearing examiner lacked authority to compel the City to provide service. The hearing examiner noted that if he had authority, he would compel the City to provide service to Stanzel under these specific facts. But, the hearing examiner allowed Stanzel to seek alternative sources for water and/or to be removed from the City's service area if desired.

¶ 10 On August 17, 2007, Stanzel filed a petition for judicial review under the Land Use Petition Act (LUPA), chapter 36.70C RCW, in superior court, requesting that the trial court direct the hearing examiner to compel the City to provide his requested water service and related

availability letter. The City moved to dismiss Stanzel's petition, arguing that he failed to exhaust his administrative remedies and therefore lacked standing. Specifically, the City claimed that Stanzel failed to submit an application to the City, failed to pay the City's application fee, failed to submit to a review and approval process Before the city council, and failed to seek redress from the City's hearing examiner. The trial court denied the City's motion to dismiss. The trial court reasoned that the Puyallup Municipal Code should be

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strictly construed and accordingly, applied only to new connections or extensions. Otherwise, the trial court reasoned, Stanzel would have to start from scratch with the City.

¶ 11 Ultimately, the trial court granted Stanzel's petition and reversed the hearing examiner, ruling that the hearing examiner did have statutory authority to compel the City to provide water service to Stanzel's church property based on the facts of this case. The trial court conditioned its decision on Stanzel meeting the " usual permitting and informational requirements of any applicant for comparable water service within the City." CP at 119. The trial court also required that Stanzel cooperate and supply detailed plans for his intended project to the City. The City appeals.

ANALYSIS

I. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

¶ 12 The City contends that the trial court erred when it denied the City's motion to dismiss Stanzel's LUPA petition for failure to exhaust administrative remedies. Under LUPA, we stand " ‘ in the shoes of the superior court’ " and limit our review to the hearing examiner's record. *Abbey Rd. Group, LLC v. City of Bonney Lake,* 141 Wash.App. 184, 192, 167 P.3d 1213 (2007) (quoting *Pavlina v. City of Vancouver,* 122 Wash.App. 520, 525, 94 P.3d 366 (2004)), *review granted,* 163 Wash.2d 1045, 187 P.3d 750 (2008). Exhaustion of administrative remedies is a prerequisite to obtaining a decision that qualifies as a decision reviewable under LUPA. *Ward v. Bd. of County Comm'rs, Skagit County,* 86 Wash.App. 266, 271, 936 P.2d 42 (1997).

¶ 13 According to the City, Stanzel failed to follow several of its application procedures for water and sewer connections or extensions outside its city limits. First, it contends that Stanzel failed to submit an application **[209 P.3d 537]** to the City for water service. The Puyallup Municipal Code (PMC) provides:

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(1) Each applicant for service shall be required to sign, on a form provided by the city, an application which shall set forth: (a) Date of application; (b) Name and social security number of applicant; (c) Location of premises to be served; (d) Size and location of water service; (e) Date applicant will be ready for service; (f) Whether the premises have been heretofore supplied with water by the city or its predecessors; (g) Purposes for which water service is to be used, including the number of dwelling units, if any, being served; (h) Address to which bills are to be mailed or delivered; (i) Whether the applicant is the owner or tenant of, or agent for the premises and if tenant, the name of the property owner; (j) Such information as the city may reasonably require. PMC 14.02.150.

¶ 14 The administrative record here contains the June 25, 2004 letter that Stanzel left on the counter at the City utilities office. The letter indicates that it was delivered along with Pierce

County's required water availability form. The June 25, 2004 letter is not signed, is not a form the City provided, does not contain Stanzel's social security number, does not include the size and location of water service, does not inform the City as to when Stanzel would be ready for such service, does not include the purpose for which Stanzel would use the water, does not include the number of buildings to be served, and does not indicate the address to which bills should be mailed or delivered.

¶ 15 The record also contains Stanzel's follow-up letter, dated January 6, 2005, for which the City asserts similar deficiencies. The January 6, 2005 letter is not a form the City provided, it does not contain Stanzel's social security number, it lacks the size and location of water service, it does not indicate the purpose for which Stanzel would use the water, it does not contain the number of dwellings to be

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served, and it does not indicate where the City should mail or deliver the bills.

¶ 16 The City states that Stanzel did not otherwise supply the information that PMC 14.02.150(1) required, especially information concerning the purpose of the requested water. It cites to Stanzel's interaction with Harris, where he responded to Harris's inquiry about the change of use on his property by saying, " [i]t was really none of their business, [he] just needed a commercial Water Availability Letter." VRP (June 20, 2007) at 43.

¶ 17 The City next faults Stanzel for failing to pay the application fee and for failing to participate in a pre-application conference with the City. Former PMC 14.22.011 (2004) provides:

14.22.011 Pre-application conference and application fee. Prior to the acceptance of an application by the city, applicants shall participate in a pre-application conference for the purpose of establishing the application fee. The purpose of the application fee is to ensure the recovery of city costs and expenses associated with the review of the application and drafting or preparing any utility extension agreement, including but not limited to actual costs of city staff time and resources as well as any outside consultation expenses which the city reasonably determines are necessary to adequately review, prepare and analyze the application and any proposed extension agreement. The application fee shall be a minimum of $2,500 with additional charges due depending upon estimated reasonable city costs and expenditures in review of the application. Disputes in the fee amount charged by the city shall be resolved by appeal to the hearing examiner. All applicants shall deposit the application fee with the city Before the application will be processed.

Former PMC 14.22.011 [2]; Administrative Record (AR) at 79-80. It is undisputed that **[209 P.3d 538]** Stanzel did not participate in such a pre-application conference and did not pay any such application fee.

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¶ 18 Next, the City faults Stanzel for failing to present an application for review to the city council and for failing to obtain the council's approval for commercial water service. Former PMC 14.22.010 (2004) provides:

14.22.010 City council approval required. It shall be the policy of the city of Puyallup that all applicants for the extension/connection of water or sewer service outside the corporate limits of

the city of Puyallup shall be subject to review and require approval by the city council prior to the issuance of a permit for the extension/connection of water or sewer service ... Applicants must demonstrate that they have initiated or are part of an ongoing annexation process which would bring the property that is subject to a utility extension/connection application into the Puyallup city limits. In its review, the city council may consider the following: impact on the water or sewer system usage; annexation considerations; compliance with the City of Puyallup's comprehensive plan and the City of Puyallup development standards; and any other considerations deemed appropriate by the city council.... The decision of the city council shall be a discretionary, legislative act. If approval is granted by the city council, it shall be in the form of a utility extension agreement approved by the city attorney.

Former PMC 14.22.010 [3]; AR at 79. Again, it is undisputed that Stanzel did not meet with the city council, and he certainly did not receive the council's approval.

¶ 19 Finally, the City faults Stanzel for failing to seek a hearing Before the City's own hearing examiner. Specifically, the City contends that the city council was the only entity that had authority to approve or deny an extension or connection of water service to Stanzel. If, it argues, a city official denied service, the PMC provides a remedy, namely, an appeal of that denial to the City's hearing examiner. PMC 2.54.070 provides:

2.54.070 Consideration of land use regulatory cases. The following cases shall be within the jurisdiction of the examiner under the terms and procedures of this chapter:

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... (13) Appeals of administrative decisions.

PMC 2.54.070. It is undisputed that Stanzel did not appeal the City's denial, if there was one, to the City's hearing examiner.

¶ 20 Essentially, the City's argument is that rather than using the City's resources and remedies, Stanzel ignored the City's procedures, opting instead to appeal directly to the County in hopes that the County would compel the City to provide Stanzel with a water availability letter. Stanzel responds first by addressing whether he fits into the category of property owners subject to the City's application process and then addresses his compliance with exhausting his remedies under the Pierce County Code (PCC). He then contends that the exhaustion of remedies requirement should not apply to him because, even if he had followed the City's process, to do so would prove futile.

¶ 21 Stanzel contends that he falls outside of the City's application requirements because he is not seeking new or extended water service and is, instead, already connected. Specifically, Stanzel contends that PMC 14.22.010 applies only to " all applicants for the extension/connection of water or sewer service outside the corporate limits of the city." PMC 14.22.010. The hearing examiner concluded that Stanzel was already an existing customer and that he was not seeking an extension. We agree.

¶ 22 As additional support for his contention, Stanzel asserts that he was not required to follow the City's application process because he did not intend to make a " material change" in the property's use. Br. of Resp't (Stanzel) at 29. PMC 14.02.150(3) provides:

(3) A customer making any material change in the size, character or extent of the equipment or

operations for which the city's service is utilized shall immediately file a new application for additional service.

[209 P.3d 539]

A change in a customer's service which requires the installation of a different or additional meter, when made at the customer's request, shall be made by the city at the customer's expense. PMC 14, 02.150(3).

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¶ 23 Here, the hearing examiner found that Stanzel's intended use for the church property would involve " very limited improvement on the site." AR at 10. Further, the hearing examiner found that " increased water requirements, if any, will be very limited," without " substantial increase in use levels." AR at 10. The substantive testimony Before the hearing examiner indicated that Stanzel intended to provide water for fire flow and additional restrooms for his new game room. A memorandum from City employee Tom Heinecke reveals that the City has " existing, relatively new, 8- and 12-inch City of Puyallup water lines" presently serving the area containing Stanzel's property. AR at 165: Accordingly, Stanzel contends that there is no basis to conclude that he did not comply with the City's requirements. Substantial evidence supports the hearing examiner's decision that Stanzel's proposed changes did not constitute an extension and were not material changes in the size, character, or extent of the necessary city services.

¶ 24 Stanzel next addresses the process that he did follow. The exhaustion of remedies doctrine applies " in cases where a claim is originally cognizable by an agency which has clearly defined mechanisms for resolving complaints by aggrieved parties and the administrative remedies can provide the relief sought." *Smoke v. City of Seattle,* 132 Wash.2d 214, 224, 937 P.2d 186 (1997). The final action under the PCC for resolution of water service disputes is a decision by the Pierce County hearing examiner. PCC 19D.140.090(F)(2).

¶ 25 Here, the hearing examiner acknowledged that Stanzel did not go through the normal dispute resolution process because of the outcome of one of the hearing examiner's earlier cases, Plexus Investments, in which the hearing examiner stated that properties located outside of the City of Puyallup but within Puyallup's exclusive water service provider area, could go directly to the county hearing examiner to resolve their disputes.

¶ 26 The hearing examiner cited PCC 19D.140.090(F)(2), which provides:

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Unresolved timely and reasonable service disputes shall be referred by the Lead Agency to the Pierce County Hearing Examiner for final resolution of non land use matters pursuant to Pierce County Code subsection 1.22.080 B.2(k).

PCC 19D.140.090(F)(2).[4]

¶ 27 PCC 19D.140.090(G) provides:

Hearing Examiner Review. Disputes referred to the Hearing Examiner shall be processed according to the provisions of Pierce County Code Chapter 1.22 as a Non Land Use Matter. Decisions by the Hearing Examiner shall be final and conclusive and must be supported by substantial evidence based on the record and the Timely and Reasonable Service Criteria contained in [Coordinated Water System Plan]-Appendix C.

PCC 19D.140.090(G). Appendix C of the Coordinated Water System Plan (CWSP) provides:
H. Pre-annexation Agreements. Pursuant to Pierce County Code 19D.140.100, pre-annexation agreements were not contemplated in the designation of exclusive water service area boundaries by the Water Utility Coordinating Committee at the time of service area boundary designation and furthermore, are not necessary to the provision of timely and reasonable service within a purveyor's exclusive water service area boundary. Therefore, a requirement that a potential customer enter into a pre-annexation agreement as a condition of service may be challenged as unreasonable through the dispute resolution process.
CAR at 185. Further, PCC 19D.140.090(A)(1) provides:
[209 P.3d 540]
1. Timely and Reasonable Disputes. Any existing or potential customer may apply to the Lead Agency to resolve timely and reasonable service disputes the customer has with the designated purveyor as provided for below. A timely and reasonable dispute shall include only existing or potential customers inside an exclusive water service area boundary and the purveyor designated in the Coordinated Water System Plan to provide service to these customers.
PCC 19D.140.090(A)(1).
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We agree that the PCC provides a forum for Stanzel to dispute the City's failure to provide him with a water availability letter as a reasonable service dispute.

¶ 28 Finally, Stanzel contends that any further exhaustion of remedies with the City would have been futile. He argues that completing an application and paying a high fee with the City would be futile because the City would still require him to agree to annexation as a precondition. Because of our earlier analysis, we do not address this issue.

¶ 29 In conclusion, Stanzel was not required to exhaust City remedies first; the PCC does not require a preannexation agreement; and thus, the trial court did not err in denying the City's motion to dismiss.

II. HEARING EXAMINER'S AUTHORITY

¶ 30 The City next argues that the trial court erred by ruling that the hearing examiner had authority to compel the City to provide water to Stanzel. The City contends that such power far exceeds the statutory authority that the PCC provides its hearing examiners. The trial court considered Stanzel's LUPA petition under RCW 36.70C.130(1)(b), which provides:
The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are: ... (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise.
RCW 36.70C.130(1)(b).

¶ 31 The City contends that the trial court's ruling failed to provide deference to Pierce County's interpretation of its hearing examiner's authority as well as the hearing examiner's own assessment of his authority, which the City claims is limited to (1) adjusting water service boundaries
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and (2) imposing reasonable conditions that make a project compatible with its environment, or carry out the goals and policies of the applicable plan. The City begins its argument by discussing the statutory nature of hearing examiners' authority. RCW 36.70.970(1), the City argues, provides hearing examiners only with the power to " hear and decide [only] those issues [the legislative authority] believes should be reviewed and decided by a hearing examiner." RCW 36.70.970(1). The City alleges that the authority to compel a municipality to provide water service or a water availability letter exceeds what RCW 36.70.970(1) permits.

¶ 32 Pierce County's code further defines the authority it provides its hearing examiners. PCC 1.22.080(B) provides its hearing examiners with authority to decide a laundry list of land use and non-land use matters. Section D of the same chapter provides the hearing examiners with power to attach *any reasonable conditions found necessary* to make a project compatible with its environment and to carry out the goals and policies of the applicable comprehensive plan, community plan, Shoreline Master Program, or other relevant plan, regulations, Federal or State law, case law or Shorelines Hearing Board decisions.
PCC 1.22.080(D) (emphasis added).

¶ 33 The section of the PCC dealing with Pierce County's Coordinated Water System Plan further clarifies the hearing examiner's authority. PCC 19D.140.090 provides a dispute resolution procedure for disputes involving " interpretation and validity of water service areas and provision of timely and reasonable service." PCC 19D.140.090(A).

[209 P.3d 541]

1. Timely and Reasonable Disputes. Any existing or potential customer may apply to the Lead Agency to resolve timely and reasonable service disputes the customer has with the designated purveyor as provided for below. A timely and reasonable dispute shall include only existing or potential customers inside an exclusive water service area boundary and the purveyor designated in the Coordinated Water System Plan to provide service to these customers.
PCC 19D.140.090(A)(1). Further:
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H. Boundary Line Adjustment Based Upon Determination of Untimely or Unreasonable Service. If the Hearing Examiner finds that a purveyor is unable or unwilling to provide timely or reasonable service within its exclusive water service area boundary, the Hearing Examiner shall readjust the purveyor's boundaries to an area which the purveyor will be able and willing to provide service *and/or impose reasonable conditions* pursuant to Pierce County Code subsection 1.22.080C.,[[5]] to ensure timely and reasonable service. The Hearing Examiner's determination on readjustment of a water service area boundary and/or imposition of reasonable conditions shall be supported by substantial evidence in the record.
PCC 19.D.140.090(H) (emphasis added).

¶ 34 The City contends that because the hearing examiner's only power is to readjust boundaries or impose reasonable conditions found necessary to make a project compatible with its environment and to carry out the goals and policies of the applicable plan, the hearing examiner lacked any such power to compel it to do anything.

¶ 35 Stanzel counters that appendix C of the CWSP, entered as exhibit 21 Before the

hearing examiner, provides a nonexclusive list of the elements that the hearing examiner considers when making a timely and reasonable service determination. Appendix C limits issues subject to review as follows:

• Interpretation and application of water utility service area boundaries. • Proposed schedule for providing service. • Conditions of service, excluding published rates and fees. • Annexation provisions imposed as a condition of service, provided existing authorities of City government are not altered by the CWSP, except where a Service area agreement exists between a city and a County, or as are specifically authorized by Chapter 70.116 RCW.

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AR at 182. Under the section titled " **TIMELY AND REASONABLE SERVICE DETERMINATION CRITERIA,**" section H addresses pre-annexation agreements as they relate to exclusive water areas. AR at 184-85.

H. Pre-annexation Agreements. Pursuant to Pierce County Code 19D.140.100, pre-annexation agreements were not contemplated in the designation of exclusive water service area boundaries by the Water Utility Coordinating Committee at the time of service area boundary designation and furthermore, are not necessary to the provision of timely and reasonable service within a purveyor's exclusive water service area boundary. Therefore, a requirement that a potential customer enter into a pre-annexation agreement as a condition of service may be challenged as unreasonable through the dispute resolution process.

CAR at 185.

¶ 36 The City argues in its reply brief that Stanzel is attempting to supplement the record on appeal. Specifically, it argues that the Standard Service Agreement Establishing Water Utility Service Area Boundaries in the record indicates that the City signed an earlier version in 1994. Appendix C cited here is a part of the 2001 version of the CWSP. Accordingly, the City contends that Stanzel cannot show that Puyallup was a signatory to the 2001 version of the CWSP. Per RAP 10.3(c), " [a] reply brief should be limited to a response to the issues in the brief to which the reply brief is directed." Further, " [a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration."

[209 P.3d 542] *Cowiche Canyon Conservancy v. Bosley,* 118 Wash.2d 801, 809, 828 P.2d 549 (1992) (citing *In re Marriage of Sacco,* 114 Wash.2d 1, 5, 784 P.2d 1266 (1990)). Because we do not consider issues raised for the first time in a reply brief, we decline to address this issue. *Sacco,* 114 Wash.2d at 5, 784 P.2d 1266.

¶ 37 The City also cites in its reply brief a different section of the 2001 CWSP that allegedly allows water purveyors to require annexation as a condition of service. We decline to review this argument for the same reasons cited above. *Sacco,* 114 Wash.2d at 5, 784 P.2d 1266. At no point during the

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hearing Before the hearing examiner or Before the trial court did the City present this specific argument and, thus, we do not consider it. *Sacco,* 114 Wash.2d at 5, 784 P.2d 1266.

¶ 38 It is clear that the PCC anticipated and allowed water customers and potential water customers to challenge the reasonableness of pre-annexation requirements. The question for this court now becomes whether the hearing examiner has authority to provide the remedy that Stanzel sought here, to require the City to provide his property with continued water service.

¶ 39 As established above, requiring new applicants for water service or service extensions outside of the city limits to agree to a pre-annexation agreement is not per se unlawful. Cases such as *MT* and *Yakima County (West Valley) Fire Protection* reveal that an exclusive provider of sewer service may impose reasonable conditions on its service agreement, including conditions beyond its capacity to provide service. *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima,* 122 Wash.2d 371, 382-83, 858 P.2d 245 (1993); *MT Dev., LLC v. City of Renton,* 140 Wash.App. 422, 428, 165 P.3d 427 (2007).

¶ 40 The distinction that the hearing examiner drew in this case was that Stanzel was already an existing water customer and the City was already providing him with residential water service. The hearing examiner found that Stanzel would not require a significant expansion of water service and any increase in use would be very limited. The hearing examiner noted that the City agreed in 1994 to provide water service to an area including this particular property. The hearing examiner noted that the City had correctly argued that a municipality cannot be compelled to provide water outside its corporate limits, but distinguished this case on the fact that the City was already providing him water. Nevertheless, the hearing examiner agreed with the county and city officials that to compel the City to provide water service as an " imposition of reasonable conditions" under PCC 19D.140.190(H) went too far and that he lacked the power to do so.

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¶ 41 The trial court was correct. As discussed above, the hearing examiner's authority is statutory. Here, the hearing examiner has authority to readjust boundary lines and

power to attach any reasonable conditions found necessary to make a project compatible with its environment and to carry out the goals and policies of the applicable comprehensive plan, community plan, Shoreline Master Program, or other relevant plan, regulations, Federal or State law, case law or Shorelines Hearing Board decisions.

PCC 1.22.080(D); PCC 19D.140.090(H). The record here supports that Stanzel did not have another viable alternative to receiving the City's water. Stanzel investigated other water service providers, including a water utility in nearby Edgewood. Edgewood informed Stanzel that it did not have distribution lines available to Stanzel's property. Stanzel considered buying a fire flow tank but quickly discovered that a 90,000 gallon tank would cost over $80,000. Stanzel's water costs through the City ranged between $30 and $50 per month. Accordingly, we hold that the hearing examiner, in this fact pattern, had authority to place a reasonable condition on the City such that it would not require Stanzel to sign a pre-annexation agreement to use City water because Stanzel was unable to seek service elsewhere, either by private well or secondary water provider.

¶ 42 Affirmed.

We concur: ARMSTRONG and HUNT, JJ.

Notes:

[1] Stanzel testified that his business is seasonal and that he sought the upgrades primarily so he could have an indoor building during the winter where people could congregate for birthday parties and to eat hamburgers. He needed the commercial water supply to support the increased bathrooms on the property.

[2] The City modified its code in 2008. *See* Ordinance 2913 § 2 (2008).

[3] The City modified its code in 2008. *See* Ordinance 2913 § 1 (2008).

[4] PCC 19D.140.080 indicates that this dispute resolution authority is for disputes under the Coordinated Water System Plan (CWSP).

[5] Reference to section C was likely error. It appears that that section D is the applicable citation.

GOODSTEIN LAW GROUP PLLC

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Filing Petition for Review

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