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SUPREME COURT OF THE STATE OF WASHINGTON

No. 46895-6-II  
COURT OF APPEALS, DIVISION II  
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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**SUPPLEMENTAL BRIEF OF RESPONDENT PORT OF TACOMA**

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## I. INTRODUCTION

This is a tort case. After receiving the evidence, being properly instructed on the law, and listening to County's theory of the case, the jury rendered 15 unanimous verdicts in favor of Respondents (collectively "Maytown"). The County asks this Court to take the case away from the jury for reasons that this Court rejected in 1997 in *City of Seattle v. Blume*, and for reasons that the Legislature rejected in 1995 when it enacted the Land Use Petition Act, Ch. 36.70C RCW ("LUPA"). The County's arguments are unsupported by law, fact, or policy, and should be rejected.

## II. ASSIGNMENTS OF ERROR AND RESTATEMENT OF ISSUES

Maytown assigns no error to the decision of the Court of Appeals.

1. This Court has previously held that tortious interference claims should be decided under traditional tort principles of proximate cause, regardless of the status of a land use process. Having been properly instructed on proximate cause, the jury found for Maytown. Should the Court affirm the jury's verdict? **Yes.**
2. LUPA separates land use appeals from damages actions, procedurally and substantively. If accepted, the County's argument would turn a LUPA appeal into the liability phase of a tort action. Should the Court reject the County's argument? **Yes.**
3. Tortfeasors are liable for all reasonably foreseeable harms caused by their torts. It was reasonably foreseeable that Maytown would incur attorneys' fees defending its permit against attack from the very government that issued it. Are such attorneys' fees recoverable as damages in a later tort claim? **Yes.**

## III. STATEMENT OF THE CASE

The County's statement of the case casts the facts in the light most

favorable to the County, ignoring the facts on which the jury made its decision. Maytown incorporates by reference the statement of the case it provided at pages 7-34 of its Response Brief in the Court of Appeals, supplemented as follows to correct a material misstatement of fact the County made at page 7-8 of its Reply Brief to the Court of Appeals, and again at oral argument.<sup>1</sup> The County incorrectly asserted that Maytown brought two *separate* appeals to the Hearing Examiner: the SEPA<sup>2</sup> appeal that Maytown won, and some sort of substantive appeal of the amendments process that Maytown lost. In fact, the latter “appeal” does not exist. As explained in pp. 48-53 of Maytown’s Response/Cross-Appeal Brief, Maytown brought only a SEPA appeal.

Maytown made two types of arguments in its SEPA appeal. Ex. 446 at 2. First, no SEPA review should have been conducted because no amendments should have been required in the first place; and second, the amendments, even if permissible, did not meet SEPA’s definition of “action” and therefore did not warrant SEPA review. *Id.* The Examiner rejected the first theory, but accepted the second and ruled that SEPA review was not required. *Id.* at 30-31.

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<sup>1</sup> The recording of oral argument before the Court of Appeals is available at <http://www.courts.wa.gov/content/OralArgAudio/a02/20160909/468956%20-%20Maytown%20Sand%20and%20Gravel%20v%20Thurston%20County.mp3>; a transcript is attached to the Declaration of Angela Seybold. The discussion referenced here appears at 11:29-11:45; 13:38-13:55 in the recording and on pp. 5-6 of the transcript.

<sup>2</sup> State Environmental Policy Act, Chapters 43.21C RCW and 197-11 WAC.

On the merits of the amendments, Maytown objected to the process but asked the Hearing Examiner to grant the amendments so staff would allow mining to begin. The Examiner did so, Exhibit 446 at 34-35, and the Board affirmed her ruling, Ex. 454 at 5 – albeit too late to save the business, as the Examiner’s April 2011 decision came 19 months after the County began the course of conduct that the jury would later determine tortiously interfered with Maytown’s business, *see, e.g.*, Ex. 361 (internal County e-mail establishing in October 2009 the “letter to proceed” requirement and delaying processing until project opponents weighed in).

#### IV. ARGUMENT

Maytown’s damages were not caused by an unappealed land use decision, but even assuming otherwise *arguendo*, tort cases such as this one are properly governed by tort principles. As discussed below in Section A, the County’s position is inconsistent with this Court’s tort jurisprudence. Section B explains how the County’s argument contradicts, in multiple ways, the LUPA statute’s plain language and its manifest purpose to procedurally and substantively separate land use appeals from actions for damages. As discussed in Section C, adjudicating tort actions under tort principles and separating such actions from land use concepts comports with the Legislature’s intent in adopting LUPA and this Court’s prior jurisprudence. Section D summarizes why the decision the County

relies upon was both favorable to Maytown and not appealable. Finally, Section E summarizes why attorneys' fees incurred as a proximate result of an intentional tort are recoverable as damages in a later tort action.

**A. Tort principles of proximate cause govern Maytown's tort claim, which was properly submitted to the jury**

Even if assuming for the sake of argument that land use law *allowed* Maytown to appeal the Hearing Examiner's reasoning on a SEPA appeal (which, as discussed below, it did not), Maytown was not *required* to bring a land use appeal before seeking tort damages. The presence or absence of an unappealed land use decision is not dispositive of tort liability, as the County suggests. Rather, the issue for purposes of tort law is whether the jury could reasonably have found that the County's actions proximately caused Maytown's damages, regardless of whether the County's actions also included an unappealed land use decision.

In *City of Seattle v. Blume*, 134 Wn.2d 260, 947 P.2d 223 (1997), this Court held that municipal liability in tortious interference is evaluated under traditional tort principles of causation. Prior to *Blume*, the "independent business judgment" rule of *King v. City of Seattle*<sup>3</sup> precluded recovery in tortious interference against a permitting agency if an applicant did not first pursue the permitting process to conclusion – that is, a plaintiff suffering a tortious land use process could not simply stop the

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<sup>3</sup> 84 Wn.2d 239, 250, 525 P.2d 228 (1974).

process and sue for damages. 134 Wn.2d at 251. Rejecting this rule in *Blume*, this Court wrote that its “main concern with the rule” was that:

some actions which could be labeled as an “independent business judgment” could also be valid attempts to mitigate damages. In many cases, a decision to withdraw from a lengthy administrative process or to settle a dispute is a reasonable attempt by the injured party to mitigate damages and would be recognized as such by the courts.

*Id.* at 258. The Court rejected the independent business judgment rule in favor of “traditional principles of proximate causation.” *Id.* at 259-60.

In this case, the jury received all relevant evidence, including the Hearing Examiner’s decision and the email from Maytown’s land use attorney that the County extensively relies upon, Exhibit 449. The jury heard the County’s argument that the County’s tortious conduct did not cause Maytown’s damages because the Hearing Examiner ruled staff had the discretion to impose the amendments process.<sup>4</sup> The County went further and told the jury, incorrectly, that Maytown could have appealed the Examiner’s reasoning about the amendments process but chose not to.<sup>5</sup>

The jury also received weeks of testimony about the months of improper County actions that preceded the amendments process, and heard Maytown counter that it had no reason to appeal because the Hearing

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<sup>4</sup> RP 3836:8-3837:10 (County’s closing: “Therefore you can't find that plaintiffs are entitled to recover damages caused by putting this matter in the hearing examiner process and requiring the amendment.”).

<sup>5</sup> RP 3837:5-7 (“Maytown and the Port considered appealing this decision, because this part was unfavorable. They did not. That's fine.”)

Examiner approved the amendments,<sup>6</sup> and Maytown was trying to finish the process as quickly as possible to begin mining and lessen the harm the County was causing.<sup>7</sup> So informed and properly instructed on the law, the jury ruled the County proximately caused \$12 million in damages.

The County's argument is fundamentally one of proximate cause: that one issue – the lack of an appeal in of a favorable decision in the amendments process – cut the causal chain and released the County from liability for every County action. The County's argument failed because the amendments process was a small part of the County's tortious conduct, and came near the end of the years-long series of improper acts by Thurston County elected officials and staff to prevent the use of an issued permit. The jury in this case awarded damages for that interference, not just because it delayed mining, but because it so undermined the finality of the mining permit that it induced Maytown to abandon its business.

The County now asks this Court to take the proximate cause issue away from the jury by imposing a new bright-line rule that goes beyond even the rejected independent business judgment rule. While the *Blume* plaintiff terminated the permit process before suing in tort, Maytown completed the process, then sued for damages. Yet the County would

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<sup>6</sup> RP 1463:22-1464:1 (Hempelmann: "We won. We don't appeal when we win.").

<sup>7</sup> *E.g.*, RP 1203:4-12 (Hempelmann: "Do everything possible. Take every step you have to take. Agree to whatever you have to agree to get started").

have the Court bar *any* recovery because Maytown did not appeal a procedural SEPA ruling in a substantively favorable decision, where doing so would have *increased* Maytown's damages by further delaying mining.

Neither tort law nor policy supports taking the issue of proximate cause away from a jury because an applicant did not pursue an appeal that would have been meaningless as a matter of both land use law and tort law. It would have been a meaningless land use appeal because Maytown obtained the amendments and could have obtained no additional relief through reversal of the reasoning on a procedural SEPA appeal that had no effect on the substance of the land use decision. The appeal would have been meaningless for tort because LUPA's standards for appeal, e.g., "clearly erroneous," have nothing to do with proximate cause. The lack of an appeal simply allowed the County to make its arguments to the jury. Reviewing courts do not second-guess a jury's resolution of fact-intensive inquiries, particularly absent a challenge to the jury's verdicts.

**B. LUPA governs land use appeals, not torts, and the County's theory contradicts the letter and purpose of LUPA**

Similar to this Court's decision in *Blume* that tort actions should be governed by traditional tort principles without regard to the status of a permit application, the Legislature adopted LUPA to separate land use

appeals from actions for damages,<sup>8</sup> which had been fused in *Lutheran Day Care v. Snohomish County*.<sup>9</sup> In 1995, the Legislature changed pre-LUPA law in multiple ways: by (1) replacing the writ of certiorari as the means of judicial review of land use decisions, RCW 36.70C.030(1); (2) replacing the “arbitrary and capricious” standard with the less deferential “clearly erroneous” standard, RCW 36.70C.130(1)(d); (3) requiring expedited review of land use decisions, RCW 36.70C.090; (4) allowing limited or no discovery, RCW 36.70C.120; and (5) expressly excluding actions for damages from LUPA’s coverage, RCW 36.70C.030(1)(c). Most importantly for this case, the Legislature declared that “[a] grant of relief [under LUPA] by itself may not be deemed to establish liability for monetary damages or compensation.” RCW 36.70C.130(2).

At oral argument in the Court of Appeals, the County’s attorney made an argument that directly contradicted the plain language of RCW 36.70C.030(1)(c), by telling the court that Maytown’s case should be taken from the jury because Maytown did not seek to use LUPA to

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<sup>8</sup> Courts implement the Legislature’s intent as expressed in the statute’s plain language, *State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002), which can include analysis of the historical context in which the statute was adopted, *see, e.g., Washington State Nurses Ass’n v. Bd. of Med. Examiners*, 93 Wn.2d 117, 121, 605 P.2d 1269, 1271 (1980).

<sup>9</sup> 119 Wn.2d 91, 115-17 & 125, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079 (1993) (holding that reversal of land use decision under writ of certiorari collaterally estops government from denying liability under 42 U.S.C. 1983 and RCW 64.40.020).

collaterally estop the County. In reference to decisions such as the Hearing Examiner's decision approving the amendments, the panel asked:<sup>10</sup> "The reasoning is adverse, but is the decision adverse?" Counsel for the County responded: "Yes, because it is prejudicial. And if you had prevailed, then you would be able to use that determination as collateral estoppel and res judicata in the follow-on damages action . . . ." This argument directly contradicts the Legislature's declaration that a "grant of relief [under LUPA] by itself may not be deemed to establish liability for monetary damages or compensation." RCW 36.70C.130(2).

The County's argument not only contradicts the statute's language, it would restore the very holding the Legislature superseded when it enacted LUPA, once again collaterally estopping government from denying liability for erroneous land use decisions, just as government was estopped under the writ.<sup>11</sup> But by the statute's plain language, LUPA decisions have no collateral estoppel effect on damages actions, and nothing in tort law justifies denying a plaintiff a jury trial because that plaintiff does not seek to collaterally estop a defendant.

Under the County's argument, plaintiffs would have to establish their right to bring a tort action by first prevailing in a LUPA action under

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<sup>10</sup> The discussion containing the statements quoted here begins at 14:17 of the recording cited *supra*, n.1, and at p. 6-7 in the attachment to the Seybold Declaration.

<sup>11</sup> *Lutheran Day Care*, *supra* n.4, 119 Wn.2d at 114-17 & 125.

the deferential appellate standards for reversal of land use decisions of RCW 36.70C.130, based on an administrative record compiled without benefit of discovery. The standards in RCW 36.70C.130 are not tort standards; they are intended to facilitate the expeditious disposition of land use appeals and do not allow, for example, examination of the motives of the regulator, a key element of intentional interference. This cannot be a proper interpretation of LUPA, because courts do not adopt interpretations that render statutes invalid,<sup>12</sup> and the County's interpretation would violate the right of trial by jury. This Court recently invalidated a statute for imposing a similar prerequisite to jury trial. In *Davis v. Cox*,<sup>13</sup> this Court ruled that the State's Anti-SLAPP Act<sup>14</sup> violated Article 1, § 21 of the Washington State Constitution because it required the judge to adjudicate factual claims on the motions, under a clear and convincing standard. The County's attempt to take this case away from the jury would similarly insert new factual and legal prerequisites to a trial by jury.

The Court of Appeals in this case did not adopt the dissent's reasoning in *James v. Kitsap County*,<sup>15</sup> as the County argues. Because Maytown's damages were not caused by a land use decision, the Court of

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<sup>12</sup> See, e.g., *Nisqually Delta Ass'n v. City of DuPont*, 95 Wn.2d 563, 568, 627 P.2d 956, 959 (1981) ("Whenever possible, courts should avoid a statutory construction which nullifies, voids, or renders meaningless or superfluous any section or words.").

<sup>13</sup> 183 Wn.2d 269, 351 P.3d 862 (2015).

<sup>14</sup> RCW 4.24.525, prohibiting Strategic Lawsuits Against Public Participation.

<sup>15</sup> 154 Wn.2d 574, 115 P.3d 286 (2005).

Appeals followed this Court's decision in *Lakey v. Puget Sound Energy, Inc.*,<sup>16</sup> as well as its own decision in *Woods View II, LLC v. Kitsap County*.<sup>17</sup> But even assuming that Maytown's damages were caused in part by a land use decision, the Legislature adopted LUPA to separate land use appeals from actions for damages or compensation. The County is asking this Court to reunite what the Legislature separated.

**C. Applying the rule of *Blume* effects the Legislature's intent to separate damages actions from land use appeals**

The *Blume* case provides the framework for analyzing the interplay between LUPA and damages actions. LUPA governs appeals of land use decisions, so it has no applicability to a damage action where the harm does not flow from a land use decision,<sup>18</sup> as the Court of Appeals properly concluded was the case here. Nevertheless, even assuming *arguendo* that Maytown's damages had been caused in part by a land use decision, they are still recoverable, not only because LUPA does not apply to "claims provided by any law for monetary damages or compensation," RCW 36.70C.030(1)(a)(c), but because even lawful actions may cause compensable damage. For example, the law of nuisance assigns liability regardless of the legality of the action complained of. *See, e.g., Grundy v. Thurston County*, 155 Wn.2d 1, 10, 117 P.3d 1089 (2005) (remanding for

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<sup>16</sup> 176 Wn.2d 909, 296 P.3d 860 (2013).

<sup>17</sup> 188 Wn. App. 1, 352 P.3d 807 (2015).

<sup>18</sup> RCW 36.70C.030(1); *Lakey*, 176 Wn.2d at 926-27; *Woods View*, 188 Wn. App. at 25.

trial in private nuisance the allegation that a permitted bulkhead had damaged plaintiff's property, in spite of the plaintiff's failure to first challenge the permit under LUPA, *id.* at 5).<sup>19</sup> Similarly, the law of tortious interference allows the jury to find liability for otherwise lawful acts, if taken for the improper purpose of harming the plaintiff.<sup>20</sup>

Under the tort principles of proximate cause this Court applied in *Blume*, the question is not simply whether harm is caused by an unappealed land use decision, but whether the harm is compensable even given the legality of a land use decision. The County relies on Court of Appeals decisions that hold where a land use decision causes harm, a damages action is barred unless the land use decision is reversed in a LUPA appeal. *See, e.g.,* Br. of App. at 55 & n.29 (citing, *inter alia*, *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010)).<sup>21</sup> The argument erroneously presumes that an award of damages in tort is a collateral attack on a land use decision. Yet, even if a tortfeasor must pay for any damages proximately caused by an

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<sup>19</sup> *Accord, e.g.,* *Tiegs v. Watts*, 135 Wn.2d 1, 15, 954 P.2d 877 (1998) (holding that a permitted discharge of pollutants could constitute a nuisance and writing "The fact a governmental authority tolerates a nuisance is not a defense if the nuisance injures adjoining property.").

<sup>20</sup> *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 558, 166 P.3d 813 (2007) ("[A] cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means . . . ." (quoting *Pleas v. City of Seattle*, 112 Wn.2d 794, 803-04, 774 P.2d 1158 (1989))).

<sup>21</sup> *James v. Kitsap County* is in accord, but did not involve tort damages, 154 Wn.2d at 579, and expressly declined to decide the issue of LUPA's exemption, *id.* at 586-87.

otherwise lawful action, a permittee may construct the permitted improvement (i.e., comply with the final “land use decision”). Insofar as prior cases precluded recovery without examining proximate cause, they may have reached the right result through the wrong analysis.<sup>22</sup>

Consistently with *Blume*, where a plaintiff seeks to recover damages arising out of a land use decision, courts should evaluate whether a jury reasonably could have found proximate cause, in light of all the evidence, even if the land use decision was legal. In this case, for example, where a reasonable applicant would accept an adverse decision because taking the time to appeal would actually *increase* damages, the jury could find the government liable. LUPA recognizes that some harmful acts can be *both* valid land use decisions *and* culpable. *See, e.g.,* RCW 36.70C.130(2); 36.70C.030(1)(c) (LUPA does not apply to damages actions, which may be pleaded with a land use petition but are not subject to LUPA procedures). The County’s argument to the contrary reads LUPA’s exemption for damages actions out of the statute.

**D. The law prohibited Maytown from appealing under LUPA or otherwise**

The County has never – not in its 43-page reply brief and not at oral argument before the Court of Appeals – meaningfully responded to

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<sup>22</sup> The result would not necessarily change under such analysis; recovery in *Tent City*, for example, may have been precluded by the failure to establish cognizable harm from permitting a homeless encampment at a church. *See* 156 Wn. App. at 397-98.

the fact that the law prohibited Maytown from appealing the reasoning the County relies upon for its argument. A “land use decision” is “a final determination” – singular – on an application, not the sum total of every government thought that preceded it. LUPA defines the term as follows:

“Land use decision” means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on [an application for a permit.]

RCW 36.70C.020(1). But the County asks the Court to read the statute as:

“Land use decision” means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, [an application for a permit,] and also a non-final determination by a local jurisdiction’s body or officer with a lower level of authority who approves an application for a permit but rejects an argument made by the applicant for the permit.

The Legislature did not include the underlined language. The process created and selected by staff (at the direction of the Commissioners’ attorney<sup>23</sup>) is not “a final determination.” The reasoning on a procedural SEPA appeal is not a substantive condition of a “land use decision.” The only “land use decision” at issue here is the final determination on Maytown’s application for amendments – the Board’s affirmance of the Examiner’s decision to approve the amendments. That decision did not harm Maytown, and Maytown could not have appealed it under LUPA, as

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<sup>23</sup> See RP 3298:16-3299:25.

Maytown explained in its prior briefing and summarizes below.

The propriety of the amendments requirement arose in Maytown's SEPA appeal, not in the underlying land use action, in which Maytown requested that the Hearing Examiner disregard any impropriety and grant the amendments.<sup>24</sup> The Hearing Examiner agreed with Maytown that SEPA review was improper.<sup>25</sup> State law allows one and only one administrative SEPA appeal,<sup>26</sup> so Maytown could not appeal the Examiner's SEPA decision to the Board.<sup>27</sup> Because the Examiner's SEPA ruling was adverse to the County, the County moved for reconsideration.<sup>28</sup>

The County's Reply Brief incorrectly asserts that Maytown filed a SEPA appeal and *separately* appealed the merits of the amendments, and the County requested reconsideration only of the former. Reply Br. at 7-8. But the latter "appeal" does not exist; the Examiner made the amendments decision in the first instance. Project opponents appealed *that* decision to the Board of County Commissioners, and the Board's "land use decision,"

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<sup>24</sup> See Ex. 446 at 2 (listing SEPA appeal issues); 30-31 & n.17 (addressing the argument under heading "SEPA Appeals" and noting applicant's (Maytown's) request for disposition of all issues).

<sup>25</sup> Ex. 446 at 31 ("Maytown as successfully demonstrated that the proposed changes . . . should not be considered an 'action' pursuant to the SEPA regulations, rendering environmental threshold review superfluous.").

<sup>26</sup> RCW 43.21C.075(3)(a); WAC 197-11-680(3)(a).

<sup>27</sup> Accord Thurston County Code 17.06.160.K ("The decision of the hearing examiner on an appeal of a threshold determination for a project action is final. . . [and] may only be appealed to Superior Court in conjunction with an appeal of the underlying action . . .").

<sup>28</sup> Ex. 125 at 1 ("The Thurston County Resource Stewardship Department's request for reconsideration is DENIED for lack of jurisdiction." (citing TCC 17.06.160.K, *supra*)).

rejecting the appeal and affirming the Examiner's decision, favored Maytown. Thus, Maytown was not an aggrieved party that could appeal the amendments decision under LUPA,<sup>29</sup> even if Maytown had wanted to incur the expense and delay of appealing a favorable decision.

Because Maytown could not appeal the amendments decision – the “underlying governmental action,” in the parlance of SEPA – it could not appeal the Examiner's SEPA decision, because SEPA absolutely prohibits a SEPA appeal absent appeal of the underlying governmental action.<sup>30</sup> SEPA exists to inform government of environmental impacts prior to governmental action.<sup>31</sup> If an action already taken (e.g., granting the amendments) has no substantive flaw, a procedural SEPA appeal would serve no purpose; where government takes a correct substantive action, a defect in the SEPA review is harmless.<sup>32</sup> Maytown cannot be barred from seeking damages for failing to appeal ancillary SEPA reasoning in a favorable decision where the law prohibited such an appeal.

Rather than respond to this black-letter law prohibiting an appeal

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<sup>29</sup> See, e.g., RCW 36.70C.070(7), (8) (appellant must specify errors in the decision).

<sup>30</sup> RCW 43.21C.075(6)(c) (“Judicial review under this chapter *shall without exception* be of the governmental action together with its accompanying environmental determinations.” (emphasis added)).

<sup>31</sup> See, e.g., *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976) (“Briefly stated, the procedural provisions of SEPA constitute an environmental full disclosure law.”).

<sup>32</sup> By contrast, the harm in the cases the County relies upon could have been prevented by timely LUPA appeal. See, e.g., *James v. Kitsap County*, 154 Wn.2d at 577-80, or *Tent City* 156 Wn. App. at 396-98 (improper exactions as part of permit); *Tent City* 156 Wn. App. at 396-98 (harm alleged to flow from permit authorizing temporary encampment).

of the Examiner's SEPA decision, the County relies upon an email written by Maytown's land use attorney, Ex. 449. The County ignores that the damage had already been done when Mr. Hempelmann wrote that April 25, 2011 email. Nineteen months had passed since staff started interfering in October of 2009,<sup>33</sup> and only weeks before Mr. Hempelmann's email, the County Commissioners issued a decision<sup>34</sup> that the trial court would reverse in July of 2011<sup>35</sup> and then in 2013, in this action for damages, would rule arbitrary and capricious<sup>36</sup> – a ruling the County did not appeal.

Presuming without analysis that land use law provided an appeal, Mr. Hempelmann's e-mail explained why one was not necessary for this tort case: The Examiner's reasoning was consistent with Maytown's theory of damages. The Examiner did not rule that staff *had* to send amendments to the Examiner, she ruled that staff had *discretion*. Maytown argued to the jury that whenever staff exercised discretion, it selected the most onerous path possible in furtherance of the improper purpose of preventing use of the issued and final permit.<sup>37</sup> That improper purpose supports recovery in tortious interference even if none of the means staff employed was independently wrongful. *Westmark*, 140 Wn.

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<sup>33</sup> Ex. 361 (October 29, 2009 staff email).

<sup>34</sup> Ex. 7.

<sup>35</sup> CP 111-116 (granting LUPA appeal on July 20, 2011).

<sup>36</sup> CP 2590-2592 (September 6, 2013 order finding decision arbitrary and capricious).

<sup>37</sup> See RP 3302:24-3310:18; 3738:19-3739:2.

App. at 558 (“A cause of action for tortious interference arises from *either* the defendant’s pursuit of an improper objective of harming the plaintiff *or* the use of wrongful means that in fact cause injury to plaintiff’s contractual or business relationships.” (emphasis added) *quoting Pleas v. City of Seattle*, 112 Wn.2d 794, 803-04, 774 P.2d 1158 (1989)). As Mr. Hempelmann anticipated and the jury concluded, the County is liable for staff’s exercise of discretion to serve an improper purpose.

Maytown could not have appealed the reasoning on which the County relies for its appeal. The County’s argument to this Court depends on a misreading of a Hearing Examiner’s resolution of a procedural SEPA issue, ancillary to a favorable land use decision that granted Maytown all possible relief, that was part of a SEPA ruling that also favored Maytown, that the law prohibited Maytown from appealing either administratively or judicially, that was consistent with the damages case Maytown presented to the jury, and that came near the end of the County’s successful effort to prevent the use of an issued and final permit. Nothing in land use or tort law bars Maytown from recovering damages.

**E. The Court of Appeals properly concluded attorneys’ fees are recoverable as damages in a later tort action**

The Court of Appeals properly held that where an intentional tort causes harm to intangible property, legal fees expended to repair the harm

or to prevent additional harm are recoverable as damages in a later tort action. Such fees are distinct from the same-suit, fees-as-costs generally prohibited by the American Rule. As the Ninth Circuit wrote in an analogous case:

The fees at issue here were incurred not in the current breach of contract action but in defending against the injunctive action found to have breached the RAND agreement. The fees sought are thus distinct from the same-suit fees generally banned by the American rule. As losses independent of the current litigation and triggered by the contract-breaching conduct, they are best characterized as recoverable consequential contract damages—the kind of damages ordinarily recoverable in breach of contract suits.

*Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1049-52 (9th Cir. 2015). Similarly, the fees at issue in this case were incurred not in the current tort action but in defending the permit from the very actions the jury found breached the County's duty in tort. The Court of Appeals also recently ruled, without addressing the American Rule, that attorney fees incurred as a result of abuse of process were not only damages recoverable in tort, but must be proved as an element of the tort. *See Bellevue Farm Owners Ass'n v. Stevens*, 198 Wn. App. 464, 477, 394 P.3d 1018 (2017). The Court of Appeals' decision permitting Maytown to introduce evidence of attorney fees as damages correctly implemented general tort principles, consistent with these cases and this Court's decision in *Pleas*.

## V. CONCLUSION

The jury decided a tort case, and the County does not challenge what the jury did. The Legislature adopted LUPA to keep land use appeals separate from damages actions. Land use appeals, which under LUPA are decided in an expedited process without benefit of discovery, by judges applying a deferential standard of review, are not the liability phases of damages actions. The County's arguments make a hash of both land use law and tort law – which both the Legislature and this Court have kept distinct – and should be rejected. Maytown respectfully requests that this Court affirm the rulings of the Court of Appeals.

RESPECTFULLY SUBMITTED this 21st day of November, 2017.

*s/Patrick J. Schneider*

*s/Steven J. Gillespie*

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**CERTIFICATE OF SERVICE**

I hereby certify that, on Tuesday, November 21, 2017, I caused to be served, in the manner indicated below, a true and correct copy of the foregoing document on each of the following:

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DATED Tuesday, November 21, 2017, at Seattle, Washington

s/Suzanne Nelson  
Suzanne Nelson

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/21/2017 4:17 PM  
BY SUSAN L. CARLSON  
CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

MAYTOWN SAND AND  
GRAVEL, LLC and PORT OF  
TACOMA, a Washington special  
purpose district,

Plaintiffs/Respondents,

v.

THURSTON COUNTY, a political  
subdivision of Washington State,

Defendant/Petitioner.

No. 94452-1

DECLARATION OF  
ANGELA SEYBOLD

I, Angela Seybold, do hereby declare and affirm as follows:

1. I am over the age of eighteen and am competent to testify in this matter. I have personal knowledge of the facts alleged herein.

2. I am an employee of the law firm of Foster Pepper PLLC. I specialize in electronic document production, and have more than thirty years of experience in the field.

3. At the request of Steve Gillespie, an attorney with Foster Pepper, I and two other members of Foster Pepper's document production department listened to and transcribed the recording of the September 6, 2015, oral argument before Division II of the Court of Appeals, available online at <http://www.courts.wa.gov/content/OralArgAudio/a02/20160909/468956%20-20Maytown%20Sand%20and%20Gravel%20v%20Thurston%20County.mp3>.

DECLARATION OF ANGELA SEYBOLD - 1

**ORIGINAL**

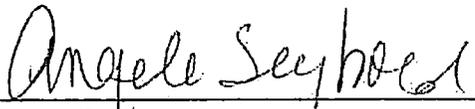
filed via  
**PORTAL**

4. A true and correct copy of the transcript is attached as Exhibit A to this Declaration.

5. To the best of my knowledge, Exhibit A is an accurate transcript of the recording.

6. To assist the reader in cross-referencing passages from the transcript and the recording referenced above in ¶ 3, Exhibit A notes each three minutes of recording. Some variation between the time stamps and the recording is possible, depending on the particular media player in use.

SIGNED at Seattle, Washington, this 21st day of November, 2017.

  
\_\_\_\_\_  
Angela Seybold

# Exhibit A

**MAYTOWN SAND AND GRAVEL v. THURSTON COUNTY  
 ORAL ARGUMENT AT DIV. 2 of the COURT OF APPEALS  
 SEPTEMBER 6, 2015**

SPEAKER	TRANSCRIPT
<b>TIME START</b>	<b>Beginning of Recording.</b>
Mike King:	I have some extracts of the record that I would like to have handed out. And also there are some copies of some charts. I have provided these materials for opposing counsel. I don't think there's a concern about them but if there is...
Judge Maxa:	Any objection with us looking at these?
Attorney:	I haven't had time to review them Your Honor. I don't know.
Judge Maxa:	Alright. Go ahead and hand them out there.
Mike King:	And I've tried to reserve ten. We'll see.
Judge Maxa:	Okay.
Mike King:	<p>May it please the court. My name's Michael King. I'm with Carney Badley Spellman. And with me at counsel table is Jason Anderson, also with the Carney Badley firm, and Mark Johnson from the Karr Tuttle firm, and we're here on behalf of the defendant in _____, Thurston County.</p> <p>This appeal centers on two threshold questions of law. On the state law side, the threshold question is whether the principal of LUPA exclusivity, derived from the Langley Petition Act, bars the plaintiff's state law claims. On the federal law side, the issue is whether Maytown § 1983 claim for a deprivation of substantive due process is barred because Maytown did not have a constitutionally protected property interest in the procedure Maytown wanted for dealing with proposed amendments to conditions to the special use permit. I will briefly add that because these issues are threshold questions regarding whether these claims should have been submitted to the jury at all, the law of the case doctrine has no application. The County repeatedly raised these threshold questions, including by a motion to dismiss during trial, the <i>Kim</i> decision of Division I, which we submitted in our second statement of additional authorities is dispositive.</p> <p>I will address first the issue of LUPA exclusivity and then the issue of constitutionally protected interest. Now to place the LUPA exclusivity issue in context, I'd like to take a few moments to identify what we believe our the handful of key facts which should not be in dispute that drive the resolution of the LUPA exclusivity issue. That issue specifically concerns LUPA's strict exhaustion of administrative remedies requirement as elucidated by the supreme court's December 2014 unanimous decision</p>

SPEAKER	TRANSCRIPT
	<p data-bbox="483 258 894 289">in <i>Durland v. San Juan County</i>.</p> <p data-bbox="483 331 1453 842">Now we start here in 2005. The County issues a special use permit for mining. They condition it among other things on ground water testing for water levels, water temperature, and water quality. This is for a site with a history of extensive contamination for historical industrial uses. We move them to February 2010. The Port saying we won't start mining. The County finds out they haven't done water quality tests. So the County staff orders that water quality tests have to be done to bring the permit into compliance before mining can begin. Well then in March 2010, the Port joined by Maytown respond with an appeal in which the Port tells the County that these water quality tests we just ordered mean mining can't start until November 2010 at the earliest. Not an ideal time to commence a mining operation in the Pacific Northwest [TIME STAMP 3:00] they observe. And more than requiring these tests is exposing the County to damages for huge economic losses. Quote unquote.</p> <p data-bbox="483 884 1453 1430">Well then in April 2010 the baton's passed to Maytown. Maytown is now the permittee. Mr. John Hempelmann steps up on the scene and he sends a request for what he describes as a series of minor amendments. The central one of which requests that the County staff itself approve an amendment that would cancel the water quality test the staff had just ordered. Claiming the tests weren't required for compliance with the conditions, which brings us to June 2010 when the County staff refused to cancel the water quality test it had just ordered and instead sent the issue to the hearing examiner to resolve. There was a hearing in front of the hearing examiner in December 2010. It was continued March 2011. And before the hearing examiner the Port and Maytown challenged the need for the water quality tests and the County staff's decision to send the issue to the hearing examiner pretending the staff gave into political pressure. That is exactly the case they would later make to the jury. No need for the tests. Wrong process. Staff gets into political pressure.</p> <p data-bbox="483 1472 1453 1829">Well on April 8, 2011, the hearing examiner decides: (1) the water quality tests were necessary, and (2) the County staff properly exercised their discretion to send the issue to the hearing examiner. And John Hempelmann admitted at trial that the hearing examiner decisions were adverse to the Port and Maytown. And at trial, Mr. Ellingson, who testified in front of the hearing examiner, testified again, RP 962 and 963, these water quality tests weren't necessary. Finally on April 25, 2011, the Port and Maytown, after the lawyers huddle, decide not to appeal these decisions to avoid as Mr. Hempelmann told his clients "making our damage case more difficult."</p> <p data-bbox="483 1871 1453 1902">Now I said these should not be disputed, but on appeal the respondents are</p>

SPEAKER	TRANSCRIPT
	<p>disputing a couple of these facts, and we need to clear up the record on those two. First, they assert... By the way, you have these charts all in front of you. Even with the additional testing ordered by the County staff in February 2010, the mining could have started by September. That's in the response brief at pages 72 and 73 citing Exhibit 63. Well you got Exhibit 63 here behind Tab 3. It doesn't say any such thing at all. And in fact, this is contrary to the record they made below. Exhibit 386. This is a picture of the relevant page from the Port's deal and it's clear that the Port was calling the County, and the jury was told this too, it would be November before the permittee was cleared to mine. Okay, enough of that revisionist history. The second newly minted assertion on appeal is that Maytown the Port prevailed on everything before the hearing examiner. That's the Response Brief on pages 25 and 53, each time citing and quoting John Hempelmann's trial testimony. Well he did say, "We won. We don't appeal when we win." But it didn't stop there. [TIME STAMP 6:00] Mr. Johnson, in cross-examination, says "We'll get back to that." And he does. You can see the green text. You can read the green text. He admitted they lost these issues. Enough of the revisionist history. Now with these facts established, let's turn to the law. I would like to talk first about the statutes standing alone...</p>
Judge Maxa:	Okay. Can I ask you...
Mike King:	Absolutely.
Judge Maxa:	I want to ask you about that April 8, 2011 order and that March hearing.
Mike King:	Yes.
Judge Maxa:	The issues as I understand it before the hearing examiner was whether to approve these amendments. Isn't that one of the issues that the hearing examiner was dealing with?
Mike King:	The hearing examiner was dealing specifically by March 2011 with whether the hearing examiner was going to approve some amendments including a compromise that resolved the water quality issue between the parties. But the hearing examiner was also still being asked by the Port and Maytown to hold that those tests weren't necessary in the first place.
Judge Maxa:	That, that was the argument, right? That they argue an alternative: (1) we don't need to be in front of you at all; (2) even if we're stuck in front of you then you should approve the amendment.
Mike King:	No. It was different from that. It was we needed a determination that this process was inappropriate. This matter should have been handled by a minor amendment. They should have just done away with these tests. They shouldn't have put us through this process and it all happened because of political pressure. If you look at the Port and Maytown briefing for the hearing examiner, the extracts are behind Tab 9, it is very

SPEAKER	TRANSCRIPT
	<p>clear they were asking for a determination on that issue. They were also asking for an approval of the compromise plan which was being opposed, groundwater monitoring plan, which was being opposed by the environmentalists who are participating in the hearing. There was also a separate SEPA issue regarding whether an action had been taken which triggered an additional level of SEPA review. But ...</p>
Judge Maxa:	<p>But they clearly did win on it?</p>
Mike King:	<p>Oh, they clearly did win on that. Now, they did not however, win on whether the water quality tests were necessary or whether the County staff properly exercised its discretion to send that issue to the hearing examiner. So let's look at LUPA standing alone as a statute briefly, as if we have no cases and we do the <i>Department of Ecology v. Campbell &amp; Gwinn</i> analysis. And we start with the declared purpose. LUPA is designed to get rid of messes like <i>Pleas v. Seattle</i> and <i>Westmark v. Burien</i>. So it's going to establish uniform expedited appeal procedures and uniform criteria for reviewing such decisions to provide consistent, predictable, and timely judicial review.</p> <p>How's he going to do that? Two ways. One, it's got an exclusivity provision. The LUPA petition process is going to be the exclusive means of judicial review of land use decisions. I know. There's an exception clause. I'll come back to that in a moment. How is that going to be enforced by standing requirement? You can't bring a LUPA petition unless you have standing statutorily defined. And the fourth part [TIME STAMP 9:00] of the standing definition is the petitioner has to have exhausted his or her administrative remedies to the extent required by law. Now let me go back to this exception clause. Because their argument, and this is their only argument based on the statutory language, their argument is "Oh well, that excepts out," suits for damages. So if we want to sue for damages and challenge a LUPA action as being proper in a damages suit, we can ignore the LUPA process... excuse me ... a land use decision is proper in a damages suit, we can ignore the LUPA process altogether. Well, that was Justice Sanders' position in the <i>James</i> case. He read .030 in isolation. And it didn't seem to find favor with his colleagues. But in any event, it shouldn't have found favor. Because that is reading that section in isolation, not in context. If you take that approach, you are going to completely frustrate the declared purpose because you're going to be allowing juries to be making calls years after the fact about whether a land use decision was correct. How does that...</p>
Judge Melnick:	<p>So, so let me interrupt and ask you a question.</p>
Mike King:	<p>Yes, Your Honor.</p>
Judge Melnick:	<p>So I'm looking at what you've put up there previously, the green high...</p>

SPEAKER	TRANSCRIPT
	the green highlight, and explain to me how the answer that it was improper for the County to place those amendments into the hearing examiner's process is a land use decision? It's a process, not a land use decision, correct?
Mike King:	Yes. The very first clause of the statute, I believe, 130 talking about the body or officer that made the land use decision engaged in unlawful procedure or failed to follow the prescribed process. So the decision and they said this was a decision, they've never disputed this was a land use decision...
Judge Melnick:	Let me rephrase my question. Maybe we're not connecting. Is the process employed a land use decision?
Mike King:	The choice of the process is a land use decision. So first, there's the land use decision to order the additional tests. Second, there is the land use decision not to amend that away by the requested minor amendment, but instead to send that to the hearing examiner. That is a land use decision about choice of process. And...
Judge Melnick:	So you're saying they could have appealed that it should've never had gone to the ... strike that.... That the administrative remedy was not exhausted because they could've taken it up and said it should have never gone to the hearing officer?
Mike King:	Not that it shouldn't... Yes. And they did. They took it to the first level. They appealed the decision, the rejection of the minor amendment, and instead the decision by the staff, Mr. Kain, in June 2010, to send the issue of their request to get rid of these tests. Remember they're requesting this minor amendment is to get rid of these tests just ordered, and so they appealed, they're forced to take that up to the hearing examiner. They're sent that route. They want the staff to make the decision. The only decision they want out of the staff [TIME STAMP 12:00] is for the staff to say yes to the minor amendment and get rid of the tests. So they are up in front of the hearing examiner and in front of the hearing examiner they ask the hearing examiner to rule that this was unnecessary. The groundwater tests we'd already done were fine. We are going along with the additional tests now but we shouldn't have been forced to do these. It wasn't necessary. And second, the staff should have made that call. They shouldn't have sent this to you. This is an improper procedure. And the hearing examiner says, "No, they were necessary. The staff made the right environmental call." And two, the staff properly exercised its discretion.
Judge Melnick:	So again, now the question... I understand all that.
Mike King:	Okay.
Judge Melnick:	My question is...is the use of the process a land use decision? Or is it the actual land use decision is the substantive ruling on the groundwater

SPEAKER	TRANSCRIPT
	6(a)/6(c)?
Mike King:	You can have a decision that involves choosing a process, and then as a result of that choice you can get another land use decision. Streaming through the process is the consequence that flows from these decisions. They wanted a minor amendment to get rid of these tests so they could start mining in the summer of 2010 and they didn't get that minor amendment. There're sent to the hearing examiner. Moreover, in front of the hearing examiner, they know that if they win the battle and the hearing examiner says these tests shouldn't have been ordered, then the environmentalists can appeal and while that appeal is pending, they can't start mining. When they get in front of the hearing examiner they ask for those two determinations and they lose. At that point they short-circuit the administrative process.
Judge Maxa:	But, but didn't they win? And maybe this is part of Judge Melnick's question, they won on the approval of the amendments because that's why they were there right? They...they weren't appealing the staff's decision that this was a major decision.
Mike King:	No, they were appealing that. They were absolutely appealing that. Their briefs reflect that. They wanted a decision from the hearing examiner, ...
Judge Maxa:	Did they file an appeal?
Mike King:	...that they shouldn't have been sent there in the first place.
Judge Maxa:	Did they file an appeal to the hearing examiner or were they sent to the hearing examiner by staff?
Mike King:	They were sent to the hearing examiner by staff. Stuck there in front of the hearing examiner. They asked the hearing examiner to rule that they shouldn't have been sent to the hearing examiner in the first place. They lost that. That's an administrative decision.
Judge Maxa:	So, so let me give you a hypothetical. I want to build an apartment complex. I think its covered by zoning. Staff says "oh we have to send that to the hearing examiner." So we go to the hearing examiner and I say "I shouldn't even be here"..
Mike King:	Right.
Judge Maxa:	...but while we're here, I want you to approve my apartment complex and the hearing examiner says "okay, you can build your apartment complex."
Mike King:	But also says...
Judge Maxa:	Do I have to... do I have to appeal that?
Mike King:	No, but if you want to make a damages case based on the notion that you were delayed by an improper decision, you have to appeal to the next level that's part of the hearing examiner decision, because it is adverse to you.

SPEAKER	TRANSCRIPT
	And if you don't, if you bail...
Judge Maxa:	The... the reasoning isn't adverse but is the decision adverse [TIME STAMP 15:00]...
Mike King:	Yes that is.
Judge Maxa:	That's...that's the question.
Mike King:	Yes, yes because it is prejudicial. Because if you had prevailed, then you would be able to use that determination as collateral estoppel and res judicata in the follow on damages action, and the jury would be so instructed. So yes, you have standing to appeal. You have an adverse decision, and you should appeal because the exhaustion of remedies provision of LUPA, the purpose of that exhaustion of a remedies provision is to take these things up the chain so if somebody later wants to base a damages claim, an injunction claim, a claim for compensation on a claim that the land use decision was improper, we want that land use decision evaluated by this expert process. We want hearing examiners to hear things and then we want it to go up the chain. If you're done at the hearing examiner level, we want a LUPA petition filed so a judge who hears these things routinely and is versed in dealing with them can evaluate that on a fully developed administrative record. If you lose at that point, you better find some other theory for your damages case. If you win, however, you will have the issue established for you in your damages case. And this, I think, if I return to the cases, is exactly what the Washington Supreme Court was saying in <i>Durland</i> . They said the exhaustion of administrative remedies requirement is strict. There are no equitable exceptions. And it is furthering LUPA's stated purpose of promoting finality, predictability and efficiency. So yes, you need to take this up the chain.
Judge Maxa:	Let me ask you...
Mike King:	Yes.
Judge Maxa:	Maybe this is a practical rather than a legal question. If they had appealed that, from what you're saying, the appeal would look something like this, and correct me if I'm wrong, and feel free to interrupt me. We appeal that this should not have gone to the process, but we want you to keep the other remedy the same that we got the amendment.
Mike King:	No. The appeal would be only those two determinations. They would ask the Board of County Commissioners to overturn those two determinations.
Judge Maxa:	But they wanted the amendments so they don't want to ...
Mike King:	They are not asking for ... The amendment is the compromise. They are no longer asking to get an amendment that says "we don't have to do any more than water temperature and water level testing." They've given that

SPEAKER	TRANSCRIPT
	<p>away in the compromise entered into in January 2011. So they're gonna be doing not 172 substances worth of tests, but 160 every year, year in and year out. But they still want that determination that they shouldn't have been forced to this process at all. That those tests shouldn't have been ordered back in February 2010; that they should have been done away with my minor amendment by the staff and that's what they want. And what we're saying is that's right. You want that determination. They want it for their damages case. I mean, it's ... it's right there in that statement in the email. They're concerned about their damages case. And of course they're concerned about [TIME STAMP 18:00] if we pursue this we can make our damages case more difficult because they know that if they take this issue up the chain to the board and to the Superior Court and they are presenting this narrow administrative question of did the County staff, was it required as a matter of law, to abrogate the test that it had just ordered. Did the hearing examiner err as a matter of law based on the record before it in finding that those tests were necessary and finding the County staff properly exercised its discretion? What do you think the likely outcome of that is going to be in the Superior Court? So they aborted the administrative process. They frustrated LUPA's purpose. Now...</p>
Judge Maxa:	<p>Let me ask you about the specific language of the order. The court didn't say as a matter of law it had to go to the hear ... excuse me... The hearing examiner didn't say as a matter of law, it had to be sent to the hearing examiner...</p>
Mike King:	<p>Correct.</p>
Judge Maxa:	<p>They said staff has discretion.</p>
Mike King:	<p>And it properly exercised that discretion.</p>
Judge Maxa:	<p>Did it say that or not?</p>
Mike King:	<p>It did say that. It said that the staff properly exercised its discretion. And I am deferring to that exercise of discretion. It had the authority to choose, number 1, that legal determination. It was not error or just not to, you know, say "okay, fine, here you can your minor amendment." And the staff properly exercised its discretion and that's informed, I think, by the other finding that these tests were necessary in the first place, the test the Port hadn't done.</p>
Judge Maxa:	<p>So then, looking specifically towards this interference, for instance, did the hearing examiner hold that this discretionary decision was done for improper means and/or improper purpose?</p>
Mike King:	<p>The hearing examiner was asked to hold that it was... that the decision was made because of improper political pressure. How can the hearing examiner say that it was a proper exercise of discretion if it was done for</p>

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	<p>improper political purposes. And that issue was in front of the hearing examiner. That was their whole theory. Their briefs reveal it. And yet the hearing examiner said this was a proper exercise of discretion.</p> <p>Now, what are their contentions on the law side? Well on the case law side, they suggest well, there is no exclusivity requirement unless you could have gotten relief in a LUPA proceeding along the lines of a damage award. And ... and that's simply not what the cases say. The Mercer Island case is very clear. You're obligated, if you want to base your damages case on a challenge to the correctness of a decision to exhaust LUPA. What then do they say? Well, we've already talked about their argument from the statutory provision, the exception at 030. We've also talked about the claim that 2010 wasn't material because we could have begun mining in September 2010 anyway even with these tests. They also claimed that they won everything in front of the hearing examiner. That's based on their representations about John Hempelmann testimony. We've talked about that. They also claimed that the respondents could not have appealed from the hearing examiner [TIME STAMP 21:00] because everything was under SEPA. Well, you know, the problem with that argument is two-fold. It... it misreads the hearing examiner's ruling. There's a roman numeral heading that says "SEPA Appeals" but it's clear from the analysis that there are two appeals. There's the amendments appeal and within the amendment appeal there's the request for the ruling on those two issues. And then there is the SEPA appeal. They are distinct. And the motion for reconsideration and the order on the motion for reconsideration makes that very clear and I've given you a copy of that behind Tab 13. But, this is a newly minted argument on appeal and those are dangerous. Because if they're right that everything was under SEPA, well then under the Thurston County Code, the provision the hearing examiner quotes, they were done. This was the final decision and they should have filed a LUPA petition. And of course, they didn't. They shouldn't have been debating it, April 11<sup>th</sup>, whether to appeal, they should have been working on their LUPA petition. Finally they attempted to shift the focus and suggest this case is really about 2010 about 2011 and not about 2011. Excuse me, it's really about November 2011 and the letter to proceed, which they say is an improper thing, and the conditions in the letter to proceed which they say are improper things, and they suggest now that's what's really killed off our venture. Well, in fact, if you read Mr. Cortner's testimony, it's clear. He's focusing. He's their damages person, their transactional facts person and he is focusing on 2010. He's talking about how we were short on cash and we needed to get jobs and we could've gotten jobs in 2010 and that would have filled the cash box back up and we would have made our first payment. But even if you credit this notion that there's sort of multiple causation going on here, November 2011, the letter to proceed with these bad conditions, is a decision. They</p>

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	<p>didn't appeal it at all. They didn't go to the hearing examiner at all. They were already in front of Judge Brose. They could have asked him, you know, "please under LUPA," gone in, they are already in front of him and said "stay that traditional language," and we're gonna go to the hearing examiner, to the Board and to you and ask you to set it aside. They disregarded LUPA obligations at the front end. They disregarded LUPA obligations at the back end. I think this must end their state law claims case and that ends the Port's judgment. Briefly on § 1983... How much time do I have left?</p>
Clerk:	<p>You have a little more than 2 minutes.</p>
Mike King:	<p>Okay. Briefly on § 1983, all I want to emphasize here is there is no constitutionally protected property interest in procedure. First, this is a discretionary call, and <i>Durland</i> makes clear you don't have a constitutionally protected interest in discretionary calls. Second, there is no constitutionally protected property interest in procedure generally. And I think the statement of additional authorities, the cases that we submitted, the <i>Carlyle</i> case and the <i>Robins</i> case make that clear. And I'll reserve the balance of my time. Thank you. [TIME STAMP 23:54]</p>
<b>TIME START</b>	<p><b>50:52</b></p>
Mike King:	<p>I'll start with § 1983, you're told that their property interest is in the right to use as permitted. But the permit is subject to conditions and one of the conditions was, do these tests, which they didn't like. So they asked for an amendment. They wanted that amendment done a certain way, by a certain process. That's the point, that's the issue in the case. You don't have a constitutionally protected interest in a particular choice of process. That deal was made ...</p>
Judge Melnick:	<p>But it didn't it delay the use of the property for a period of time?</p>
Mike King:	<p>It doesn't matter. That would be causation. As far as § 1983 is concern, you've got to identify the protected property interest, and the protected property interest here is in the procedure. Because they don't have a right to use the things contrary to the conditions and that's what they got into trouble with. Now, we have a very important concession, and that is the concession that if a permit was denied, first level decision, and you didn't do anything about that and then you tried to sue for damages, oh, that would be a LUPA decision. You had to go through the LUPA process and you'd be barred from saying you get damages because it was wrong. But that's their letter to proceed theory. Before you they told you that the heart of their case was really what happened in November 2011 when this wrongful letter to proceed with the wrongful conditions was issued. In fact, in answer to your question about the damages, Your Honor, you were told the problem here was the undermining of the value of the permit to the process we didn't have any credibility in the market. That's the</p>

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	November 2011 causation theory. But they just admitted that became a land use decision where they didn't appeal it. And therefore, they had to file a LUPA petition and they did not.
Judge Melnick:	So let me ask you... One of the points was that there's all this other evidence. Even if you had to appeal this April 8, 2011 order, there's all this other evidence. What's your response to that?
Mike King:	The other evidence isn't material to the source of their damages case. The source of their damages case, and let me just wrap up here with this, the source of the damages case is now you're told November 2011 which is a decision they didn't appeal at all which became final and they didn't file a LUPA petition, and the hearing examiner's determinations which upheld what the County staff did... all you have to do is read the record on that; read Exhibit 446. The exercise of discretion was recognized as proper and Mr. Ellingson's testimony at trial showing that he's challenging the need for the test, which the hearing examiner said were necessary. And in both of those cases you've got land use decisions, an administrative process that is short circuited at the one end, when they bail and don't complete it. And an administrative process under their big new theory on appeal that November 2011 is the critical point where they didn't even start at all. They got a land use decision by their own definition and they didn't seek relief and yet they base their case on it. That takes out the state law claims. All of the testimony about the wrongdoing makes the question of whether [TIME STAMP 53:52] the jury should have heard these claims at all when the theory was that this wrongdoing of pressure produce wrongful land use decisions. And they didn't go through the LUPA process to test out that theory first as the statute requires.
Judge Maxa:	Thank you. One minute.
Judge Worswick:	Is there anything to rebut?
Judge Maxa:	Oh wait, actually that's a good point. There's really isn't anything for you to rebut because you didn't mention anything about attorney fees.
Steve Gillespie:	He undermines my case for attorney's fees though if he wins on the underlying argument that he just gave.
Judge Maxa:	No.
Room:	[laughter]
Judge Worswick:	We're not buying it counsel
Judge Maxa:	I don't think so. Sorry about that. Mr. King preempted your brilliant minute long rebuttal. Thank you counsel very much.
<b>TAPE END</b>	<b>End of Recording</b>

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November 21, 2017 - 4:17 PM

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**Appellate Court Case Title:** Maytown Sand and Gravel, LLC v. Thurston County, et al.  
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