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SUPREME COURT  
OF THE STATE OF WASHINGTON

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MAYTOWN SAND AND GRAVEL, LLC and PORT OF  
TACOMA,

*Plaintiffs/Respondents,*

v.

THURSTON COUNTY,

*Defendant/Petitioner*

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

This case presents three issues for this Court's resolution:

- *LUPA*. Will this Court allow parties to sue a local government for damages for claimed substantive errors in the application of land-use laws, without first going through the process for challenging such decisions under the Land Use Petition Act?

- *Substantive due process and land-use law*. Does a person have a constitutionally protected property interest in a specific procedure for resolving a land-use dispute with a local government? Assuming there is such a constitutionally protected interest, what must be shown to establish that a local government deprived a party of that interest by wrongdoing “shocking to the conscience,” and not merely arbitrary and capricious?

- *Exceptions to the American Rule on attorney's fees*. Should this Court recognize another exception to Washington's “American Rule” approach to attorney's fees, which would allow prevailing claimants in land-use disputes with local governments to recover their pre-litigation fees as consequential damages?

## II. SUPPLEMENTAL STATEMENT OF THE CASE

The County incorporates its prior Statements set forth in its Petition for Review and its Opening Brief to the Court of Appeals. Additional factual matters will be addressed in the Supplemental Argument.

### III. SUPPLEMENTAL ARGUMENT

- A. **The Court of Appeals' reading of subsection .030(1)(c) of LUPA frustrates the Legislature's declared goal of achieving expeditious and uniform disposition of land-use disputes.**
1. **The record is clear: the Port and Maytown (1) challenged before the Hearing Examiner the Staff's decision to impose additional water quality tests and then to refer the issue to the Hearing Examiner for resolution, (2) decided not to appeal after losing that issue before the Hearing Examiner, and then (3) based their damage claims on a substantive challenge to that referral, and to the Hearing Examiner's decision to uphold that referral.**

In view of a chronic controversy that has plagued this case about certain key facts bearing on the resolution of the LUPA issue, the County sets forth the following facts established by the record, pertaining to the special-use-permit amendments issue that became the core of the Port and Maytown's damages case.

First, the record establishes that the Port and Maytown litigated before the Hearing Examiner their claim that the Staff wrongfully imposed additional water testing requirements and then wrongfully referred to the Hearing Examiner the question of whether the Port and Maytown should be relieved of those requirements. The Port and Maytown argued that the Staff's actions were the result of improper political pressure. The Port argued in its brief to the Hearing Examiner:

After first concluding that the technical amendments could be done at the staff level (a decision that was unappealed), the County reversed itself and determined that a full SUP amendment process before the Hearing Examiner was required. The County stated in writing that the decision was prompted by the scope of MSG's request, but *County staff orally informed MSG that the switch was made due to the high volume of opposition to the requests.*

Although *this sort of regulatory decision may not be made to quell project opposition*, *Maranatha Min., Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990) (“Community displeasure cannot be the basis of a permit denial.”), the County persisted.

CP 7535 (emphasis added). Maytown likewise argued in its brief to the Hearing Examiner:

On April 22, 2010, MSG applied for the administrative amendments discussed in the Compliance Memo. FORP submitted approximately 100 pages of comments and additional documents. *Largely based on FORP’s comments, the County changed its mind* about the ability to amend the SUP through an administrative action and determined that “the April 22, 2010 application to amend SUP 020612 must be submitted to the Hearing Examiner for decision-making.” ...

The County’s decision to impose a SUP amendment hearing in addition to the Five Year Review Compliance Hearing *cannot be based solely upon public opposition to the changes*. *Maranatha Mining v. Pierce County*, 59 Wn. App. 795 (1990); *see also, Sunderland Services v. Pasco*, 127 Wn.2d 782 (1995).

...

*[I]n response to citizen opposition* the County chose to create an unlawful process with the result of providing opposition groups additional appeal opportunities and subjecting MSG to additional prejudicial delay.

CP 7544-46 (emphasis added; footnote omitted).

Second, the record establishes that the Hearing Examiner ruled against the Port and Maytown. First, the Hearing Examiner ruled that the Staff reasonably required additional water testing before allowing mining to begin:

31. The February 19, 2010 Romero memorandum required testing for approximately 160 parameters that were not specified in the 2005 Plan. The Applicant objected to the County adding new or additional testing parameters because: a) the 2005 Plan was

approved, is final, and may not be added to, and b) mining does not use the extensive list of compounds they would be required to test pursuant to the additional parameters. *Ellingson Testimony; Exhibit 10.*

32. *Given the site's history of extensive contamination from historical industrial uses, testing for the additional County parameters is necessary to determine whether operations contribute to the release of pre-existing contaminants into groundwater. Romero Testimony; Exhibit 1, Attachment dd.*

Ex. 446 at p. 21 of 35 (emphasis added). Second, the Hearing Examiner ruled that the Staff appropriately exercised its discretion when it decided to refer to the Hearing Examiner the issue of whether to abrogate the additional test requirement:

**An SUP amendment was required.** Both MSG and the Port argue that the changes entailed in the instant proposal to an amend SUPT-02-0612 [*i.e.*, the additional testing ordered by the Staff] 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 it may arguably have been in accordance with County Code for the Applicant's technical non-compliance with water monitoring deadlines to be handled as an enforcement action, changes to the nature and number of required monitoring sites fall less clearly within the scope of enforcement. Because the County Code does not explicitly state criteria establishing whether SUP 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 pps. 30-31 of 35 (emphasis added).

Third, the record establishes that, having lost before the Hearing Examiner, Respondents chose not to appeal even though they had lost this

issue. During his testimony at trial, Mr. John Hempelmann, the land-use lawyer who represented Maytown before the Hearing Examiner, and who was the Respondents' principal trial witness on land-use issues, initially attempted to claim that the Port and Maytown did not appeal from the Hearing Examiner's decision because they won ("We won. You don't appeal when you win." RP 1464, line 1). But Hempelmann then admitted that the Port and Maytown lost their challenge to the Staff's decision to refer the amendment issue to the Hearing Examiner:

Q. But she [*i.e.*, the Hearing Examiner] also made some decisions that were contrary to your and the Port's request, isn't that true?

A. Yes.

\* \* \* \*

Q. ...[I]n essence, she [*i.e.*, the Hearing Examiner] rejected your argument and the Port's argument that it was improper for the County to place these amendments into the Hearing Examiner process; correct?

A. ***That's generally correct.***

RP 1474, lines 21-23 & 1476, lines 6-11 (emphasis added).

Mr. Hempelmann had to answer this way. On April 25, 2011 (shortly after the Hearing Examiner issued her decision), Hempelmann sent an e-mail to his clients, which was in evidence as Trial Exhibit 449. In that e-mail, Hempelmann explained that he and Mr. Tayloe Washburn (the land-use counsel for the Port) had changed their minds and decided not to appeal the Hearing Examiner's decision because the result could "make our damages case more difficult":

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 SUP 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 SUP 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 BOCC, we know the BOCC will rule against us and would likely use language that said the formal SUP 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 (emphasis added).

The Port's and Maytown's lawyers knew that, following the expected adverse decision by the Board, they would be confronted with a statutorily defined "land-use decision" they would have to challenge via a LUPA petition.<sup>1</sup> They further knew that, in that petition, they would be asking a superior court judge to rule that the Hearing Examiner abused her administrative-law discretion when she ruled (1) the Staff had the discretion under the County Code to send the key amendment issue—whether to require an additional year of testing, to account for pollution levels in ground water, which the Port had never tested for—to the Hearing Examiner for final resolution, and (2) the Staff had reasonably exercised its discretion in ordering those additional tests. Finally, the lawyers knew that, if they

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<sup>1</sup> See *Cave Props. v. City of Bainbridge Island*, 199 Wn. App. 651, 663-65, 401 P.3d 327 (2017) (analyzing RCW 36.70C.020(2)(b), under which an interpretive or declaratory decision regarding application of ordinances to a specific property is a land-use decision).

lost before the superior court, they would be barred, under *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013), from basing their damages claim on a substantive challenge either to the Hearing Examiner's rulings, or to the Staff's rulings that the Hearing Examiner had upheld.

Respondents thus decided not to appeal from the Hearing Examiner, and instead to try in the follow-on damages action to finesse the ensuing exhaustion-of-remedies issue under LUPA. And the finesse succeeded: the trial court refused to dismiss claims based on a substantive attack on the actions of the Staff and the Hearing Examiner. RP 147-150 (denial of County's motion for summary judgment). This opened the door at trial to (1) Mr. Charles Ellingsen's attack on the need for the additional water tests, and (2) Mr. Hempelmann's attack on the Staff's decision to refer that issue to the Hearing Examiner for resolution, and the Hearing Examiner's decision to uphold that referral. RP 947, 958-59, 962-63, 967-68, 990 (Ellingsen); RP 1137-38, 1141-43, 1156-58, 1211-13, 1329-30, 1464 (Hempelmann); *see also* RP 3739-40 (closing argument of counsel for the Port, attacking the tests and the process).

It was the delay of Maytown's ability to start mining in 2010, said to have been caused by the imposition of these additional tests, and then the Staff's refusal to undo that requirement and instead refer the matter to the Hearing Examiner, that formed the central basis for the claim that County actions killed the mining project. Ex. 386 (Port appeal, 3/2/2010 at p. 15) (warning that the new tests "ha[ve] the potential to delay mining for a year or more[,] which would "result in huge economic losses"); RP 1170-73,

1322-34, 1422, 1514 & 1531 (Hempelmann); *see also* RP 3899-90 (closing argument of counsel for Maytown, claiming a lost opportunity “to have been up and mining” in 2010). The Port and Maytown did introduce some evidence that this damage was exacerbated by a later Staff decision in November 2011, which supposedly so conditioned the issuance of the formal permission to commence mining as to impair the ability to land the contracts needed to avoid financial failure. *Compare* Ex. 1 (11/8/2011 letter to proceed) *with* RP 2331-32 (testimony of California-based consultant Steve Cortner, claiming that the conditions “killed everything”). Yet Respondents did not seek review of this Staff decision, even so much as by the Hearing Examiner; once *again*, Respondents chose to frustrate LUPA.<sup>2</sup>

**2. The decision by the Port and Maytown to bail midstream from the County’s administrative process, thereby frustrating LUPA review of their claims of substantive land-use error by the County, should bar their state-law damages claims.**

The Court of Appeals grounded its decision in the language of subsection .030(1)(c) of LUPA. In doing so, the Court of Appeals embraced

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<sup>2</sup> In this latter regard, Respondents’ conduct exactly parallels that of the Petitioners in *Community Treasures v. San Juan County*, 198 Wn. App. 1032, 2017 WL 1315502, *rev. granted*, 189 Wn.2d 1001 (Sept. 6, 2017), which will be heard along with this case. In *Community Treasures*, the Petitioners (John Evans and a nonprofit corporation, Community Treasures) challenge the appropriateness of permit fees imposed by San Juan County Staff at the time of the Petitioners’ permit applications; just like Respondents here regarding the November 8, 2011 letter-to-proceed, “[n]either Evans nor Community Treasures filed an administrative appeal challenging the imposition of the permit fees for the applications.” *Community Treasures*, 2017 WL 1315502 at \*1. Instead, they filed a class action on behalf of all similarly situated persons, seeking damages and a judgment against San Juan County for imposing allegedly improper permit fees. *Id.*

Here, Maytown not only did not seek review, its attorney actually expressed pleasure that the Staff had accepted his proposed language for the letter to proceed. Ex. 466.

(albeit without attribution) Justice Sanders' dissent in *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005). His approach focused on .030(1)(c) in isolation, contrary to the mandate of *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002), in which this Court adopted the "context" approach to statutory interpretation. Under the context approach, Washington courts determine the plain meaning of a statute, and from that meaning derive the governing legislative intent, by examining not only the words of the provision immediately at issue (here, subsection .030(1)) but the statute as a whole, including any Legislative statement of purpose. *E.g., G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 310, 237 P.3d 256 (2009) (under the context approach to statutory interpretation, "an enacted statement of legislative purpose is included in a plain reading of a statute" (citation omitted)).

The Legislature declared that LUPA's purpose is to "establish[] uniform, expedited appeal procedures and uniform criteria for reviewing [land-use] decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. Consistent with that purpose, this Court has ruled that LUPA's exhaustion-of-administrative remedies requirement must be strictly enforced. *Durland v. San Juan County*, 182 Wn.2d 55, 67, 240 P.3d 191 (2014) ("We decline to recognize equitable exceptions to LUPA's exhaustion requirement because the exhaustion requirement furthers LUPA's stated purposes of promoting finality, predictability, and efficiency."); *accord Cingular Wireless v. City of Clyde Hill*, 185 Wn.2d 594, 601-03, 374 P.3d 151 (2016) ("For a court to review

a land use decision...the petitioner must exhaust all available administrative remedies.”).

Reading subsection .030(1)(a) in isolation, as the Court of Appeals did, frustrates that purpose. Allowing damage actions based on substantive challenges to local land-use decisions to proceed with no obligation first to litigate that challenge through the LUPA process would reduce LUPA to an option that would-be damage complainants may forgo as they see fit (for example, because the would-be complainant fears the effect on the viability of the damages claim of a LUPA decision rejecting the claim of substantive local-government error). The result could quickly unravel the overarching authority of LUPA itself, and return Washington land-use law to the pre-LUPA patchwork exemplified by the decades-long battle between the Pleas family<sup>3</sup> and the City of Seattle over a multi-unit apartment complex the Pleases sought to build in Seattle’s Capitol Hill neighborhood.<sup>4</sup>

The context approach to statutory interpretation avoids this result. Rather than reading the language of subsection .030(1)(a) in isolation as establishing a total exemption of damage claims from LUPA—the way Justice Sanders did in his *James* dissent and the Court of Appeals did here—the subsection can and should be read as establishing only that a party need not litigate the damages claim itself (*e.g.*, for tortious interference) within

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<sup>3</sup> The Pleas family name is pronounced “Place,” not “Please.”

<sup>4</sup> The Pleases eventually sued for damages, winning a \$969,468 verdict upheld by this Court over thirty years after the Pleases initiated their multi-unit project. *See Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989) (reversing Court of Appeals and reinstating judgment on verdict); *see also Pleas v. City of Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978) (granting writ relief against City).

the restrictive procedural confines of a LUPA petition proceeding, but may later pursue that claim as a damages action to which the normal rules of civil procedure will apply—so long as the superior court in the LUPA proceeding has ruled in that party’s favor on its claim of substantive land-use error, on which the follow-on tort claims are predicated.<sup>5</sup>

This Court’s LUPA jurisprudence reflects an understanding that the Legislature’s stated purpose in enacting LUPA cannot be achieved unless the requirement to exhaust administrative remedies—and get to a “land use decision” that must then be reviewed through a LUPA petition—is strictly enforced. The Port and Maytown flouted that requirement, bailing from the Thurston County administrative process midstream, lest the conclusion of that process—in Mr. Hempelmann’s words—make the Port and Maytown’s damages case “more difficult.” This Court should now hold that the Port and Maytown’s decision to bail from the County’s administrative process bars their state-law claims, vacate the judgment on the jury’s verdict as to those claims, and direct that those claims are dismissed with prejudice.<sup>6</sup>

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<sup>5</sup> This reading of subsection .030(1)(a) is also consistent with this Court’s analysis in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013). In her opinion for the Court, then Justice (now Chief Justice) Fairhurst reviewed several decisions of this Court and the Court of Appeals bearing on the issue and made clear that a damages action *would* be held barred for not first seeking relief through LUPA, if the claim for damages rested on attacking the correctness of the land-use action taken by the local government being sued for damages. See 176 Wn.2d at 927, n.11 (citing and discussing *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005), *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010), *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), and *Shaw v. City of Des Moines*, 109 Wn. App. 896, 37 P.3d 1255 (2002)).

<sup>6</sup> *James* is not the only case where LUPA was held to require a permit applicant to appeal an administrative decision that was primarily favorable but included an adverse ruling. See also, e.g., *Harrington v. Spokane County*, 128 Wn. App. 202, 212, 114 P.3d 1233 (2005); *Spice v. Pierce County*, 149 Wn. App. 461, 467-68, 204 P.3d 254 (2009).

**B. Maytown’s substantive due process claim fails for two reasons: (1) Maytown had no protected property interest in what became its preferred procedure for dealing with water-testing requirements; and (2) Maytown failed to show that the County’s actions met the stringent “shocking to the conscience” test required to establish a deprivation of substantive due process.**

**1. Maytown had no protected property interest in a specific procedure.**

Maytown has not disputed that it must have a constitutionally protected property interest in order to pursue a claim for deprivation of substantive due process, but has insisted that the necessary protected property interest is found in the special-use permit itself, which was assigned to Maytown under its agreement with the Port. But that permit was subject to conditions, one of which (Condition 6C) required compliance with water-quality testing requirements before mining could commence.

In February 2010, County Staff issued a determination that the permit holder (at that time, the Port) had to perform additional tests to bring the permit in compliance with that condition. The Port, joined by Maytown, objected to these new tests, and asked the Staff to withdraw the requirement that they be performed and certify that Condition 6C had been satisfied. Ex. 429 at 15 (¶ 15); Ex. 394 at 1, 3-4. The Staff instead ruled that it would send the issue to the Hearing Examiner, for the Hearing Examiner to resolve. Ex. 446 at 15; Ex. 55 at 1; RP 1154-55. Maytown asserted at trial that the Staff decision to refer the water-quality issue to the Hearing Examiner, rather than handle the issue itself—by cancelling the tests the Staff had just ordered—was the result of wrongful conduct by County actors (*e.g.*, pressure from council members on Staff) was “shocking to the

conscience” and thus a deprivation of Maytown’s substantive due process rights. But Maytown has no such claim unless it has a constitutionally protected property interest in the *procedure* to which it contends it was entitled: a decision by the Staff on whether to withdraw the contested testing requirements, rather than being forced to undergo a hearing before the Hearing Examiner on whether the Hearing Examiner would withdraw the contested requirements.

This Court has recognized that there generally is no constitutionally protected interest in a specific procedure:

[W]e cannot think of any notion of property that would justify us holding that this procedural setback is a deprivation of property. Any attempt to portray plaintiffs’ procedural rights during the add lands process as a constitutionally protected property interest would be a radical change in the law of due process. *See, e.g., Olim v. Wakinekona*, 461 U.S. 238, 250-51, 103 S. Ct. 1471, 75 L. Ed. 2d 813 (1983) (“The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.” (footnote omitted)); *Curtis Ambulance of Fla., Inc. v. Bd. of County Comm’rs*, 811 F.2d 1371, 1377 (10th Cir. 1987) (“Courts generally agree that no property interest exists in a procedure itself, without more.”).

*Carlisle v. Columbia Irrigation Dist.*, 168 Wn.2d 555, 573-74, 229 P.3d 761 (2010). In *Curtis Ambulance of Florida v. Bd. of County Comm’rs*, 811 F.2d 1371 (10th Cir. 1987), cited with approval by this Court in *Carlisle*, the Tenth Circuit elaborated on what is required to establish a constitutionally protected property interest:

The process requirement necessary to satisfy fourteenth amendment procedural due process comes into play only after plaintiff has shown that it has a property or liberty interest. *Vinyard [v. King]*,

728 F.2d [428] at 430 n. 5 [(10th Cir. 1984)] (citing [*Bd. of Regents of State Colleges v. Roth*, 408 U.S. [564] at 569-70, 92 S. Ct. [2701] at 2705[, 33 L. Ed. 2d 548 (1972)]). To establish a property interest in a particular benefit, one must have a “legitimate claim of entitlement” to it. *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709. “[A]n abstract need or desire for it” or a “unilateral expectation” is insufficient. *Id.*; see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982). Whether such claim of entitlement exists, and the sufficiency thereof, is determined “by reference to state law.” *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 2077, 48 L. Ed. 2d 684 (1976). However, while the typical claim of entitlement is based upon “specific statutory or contractual provisions,” it need not be. *Casias [v. City of Raton]*, 738 F.2d [392] at 394 [(10th Cir. 1984)]. Rather, “[a] person’s interest in a benefit is a ‘property’ interest for due process purposes if there are ... rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.” *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972).

811 F.2d at 1375-76.

Maytown can point to no “rules or mutually explicit understandings that support” its “*claim of entitlement*” (*Perry*, 408 U.S. at 601 (emphasis added)) to have the Staff, and not the Hearing Examiner, resolve whether Maytown would have to conduct further water-quality testing to bring the SUP into compliance with Condition 6C. The Hearing Examiner ruled that the question was instead a matter entrusted to the *expert discretion* of the Staff. See Ex. 446 at pps. 30-31 of 35 (“Because the County Code does not explicitly state criteria establishing whether SUP amendments are administrative or quasi-judicial, the Department [*i.e.*, the Staff] 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).”). A local-government authority exercising its discretion as to whether to grant a party the benefit of a particular procedure is, by definition, the antithesis of a party being entitled to the benefits of that procedure.

The irony of Maytown’s claim is shown by its enthusiastic approval of the Hearing Examiner’s decision and competence. *See* Ex. 447 (“Fantastic Findings and Conclusions”). In effect, Maytown is arguing that it had a constitutionally protected property interest in avoiding a hearing before a fair-minded and highly capable hearing examiner. No court has found a protected property interest in such circumstances, and this Court should decline to do so, as well.

**2. The County engaged in no conduct “shocking to the conscience.”**

By the time of trial, Maytown’s only claim of constitutional deprivation under 42 U.S.C. § 1983 was a claim for deprivation of substantive due process. The jury was correctly instructed that Maytown could not prevail unless it showed action by the County “shocking to the conscience.” The fundamental legal problem presented by the jury’s subsequent verdict for Maytown on that claim involves the evolution of the governing law, which has increasingly restricted the scope of such claims and which compels the conclusion that Maytown failed as a matter of law to show misconduct by the County “shocking to the conscience.”

Washington case law has lagged behind this evolution. The last time this Court addressed the standard required to show a deprivation of substantive due process in a land-use dispute was in *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1997). Justice Sanders' majority opinion adopted the showing requirement set forth by the Ninth Circuit in *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), under which proof that the local government acted arbitrarily was sufficient to establish a deprivation of substantive due process. *See Mission Springs*, 134 Wn.2d at 966-68.

The U.S. Supreme Court has subsequently made clear that “only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense’” and thus give rise for local-government liability for deprivation of substantive due process. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (requiring a finding of conduct that “shocks the conscience”)). The federal Circuit Courts of Appeals and state appellate courts now routinely hold that merely showing arbitrariness in a local government land-use decision is insufficient to establish a deprivation of substantive due process. *See, e.g., Shanks v. Dressel*, 540 F.3d 1082, 1088-89 (9th Cir. 2008); *Onyx Props., LLC v. Bd. of County Comm’rs of Elbert County*, 838 F.3d 1039, 1048-49 (10th Cir. 2016); *United Artists Theatre Circuit v. Twp. of Warrington, PA*, 316 F.3d 392, 399-401 (3d Cir. 2003) (Alito, J.); *Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686,

688-91 (1991) (following *Queen Anne Courts v. City of Lakeville*, 726 F. Supp. 733 (D. Minn. 1989)).<sup>7</sup> Courts are reluctant to find “conscience-shocking behavior in the land use context absent some showing that the conduct was permeated either with self-dealing or corruption.” *Giuliana v. Springfield Twp.*, 238 F. Supp. 3d 670, 696 (E.D. Pa. 2017) (citations omitted) (rejecting claim).<sup>8</sup> Evidence showing nothing more than “principled opposition” to a developer’s plans will not suffice. *Buckler v. Rader*, 53 F. Supp. 3d 1371, 1375 (N.D. Ga. 2014) (rejecting claim). The Constitution should not allow condemnation as “shocking to the

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<sup>7</sup> In 1989 in *Queen Anne Courts*, the court anticipated the restrictive direction of future U.S. Supreme Court decisions in this area. The court expressly refused to follow the Ninth Circuit’s decision in *Bateson* that Justice Sanders found persuasive ten years later in *Mission Springs*. See 726 F. Supp. at 737 (refusing to follow what the court acknowledged to be the then- majority approach of the federal Circuit Court of Appeals, including the Ninth Circuit in *Bateson*). The court instead agreed with the more restrictive view of Judge Arnold of the Eight Circuit in his concurring opinion in *Lenke v. Cass County*, 846 F.2d 469 (8th Cir. 1987) (*en banc*), and of the First Circuit in its decision in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982), under which mere arbitrariness was not sufficient to establish a deprivation of substantive due process:

[T]he Court believes that in the specific area of zoning decisions, the approach taken by Judge Arnold and the rest of the *Lenke* concurrence is appropriate. The nature of zoning decisions is such that they will always be susceptible to “simple rote allegations that the zoning decision is arbitrary and capricious.” *Lenke*, 846 F.2d at 472 (Arnold, J., concurring). As the *Creative Environments* court stated:

Every appeal by a disappointed developer from an adverse ruling by a local ... planning board necessarily involves some claim that the board exceeded, abused or “distorted” its legal authority in some manner, often for some allegedly perverse (from the developer’s point of view) reason.

680 F.2d at 833.

*Queen Anne Courts*, 726 F. Supp. at 738 (emphasis in original). Also correctly anticipating the future direction of U.S. Supreme Court decisions, the Minnesota Supreme Court two years later adopted *Queen Anne Court*’s rejection of arbitrariness as sufficient to establish a deprivation of substantive due process. See *Northpointe Plaza*, 465 N.W.2d at 688-91.

<sup>8</sup> Upon reflection, the County withdraws its citation to the Sixth Circuit’s approach to this issue, under which corruption would not be recognized as giving rise to a deprivation of substantive due process. See *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 862 (6th Cir. 2012), cited in the County’s Opening Brief to the Court of Appeals at 72, 76-77.

conscience” what in reality is an elected official responding to the concerns of their constituents. *See Clark v. City of Hermosa Beach*, 46 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223, 244 (1996) (citing and quoting *Stubblefield Constr. v. City of San Bernardino*, 32 Cal. App. 4th 687, 38 Cal. Rptr. 2d 413, 426 (1995) (“[A]fter all, a legislator is supposed to respond to the concerns of his or her constituents.”)).

Here, Maytown offered no evidence of self-dealing or corruption, but only that elected County officials responded to the concerns of their constituents—concerns that not even Maytown suggests was animated by anything other than principled opposition to Maytown’s mining venture and its environmental impacts. That these concerns led these officials to act in a way that a jury could conclude was arbitrary and capricious (*e.g.*, “find me an emergency”) does not, under contemporary substantive due process standards, constitute a legally cognizable basis for such a claim.

Maytown also ignores that the County (including the Board of Commissioners) made several decisions that favored Maytown over their environmental opponents:

- FORP’s insistence that the SUP had lapsed was *rejected* by the Thurston County Department of Community Development (Kain). Ex. 85.
- Maytown’s Five-Year Review was *approved* by the Thurston County Hearing Examiner in December 2010, Ex. 429, and remanded by the Board only for further fact-finding on a single, narrow issue. CP 106-10.
- The SUP amendment supported by Maytown and opposed by FORP was *approved* by the Thurston County Hearing Examiner in March 2011. Ex. 446.

- FORP’s appeal of the Examiner’s SUP amendment approval was *denied* by the Board in August 2011. Ex. 454.

These actions cannot be reconciled with the image Maytown attempts to paint, of a local government behaving in such a high-handed fashion that its actions can reasonably be said to “shock the conscience.” Finally, Maytown ignores that, for *the* critical decisions it claimed deprived it of substantive due process, just as much as for its state-law damage claims, its accusations of unlawful action were rejected by the Hearing Examiner, who embodied the County when she ruled and against whom Maytown has not cast so much as a single aspersion of improper motive. In sum, this Court should vacate the finding in favor of Maytown on its substantive due process claim and direct dismissal of that claim with prejudice.

**C. This Court should decline to adopt a new exception to the American Rule and reverse the award of fees on appeal.**

The “American Rule” prohibits recovery of attorney’s fees except as authorized by contract, statute, or a recognized ground in equity. *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997). The Court of Appeals held that the American Rule did not apply to fees the Port and Maytown had incurred prior to litigation and were not allowed to seek as consequential damages at trial. But Washington has allowed recovery of fees as consequential damages only in limited circumstances. Principally, the doctrine of equitable indemnity permits recovery where “a breach of duty by A...exposed B to litigation with C, a third person who was a stranger to the event involving A and B”—circumstances not present here, where the Port and Maytown’s dispute was with the County alone. *Manning*

*v. Loidhamer*, 13 Wn. App. 766, 769, 538 P.2d 136 (1975); *see also Wells v. Aetna Ins. Co.*, 60 Wn.2d 880, 882-83, 376 P.2d 644 (1962).<sup>9</sup> The Court of Appeals' citation of a California insurance-bad-faith case does not provide a principled basis to adopt a new exception, as the policy concerns arising where an insurer has breached its quasi-fiduciary duty of good faith to its insured do not carry over into the land-use-regulation context.<sup>10</sup>

Finally, this Court should reverse the decision to award the Port and Maytown fees on appeal where they failed to devote a separate section of their brief to the request as required by RAP 18.1. *See Wilson Court Ltd. P'ship v. Toni Maroni's*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998).

#### IV. CONCLUSION

This Court should vacate the judgment on jury verdict for the Port and Maytown and direct the dismissal of their claims with prejudice.

Respectfully submitted this 21<sup>st</sup> day of November, 2017.

**CARNEY BADLEY SPELLMAN, P.S.**

By Michael B. King  
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<sup>9</sup> Nor does this case involve any of the other specific circumstances where fees have been allowed as consequential damages. *See McCready*, 131 Wn.2d at 275, 278.

<sup>10</sup> This Court should similarly reject the Port and Maytown's alternative argument, raised for the first time on appeal, that it be allowed to recover fees under the "bad faith" exception to the American Rule. *See* RAP 2.5(a); *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 362, 110 P.3d 1145 (2005). Like others, this exception applies in narrow circumstances not present here. *See Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927-28, 982 P.2d 191 (1999) (citing *Bell v. Sch. Bd.*, 321 F.2d 494, 500 (4th Cir. 1963)).

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record via Email to the following:

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DATED this 21<sup>st</sup> day of November, 2017.

*Patti Saiden*

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Patti Saiden, Legal Assistant

# CARNEY BADLEY SPELLMAN

November 21, 2017 - 4:20 PM

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