

FILED
SUPREME COURT
STATE OF WASHINGTON
1/9/2018 3:54 PM
BY SUSAN L. CARLSON
CLERK

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/Petitioner.

**ANSWER TO BRIEF OF AMICI CURIAE WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS AND
WASHINGTON STATE ASSOCIATION OF COUNTIES**

Patrick J. Schneider, WSBA #11957
Steven J. Gillespie, WSBA #39538
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: pat.schneider@foster.com
steve.gillespie@foster.com
*Attorneys for Plaintiff/Respondent
Port of Tacoma*

Eric Christensen, WSBA #27934
CAIRNCROSS HEMPELMANN PS
524 Second Avenue, Suite 500
Seattle, WA 98104
Telephone: (206) 587-0700
Facsimile: (206) 587-2308
Email: echristensen@cairncross.com
*Attorneys for Plaintiff/Respondent
Maytown Sand and Gravel, LLC*

John E.D. Powell, WSBA #12941
Jed Powell & Associates PLLC
7191 Wagner Way, Suite 202,
Gig Harbor, WA 98335-1165
Telephone: (206) 618-1753
Email: jed@jedpowell.com
*Attorneys for Plaintiff/Respondent
Maytown Sand and Gravel, LLC*

TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE.....	3
III. ARGUMENT.....	5
A. Underlying Amici’s arguments is the collateral estoppel argument that the County has abandoned.....	6
B. Amici’s arguments require this Court to re-write multiple sections of the LUPA statute	7
C. Amici’s arguments are misguided for four additional reasons.....	9
1. A land use process is not a land use decision	10
2. LUPA does not provide for declaratory relief	11
3. LUPA does not provide relief from a favorable land use decision that results from an improper process	12
4. LUPA does not apply to actions for damages.....	14
D. A tort action does not collaterally attack a land use decision or the process that produced it.....	15
E. Amici’s argument contradicts the regulatory reform purpose of the bill through which the Legislature adopted LUPA	17
IV. CONCLUSION.....	19

TABLE OF AUTHORITIES

CASES	Page(s)
<i>City of Seattle v. Blume</i> , 134 Wn.2d 243, 947 P.2d 223 (1997).....	2, 20
<i>Grundy v. Thurston County</i> , 155 Wn.2d 1, 117 P.3d 1089 (2005).....	16
<i>In re Jurisdiction of King County Hearing Examiner</i> , 135 Wn. App. 312, 144 P.3d 345 (2006).....	12
<i>Jones v. Town of Hunts Point</i> , 166 Wn. App. 452, 272 P.3d 853 (2012).....	13
<i>King v. City of Seattle</i> , 84 Wn.2d 239, 525 P.2d 228 (1974).....	2
<i>Lutheran Day Care v. Snohomish County</i> , 119 Wn.2d 91, 829 P.2d 746 (1992), <i>cert. denied</i> , 506 U.S. 1079 (1993).....	18
<i>Shaw v. City of Des Moines</i> , 109 Wn. App. 896, 37 P.3d 1255 (2002).....	14
<i>Stafne v. Snohomish County</i> , 174 Wn.2d 24, 271 P.3d 868 (2012).....	5
<i>Tiegs v. Watts</i> , 135 Wn.2d 1, 954 P.2d 877 (1998).....	16
<i>Westmark Dev. Corp. v. City of Burien</i> , 140 Wn. App. 540, 166 P.3d 813 (2007).....	16
<i>Young v. Pierce County</i> , 120 Wn. App. 175, 84 P.3d 927 (2004).....	8, 13

STATUTES

RCW 36.70C.010.....19
RCW 36.70C.020(2)7, 10
RCW 36.70C.030(1) passim
RCW 36.70C.090.....18, 19
RCW 36.70C.120.....18
RCW 36.70C.130(1) passim
RCW 36.70C.130(2)2, 9, 11, 18
RCW 36.70C.140.....9, 11, 19
RCW 43.21C.075(3)(a).....5

OTHER AUTHORITIES

WAC 197-11-680(3)(a)5
Laws of 1995, Ch. 34717
Richard L. Settle, The Washington State Environmental
Policy Act, App’x E at E-418

I. INTRODUCTION

The jury's unchallenged verdict establishes that the highest elected officials in Thurston County intentionally interfered with the use of a permit the County itself had issued, successfully defeating the expectancy of a public entity and a lawful private business. Relying on an argument the Petitioner has waived, the Washington State Association of Counties and the Washington State Association of Municipal Attorneys (collectively "Amici") seek to shield the County from the damages awarded by the jury by asking this Court to commingle tort and land use law in a way that contradicts this Court's precedent and the express language of the LUPA statute. Amici's argument also would require plaintiffs to use LUPA's expedited procedures, with the burden those procedures impose on the superior courts, to litigate damages even though LUPA's standards have nothing to do with liability for damages.

In order to agree with Amici's argument this Court would have to:

- Ignore the fact that the County abandoned its collateral estoppel argument, Pet. For Rev. at 10 n.7.
- Hold that Maytown is collaterally estopped from presenting its damage case to the jury because Maytown did not bring a LUPA appeal of the Hearing Examiner's administrative decision, even though Amici do not attempt to demonstrate that the elements of collateral estoppel are met.
- Hold as a matter of law that LUPA creates standards of liability for damages even though it expressly states that:
 - LUPA "does not apply to claims provided by any law for

monetary damages or compensation,” RCW 36.70C.030(1)(c), and

- “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).
- Re-write the Hearing Examiner’s decision so that it addresses the propriety of the County’s process in her decision on the amendments instead of in her SEPA decision.
- Rewrite the LUPA statute in multiple ways to:
 - Allow the Hearing Examiner’s re-written administrative decision to be appealed to superior court;
 - Change the standard for harmless procedural error;
 - Include a new standard for granting relief from a favorable land use decision due to the improper motives of the regulator; and
 - Authorize the court to issue declaratory relief about process.

No Washington court has ruled that a party that completes a land use process and obtains all requested entitlements is barred from seeking damages because that party did not also attempt to use the land use process to collaterally estop the government from denying liability in tort. Not only do Amici and the County implicitly ask this Court to overrule *City of Seattle v. Blume*, 134 Wn.2d 243, 258-60, 947 P.2d 223 (1997), and reinstate the defunct “independent business judgment” rule of *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974), they go farther and ask this Court to adopt a new rule that would bar damages actions unless applicants establish the government’s liability in tort through LUPA’s expedited appeal procedures. Tort and land use law are separate

bodies of law – this Court declared as much in *Blume*, and the Legislature expressly separated land use appeals from actions for damages in LUPA.

For the reasons previously briefed and those described below, Respondents Port of Tacoma and Maytown Sand and Gravel, LLC (collectively “Maytown”) respectfully request that the Court affirm the decision of the Court of Appeals.

II. STATEMENT OF THE CASE

Maytown adopts by reference its previous statements of the case, supplemented here to address a misstatement that appears in Amici’s brief. Unlike the County’s briefs, Amici’s brief recognizes that the proceedings before the Hearing Examiner included both the merits of the amendments application and two appeals of the County’s SEPA determination. However, Amici mistakenly suggest that the question of the propriety of the amendments process arose exclusively in the amendments hearing, while the only SEPA issue was whether the amendments constituted an “action” under SEPA. *See* Br. at 4-5. That is incorrect.

The Hearing Examiner’s ruling summarizes the SEPA arguments Maytown raised. Ex. 127 at 2. Contrary to the argument in Amici’s statement of the case, Br. at 4 & n.3, the Hearing Examiner correctly wrote that Maytown raised the propriety of the amendments process *in its SEPA appeal*. Ex. 127 at 2. Accordingly, the Hearing Examiner resolved

that issue *in her SEPA decision*. *Id.* at 30-31. Maytown argued in its SEPA appeal that because no amendments should have been required, it was improper to conduct SEPA review of those amendments. *Id.* at 2. The Hearing Examiner disagreed, concluding that staff had “discretion” to require amendments, and, absent specific direction in Thurston County Code, she deferred to staff’s conclusion. *Id.* at 30-31. Contrary to Amici’s unsupported assertion, Br. at 5, the Examiner did not rule that staff’s exercise of that discretion was “appropriate,” Ex. 127 at 30-31. The question of “appropriate” was not, and could not have been, resolved until this damages action, after Maytown was able to conduct discovery into the County’s motivation.

Maytown did not ask the Examiner to reject the amendments as improperly required. Maytown asked the Examiner to grant the amendments, even as Maytown preserved the argument that the amendments were improper in case she did not grant the amendments. *See* CP 7546 (after explaining why the amendments process was improper, Maytown “urges the Examiner to proceed to approve the SUP Amendments”); CP 7535 (after explaining why it was improper to require amendments, Port of Tacoma asks the Examiner to “address the merits of the requested amendments regardless of her disposition on the process questions.”) The Examiner approved the application for amendments,

subject to one substantive mitigating condition that did not prejudice Maytown. Ex. 127 at 34.

Project opponents appealed the Examiner’s decision to the Board of County Commissioners. Ex. 454 at 4 (p. 3 of the decision). The Board – the County’s body with the “highest level of authority to make the determination, including those with authority to hear appeals,” in the language of LUPA – affirmed the Examiner’s decision, *id.*, making the only “land use decision” related to the amendments. That decision was favorable to Maytown and does not address the amendments process.

III. ARGUMENT

In order to reach the legal issues raised by Amici this Court must first re-write the Hearing Examiner’s land use decision so that it addresses the propriety of the process in her decision on the amendments (which was administratively appealable) instead of in her decision on the SEPA appeal (which was not subject to a second administrative appeal¹).

Even if this Court were to re-write the Hearing Examiner’s decision for her, Amici’s argument would be without merit for the many

¹ RCW 43.21C.075(3)(a); WAC 197-11-680(3)(a). Maytown also could not have appealed the SEPA decision under LUPA because the Board’s land use decision favored Maytown. The authority cited by Amici (Br. at 12), *Stafne v. Snohomish County*, 174 Wn.2d 24, 271 P.3d 868 (2012), is not to the contrary. In that case, the Court of Appeals erroneously created a new right of judicial review, inadvertently discarding the GMA-mandated administrative remedy. *Id.* at 34. Snohomish County was prejudiced by the result, as was every county that plans under the GMA, and this Court properly granted cross-petitions for review. It does not appear that the question of whether Snohomish County was “aggrieved” by its pyrrhic victory was litigated in *Stafne*.

reasons discussed below.² First, as Amici acknowledge, Br. at 18-19, the doctrine of collateral estoppel underpins their argument, yet not only do Amici not attempt to establish that the elements of collateral estoppel are met, the County abandoned its collateral estoppel argument, Pet. for Rev. at 10 n.7. Second, to accept Amici's argument, the Court would have to re-write several sections of LUPA and ignore other sections. Third, Amici's arguments suffer from a number of flaws, beginning with the incorrect premise that a land use process is a land use decision. LUPA does not provide declaratory relief, LUPA does not provide relief from procedural errors that do not affect the land use decision, and LUPA does not apply to actions for damages. An award of damages in tort does not collaterally attack a land use decision. Finally, Amici's arguments contradict the regulatory reform purpose of the bill in which the Legislature adopted LUPA.

A. Underlying Amici's arguments is the collateral estoppel argument that the County has abandoned

Amici argue that Maytown should have used LUPA's procedures and standards to establish the County's liability in tort for damages, and because Maytown did not do so, Maytown is collaterally estopped from

² In responding to Amici's arguments, Maytown neither abandons nor waives any arguments it has made previously. In particular, in light of the overwhelming evidence establishing the County's culpability, neither the County nor Amici establish that the County escapes liability even if the Court agrees with Amici's arguments.

establishing liability and damages in its tort case to the jury. Amici write: “The Examiner’s decision, which was not appealed, should collaterally estop Respondents from challenging the propriety of the SUP amendment process in a damages action.” Br. at 18-19. Amici do not attempt to demonstrate that the elements of collateral estoppel are met, however, and the County abandoned its collateral estoppel argument, Pet. for Rev. at 10 n.7.

The standards for collateral estoppel could not be met in this case because the elements of the torts presented to the jury were fundamentally different from LUPA’s standards for granting relief at RCW 36.70C.130(1), and the facts presented to the jury – largely obtained through discovery conducted *after* resolution of all land use issues – were fundamentally different from the facts that would have been presented to the Court in a LUPA appeal that preceded discovery.

B. Amici’s arguments require this Court to re-write multiple sections of the LUPA statute

Amici assert that the Legislature’s definition of land use decision “does not articulate what constitutes a decision that must be reviewed under LUPA.” Br. at 7. Amici ask this Court to expand the Legislature’s definition so that it includes administrative decisions about process that precede the legislatively defined “final determination,” RCW

36.70C.020(2), as if the statute included the language underlined below:

2) “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:

(a) An application for a project permit . . . and also a determination by a local jurisdiction’s body or officer with a lower level of authority who approves an application for a permit but also approves a process to which the applicant objects.

Of course, the Legislature did not include the underlined language, and this Court should not read it into the statute.

LUPA authorizes a court to reverse a land use decision only if errors in process are not “harmless” – that is, do “not affect the outcome of the [land use] case”³ – so Amici’s argument also requires this Court rewrite LUPA’s standards for granting relief, as if RCW 36.70C.130(1)(a) included language such as that underlined below:

The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless; provided, however, that procedural error is not harmless if the land use process was imposed for an improper purpose or it causes economic harm to the applicant even though it results in a lawful land use decision; . . .

However, LUPA does not provide for declaratory relief, it allows the superior court to affirm, deny, or remand a land use decision. Because

³ *Young v. Pierce County*, 120 Wn. App. 175, 187-89, 84 P.3d 927 (2004). This case, and the concept of harmless error in LUPA, are discussed below at Section III. C.3.

the County approved the amendments,⁴ Maytown would not have sought any of that relief, so Amici’s argument also asks this Court to rewrite RCW 36.70C.140 so that it reads:

The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings, or may affirm the land use decision while issuing a declaratory judgment regarding the lawfulness of the process that led to the land use decision. . . .

Even if the Legislature had included the language that Amici’s arguments implicitly ask this Court to import into LUPA, Amici’s arguments would also require this Court to ignore language that the Legislature did include in the statute. Amici’s brief asks this Court to decide that an applicant must bring a LUPA appeal in order to establish liability for damages, which directly contradicts the Legislature’s express statements that:

1. LUPA does not apply to “[c]laims provided by any law for monetary damages or compensation,” RCW 36.70C.030(1)(c), and
2. “A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.” RCW 36.70C.130(2).

This plain statutory language should not be ignored.

C. Amici’s arguments are misguided for four additional reasons

Even ignoring the flaws described above, Amici’s arguments cannot succeed for a number of reasons. First, Amici improperly conflate

⁴ See discussion, *infra*, at Section III.C.2.

LUPA's appellate standards of review of a land use decision with the land use decision itself. Second, LUPA prescribes the types of relief the superior court can grant under its appellate authority, and that relief does not include declaratory judgment. Third, LUPA does not provide relief from a faulty process that nevertheless manages to produce a favorable land use decision. Finally, LUPA does not apply to actions for damages.

1. A land use process is not a land use decision

Contrary to Amici's argument, Br. at 7-10 a land use *process* is not a land use *decision*. A "land use decision" is the final, substantive decision – the "final determination" – on a land use application. RCW 36.70C.020(2). It is neither the creation of a process, nor the selection of a process. It is singular ("a final decision"), not plural ("the final decision *and any interlocutory decisions or actions on procedural issues*").

Here, the relevant administrative decision was the Hearing Examiner's favorable decision to grant Maytown's amendments, while the "land use decision" was the favorable Board decision affirming the Examiner.

LUPA establishes the appellate standards which an appellant must meet to obtain the limited relief available under LUPA, including the "body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was

harmless.” RCW 36.70C.130(1)(a). The Legislature refers to “unlawful procedure,” “prescribed process,” and “land use decision” as three separate things.⁵ Contradicting this basic sentence structure, Amici argues that the three are actually one. In fact, the clause accurately reflects reality: by following a procedure, the local government creates a land use decision. A land use *process* is no more a land use *decision* than a recipe is a cake.

2. LUPA does not provide for declaratory relief

Even if LUPA authorized appeals of administrative decisions about process, LUPA does not provide the relief that is central to Amici’s and the County’s theory. LUPA gives the superior court three, and only three, options to resolve a LUPA appeal: (1) affirm the land use decision, (2) reverse the land use decision, or (3) remand the land use decision for modification or further proceedings. RCW 36.70C.140. If (and only if) the court remands, it “may make such an order as it finds necessary.” *Id.* The statute does not include the option (4) that Amici’s argument requires: to affirm a substantively correct and favorable land use decision and *also*

⁵ Similarly, an appellant can obtain relief if “[t]he land use decision is outside the authority or jurisdiction of the body or officer making the decision.” RCW 36.70C.130(1)(e). The sentence presumes that the land use decision is something separate from the body or office that makes the decision.

“make such an order as it finds necessary.”⁶

Had Maytown appealed the Board’s favorable land use decision, it would not have requested any of the relief provided for in the statute because the County issued the amendments that Maytown sought. LUPA does not authorize the superior court to affirm a permitting decision and also issue a declaratory judgment about the process that led to the favorable decision.

3. LUPA does not provide relief from a favorable land use decision that results from an improper process

The unarticulated premise in Amici’s argument is that LUPA provides relief for a flawed procedure that nevertheless produces a substantively correct land use decision. This premise is contrary to the statute: a flawed procedure is grounds for reversal only if it is not harmless, i.e., only if it substantively affects the land use decision. Here, however, the land use decision approved the permit, so any error in the process was, by LUPA’s express terms, irrelevant to the validity of the land use decision.

This harmless error concept is codified in LUPA’s standards for reversal. RCW 36.70C.130(1)(a). Because the decision to grant the

⁶ Cf. *In re Jurisdiction of King County Hearing Examiner*, 135 Wn. App. 312, 321-22, 144 P.3d 345 (2006) (holding that where ordinance gave the hearing examiner the authority to (a) deny a SEPA appeal or (b) grant with conditions, it was error for the examiner to *deny* an appeal with conditions).

amendments to allow pre-mining activities to commence was correct and favorable to Maytown, any procedural error was harmless as a matter of land use law – which is all LUPA applies to.

The question of whether a procedural error is harmless depends on whether the land use decision would have been substantively different had the proper process been followed,⁷ *not* whether following the correct process would have been less expensive than following the unlawful process. For example, in *Young v. Pierce County*, *supra* n.5, the Court of Appeals addressed an undisputed procedural error: the county code required a citation to list the title, chapter, and section of violated code, but the citation at issue in the case failed to cite the section. 120 Wn. App. at 187-89. Writing that error is harmless when it “does not affect the outcome of the case,” the court found the error at issue in *Young* harmless, *id.*, despite the fact that the affirmance of the violation was adverse to (and presumably expensive for) the plaintiff.

Similarly, as to Maytown, the procedural error here was harmless as a matter of land use law because it did not affect the outcome of the land use issues before the Examiner. Maytown obtained the right to operate its mine, despite the fact that Maytown incurred unnecessary

⁷ *Cf.*, e.g., *Jones v. Town of Hunts Point*, 166 Wn. App. 452, 462-63, 272 P.3d 853 (2012) (finding a procedural error harmless because it did not alter the outcome of the land use decision, without discussing whether the error was more expensive to the appellant).

expenses in obtaining that right. The time and expense involved with obtaining the land use decision is a question of damages, not land use law.

Maytown made its procedural objections to preserve the issue in the event that Maytown needed to appeal an *adverse* land use decision. Had the Hearing Examiner or Board denied the amendments, Maytown would have argued on appeal that the entire amendments process was unnecessary. Instead, Maytown won.⁸ Parties routinely preserve objections during a judicial or quasi-judicial process while continuing with the process despite an adverse ruling, and this case was no different. Both the Port and Maytown preserved their objections to the process while doing everything they could to avoid further damages by commencing mining as soon as possible.⁹ Because no party asked the Hearing Examiner to reject the application due to the impropriety of the process, any decision she did make on the propriety of the process was dictum.

4. LUPA does not apply to actions for damages

Maytown has already briefed the many ways in which the

⁸ Relying on dicta from *Shaw v. City of Des Moines*, 109 Wn. App. 896, 37 P.3d 1255 (2002) (reversing Clerk’s dismissal of lawsuit resulting from an error in the superior court’s computer system), Amici read an order of events into LUPA – that a land use petition must conclude before any damages action – that is nowhere to be found in LUPA. Br. at 17. Maytown did exactly that, resolving all land use issues by obtaining all entitlements staff required, then litigating the damages claim.

⁹ Had Maytown not objected to the process, the County would have argued that Maytown waived the issue, as the County did anyway. The County argued to the Court of Appeals that Maytown had reached a “settlement and compromise” with the County, essentially arguing that Maytown’s objection did not suffice to preserve the issue.

Legislature acted to separate land use appeals under LUPA from actions for damages, and the reasons why the Legislature did so. However, Amici advance a new argument, that LUPA’s exemption for damages should be construed narrowly. Br. at 15 (discussing interpretation of RCW 36.70C.030(1)(c)). This implicitly casts LUPA as establishing the general rule for commencing lawsuits, while carving out a narrow exception applicable only to “[c]laims provided by any law for monetary damages or compensation.”

The argument turns reality on its head. *LUPA* is the exception to the general rules for commencing lawsuits: the Civil Rules, which apply to actions for damages. *LUPA* creates a narrow means for invoking the appellate jurisdiction of the superior court to review land use decisions, and the Court should apply RCW 36.70C.030(1)(c) according to its plain language: it does not apply to “claims provided by *any law* for monetary damages.”

D. A tort action does not collaterally attack a land use decision or the process that produced it

Amici’s argument regarding the “monetary damages” exception presumes that an award of damages in tort constitutes a collateral attack on a land use decision. Br. at 13-15. The Port addressed this issue in its Supplemental Brief, but it bears repeating: damages recoverable in tort can

and do flow from otherwise lawful conduct. *See, e.g., Grundy v. Thurston County*, 155 Wn.2d 1, 10, 117 P.3d 1089 (2005) (remanding for 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); *accord, e.g., Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 558, 166 P.3d 813 (2007) (tortious interference lies for actions taken for an improper purpose, independent of the propriety of the means employed). The fact that government authorizes an action does not preclude a torted party from recovering damages caused by that action. *Tiegs v. Watts*, 135 Wn.2d 1, 15, 954 P.2d 877 (1998) (holding a permitted discharge of pollutants can constitute a nuisance and writing "The fact a governmental authority tolerates a nuisance is not a defense if the nuisance injures adjoining property."). Put another way, the fact that a court awards damages in tort that result from a land use decision does not render the land use decision invalid – the permittee may proceed with the project according to the final land use decision while a damages action proceeds according to the Civil Rules.

The relevant question for this tort case is not whether the Thurston County Code allows a disinterested regulator to require permit amendments through a hearing examiner process – which is the question the Hearing Examiner answered on Maytown's SEPA appeal. Rather, the

question for this intentional tort case is whether staff made process decisions in service of the Commissioners' improper purpose to kill the mine. The evidence supporting the Commissioners' improper motive – which was obtained through discovery in this tort action after the land use issues were resolved – overwhelmingly supports the jury's affirmative answer to that question. LUPA does not allow reversal of a land use decision due to the improper motives of the decision-maker, RCW 36.70C.130(1), so the only way to litigate that issue is in a damages action. Whether the process was otherwise lawful is irrelevant if the evidence establishes – as it did here – that the County regulated with the purpose of driving the mine out of business.

E. Amici's argument contradicts the regulatory reform purpose of the bill through which the Legislature adopted LUPA

Amici begin their argument by describing LUPA as “a short statute with scant legislative history.” Br. at 6. In fact, LUPA was part of the Regulatory Reform Act of 1995. *See* Laws of 1995, Ch. 347 §§ 701-715. Occupying 106 single-spaced pages of Washington's Session Laws, the Act implemented the recommendations of then-Governor Lowry's task force on regulatory reform. *See* Laws of 1995, ch. 347. The plain language of the bill establishes that the Legislature adopted LUPA as part of an extensive effort to streamline every element of the land use

entitlement process: planning under the GMA, the adoption of development regulations (zoning), the application and permitting process, environmental review, the appeals process, and so on.¹⁰

One of the Legislature's reforms was to supersede *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079 (1993), by emphatically separating land use appeals from actions for damages. LUPA did this 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), thereby eliminating the collateral estoppel effect established by *Lutheran Day Care*; (3) requiring expedited review of land use decisions, RCW 36.70C.090; (4) allowing limited or no discovery, RCW 36.70C.120; (5) expressly excluding actions for damages from LUPA's coverage, RCW 36.70C.030(1)(c); and declaring 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).

Amici ask this Court to disregard not only the plain language of LUPA and its legislative history, but also its purpose:

¹⁰ *Accord*, Richard L. Settle, The Washington State Environmental Policy Act, App'x E at E-4 (titled "Regulatory Reform" and containing 47 pages of analysis of the bill's effect on SEPA alone; Prof. Settle describes the bill as "a sweeping package of legislation" that followed "the 1994 report of the Governor's Task Force on Regulatory Reform").

. . . to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

RCW 36.70C.010. Amici ask this Court to hold instead that the Legislature's purpose was to require applicants, who overcome improper official interference and obtain the land use entitlements they apply for, to put their projects on hold while they prosecute administrative and judicial appeals that serve no land use purpose (but nonetheless require expedited review by the courts, RCW 36.70C.090), in order to obtain what amounts to declaratory judgments (relief that is not available under LUPA, RCW 36.70C.140) that will establish liability by means of collateral estoppel in separate tort actions (even though LUPA's standards are not tort standards, RCW 36.70C.130(1); LUPA expressly does not apply to tort actions, RCW 36.70C.030(1)(c); and a grant of relief under LUPA does not establish liability in tort, RCW 36.70C.130(2)). Amici's arguments contradict the statute and the very purpose of regulatory reform.

IV. CONCLUSION

Land use law and tort law are, and should remain, separate. They serve different purposes, and employ different standards. This Court should decline the County's request to fuse them. Only by adding language to LUPA, by ignoring what the Legislature actually wrote in

LUPA, by disregarding LUPA's purpose, and by overruling this Court's precedent in *Blume v. Seattle, supra*, can the Court absolve the County of the liability that the jury imposed by fifteen unanimous verdicts.

RESPECTFULLY SUBMITTED this 9th day of January, 2018.

s/Patrick J. Schneider

s/Steven J. Gillespie

Patrick J. Schneider, WSBA #11957

Steven J. Gillespie, WSBA #39538

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000

Seattle, Washington 98101-3292

Telephone: (206) 447-4400

Facsimile: (206) 447-9700

Email: pat.schneider@foster.com

steve.gillespie@foster.com

Attorneys for Respondent Port of Tacoma

s/John E.D. Powell

John E.D. Powell, WSBA #12941

JED POWELL & ASSOCIATES, PLLC

7191 Wagner Way NW Ste. 202

Gig Harbor, WA 98546

Telephone: (206) 618-1753

Email: jed@jedpowell.com

*Attorneys for Respondent Maytown Sand and Gravel,
LLC*

s/Eric Christensen

Eric Christensen, WSBA #27934

CARINCROSS HEMPELMANN PS

524 2ND Ave., Suite 500

Seattle, WA 98104

Telephone: (206) 587-0700

Facsimile: (206) 587-2308

Email: echristensen@cairncross.com

*Attorneys for Respondent Maytown Sand and Gravel,
LLC*

CERTIFICATE OF SERVICE

I hereby certify that, on Tuesday, January 09, 2018, I caused to be served, in the manner indicated below, a true and correct copy of the foregoing document on each of the following:

Elizabeth Petrich
Thurston County Deputy
Prosecuting Attorney
2000 Lakeridge Dr. SW, Bldg. 2
Olympia, WA 98502
petrice@co.thurston.wa.us
*Served via electronic mail
Attorney for Thurston County*

Carolyn A. Lake
Goodstein Law Group PLLC
501 S. G Street
Tacoma, WA 98405
253-779-4000
Fax: 253-779-4411
clake@goodsteinlaw.com
*Served via electronic mail
Attorney for Port of Tacoma*

Michael B. King
Jason W. Anderson
Rory Drew Cosgrove
Carney Badley Spellman, P.S.
701 5th Avenue, Ste. 3600
Seattle, WA 98104
(206) 622-8020
king@carneylaw.com
anderson@carneylaw.com
cosgrove@carneylaw.com
*Served via electronic mail
Attorney for Thurston County*

Mark R. Johnsen
Steven David Robinson
Karr Tuttle Campbell
Special Deputy Prosecuting
Attorney for Thurston County
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
mjohnsen@karrtuttle.com
sdrobinson@karrtuttle.com
*Served via electronic mail
Attorney for Thurston County*

Don C. Bauermeister
James Hertz
FRIEDMAN | RUBIN
1126 Highland Avenue
Bremerton, WA 98370
(360) 782-4300
don@friedmanrubin.com
jhertz@friedmanrubin.com
*Served via electronic mail
Attorney for Maytown Sand &
Gravel, LLC*

Josh Weiss
Washington State Association of
Counties
206 10th Avenue S.E.
Olympia, WA 98501-1311
(360) 586-4219
jweiss@wacounties.org
*Served via electronic mail
Attorney for WSAC*

Daniel G. Lloyd
Vancouver City Attorney's Office
P. O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500
dan.lloyd@cityofvancouver.us
Served via electronic mail
Attorney for Amicus WSAMA

Daniel B. Heid
City Attorney
City of Auburn
25 West Main
Auburn, WA 98001
(253) 931-3054
dheid@ci.auburn.wa.us
Served via electronic mail
Attorney for Amicus WSAMA

Darcey Eilers
Deputy City Attorney, City of
Bothell
18415 101st Ave NE
Bothell, WA 98011
Darcey.eilers@bothellwa.gov
Attorneys for Amicus WSAMA

Laura C. Kisielius
Deputy Prosecutor, Snohomish
County
3000 Rockefeller Ave
Everett, WA 98201
Laura.kisielius@snoco.org
Served via electronic mail
Attorneys for Amicus WSAC

Duana T. Kolouskova
Vicki E. Orrico
11201 SE 8th Street, Ste. 120
Bellevue, WA 98004
kolouskova@jmmlaw.com
Served via electronic mail
Attorneys for Amicus MBA

Brian T. Hodges
Pacific Legal Foundation
10940 NE 33rd Place, Ste. 210
Bellevue, WA 98004
BHodges@pacificlegal.org
Served via electronic mail
*Attorneys for Amicus Pacific
Legal Foundation*

DATED Tuesday, January 09, 2018, at Seattle, Washington

s/Suzanne Nelson

Suzanne Nelson, Legal Assistant

FOSTER PEPPER PLLC

January 09, 2018 - 3:54 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94452-1
Appellate Court Case Title: Maytown Sand and Gravel, LLC v. Thurston County, et al.
Superior Court Case Number: 11-2-00395-5

The following documents have been uploaded:

- 944521_Briefs_20180109154922SC765871_5372.pdf
This File Contains:
Briefs - Answer to Amicus Curiae
The Original File Name was Answer to Brief of Amici Curiae WSAMA and WSAC.pdf

A copy of the uploaded files will be sent to:

- Laura.Kisielius@snoco.org
- PAOAppeals@co.thurston.wa.us
- anderson@carneylaw.com
- brenda.bole@foster.com
- bth@pacificlegal.org
- clake@goodsteinlaw.com
- cosgrove@carneylaw.com
- dan.lloyd@cityofvancouver.us
- darcey.eilers@bothellwa.gov
- deborah.hartsoch@cityofvancouver.us
- dheid@auburnwa.gov
- don@friedmanrubin.com
- dpinckney@goodsteinlaw.com
- echristensen@cairncross.com
- gglosser@cairncross.com
- jed@jedpowell.com
- jhertz@friedmanrubin.com
- jweiss@wsac.org
- king@carneylaw.com
- kolouskova@jmmlaw.com
- laura.kisielius@co.snohomish.wa.us
- mjohnsen@karrtuttle.com
- orrico@jmmlaw.com
- petrice@co.thurston.wa.us
- sdrobinson@karrtuttle.com
- steve.gillespie@foster.com
- swatkins@karrtuttle.com

Comments:

Sender Name: Patrick Schneider - Email: pat.schneider@foster.com

Filing on Behalf of: Patrick John Schneider - Email: pat.schneider@foster.com (Alternate Email:

litdocket@foster.com)

Address:

1111 Third Avenue, Suite 3000

Seattle, WA, 98101

Phone: (206) 447-4400

Note: The Filing Id is 20180109154922SC765871