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SUPREME COURT  
STATE OF WASHINGTON  
1/9/2018 4:14 PM  
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No. 94452-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

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MAYTOWN SAND AND GRAVEL, LLC and PORT OF  
TACOMA,

*Respondents,*

v.

THURSTON COUNTY,

*Petitioner.*

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**PETITIONER THURSTON COUNTY'S CONSOLIDATED  
ANSWER TO BRIEFS OF AMICI CURIAE**

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## **I. ARGUMENT IN ANSWER TO AMICUS CURIAE**

### **A. LUPA Preemption and Failure to Exhaust Administrative Remedies (Answer to Briefs of Amici Curiae WSAMA, WSAC, and Master Builders)**

The County agrees with WSAMA and WSAC's analysis that Maytown was required to exhaust its administrative remedies under LUPA by appealing the disputed portion of the hearing examiner's partially adverse decision, and that LUPA's exception for "claims...for monetary damages or compensation" in RCW 36.70C.030(1)(c) does not excuse this failure. The County also agrees with these amici that the State Environmental Policy Act (SEPA) did not prohibit Maytown from appealing the hearing examiner's decision, and that the County Staff acted properly in referring to the examiner the decision whether to grant an amendment pertaining to the groundwater-monitoring permit condition requested by Maytown, because that issue was not governed by SEPA.

Maytown brought multiple issues to the hearing examiner, as reflected by its submission of two separate briefs. In a brief entitled "Amendments: Maytown Sand & Gravel's Brief in Support of Granting SUP Amendments," Maytown asked the examiner to amend the groundwater-monitoring permit condition while also ruling that the amendment process was "unlawful" because the County had allegedly required hearing-examiner approval only because of pressure from environmental groups. CP 7543-46. In a separate brief entitled, "SEPA Appeals: Maytown Sand & Gravel's Brief in Support of Approving MDNS and Response to FORP Appeal," Maytown asked the examiner to (1) rule

that the amendment was not an “action” necessitating SEPA review and (2) reject an appeal by an environmentalist group, Friends of Rocky Prairie (FORP), which alleged that amending the groundwater-monitoring condition was an unlawful amendment of a SEPA determination made in 2005. CP 7548-50; *see also* Ex. 446 at 30-34.

The examiner granted the amendment to the groundwater-monitoring condition (unopposed by the County<sup>1</sup>), and also ruled that the County properly referred the matter to the examiner because “[a]n SUP amendment was required,” ruled that the amendment was not an “action” under SEPA, and rejected FORP’s appeal. Ex. 446 at 30-31. That the examiner addressed the first two issues under the heading “SEPA Appeals” did not convert the issue of the appropriate decision maker for the amendment into one governed by SEPA. Indeed, when the County moved for reconsideration (strictly as to the determination that the amendment was not an “action” under SEPA), the examiner observed in denying the County’s motion that Maytown “argued no other issues in its SEPA appeal aside from the allegedly unlawful environmental threshold review.” Ex. 125 at 2.

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<sup>1</sup> The Port (later joined by Maytown) originally sought a determination that additional water-quality tests required by the Staff to establish compliance with groundwater-monitoring requirements were themselves improperly required. Ex. 386 at 12-17; Ex. 446 at 20-21. Maytown and the County then reached a settlement of this issue, and an amendment adopting this settlement is the amendment the hearing examiner ultimately approved. Ex. 446 at 21-22. But the hearing examiner also ruled that requiring additional water testing in the first place was appropriate, given the environmental history of the site. Ex. 446 at 21.

The strict exhaustion-of-remedies requirement in LUPA “is essential because it furthers LUPA’s policy of efficient and timely review.” *Durland v. San Juan County*, 182 Wn.2d 55, 68, 340 P.3d 191 (2014). Contrary to the Master Builders’ suggestion, the doctrine of exhaustion does not require a party to litigate its damages case before the administrative tribunal, in an expedited fashion, without either the benefit of civil discovery or a jury. What it *does* require, of a party *who wishes to sue for damages based on a challenge to the correctness of the determination of a land-use-related issue by local government*, is that the party pursue administrative review to the point of receiving a “land use decision”—defined by LUPA as “a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including with authority to hear appeals”<sup>2</sup>—and then, unless the land-use decision is favorable on the issue that forms the basis for the damages action, file a timely LUPA petition in Superior Court. Once the party then obtains a determination in the form of a final, unappealed Superior Court decision that is *favorable* on the pertinent issue, *that* determination may form the basis of a damages action, which the party may file and litigate in due course under the rules of civil procedure. *Shaw v. City of Des Moines*, 109 Wn. App. 896, 901-02, 37 P.3d 1255 (2002).

It is only in this manner that LUPA’s stated purpose—“establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely

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<sup>2</sup> RCW 36.70C.020(2).

judicial review”<sup>3</sup>—can be fulfilled. As this Court observed in *Durland*, the doctrine of administrative remedies serves important purposes in that it:

(1) insure[s] against premature interruption of the administrative process; (2) allow[s] the agency to develop the necessary factual background on which to base a decision; (3) allow[]s exercise of agency expertise in its area; (4) provide[]s a more efficient process; and (5) protect[s] the administrative agency’s autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts.

*Id.* (quoting *S. Hollywood Hills Citizens Ass’n v. King County*, 101 Wn.2d 68, 73-74, 677 P.2d 114 (1984)). Allowing parties to sue for damages without exhausting administrative remedies—and thus allowing juries lacking “agency expertise” to determine the correctness of local-government actions under land-use laws—is the antithesis of “consistent, predictable, and timely judicial review.”

The Master Builders correctly observe that the County “never issued a land use decision that is substantively ‘adverse’ to Maytown’s interest” and that Maytown’s claims are “not based on [a] challenge to the merits of a land use decision.” Amicus Curiae Brief of Master Builders at 3. But that observation is correct only because Maytown *short-circuited getting to a land-use decision, by bailing from the administrative review process, midstream.* The examiner’s April 2011 decision on the amendment request plainly was not a “land use decision” because it was not “a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including with authority to hear

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<sup>3</sup> RCW 36.70C.010.

appeals.” RCW 36.70C.020(2). But this fact does not help Maytown: the absence of a land-use decision that was adverse on the pertinent issue was only because Maytown failed to exhaust its administrative remedies. Maytown avoided LUPA’s requirement of a land-use petition only by making a tactical choice not to pursue administrative review precisely so that there would never *be* a land-use decision triggering the requirement to file a LUPA petition. Because the courts in this case have thus far refused to apply LUPA’s exhaustion requirement, Maytown has been allowed to subvert LUPA by having a jury determine the correctness of the County’s actions, and by asking that jury to disagree with and effectively overturn the hearing-examiner decision that Maytown deliberately did not challenge.

Maytown would have been entitled to sue for damages following the hearing examiner’s decision only if the examiner had *agreed* with its position that the County had improperly sent Maytown’s amendment request to a hearing examiner (and if the County then did not appeal that decision). But the examiner’s decision was *adverse* to Maytown—on the very ground it later asked the jury to award damages. Maytown and the Port specifically requested that the examiner “rule” that Thurston County staff had improperly sent its amendment request to the hearing examiner as a major amendment in response to public pressure, rather than process the request as a minor amendment that could have been adopted by staff.<sup>4</sup> CP 7534-35, 7544-46. The examiner rejected Maytown’s position and ruled that “[a]n SUP amendment was required.” Ex. 446 at 30-31. Maytown

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<sup>4</sup> See Thurston County Code § 20.60.020.

knew that this decision was adverse—it even considered appealing the decision—but decided not to do so for tactical reasons. Ex. 449. That deliberate failure to exhaust administrative remedies should have barred Maytown’s damages action.

This Court has held, consistent with the purposes of LUPA, that a party must challenge the part of a land-use decision that is adverse even if it is otherwise favorable in that it grants a permit. *James v. County of Kitsap*, 154 Wn.2d 574, 586, 115 P.3d 286 (2005) (holding that developers were required to appeal imposition of impact fees, even though they otherwise “prevailed” in obtaining permits); *see also* Petitioner’s Supplemental Brief at 11 n.6 (citing additional cases). Excusing parties from appealing adverse rulings just because they are part of a determination that is otherwise favorable would create a loophole in the strict exhaustion requirement which could only serve to undermine its effectiveness.

The Master Builders’ concern about discouraging cooperation between permit holders does not warrant refusing to enforce LUPA’s strict exhaustion requirement, any more than the equitable considerations warranted creating an exception to strict exhaustion in *Durland*. In any event, this case itself refutes the Master Builders’ concern about cooperation: Thurston County and Maytown negotiated a compromise regarding the substance of the water-monitoring requirements, and presented that compromise for adoption by the hearing examiner, even while Maytown was simultaneously challenging the County staff’s decision

to require the now-agreed-upon requirements be submitted to the hearing examiner for approval. *See* Ex. 446 at 21-22.

Nor does anticipated delay from administrative appeals warrant refusing to apply LUPA's strict exhaustion requirement. Delay is an inherent part of any administrative review process, and completing that process necessarily will take *some* more time than allowing parties to bail from it, mid-stream. In any event, no additional delay in fact would have resulted here had Maytown appealed the examiner's decision, because another interested party, FORP, appealed the decision to approve the compromise groundwater-monitoring plan to the Board of County Commissioners (BOCC). (The BOCC affirmed the hearing examiner. Ex. 454.)

The Master Builders are incorrect that our courts have excused compliance with LUPA for "cases that are related to land use decisions, but not direct challenges to the decisions themselves." Amicus Curiae Brief of Master Builders at 13. In *Lakey v. Puget Sound Energy, Inc.*, this Court held that LUPA did not apply because the homeowners did not challenge the correctness of the City of Kirkland's land-use decisions, and their inverse-condemnation claim was purely a "claim[]...for monetary damages or compensation" under RCW 36.70C.030(1)(c). 176 Wn.2d 909, 926, 296 P.3d 860 (2013). This Court observed that that LUPA applies in cases "where the relief require[s] a judicial determination that the land use decision was invalid *or partially invalid*" and not in cases "which only

seek[] compensation rather than reversal or modification of a land use decision.” *Id.* at 926-27 (emphasis added).

In the other two cases cited by the Master Builders on this point, there is no indication that any party raised LUPA. *See Mission Springs Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998); *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007). Indeed, LUPA was not yet effective when the challenged actions of the Spokane City Council in *Mission Springs* occurred and the complaint was filed. 134 Wn.2d at 952-57. And in *Westmark*, not only was LUPA not raised, but the damages case was based strictly on delay by the City of Burien and not a challenge to any land-use decision. 140 Wn. App. at 559-61.

The doctrine of finality, raised by the Master Builders, if anything supports the County’s position. Thurston County never attempted to “collaterally attack” Maytown’s permit (Amicus Curiae Brief of Master Builders at 18-19); rather, it sought to enforce the valid and unappealed conditions placed on the permit by the hearing examiner who issued it in 2006. As shown by its request for eight amendments to those conditions (a request later scaled back to just the condition on groundwater monitoring), Maytown acknowledged it had to satisfy all permit conditions before it could mine a single load of gravel. Ex. 429 at 15; Ex. 394. The County staff’s determination that a hearing examiner should decide Maytown’s request to amend a permit condition originally imposed by a hearing examiner was eminently reasonable, as the hearing examiner determined.

Ex. 446 at 30-31.<sup>5</sup> Given Maytown’s failure to pursue available administrative review of that decision, the decision should have been accorded finality in this case, barring any collateral attack through a damages action premised on a challenge to its correctness.

**B. Substantive Due Process (Answer to Brief of Amicus Curiae Pacific Legal Foundation)**

**1. Lack of a Protected Property Interest**

The Pacific Legal Foundation’s distinction between “old” property and “new” property is not pertinent here. Thurston County has never disputed that the holder of a land-use permit has a vested property right, or maintained that Maytown’s permit has the status of a mere “government benefit.” In reality, the right granted by Maytown’s permit was never truly the focus of Maytown’s case: Thurston County never revoked nor threatened to revoke Maytown’s permit. Maytown instead asserted that the County acted unfairly (indeed, so unfairly that the County’s actions were “shocking to the conscience”) when County Staff ruled that whether amendments requested by Maytown would be granted—most importantly, an amendment that sought to do away with the additional groundwater tests for pollutants, *which the Staff had just said had to be done to bring the*

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<sup>5</sup> It warrants underscoring that the failure to start mining, from the issuance of the permit in 2005 through 2009, was entirely the result of decisions taken by the permit holders (the original owner, followed by the Port). It was these parties (the original permit holder, followed by the Port) who failed to do anything to satisfy groundwater-monitoring requirements beyond measuring temperature, and when the County Staff notified the Port in February 2010 that it would also have to test for pollutant levels before mining could commence, the Port filed an appeal stating that testing for pollutant levels would imperil the economic viability of any mining effort. Ex. 386 at 15-16. But the hearing examiner found that the Staff requiring testing for pollutants was reasonable, given the area’s polluted past (*e.g.*, armaments production). Ex. 446 at 21.

*permit into compliance with permit Condition 6C*—would be decided by the hearing examiner, and not by the Staff itself.

The Foundation disputes that Maytown’s substantive-due process claim is properly characterized as asserting, at base, a right to a specific procedure. The Foundation focuses on the BOCC’s partial reversal and remand of the hearing examiner’s decision on the five-year review of the permit. But the remand order is a red-herring. Maytown challenged that decision by a timely LUPA petition, the Superior Court reversed the order within four months of its entry, the County did not appeal, and the short delay could have resulted in little, if any, damages. CP 111-16. After stripping away bluster about comments by commissioners (which were permissible), and a baseless assertion that the County invented a new requirement of a “letter to proceed” (really just confirmation that all previously unsatisfied conditions had been satisfied), Maytown’s argument boils down to the claim that it was entitled to have its request to amend the groundwater-monitoring condition decided by County staff as opposed to a hearing examiner. *See, e.g.*, RP 3739-42 (closing argument).<sup>6</sup>

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<sup>6</sup> It is important to keep in mind that Maytown abandoned its *procedural* due process claim before the case was submitted to the jury. And no wonder! Procedural due process claims are governed by the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), under which the principle concern is whether the complaining party received sufficient process. Here, Maytown’s federal constitutional claim was grounded on the theory that it was wrongfully compelled to accept *too much process* (a decision by a hearing examiner based on a record developed during an adversarial proceeding, rather than a decision by County Staff based on whatever was in the file at the time). Such an upside-down approach to process issues left Maytown with no choice but to abandon its procedural due process claim and pursue only a substantive due process claim.

The principle that there is no constitutionally protected interest in a particular procedure applies in land-use cases. This Court has held in a case involving interests in land and money that procedural rights do not give rise to constitutionally protected property interests, noting that to conclude otherwise “would be a radical change in the law of due process.” *Carlisle v. Columbia Irrigation Dist.*, 168 Wn.2d 555, 567, 229 P.3d 761 (2010); *see also Fusco v. State of Conn.*, 815 F.2d 201, 205-06 (2d Cir. 1987); *Neighbors for Notice, LLC v. City of Seattle*, 2013 WL 5211878 at \*4-6 (W.D. Wash. 2013).

As a matter of law, in deciding that Maytown’s request to amend a valid condition of its special-use permit would not be processed by County staff but needed to be ruled on by a hearing examiner, the County did not deprive Maytown of a protected property interest. And without such a protected property interest, Maytown’s substantive due process claim fails, as a matter of law.

## **2. Absence of Conduct Shocking to the Conscience**

Contrary to the Foundation’s implication, it was proper for County commissioners to meet with constituents to discuss issues surrounding the mine when no appeal was before them in their quasi-judicial capacity. *See Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d 869, 886-87, 913 P.2d 793 (1996); RCW 42.36.020, .060. The case relied upon by the Foundation, *Cine Sk8, Inc. v. Town of Henrietta*, 507 F.3d 778 (2d Cir. 2007), actually supports the County’s position. While The Foundation asserts that the Second Circuit in *Cine Sk8* “rejected an

argument that the property owner must prove improper motive to sustain a substantive due process claim,” the existence of evidence to support a finding of an improper motive—racism—was in fact the central basis for the court’s holding.

The town board in *Cine Sk8* had amended a teen recreation center’s special-use permit to prohibit dances after an “overcrowding incident.” 507 F.3d at 779-80. The center submitted evidence that three of the four board members had made comments that could reasonably be interpreted as showing racist motivations. *Id.* at 781-82, 787. According to witnesses, the town supervisor stated in a meeting, “Look at these pictures. There is not a white face among them. I don’t want these people in my town.” *Id.* at 781-82. The United States Court of Appeals for the Second Circuit reversed the summary dismissal of the center’s substantive due process claim, holding that the center had at least raised a genuine issue of material fact as to whether a majority of the town board acted with racial animus in voting to amend the special-use permit. *Id.* at 787-89.

Thurston County’s conduct is readily distinguishable from that of the town board in *Cine Sk8*. Contrary to the Foundation’s assertion, the County did not “deprive Maytown of its lawful right to mine gravel in accordance with its vested special use permit.” Amicus Brief of PLF at 18. Thurston County never amended Maytown’s permit to prohibit allowed uses; instead, among several other favorable decisions, the County granted Maytown’s request to amend a condition of its permit. Nor is there any evidence or suggestion that the principled opposition of some County

commissioners to Maytown’s project was animated by anything other than a desire to respond to the concerns of their constituents and prevent the feared adverse environmental impacts of mining—a motivation that is decidedly *not* shocking to the conscience. There was no showing that racism or corruption played any role in the commissioners’ actions.

The commissioners may have been too zealous in how they responded to the environmental concerns of their constituents, and that zealotry may have moved them to act in ways that could reasonably be found to have been arbitrary and capricious. But over-zealousness on the part of an elected official in carrying out their democratic obligation to respond to citizen concerns, even to the point of acting arbitrarily and capriciously, must not be conflated with government action so wrongful that it can be characterized as “shocking to the conscience.” The jury’s verdict on this issue cannot stand because, in the end, the evidence does not reasonably support a finding of anything more than arbitrary and capricious conduct.

## **II. CONCLUSION**

The arguments of WSAMA and WSAC correctly bolster the County’s contention that the Port and Maytown should not have been allowed to proceed with state law damages claims based on challenges to County determinations that the Port and Maytown could have, but did not, take through a full LUPA process; the Master Builders’ arguments to the contrary are meritless. The Pacific Legal Foundation’s defense of Maytown’s substantive due process misapprehends the nature of the

supposed property interest underlying Maytown's claim (an interest in a particular procedure, which is not protected by the Due Process Clause of the Fourteenth Amendment), and an untenably broad view of what kind of local government behavior can be deemed "shocking to the conscience."

Respectfully submitted this 8<sup>th</sup> day of January, 2018.

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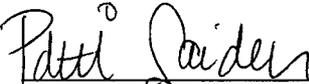
## CERTIFICATE OF SERVICE

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

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DATED this <sup>9<sup>th</sup></sup> day of January, 2018.

  
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January 09, 2018 - 4:14 PM

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