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No. 94452-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 46895-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC and
PORT OF TACOMA,

Plaintiffs/Respondents,

v.

THURSTON COUNTY,

Defendant/Appellant

AMICUS CURIAE BRIEF OF MASTER BUILDERS OF KING AND SNOHOMISH COUNTIES

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I. INTRODUCTION

This Amicus Curiae Brief is filed by the Master Builders of King and Snohomish Counties (the "MBA") in support of Respondents Maytown Sand and Gravel, LLC's and Port of Tacoma's ("Maytown") request for this Court to affirm the Court of Appeals decision.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The MBA is a trade organization comprised of professional home builders, architects, remodelers, suppliers, manufacturers and sales and marketing professionals doing business throughout King and Snohomish Counties. The MBA has become the largest local home builders' association in the United States primarily because of its active approach in addressing the region's housing needs through advocacy. With nearly 2900 member companies comprising interests in all facets of land development and housing construction, the MBA is the authoritative voice on housing issues in the greater Seattle metropolitan area. The MBA strives to be the most trusted and respected source for housing.

This case raises several issues critical to the MBA's members in order to protect their ability to work under validly-issued land use permits in a manner that protects them from unlawful delays and improper conduct. It is strongly in the MBA membership interest to not be burdened with unnecessary procedural hurdles when access to the judicial

system is necessary to stop such improper conduct. However, Thurston County (the "County") asks this Court to do just the reverse, to strip land use decisions of their finality and impose procedural hurdles to block parties such as MBA members from rightfully accessing courts when a jurisdiction's unlawful conduct or delays result in actionable damages. The County would have this Court abrogate legislative and judicial safeguards that ensure municipalities respect the validity of permits, regardless of political regimes. For these reasons, we ask that the Court uphold the Court of Appeals and Superior Court decisions.

III. STATEMENT OF THE CASE

The MBA adopts the Background Facts and Procedural History of the Court of Appeals Opinion,[1] and Respondent/Cross Appellants' Joint Response and Opening Brief for the Court of Appeals proceeding.

IV. ARGUMENT

The County asks this Court to change the law and require, for the first time, that a damaged property owner or permitee such as Maytown first bring a Land Use Petition under chapter 36.70C RCW as a prerequisite to any claim for tort damages under any circumstances. The County would have this Court make a Land Use Petition a prerequisite

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[1] *Maytown Sand & Gravel LLC v. Thurston Cty.*, 198 Wn. App. 560, 567-76, 395 P.3d 149 (2017), review granted, 404 P.3d 480 (Wash. 2017).

even where the tort claim is based on the County's interference with Maytown's ability to work under the land use decision issued years previously.[2]

Maytown's claims are not based on challenge to the merits of a land use decision, but rather on the County's interference with Maytown's attempt to work under the previously issued land use decision, the Special Use Permit ("SUP"). That SUP could not have been the subject of a Land Use Petition by Maytown because it was properly issued in 2006 and Maytown had no legal objection to it. And likewise, Maytown acquiesced to the subsequent amendments, which Maytown concluded were not adverse to its interests. As a result, the County has never issued a land use decision that is substantively 'adverse' to Maytown's interests. Instead, it was the County's ongoing actions improperly obstructing Maytown's *use* of the land use decisions that resulted in damage. The County's obstruction amounted to tortious interference with a business expectancy and violated Maytown's constitutional right to substantive due process which, the jury found, caused Maytown to suffer $12 million in damages.

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[2] In its Supplemental Brief, the County appears to concede that its exhaustion of remedies argument, i.e. that LUPA should be a prerequisite to damages claims, cannot bar Maytown's substantive due process claim and award of damages under 42 U.S.C. § 1983. For the reasons noted below and in Maytown's Supplemental Brief, the County's concession is correct. There is no requirement to exhaust state-level remedies before bringing substantive due process claim under § 1983.

A. The County's Attempt to Make Tort Claims Contingent Upon Bringing a LUPA Action Results in Absurd Consequences and would be Impossible to Implement in Practice.

The Washington State Legislature enacted the Land Use Petition Act ("LUPA") to replace the cumbersome and confusing writ of certiorari procedure, creating an exclusive avenue for judicial review of the merits of land use decisions.[3] LUPA provides an expedited procedure for appeals of land use decisions, "to provide consistent, predictable, and timely judicial review"[4] in which the court is limited to determining whether "the hearing examiner made a mistake of law," whether "there was insufficient evidence to support the decision" of the hearing examiner, or if the decision was "clearly erroneous."[5] This narrow scope of review based on an administrative record means there is no opportunity for discovery that would be necessary to determine damages, and no right to jury trial.

Contrary to the County's arguments, a claim for monetary damages under any theory of law, whether statutory, constitutional or common, is legally divorced from LUPA by the Washington State Legislature's express declaration. As a corollary to the legislature's intent that LUPA be the "exclusive means of judicial review of land use decisions,"[6] the

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[3] RCW 36.70C.010.
[4] *Id.*
[5] *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001)
[6] RCW 36.70C.030.

legislature recognized that there are claims for which LUPA would be inappropriate.[7] One of those claims is claims for damages:

> [T]his chapter does not apply to:
> * * *
> (c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.[8]

LUPA goes further to separate monetary damages claims by declaring that a grant of relief from an unlawful land use decision under LUPA "may not be deemed to establish liability for monetary damages or compensation."[9] In these ways, LUPA clearly acknowledges that there may be damage claims against a municipality separate and apart from an adverse land use decision.

The County's arguments not only conflict with this legislative direction. Instead, the County would have this Court force a property owner to bring a LUPA action as a prerequisite to any damages claim that might relate, in any form or fashion, to any aspect of a land use permitting

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[7] *Cf., e.g.*, *Berst v. Snohomish County*, 114 Wn. App. 245, 253-54, 57 P.3d 273 (2002) (holding LUPA inapplicable to challenge to site-specific moratorium issued under Forest Practices Act because it did not meet definition of "land use decision").
[8] *Id.*
[9] RCW 36.70C.130(3).

processes, even if the property owner was not adversely affected by the land use decision itself.

The County's absurd reading of LUPA would have far-reaching consequences as discussed below. First, it discourages the day-to-day cooperation and collaboration that are essential to permitting processes, and which may continue long after a permit (land use decision) is issued. Second, it would irrationally require a property owner to appeal a land use decision that is not adverse.[10] Third, contrary to LUPA's exclusion of damages claims, it would tie tort claims resulting from the jurisdictions' malfeasance to the LUPA process, giving those claims expedited treatment as compared to other tort claims, while providing little or no opportunity for discovery, inadequate time for a civil trial, and would eliminate the right to jury trial for damage claims that arise from a local government's misconduct if it happens to arise from an action in the area of land use.

1. The County's Reading Would Discourage Collaboration with Jurisdictions and Mitigation of Damages.

Negotiations and collaboration between jurisdictions and property owners are a daily occurrence and a necessary part of the permitting

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[10] We recognize that not all permittees, i.e. recipients of a permit or approval, are always land owners. For example, they may be tenants, or have some other property interest. However, most commonly the property owner is the recipient of the permit or approval, i.e. the land use decision. For purposes of brevity we refer to any recipient of a permit as a 'land owner.'

process.[11] Those negotiations may streamline the process; the give and take referenced by this Court in *Friends of the Law* helps to arrive at land development that balances a broad range of interests. Especially in larger projects, there are many variables that are the subject of negotiation. It is often in a property owner's best interest to compromise with, or even acquiesce to unreasonable or unlawful demands made by the permitting jurisdiction as Maytown did. These negotiations, compromises and concessions take place not only while the permit application is being processed, but also after the permit is issued in order to effectively and efficiently use that permit or approval. Unquestionably, time is a critical factor in land development. This is especially true in instances when a jurisdiction is engaging in a pattern of improperly delaying or obstructing implementation of a permit. In such cases, bringing an action against a jurisdiction that is wrongfully delaying the process will only further the delay and escalate the damages.

In these instances, it may be in the property owner's best interest to accede to the jurisdiction's demands in an effort to move forward and mitigate their damages, as it was in the instant case with the amendments

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[11] *Knight v. City of Yelm*, 173 Wn.2d 325, 344, 267 P.3d 973 (2011) (the land development process "anticipates negotiations and modifications..."); *Friends of the Law v. King County*, 123 Wn.2d 518, 528, 869 P.2d 1056 (1994) (the land development approval process involves modifications resulting from "give and take").

process the County required Maytown to follow. And conversely, if the property owner does not mitigate its damages through acceding to demands or exactions, a city or county could later argue to a court that the property owner had the ability to proceed under the permit in a timely fashion but did not mitigate its damages in order to do so.

The County's arguments would have the irrational effect of forcing property owners to stop the permitting process and challenge improper demands in court immediately, rather than negotiate or comply under protest. The County's arguments create more contention and would increase litigation by forcing parties to bring legal action to preserve potential damage claims, even when they do not otherwise contest the substance of the land use claim, at a time when they could be putting their collective energies into negotiating resolutions and mitigating damages. Forcing a property owner to escalate the battle, often before it is clear whether the negotiations will obviate the need for litigation at all, will lead to more delays, greater impact on the project, greater damages, and more litigation. Instead, allowing the parties to work together to come to some sort of solution to allow the project to move forward will reduce both damages and litigation. The current statutory and common law scheme fosters exactly this environment.

In this case, Maytown sought to resolve issues with the County in an effort to move forward and save its business, holding off on litigation to see if it could work through the issues with the County. Maytown was trying to chart a course through an obstacle course in hopes of beginning work under the SUP as soon as possible. Maytown agreed to the amendments to the SUP, even though it did not believe that the County had the authority to require the amendments. This was an effort to mitigate its damages and hopefully avoid protracted litigation. Yet the County would punish Maytown's attempt to mitigate its damages by arguing that Maytown's decision to acquiesce to merits of the land use decision *shields* the County from liability for its other tortious conduct. The County's view is that Maytown should only have had the options of functionally abandoning the mine and immediately suing, or abandoning their damages action and try to mine immediately. The County believes Maytown should not have had the ability to mitigate its damages by mining as quickly as it could and separately addressing out damages under tort standards and after conducting discovery under the Civil Rules.

The County's argument would have required Maytown to appeal the SUP amendments even though Maytown would have had no legal issues on the merits to argue in a Land Use Petition. To initiate a LUPA action, one must set forth "A separate and concise statement of each error

alleged to have been committed"[12] and a "concise statement of facts upon which the petitioner relies to sustain the statement of error."[13] Maytown could not have brought a Land Use Petition against either the original SUP or the amendments, *because there was no adverse land use determination from which to appeal.* Maytown acceded to the County's demands for the amendments in an effort to begin mining as soon as possible and mitigate its damages. As a result, Maytown had no statement of error to set forth in a LUPA petition, nor could it provide a statement of facts that would sustain a statement of error. Any such LUPA petition could have been dismissed for failure to state a claim under CR 12(b)(6).

The County's reading of LUPA would eviscerate RCW 36.70C.030(1)(c): it would force a property owner to bring a claim over a decision to which it had acceded merely to preserve its rights to claim damages related to the jurisdiction's *actions* even though those actions were not directly related to or incorporated in the jurisdiction's land use *decision.* The goal of LUPA is to provide expedited appeal procedures and timely judicial review to assure that land use decisions are consistent with law and supported by the evidence in the administrative record. Yet requiring Maytown and similarly situated parties to file a

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[12] RCW 36.70C.070(7).
[13] RCW 36.70C.070(8).

LUPA action would have the opposite effect: it would force such parties to appeal unobjectionable decisions; add additional, unnecessary court proceedings; discourage resolution of issues; and further add to the time and cost of their project. The Court should not disregard the statute's plain language and purpose in order to penalize efforts to resolve or avoid disputes by abrogating an applicant's ability to later bring a damages claim under common tort law, Chapter 64.40 RCW or §1983.

2. A Land Use Petition Cannot Logically be a Prerequisite to a Damages Claim.

Not every dispute over a permit involves a final land use decision which can be appealed under LUPA. Certainly some disputes involve a jurisdiction's wrongful decision to deny or condition a permit.[14] In such a case, an applicant's options are clear: live with it or bring a LUPA action.[15] But often there is no adverse land use decision from which to appeal. The jurisdiction may be improperly delaying processing an application.[16] Or, as was the case with Maytown, a jurisdiction may be wrongfully interfering with implementation of a previously issued and valid permit.[17]

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[14] *See e.g. Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000); *Chelan County v. Nykreim*, 146 Wn.2d 904, 933, 52 P.3d 1 (2002).
[15] *Nykreim*, 146 Wn.2d 904, 932-933.
[16] *See e.g. Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 352 P.3d 807 (2015)
[17] *See e.g. Alger v. City of Mukilteo*, 107 Wn.2d 541, 730 P.2d 1333 (1987).

The County's argument leaves no room for damages claims where there is no land use decision (whether or not adverse), thereby inventing a legal fiction that puts a property owner into an impossible scenario. Under the County's arguments, a property owner would have no remedy for damages where a city or county issues a land use decision, such as the 2006 SUP here, and then waits months or years before either adding prerequisites that unlawfully delay rightful use of, or refusing to allow work under, that permit. Under the County's LUPA construct, the property owner would be left without remedy even if the government agency delays action for years because there would never be a land use decision to appeal.[18]

Further, by the time a jurisdiction's s damaging actions accrue, the 21-day LUPA statute of limitation would have long passed, allowing the jurisdiction to avoid judicial review and liability for its improper actions. If accepted, the County's arguments would increase litigation as property owners would have to appeal even favorable land use decisions if they have any concern that a city or county might subsequently delay the project after it is permitted. As this Court recognized in *Lakey v. Puget Sound Energy, Inc.*,[19] not every case against a municipality involves

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[18] *See e.g. Sherman v. Town of Chester*, 752 F.3d 554 (2nd Cir. 2014)
[19] *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 927, 296 P.3d 860 (2013).

damage claims where the relief required a judicial determination that a land use decision was invalid.

As alluded to above, although a tort claim may be *related* to permitting and land use decisions, it is important to distinguish between a challenge to the merits of a land use decision under LUPA versus a tort challenge to a municipality's *actions related to* a previously issued land use decision.[20] The legislature and Washington Courts expressly acknowledge a party's right to seek damages above and beyond LUPA, by exempting claims for damages from LUPA.[21]

Courts have recognized that there are innumerable scenarios in which a LUPA action would be inappropriate or even nonsensical. Courts have allowed cases that are related to land use decisions, but not direct challenges to the decisions themselves, to proceed under these alternative remedies without the prerequisite of a LUPA action. In *Lakey v. Puget Sound Energy, Inc.*, the plaintiffs sought compensation for inverse condemnation, rather than challenging to the city's land use decision to issue a variance.[22] The Court rejected the City's argument that LUPA extends to all damage claims that a plaintiff may have arising from

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[20] *Woods View II*, 188 Wn. App. 1
[21] RCW 36.70C.030; *Woods View II*, 188 Wn. App. 1.
[22] 176 Wn.2d at 926–28.

issuance of a land use decision. In *Mission Springs v. City of Spokane*,[23] a developer brought action for damages against the city under RCW 64.40 and §1983 for wrongful refusal to process a grading permit. Because the city did not issue the grading permit until well after the plaintiff had sued for damages, a LUPA would have been futile. Under the County's argument, although the Supreme Court allowed the *Mission Springs* plaintiff to sue under chapter 64.40 RCW before the City issued the permit, the plaintiff could not have filed suit in tort until after permit issuance, and even then only after first successfully challenging its own, favorable permit in a LUPA action. Similarly, in *Westmark Dev. Corp. v. City of Burien*, the Court did not tie claims under chapter 64.40 RCW, §1983 and tort theories of interference with business expectancy and negligent misrepresentation to challenge of a land use decision under LUPA.[24] Although each of these cases involved a land use decision, whether final or in the review stage, no court required a LUPA action as a prerequisite to bringing a tort claim for damages.

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[23] *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998).
[24] *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 550, 166 P.3d 813 (2007).

3. The County's Arguments Unnecessarily Tangle Judicial Procedure, Risking Misuse of LUPA's Expedited Review Process.

When the legislature enacted LUPA, it recognized the importance of timely review of the merits of land use decisions, and accorded such review an expedited judicial process unique to LUPA. Ignoring the plain language of LUPA that carves out damages claims, and applying the County's interpretation would necessarily lead to the conclusion that land use related torts should be heard as part of a LUPA process. The County's arguments will naturally lead to abuse of that expedited judicial review as parties on either side of the equation may be motivated to want a speedy judicial decision. Damages claims tangentially related to land use matters will be heard ahead of other tort claims by means of the expedited LUPA process. This could inundate the already crowded superior court docket with torts that have some land use aspect, although not stemming directly from a land use decision. In addition, the County provides no rational procedural path for how a Superior Court should address such critical considerations as discovery and jury trial, neither allowed generally under LUPA but which may be critical to tort claims, in the context of a consolidated Land Use Petition and tort action. Finally, the County's position also raises concerns as to separation of powers between the

legislature and the judiciary by using statute to instruct a court on its docketing priorities.

B. The County's Arguments Violate the Doctrine of Finality.

The State of Washington values predictability and finality in land use permitting through the Doctrine of Finality and vesting laws.[25] Allowing the County to subvert Maytown's validly-issued SUP and avoid liability for its delay and improper conduct would undermine the long standing rule in Washington State that protects the finality of permits that have been issued. While the County tries to characterize the issue as a failure to appeal a *new* land use decision, Maytown's damages actually originate with County's failure to allow Maytown to proceed under the 2006 SUP. The SUP was a valid, vested and compliant permit, a fact which the County itself confirmed in 2008 and 2009.[26] The SUP was final in 2006 and was not appealed. The SUP was the land use decision for purposes of the Doctrine of Finality.

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[25]As this Court noted in *Snohomish County v. Pollution Control Hearings Bd.*, 187 Wn.2d 346, 373, 386 P.3d 1064 (2016), as amended (May 2, 2017), reconsideration denied (May 10, 2017), pending permit applications are governed by vesting laws while projects that already have permits issued are governed by the Doctrine of Finality. *See also, Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974) ("The purpose of time limitations in such matters is to give finality to the actions on zoning matters. If there were not finality, no owner of land would ever be safe in proceeding with development of his property."); *Skamania County v. Columbia River Gorge Com'n*, 144 Wn.2d 30, 48, 26 P.3d 241 (2001) (referencing the "strong public policy favoring administrative finality in land use decisions").
[26]Exs. 141 and 143.

Under the Doctrine of Finality, Maytown had an absolute right to begin the process of activating the SUP. However, while Maytown attempted to do so, the County unilaterally added new prerequisites to Maytown's ability to use the approved SUP, such as the new obligation to obtain a "Letter to Proceed" and the amendment. These prerequisites hampered Maytown's ability to proceed with work under the permit and violated the Doctrine of Finality.

It is important to distinguish between (a) the approval of the SUP and amendments, which were final land use decisions under LUPA but not adverse to Maytown, and (b) the County's actions that interfered with Maytown's use of the approved SUP. The County wants to invoke LUPA to *circumvent* the state's vesting laws and the Doctrine of Finality. But it is the County which created fictitious hurdles in an attempt to insulate itself from liability for its own unlawful conduct.[27]

The County's actions constituted a collateral attack on the SUP that violates the very essence of the Doctrine of Finality, which is intended to preclude such collateral attacks on previously unchallenged land use decisions and to provide a final decision on which property owners may rightfully and reasonably rely. The Doctrine of Finality is intended to

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[27]Such as the a "Letter to Proceed" and groundwater monitoring requirements that were not part of the original SUP's conditions.

prevent the very scenario presented in Maytown: a property owner goes through the proper channels to obtain its permit, only to become a political football later when the politics of the municipality change.

There are serious ramifications when the Doctrine of Finality is undermined:

> [I]f this court allows local government to rescind a previous land use approval without concern of finality, innocent property owners relying on a county's land use decision will be subject to change in policy whenever a new County Planning Director disagrees with a decision of the predecessor director.[28]

When the County delays a property owner's ability to use a permit such as the SUP, the same scenario arises as in *Nykreim*. Nonetheless, the County provides no justification in the public interest that would support its subversion of the doctrine.

This Court has refused to allow such collateral attacks on valid permits. In *Wenatchee Sportsman,*[29] the county had granted an application for a site-specific rezone, which constituted a final land use decision which was not appealed. The county approved a subsequent plat for the same property, which the respondents appealed. Through that appeal, respondents attempted to collaterally attack the earlier rezone decision.

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[28] *Nykreim,* 146 Wn.2d 904, 933.
[29] *Wenatchee Sportsmen*, 141 Wn.2d 169, 181.

This Court held that LUPA plainly and unambiguously required that challenge to have been brought LUPA's 21 day time limit.[30]

Similarly, in *Habitat Watch*, this Court held that a LUPA challenge to a grading permit could not be used to collaterally attack a special use permit that had been issued earlier in the development process.[31]

In the case at hand, the County should not be able to act in ways that unlawfully delay or effectively rescind previous land use approvals to the detriment of property owners relying on the County's prior land use decision, simply because a new regime is in power. Allowing municipalities to abrogate valid permits through later-imposed conditions defeats the Doctrine of Finality, and this Court should not sanction such actions by allowing municipalities to hide behind an invocation of LUPA for those improperly imposed fictions.

V. CONCLUSION

Based on the foregoing analysis and argument, the MBA respectfully requests that the Supreme Court uphold the Court of Appeals and Superior Court decisions in this matter.

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[30] *Id.*, 141 Wn.2d at 181–82.
[31] *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410–11, 120 P.3d 56 (2005).

DATED this 11th day of December, 2017.

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1300-32 Amicus Curiae Brief of MBA 12-11-17

CERTIFICATE OF SERVICE

I, Evanna L. Charlot, am a citizen of the United States, resident of the State of Washington, and declare under the penalty of perjury under the laws of the State of Washington, that on this date, I caused to be served via electronic mail, a true and correct copy of: **MOTION FOR LEAVE TO FILE AMICUS BRIEF; AND, AMICUS CURIAE BRIEF OF MASTER BUILDERS OF KING AND SNOHOMISH COUNTIES**, upon all counsel and parties of record at the address listed below.

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Dated this 11th day of December, 2017, in Bellevue, Washington.

Evanna L. Charlot

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