

No. 94452-1

No. 46895-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION TWO

MAYTOWN SAND AND GRAVEL, LLC, and
PORT OF TACOMA,

Respondents,

v.

THURSTON COUNTY,

Appellant.

ON APPEAL FROM LEWIS COUNTY SUPERIOR COURT
Honorable Richard L. Brosey

APPELLANT'S OPENING BRIEF

Mark R. Johnsen, WSBA No. 11050
Steven D. Robinson, WSBA No. 12999
KARR TUTTLE CAMPBELL
701 Fifth Avenue, Suite 3300
Seattle, Washington 98104-7055
Telephone: (206) 223-13-13
Facsimile: (206) 682-7100

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Justin P. Wade, WSBA No. 41168
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Attorneys for Appellant Thurston County

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I. INTRODUCTION

This case involves an attempt to shift the cost of a failed business venture onto a local government, through a civil damages action that should never have been allowed to get to a jury.

In 2005 Plaintiff and Respondent Port of Tacoma bought property in Thurston County for \$21,000,000. The property was subject to a permit that allowed gravel mining if certain conditions were satisfied. The Port wanted to develop an “intermodal transit” facility on the property. But strong public opposition, compounded by disastrously changed economic conditions, caused the Port late in 2008 to abandon its project and put the property up for sale.

In 2009 out-of-state businessmen Jim Magstadt and Steve Cortner decided to bid on the property, aiming to develop a gravel mine. They hoped to raise over \$10,000,000 in capital from third-party sources, to sustain the project’s economic viability through what Magstadt and Cortner recognized would likely be a two to three year start-up period before mining could begin. In the midst of the worst economic downturn since the Great Depression, the hoped-for third-party investment money did not materialize. Magstadt and Cortner, however, managed to persuade Randy and Dan Lloyd, experienced local gravel-mine operators, to join their venture. They formed Plaintiff and Respondent Maytown Sand and Gravel, and capitalized it with \$2,500,000 of Lloyd money. This substantially reduced capitalization, however, meant that mining would have to start no later than 2010, or the venture would fail.

In late 2009 the Port and Maytown agreed to a purchase of the property by Maytown for \$17,000,000 -- \$4,000,000 less than what the Port paid for the property in 2006. The Port and Maytown then pressed Thurston County to allow mining to start in 2010. The County responded that mining could not begin until certain permit conditions had been satisfied, including groundwater monitoring of potential pollutants which had yet to be done. Completion of the groundwater monitoring, however, meant mining could not begin until 2011. And delaying the start of mining until 2011 would doom the venture.

In April 2010 the Port and Maytown closed on their deal. They again tried to persuade the County to allow mining to begin right away. The County refused. The project failed. The Port and Maytown then sued the County for millions, alleging tortious interference with contractual relations, negligent misrepresentation, general negligence, and (by Maytown) deprivation of federal constitutional due process (actionable under 42 U.S.C. § 1983). The Port and Maytown claimed that the political leadership of the County had been dead set against the mine, and had wrongfully pressured County staff to delay the start of mining, by any means, in order to kill the project.

The Legislature adopted the Land Use Petition Act to replace the existing patchwork process for resolving land use disputes. That process was frequently marred by confusion and delay, and sometimes ended in the frustration of legitimate developer hopes and large damage verdicts against local government. The Legislature's declared goal of "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, will be frustrated, however, if developers are allowed to pursue damages claims after bailing from the middle of a local land use administrative process, because they fear the final outcome will make a future damages cases “more difficult.”

That is what happened here. The Port and Maytown got to a point in the Thurston County land use administrative process in which they had received a favorable ruling from the County’s hearing examiner on several issues. The hearing examiner, however, rejected the Port and Maytown’s claim that the County staff should not have referred to the hearing examiner the question of whether to grant Maytown’s request that the County eliminate the groundwater monitoring requirements that were making it impossible to start mining in 2010. According to the Port and Maytown, had the staff granted the request, instead of referring the issue to the hearing examiner, mining could have started in 2010. But the hearing examiner found that the staff acted reasonably when the staff determined that the issue of groundwater monitoring requirements was appropriate for resolution through an evidentiary hearing before a hearing examiner, and further found that the requirements were necessary for groundwater protection.

The Port and Maytown feared that, if they appealed these hearing examiner determinations through the administrative process, the final result would -- in the words of their lead land-use counsel -- “make our

damage case more difficult[.]” Exh. 449.¹ ***And the Port and Maytown were right to be concerned.*** Challenging how the County staff handled the question of groundwater monitoring requirements was the ***linchpin*** of their planned damages case, and continuing to litigate that issue through the administrative process ultimately risked an adverse superior court LUPA ruling that would cut the legal legs out from under their case. So, instead of taking that risk, the Port and Maytown bailed from the administrative process, midstream. They did not appeal the hearing examiner’s rulings. Instead, they made the handling of the groundwater monitoring requirements issue the centerpiece of a damages case they ultimately were allowed to present to a Lewis County jury in the Summer of 2014. And that jury returned a verdict of \$12,000,000 in favor of the Port and Maytown.

This outcome cannot be reconciled with the Legislature’s purpose in enacting the Land Use Petition Act. In December 2014 the Washington Supreme Court, by its decision in *Durland v. San Juan County*, 182 Wn.2d 55, 240 P.3d 191 (2014), made crystal clear that LUPA’s exhaustion of administrative remedies requirement must be ***strictly enforced***. The trial court failed to do that here, and the end result was a jury verdict based on an attack on Thurston County’s land use decision-making whose legal viability should first have been tested under LUPA. This Court therefore should vacate the judgment on the jury’s verdict and remand with

¹ The County has attached a copy of Exhibit 449 as the only appendix to this brief.

directions that the Port's and Maytown's state law claims be dismissed with prejudice.

This Court should also remand with the additional direction that Maytown's federal due process claim be dismissed with prejudice, and its related attorney fees award be vacated. Maytown failed to show either that it had a cognizable property interest, or that anything the County could be said to have done was "shocking to the conscience" (the legal test that must be met to show that a land use decision violates due process). Either of these failures is fatal to Maytown's due process claim.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error.

The County assigns the following errors:

1. The trial court erred in refusing to dismiss Plaintiffs' state law claims as a matter of law before trial. *See* RP 45-46 (initial hearing on Thurston County's Motion for Summary Judgment, September 28, 2012), 99-114 (hearing on Maytown's Motion for Partial Summary Judgment under RCW 64.40, and further hearing on Thurston County's Motion for Summary Judgment, November 19, 2012), 147-52 (further hearing on Thurston County's Motion for Summary Judgment, March 1, 2013); CP 1950-53 (Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Thurston County's Motion for Summary Judgment, dated March 1, 2013).

2. The trial court erred in denying the County's motion for summary judgment to dismiss Maytown's claim under 42 U.S.C. § 1983.²

² The County is not assigning error to the trial court's related award of attorney's fees under 42 U.S.C. § 1988. The trial court exercised its discretion to reduce Maytown's fee request, and the County does not take issue with that exercise of discretion. CP 7551-62. The fee award, however, is derivative of Maytown's right to recover for a deprivation of due process, and therefore cannot stand if this Court determines that Maytown's due process claim should have been dismissed.

See CP 1950-53 (Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Thurston County's Motion for Summary Judgment, dated March 1, 2013); RP 323-24 (October 4, 2013).

3. The trial court erred in denying the County's motion for judgment as a matter of law at the close of the Plaintiffs' case in chief. *See* RP 2882-86.

4. The trial court erred in entering judgment on the verdict against the County. *See* CP 6392-94.

5. The trial court erred in denying the County's post-trial motion for judgment in the matter of law or in the alternative for a new trial or amendment of the judgment. *See* RP 3951-54 (October 3, 2014); CP 7448-49 (Order Denying Thurston County's Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial or Amendment of Judgment, dated October 16, 2014).

B. Statement of Issues.

The following issues pertain to the assignments of error:

1. Plaintiffs made a tactical decision to forego available administrative remedies, deliberately avoiding issuance of a "land use decision" that would need to be appealed to superior court under LUPA to preserve the ability to sue for damages. Were Plaintiffs' state law tort claims barred under LUPA's strict requirement to exhaust administrative remedies? (Assignments of Error Nos. 1, 3, 4, 5.)

2. On Plaintiffs' specific request, a Thurston County hearing examiner decided the issues underlying Plaintiffs' tortious interference claims, *i.e.*, whether the County acted for an improper purpose or by improper means. The hearing examiner ruled in the County's favor. Were Plaintiffs' tortious interference claims precluded under the doctrine of collateral estoppel? (Assignments of Error Nos. 1, 3, 4, 5.)

3. The special relationship exception to the public duty doctrine requires the plaintiff to establish justifiable reliance upon an express assurance by the government. Plaintiffs' evidence was that the County made, at most, a qualified prediction upon which Plaintiffs could not justifiably have relied. Were Plaintiffs' negligent misrepresentation and general negligence claims barred under the public duty doctrine? (Assignments of Error Nos. 1, 3, 4, 5.)

4. A negligent misrepresentation plaintiff must prove, by clear, cogent, and convincing evidence, that the defendant made a false representation as to a presently existing fact. Plaintiffs alleged only a promise of future conduct which, even if relied upon, could not have been a proximate cause of damage to Plaintiffs. Did Plaintiffs fail to establish the elements of negligent misrepresentation by clear, cogent, and convincing evidence? (Assignments of Error Nos. 1, 3, 4, 5.)

5. The hearing examiner rejected Plaintiffs' argument that the County was bound by an alleged representation that amendments to permit conditions, if required, would be approved by staff. Were Plaintiffs' negligent misrepresentation claims precluded under the doctrine of collateral estoppel? (Assignments of Error Nos. 1, 3, 4, 5.)

6. By agreeing to a new groundwater monitoring plan and presenting it to the hearing examiner for adoption, Plaintiffs compromised and settled the issues on which their general negligence claims focused. Did Plaintiffs thus waive those claims? (Assignments of Error Nos. 1, 3, 4, 5.)

7. A Thurston County hearing examiner adopted the stipulated and jointly presented groundwater monitoring plan. Were Plaintiffs' general negligence claims precluded under the doctrine of collateral estoppel? (Assignments of Error Nos. 1, 3, 4, 5.)

8. A developer must prove it was deprived of a cognizable property interest, and in a manner that was shocking to the conscience to prevail on a substantive due process claim arising from a land use decision. Did Maytown fail to offer evidence of actions by Thurston County that involved deprivation of a cognizable property interest, or conduct so wrongful as to "shake the foundations of this country," *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 862 (6th Cir. 2012), and therefore constitute conduct shocking to the conscience? (Assignments of Error Nos. 1, 2, 3, 4, 5.)

III. STATEMENT OF THE CASE

- A. In 2005, Thurston County issued a special-use permit to mine sand and gravel, subject to conditions that needed to be satisfied before mining could begin. The next year, the Port of Tacoma purchased the mine property, planning to develop an intermodal freight transport facility as well as exploit the mine. In late 2008, facing public opposition and disastrous economic conditions, the Port abandoned those plans and put the property up for sale.**

This case arises out of an unsuccessful attempt to mine sand and gravel on a portion of mostly undeveloped land near Maytown in Thurston County.

The property, which originally comprised 1,613 acres, contains several protected habitats including wetland, riparian, native outwash prairie, and oak woodland habitats. Exh. 303 at 7-9, 18-19.³ Wetlands and associated buffers are found along two creeks, and native outwash prairie occupied the majority of the overall property. Exh. 303 at 9-10. Native outwash prairie is defined as “open areas of excessively drained soils...greater than five acres in size which are covered by native drought-resistant species of grasses, forbs, lichens, and mosses.” Exh. 303 at 20. Native outwash prairie is “an extremely rare and endangered habitat, with only 20 extant areas in the world.” Exh. 303 at 20.

³ Trial Exhibit 303 is a copy of the findings, conclusions and decision of the Thurston County Hearing Examiner, issued in 2005 in granting a special use permit to mine sand and gravel on a portion of the property. As will be discussed more fully later in this brief, that permit and its requirements are at the center of this case. The Plaintiffs have consistently maintained that the determinations pertaining to the grant of this permit are conclusive and binding. *See, e.g.*, CP 136, 182; Exh. 386 at 2.

In 2002, then-owner Citifor, Inc.,⁴ applied for a special-use permit (SUP) to operate a sand and gravel mine on a portion of the property. Exh. 303 at 1; Exh. 429 at 10. Citifor proposed to designate a 587-acre “project site” within its total acreage, within which mining would be allowed in eight “mine areas” totaling 300 acres. Exh. 303 at 7-8, 31. It was estimated that the mine could produce 20.6 million cubic yards of sand and gravel during a 20-year lifespan. Exh. 303 at 7-8, 11. A rail line crossed the property, and it also had convenient access to Interstate 5, both of which could facilitate shipping of materials to and from the site. Exh. 303 at 8.

Approximately 700 acres of Citifor’s overall ownership, including the project site, had been used for industrial purposes since before World War II, including manufacturing and testing of dynamite and other explosives. Exh. 303 at 9; Exh. 429 at 10. This resulted in significant soil and groundwater contamination. Exh. 303 at 9; Exh. 429 at 10. Under an agreed order entered by the Department of Ecology (DOE), the eight mine areas would be released for mining as they were cleaned up or determined by DOE not to be contaminated. Exh. 303 at 9. As of the issuance of the permit, DOE had released mine areas one and two, the first areas designated to be mined. Exh. 303 at 9.

The special-use permit application was subject to review under the State Environmental Policy Act (SEPA), which meant the County was

⁴ The named applicant was Allen & Company, LLC, acting as agent of Citifor. *See* Exh. 429 at 10.

required to issue a determination of significance (DS), a determination of non-significance (DNS), or a mitigated determination of non-significance (MDNS). *See* RCW 43.21C.240(1). The County issued an MDNS in May 2004. Exh. 303 at 17. This was appealed by the Black Hills Audubon Society (BHAS),⁵ a conservation organization. Exh. 303 at 17. Citifor entered into a settlement agreement with BHAS, under which Citifor made several modifications to its proposal, including reducing the project site from 587 to 497.3 acres and the total proposed mine area from 300 to 284 acres. Exh. 303 at 31; Exh. 302 at 1. As a result of the settlement, in 2005 the County issued a new MDNS. Exh. 303 at 31, 43; Exh. 302; Exh. 429 at 11.

The 2005 MDNS included several conditions that had to be satisfied before mining could commence. Of these, Condition 6, pertaining to groundwater monitoring, would become the focus of Plaintiffs' damages case.

Condition 6 required the permittee to adhere to the Maytown Aggregates Groundwater Monitoring Plan, which had been prepared by Citifor's consultant, Charles "Pony" Ellingson.⁶ Exh. 179; Exh. 302 at 3-4; Exh. 303 at 13. The groundwater monitoring plan addressed concerns that mining could adversely affect nearby domestic wells and wetlands. *See* Exh. 179.

⁵ Throughout the verbatim report of proceedings, the name "Black Hills Audubon Society" has been transcribed as the Black Hills "Autoban" or "Autobahn" Society.

⁶ Ellingson later became a consultant to Plaintiff Maytown Sand and Gravel, and -- as will be discussed later in this brief -- testified at trial in support of the Plaintiffs' case.

Condition 6 imposed requirements with reference to the groundwater monitoring plan. Exh. 302 at 3-4. First, Condition 6A required the permittee to field-verify off-site supply wells within a year of permit issuance:

Prior to any mining activity and within one year of final issuance of the Special Use Permit...issuance the operator will field-verify off-site supply wells in the following areas: [specified].

Exh. 302 at 4.⁷ Second, Condition 6C required the permittee to establish seventeen “monitoring wells” within and surrounding the mine, to monitor “water levels, temperature, and water quality, including measurement of background conditions,” starting within 60 days of permit issuance:

Pursuant to the Groundwater Monitoring Plan, to avoid repeated access to the private wells identified in the [preceding] conditions, seventeen (17) monitoring wells shall be established within and surrounding the mine. The wells shall monitor water levels, temperature, and water quality, including measurement of background conditions, and by documenting the construction and performance of off-site water supply wells prior to mining. The surveys shall begin within 60 days of the final issuance by the County of the Special Use Permit.

Exh. 302 at 4.

Condition 6C did not precisely mirror the groundwater monitoring plan. The groundwater monitoring plan did not require 17 monitoring *wells* but more generally 17 monitoring *stations*. Exh. 179 at 1. Four of

⁷ The County staff hydrogeologist, Ms. Nadine Romero, testified during the five-year review proceeding (discussed later in this brief) that the purpose of the off-site survey was as much to protect the mine operator as to protect the off-site well owners, as it “prevents the mine for being blamed for contaminants already in the offsite well water.” Exh. 429 at 21.

these stations were to monitor “process water” from the mining operation, under a permit from the National Pollutant Discharge Elimination System (NPDES). *Id.* at 1, 7-8. Background samples were to be collected from these stations prior to mining, to establish the parameters of “temperature, specific conductance, turbidity, and possibly dissolved iron and manganese.” Exh. 179 at 7. The remaining 13 stations were meant to detect possible effects on off-site domestic wells and wetlands by monitoring “water levels and temperatures.” Exh. 179 at 4-5. Of those 13 stations, nine were to be wells and the remainder were to be surface stations. Exh. 179 at 5.

After a full public hearing process, the hearing examiner granted the permit in December 2005, and adopted the MDNS. Exh. 303 at 43; Exh. 429 at 11. The hearing examiner also designated the mine areas as “mineral resource lands of long-term commercial significance.” Exh. 303 at 43. *See* RCW 36.70A.170. The hearing examiner found that “[o]perations would commence with an initial start-up and construction period during which the rock-processing infrastructure...would be installed. Ground preparation and stripping of mine area 1 would occur during the initial startup phase.” Exh. 303 at 11.

In March 2006, Citifor sold the majority of its acreage, not including the project site, to the Washington Department of Fish and Wildlife (WDFW) for conservation purposes. Exh. 429 at 12. In October 2006, Citifor sold the remaining land to the Port of Tacoma, including Citifor’s rights under the permit. Exh. 429 at 12.

The Port planned to build an intermodal freight transport facility (rail and truck) in cooperation with the Port of Olympia, as well as mine sand and gravel to make the site economically viable. Exh. 429 at 12; RP 741-42, 746. Both the transportation facility and mining aspects of Port's plan garnered significant resistance from BHAS and a conservation group that materialized specifically to oppose the Port's plan, Friends of Rocky Prairie (FORP). Exh. 429 at 37-38; RP 808.

Then, in mid-September 2008, the American stock markets crashed, ushering in the worst economic downturn since the Great Depression of the 1930s. The Port abandoned its transport facility project, and began marketing the property for sale. Exh. 429 at 13; Exh 446 at 13-14; RP 774-75, 817, 3084.

B. Jim Magstadt and Steve Cortner, out-of-state businessmen lacking experience with gravel mining here, decided to bid on the Port's property. They joined forces with locals Randy and Dan Lloyd to form Maytown Sand and Gravel. The viability of their business plans ultimately came to rest on the need to commence mining no later than 2010.

California real-estate investor Jim Magstadt became aware of the Maytown mining opportunity in late 2008. CP 7579-80. He partnered with consultant Steve Cortner, and they began what turned out to be a year-and-a-half-long due diligence process. CP 7579-81. Neither had experience with gravel mining in Washington. RP 2335, 2351. They were informed that a local company, Miles Sand & Gravel, "controls the market" in Thurston County and that another major company, Lakeside Industries, also had a "big presence." RP 2337-38; Exh. 313. They bid on

the property anyway, offering \$20 million. RP 790; Exh. 314. The Port received three bids for the property and chose to negotiate exclusively with the highest bidders, Magstadt and Cortner. RP 779-80; Exh. 314.

Magstadt and Cortner initially planned to find passive investors to finance the property purchase and start-up costs, and then contract with a mine operator. RP 2200-02, 2206-08; CP 7588. They anticipated that it would take up to three years after purchase to get the mine up and running. RP 2379-80; CP 7612-14. Cortner prepared pro formas that contemplated start-up capital between \$11 and \$15 million, and a two-to-three-year holding period before mining would begin, *i.e.*, until 2012 or 2013. RP 2207, 2357, 2374-86; Exhs. 330, 337, 338, 339, 343, 344, 345, 347, 348.

Magstadt and Cortner were unsuccessful in finding passive investors. RP 2354; CP 7588-90. Cortner revised the pro formas to reduce the amount of passive capital investment down to between \$5 million to \$7.8 million, with an additional \$5 million now to come from the hoped-for mine operator. RP 2386-87; Exh. 348, 353. In mid-2009, they began talks with brothers Randy and Dan Lloyd, experienced mine operators. RP 2367. In September 2009, Cortner revised the pro formas to show *all* of the start-up capital being supplied by the Lloyds. RP 2388; Exh. 355. Cortner also significantly reduced the start-up time, now assuming that mining could start as soon as the third quarter of 2010. RP 2388; Exhs. 355, 357.

The Lloyds' financial officer cautioned Cortner that his production assumptions for 2010 and 2011 were "a bit too aggressive" and that

production alone would not carry the debt load. RP 2389-90; Exh. 356. Cortner then further revised the pro formas to assume that non-mining property could be sold for more than \$7 million within the first year or two to offset costs. RP 2377, 2391-92; CP 7600, 7616; Exh. 205; Exh. 357. (No attempt would ever be made, however, to sell any portion of the property. RP 2394; CP 7615.)

In October 2009, Maytown Sand & Gravel, LLC (Maytown), was formed with two member entities -- one controlled by Magstadt and Cortner, and the other, called BroCo, controlled by the Lloyd brothers. RP 2208-10; Exh. 385. Maytown entered into an operating agreement with Lloyd Enterprises, Inc., another entity controlled by the Lloyd brothers, to operate the mine. RP 2211-12; Exh. 380. Maytown borrowed \$2.5 million from BroCo -- over half of which would be spent by the closing of the property purchase the following April. RP 2367, 2404; Exhs. 387, 480.⁸

Cortner further revised the pro formas to reflect \$300,000 of operating income in 2010, based on an even earlier start of mining: “as soon as humanly possible,” now defined as no later than the first week of June 2010. Exh. 364 at MSG 7380; RP 2221-22. Production needed to begin by that date, to avoid having debt service kill the project. RP 2390.

⁸ Magstadt and Cortner had put up \$150,000 (\$75,000 each) as earnest money, RP 2409, but they were paid that back out of the BroCo loan funds when the purchase closed. Exh. 480. Other disbursements paid from the loan at the time of closing included \$120,000 each to Magstadt (“Southwest Realty Group”) and Cortner for “Consulting Fees,” \$382,000 to Cairncross and Hempelmann (“C & H”) for legal fees, and a wire transfer to the Port of \$894,190.15.

C. In October 2009, Maytown and the Port entered into a purchase and sale agreement. But Maytown's due diligence then revealed that compliance with permit conditions could delay mining until 2011 or later -- a conclusion confirmed by the County's official communications regarding compliance with permit conditions.

The Port knew it would be a challenge to perfect the mining permit and obtain authorization to commence mining. RP 793. The Port knew there would be strong public opposition to the mine, because there had been strong opposition to its own proposal and to the Port's efforts to avoid expiration of the mining permit. RP 828-29. The Port expected that FORP would challenge the mine at every opportunity, so long as it had resources to continue fighting. RP 830. The Port anticipated that challenges to the amendments and the five-year review could take a year or two to resolve. CP 829-30.

On October 28, representatives of the Port and Maytown met with County staff and discussed issues including the County's position on the status of compliance with the permit conditions. Exh. 429 at 14; Exh. 361.⁹ According to Cortner, County planning manager Mike Kain said at this meeting that he did not see any reason why mining could not start 30 to 60 days following a request for authorization to proceed. RP 2227. Kain denied making this representation. RP 3163. Kain testified he only represented that the County would typically respond to a request to proceed within 30 to 60 days. RP 3163.

⁹ While Exhibit 361 suggests that the meeting occurred on October 29, testimony clarified that it occurred on October 28. See RP 2146-47, 2541, 3192, 3235, 3263.

Kain's recollection was consistent with a written summary of what was discussed at the meeting, prepared by a County staffer and circulated internally the next day, which recited that "[s]taff informed the [Port and Maytown] representatives" that:

2. Mining could commence *once the County makes a determination that all of the conditions of the special use permit are satisfied*, and after the County issues a letter permitting them to proceed.

3. A letter from the applicant needs to be submitted to the County requesting the above review. A fee of \$990 will be assessed. Hourly charges will apply. The time line would typically be 30 to 60 days. Outside issues may require additional time. The review will not be initiated until a proposed letter is received from the Friends of Rocky Prairie outlining their view of Port of Tacoma compliance with conditions of approval. If such letter is timely submitted, it will be forwarded to the Port for comment. Only after this process will the review of the request to commence mining be initiated. If the Friends letter is not timely, the review process will be modified and initiated.

4. Major amendments to the special use permit conditions, such as removing a required berm or changing time lines for completion of conditions, would need to be approved by the Hearing Examiner.

Exh. 361 (emphasis added).

After their meeting with County staff, the Port and Maytown that same day entered into a purchase and sale agreement. RP 2398, 2541-42; *see also* Exh. 390 at MSG000244.¹⁰ The Port agreed to sell the property to Maytown for \$17,000,000 -- over \$4,000,000 less than what the Port

¹⁰ The Purchase and Sale Agreement document itself was not introduced into evidence. There is no dispute, however, that the parties entered into such an agreement, and on October 28. Exh. 390 at MSG000244.

paid for the property in 2006, and less than what Magstadt and Cortner had initially bid. RP 790.¹¹ The price was negotiated down from Magstadt and Cortner's initial bid of \$20,000,000 largely because of "fear and uncertainty about the County's permitting process and what was going to happen going forward." *Id.*

By December, Maytown had become so concerned that the permit might not survive the County's review process that on December 10 Maytown asked the Port to agree to fund the "defense" of the special-use permit, as well as water rights necessary for mining. Exh. 370.¹² Maytown told the Port that a "due diligence blitzkrieg" had raised "deep concern about whether the SUP will survive the five year review." Exh. 370. Maytown observed that "certain SUP conditions were not satisfied and ... compliance with others is questionable." Exh. 370. Maytown also observed that it had become "very clear that all of the current Thurston County Commissioners are hostile to this project and would rather see the land preserved as prairie." Exh. 370. Maytown expressed the concern that it could end up "buying a gopher preserve for Seventeen Million Dollars." Exh. 370.

¹¹ That difference, moreover, understated the extent of the loss the Port was taking on the property, because the Port had invested an additional \$2,000,000 after the sale on remediation of contamination, which was required before the property could be used. RP 749-50.

¹² Maytown's request was not adopted. *See* Exh. 381; Exh. 390 at MSG 266.

Maytown's concerns could only have been reinforced by its receipt the next day (December 11) of the County's responses to a series of questions Maytown had submitted the month before.

The responses flagged issues with several permit conditions. Exh. 371. The County told Maytown that MDNS Conditions 6A and 6C had not been complied with because the reporting deadlines had not been met. Exh. 371. The County observed that the late-submitted water monitoring reports were "not acceptable" because they showed only 14 well sites and did not reflect monitoring of water quality. Exh. 371. The County warned that the failure to meet deadlines in permit conditions could jeopardize the validity of the permit:

For those items without a stated or implied timeline, compliance must be achieved either prior to initiation of substantial activity on site, or prior to mineral extraction, depending on the requirement. ***For any item with a stated or implied timeline that has passed, compliance cannot be achieved.*** Depending on the significance of the item in noncompliance and the number of such items, whether individually significant or not, ***the validity of the special use permit could be jeopardized.*** If compliance issues are deemed to be less than significant and therefore, the SUP remains valid, the items must still be completed in a timely manner or mineral extraction cannot commence.

Exh. 371 at 2 (emphasis added).

The County also stated that permit conditions could be amended upon formal application to the County, but such an application could necessitate a public hearing depending on whether the amendment requests were determined to be "minor" or "major" under the County Code:

The determination of whether the amendment is minor or major would be made by the County. That determination would dictate the amendment process.

The Hearing Examiner is the approval authority for a major amendment. A public hearing would be required. Approval authority for a minor amendment lies with staff.

Exh. 371 at 2; *see* TCC § 20.60.020. In addition, the County stated that the determination of whether amendments were major or minor would be made only after submission of an application to amend:

The County has not determined whether amendment to the well monitoring conditions would be deemed minor or major. *That determination would be made only upon submittal of a formal request to amend*, or at the time of request for a Letter to Proceed.

Exh. 371 at 2 (emphasis added).

D. The Port pressed the County to find that all permit conditions had been complied with. Instead, on February 16, 2010, the County issued a written notification to the Port that all conditions had not been met, and that compliance with groundwater monitoring requirements would mean mining could not begin in 2010.

Following the October 2009 meeting with County staff, the Port had requested authorization to commence mining. Exh. 429 at 14. On January 4, 2010, the Port submitted a memorandum asserting that all permit conditions had been substantially complied with. Exh. 67 at 4. Regarding MDNS Condition 6C, the Port asserted that the condition was ambiguous and that the Port's interpretation of it as requiring monitoring of only temperature and water levels, and not actual water quality, was reasonable. Exh. 67 at 15.

The County had undertaken an analysis of compliance with the permit conditions, which it addressed in a memorandum transmitted under a cover letter from County planning manager Mike Kain, on February 16, 2010. Exh. 429 at 14; Exh. 382. Kain's letter stated that several pre-mining conditions remained to be satisfied, some of which would require amendment of the permit because missed deadlines could not be complied with retroactively. Exh. 382 at 1. Regarding the question of whether these matters would have to be submitted for disposition to a County hearing examiner, Kain's letter stated: "*At this point*, our analysis is that there are no unmet requirements that rise to the Hearing Examiner level to attain compliance." Exh. 429 at 14; Exh. 382 at 1 (emphasis added).

Regarding MDNS Condition 6A, the "compliance memo" attached to Kain's letter stated that this condition had not been complied with because, while the off-site supply wells had been verified as of December 2009, the information was required to have been submitted two years earlier, in December 2006. Exh. 383 at 3. But the memo also noted that this was not a significant issue because no earth-disturbing or mining activity had yet occurred, and that the "minor timeline change may be approved by staff upon submittal of an application for amendment." Exh. 383 at 3.

Regarding MDNS Condition 6C, the memo stated that the condition had only been partially satisfied. Exh. 383 at 4. The requirement that the surveys begin within 60 days of issuance had not been

met, as reporting had not commenced until January 2008. Exh. 383 at 4. In addition, less than 17 sites had been monitored. Exh. 383 at 4.

The compliance memo *also* observed that, while Condition 6C required monitoring of water quality at all 17 monitoring stations, the Port had monitored only water level and temperature at some stations. Exh. 383 at 4. The County acknowledged that the groundwater monitoring plan itself did not require more, but cited its long-standing practice of applying “the more inclusive/protective condition” in the event of a conflict. Exh. 383 at 4. The memo then went on to state that, “[t]o provide an effective baseline from which to compare after mining commences, the water quality and background conditions must be monitored a minimum of two times prior to the commencement of mining[,]” and that “[o]ne monitoring event must occur during the highest groundwater levels in March and one must occur during the lowest groundwater levels in September.” Exh. 383 at 4.

The compliance memo’s conclusions regarding water quality monitoring requirements were based on a memorandum prepared by County hydrogeologist Nadine Romero, which was attached to and made a part of the compliance memo. Exh. 383 at 4; Exh. 63. By their plain terms, the compliance memo’s conclusions meant that *mining would not be able to begin in 2010*.

- E. Responding to the County’s notification, the Port initiated an appeal from the County’s determinations. In that appeal, supported by Maytown, the Port stated that the County’s groundwater monitoring requirements *would prevent the start of mining in 2010.***

The Port filed an appeal challenging the County’s determinations set forth in the compliance memo. Exh. 386; Exh. 390 at MSG000285; RP 871-73. The Port argued that the groundwater monitoring plan, not the MDNS, contained the substantive requirements. Exh. 386 at 12. The Port complained that the County had adopted an “unnecessarily strict interpretation of the ambiguous language of the County-drafted MDNS” in determining that the permittee was required to monitor water quality at not just the four NPDES stations, but all 17 monitoring stations. Exh. 386 at 14-15. The Port also alleged that the County was requiring the permittee to monitor a broad suite of pollutants that had “nothing to do with the potential impacts of gravel mining.” Exh. 386 at 15 (emphasis omitted).

The Port observed that compliance with the County’s interpretation of the water monitoring requirements *would mean that mining could not begin in 2010 and could be delayed up to a year or more:*

Compliance with the new monitoring program presented in the Groundwater Memo *would require the permittee to conduct extensive testing at least through September of 2010 before requesting permission from the County to commence mining.* Assuming the County took 30 days to conclude that the additional testing had been performed adequately, it would be November before the permittee was cleared to mine. November is not an ideal time to commence a mining operation in the Pacific Northwest, so *this requirement has the potential to delay mining for a year or more.*

Exh. 386 at 15 (emphasis added). Along the same lines, the Port further stated:

Because compliance with the County Memo and the Groundwater Memo would require the permittee to conduct measurements in March and September, *this determination has the potential to push mining out to 2011*. That would be very costly for the Port's buyer and has a very real possibility of killing the real estate deal.

Exh. 386 at 16 n.20 (emphasis added).

Maytown formally intervened and joined in the Port's appeal as an interested party. RP 872-73.

F. In April 2010, Maytown and the Port closed on the sale of the property to Maytown. They also agreed to cooperate in an effort to remove the obstacles to the commencement of mining in 2010. Maytown and the Port expressly acknowledged that the result of this effort was at best uncertain. Maytown and the Port began positioning themselves for a subsequent damages lawsuit.

The Port-Maytown purchase and sale transaction closed on April 1, 2010, with the signing of a 20-year real estate contract for \$17 million, and Maytown making a down payment of \$1,000,000. Exh. 429 at 15; Exh. 390 at MSG 223, 264. The agreement required Maytown to make its first installment payment a year later, in April 2011. Exh. 390 at MSG000264.

In a related agreement, Maytown and the Port described how they would divide the responsibilities of attaining and maintaining compliance

with the permit conditions. Exh. 390 at MSG 266.¹³ It remained critical that mining commence in the Summer of 2010. RP 1170-73, 1323-24, 1422, 1514, 1531, 2329, 3775. Maytown and the Port nonetheless expressly recognized that the outcome of the pending appeal by the Port challenging the need for additional pre-mining water monitoring, as well as a planned request for an amendment to eliminate the additional groundwater monitoring requirement, were both “uncertain.” Exh. 390 at MSG000285.

This agreement reflected the continuing belief of the Port and Maytown that they needed to approach the regulatory process with an eye towards how it could affect a damages action they had begun contemplating no later than December 2009. *See* CP 3207-15 (“Joint Defense, Common Interest and Confidentiality Agreement” entered into as of December 18, 2009). This understanding was later confirmed in an August 23, 2010 e-mail, from the Port’s attorney to Maytown attorney John Hempelmann:

I think I agree with you that right now may not be the time to push [sic] the *Burien* trigger.... We have tried from Day One on this case to make our record in a manner that helps support such a step, if and when it is necessary.

CP 3294.¹⁴

¹³ The Port would remain involved with the mining permit process because it had sold the property to Maytown on a contract basis and would retake the property if Maytown defaulted. RP 789-90, 828.

¹⁴ “*Burien*” was a reference to *Westmark Development Corp. v. City of Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007), a pre-LUPA land-use dispute that resulted in a multi-million dollar verdict against the City of Burien after ten years of litigation, and --
(Footnote continued next page)

G. Maytown requested that County staff amend several permit conditions, including the groundwater monitoring parameters. The County responded by referring the amendments to a hearing examiner for decision.

Maytown had brought in noted land use attorney John Hempelmann to help navigate the regulatory process. RP 1063-64, 1103.¹⁵ On April 22, 2010, Hempelmann submitted on behalf of Maytown a request for eight amendments to six permit conditions, including MDNS Condition 6. Exh. 429 at 15; Exh. 394.

With respect to Condition 6, Maytown requested an amendment of the missed deadlines in 6A and 6C; in addition, Maytown took issue with the work of County hydrogeologist Nadine Romero, asserting -- as had the Port in its appeal -- that Ms. Romero had interpreted Condition 6C “as requiring background testing of a suite of pollutants *that have nothing to do with mining and were never contemplated by the County, the applicant, or the Hearing Examiner.*” Exh. 394 at 3 (emphasis added). Maytown requested an amendment to Condition 6C to eliminate the background testing recommended by Romero. Exh. 394 at 3-4.

Maytown asserted that it was requesting only “minor amendments which can be processed administratively.” Exh. 394 at 1. As

as will be addressed in the Argument section of this brief -- an exemplar of the kind of prolonged and frustrating land use dispute that the adoption of LUPA was intended to avoid.

¹⁵ Hempelmann, a founding member of the law firm Cairncross & Hempelmann, has been practicing land use law almost since the practice’s inception with the adoption of the State Environmental Policy Act in 1969. RP 1013-14. Hempelmann’s testimony would prove a centerpiece of Plaintiffs’ case indicting the County’s land use decision-making process and determinations.

Hempelmann explained at trial, treating amendments as “minor” would mean that mining could start upon their approval by County staff, and would not have to be stopped if any appeals were taken by mine opponents challenging the amendments. RP 1168-69, 1358; *see* RCW 34.05.467. On the other hand, if amendments were deemed “major” and referred to a hearing examiner for a decision, mining could not begin until the hearing examiner approved them, and mining would continue to be on hold if mine opponents appealed any approval of “major” amendments by the hearing examiner. RP 1168-69, 1358. Hempelmann’s testimony left no doubt that treating amendments as “major” *would mean mining could not begin in 2010.*

Notice of the amendment application was published, and the County received voluminous comments. Exh. 446 at 15. In the weeks that followed, Hempelmann pressed Mike Kain to approve the eight requested amendments directly. RP 1154, 1171.

Consistent with its explanation to Maytown back in December, that it would determine whether amendments were major or minor only upon submission of a formal application to amend, the County now undertook to make that determination. On June 8, 2010, County hydrogeologist Romero provided a memorandum to Kain stating that the requested amendments to Conditions 6A and 6C were not minor. Exh. 117 at 1. Kain then informed Hempelmann that the amendments would be sent to the hearing examiner, and that a letter would follow to that effect. RP 1154-55.

Hempelmann testified that Kain told him that the direction to send the amendments to the hearing examiner had come from “on high” (meaning the Board of County Commissioners or “BOCC”), and reflected public opposition to mining. RP 1146, 1155, 1157.¹⁶ Hempelmann further testified that he was told by others that Kain’s job was at risk if he did not go along with the direction from “on high” to send the amendments to the hearing examiner. RP 1189. At trial, Kain denied that the decision to send the amendments to the hearing examiner was the result of pressure from “on high.” RP 3227.

The County’s letter, dated June 17 and signed by Kain, informed Maytown that its package of requested amendments rose above the level of administrative determination and would be deemed “major,” which meant they would be referred to a hearing examiner for a decision. Exh. 429 at 15; Exh. 446 at 15; Exh. 55 at 1. The letter stated that, “[a]lthough it may be possible to amend the requirements to attain compliance, the Department has determined that the decision to amend the special use permit is beyond the purview of staff.” Exh. 55 at 1.

¹⁶ In July 2010, Hempelmann wrote to his clients: “Knowing they will have an appeal and knowing that the Commissioners support FORP, ‘those on high’ including Mike[Kain]’s boss have concluded that Mike should send the remaining Minor Amendments directly to the Hearing Examiner.” Exh. 42 at 1.

H. July 1, 2010: Maytown withdrew its requested amendment regarding the scope of the groundwater monitoring requirements. *This concession ensured that mining could not start in 2010.*

On July 1, Maytown pared its list of requested amendments down to only the timing of satisfying Conditions 5 (construction of a highway turn pocket), 6A (off-site well verification), and 6C (groundwater monitoring). Exh. 446 at 15; Exh. 50. Regarding 6C, however, *Maytown withdrew its request to eliminate the “background testing of the broad suite of pollutants as requested by Nadine Romero.”* Exh. 50 at 2 (emphasis added). Maytown now stated that it would perform the first year of water quality monitoring “before mining begins.” Exh. 50 at 2-3. Maytown and the Port also withdrew their appeal from the County’s February 16, 2010, compliance memo. Exh. 50 at 2.

The background testing that Maytown was now saying it would perform “before mining begins” was the same testing that the Port, in its appeal filed in March 2010, had stated would mean that mining *could not begin in 2010*. See Exh. 50 at 2; Exh. 386 at 15, 16 n.20. RP 1157. Thus, by abandoning its request to amend Condition 6C to the extent of eliminating the background testing requirement, *Maytown now itself assured that mining could not begin in 2010*.

In October 2010 Maytown withdrew the request to amend Condition 5. Exh. 446 at 15; Exh. 21; RP 1196, 1205.¹⁷ Maytown’s

¹⁷ This was an additional action by which Maytown itself assured that mining could not begin in 2010. Maytown agreed to construct the turn pocket to WSDOT specifications “prior to trucking aggregate off the site.” Exh. 21. Maytown obtained
(Footnote continued next page)

successive withdrawals of amendment requests left only the deadlines in Conditions 6A and 6C to be amended. Exh. 446 at 15; Exh. 21; RP 1196, 1205.

As stated, Hempelmann testified that treating amendments as minor would mean that mining could start upon approval, and would not have to be stopped if any appeals were taken challenging the approval of what had been deemed “minor” amendments. *See* RP 1168-69, 1358. Maytown nonetheless contended at trial that it continued to hope that its withdrawal of the balance of the amendment requests would prompt the County to terminate the major amendment process and treat the remaining amendments as minor. RP 1155-57, 1205. But even if Maytown had managed to persuade the County to re-characterize the balance of the requested amendments as minor, Maytown’s agreement on July 1 to perform the additional water monitoring, as recommended by Romero and set forth by the County in its February 2010 compliance memo, still meant mining could not start in 2010.

approval from WSDOT to construct the turn pocket, on the condition that *no asphalt paving work would be undertaken before April 2011*. RP 2445; Exh. 425 (Project Specs. at 4).

- I. Maytown and the County reached a compromise on the groundwater monitoring requirements, and that compromise was approved by the hearing examiner. Maytown challenged the decision to refer the amendments to the hearing examiner, but the hearing examiner ruled that the County had acted properly. *Maytown and the Port then chose not to appeal that ruling through the remaining administrative process, concerned that the outcome could make a follow-on damages case “more difficult.”***

The hearing examiner initially considered the amendments issues in December 2010, during a hearing at which the Port and Maytown also disputed several County proposals advanced as part of the separate five-year review process.¹⁸ Needing to resolve the five-year review before the end of 2010, the hearing examiner elected to postpone taking action on the amendment matters until after a second hearing to be held in March 2011. Exh. 429 at 44-45.

During the period between the December and March hearings, “Pony” Ellingson, Ms. Romero, and County staff agreed on a new groundwater monitoring plan. Exh. 446 at 21; RP 1001 (Ellingson), 1523 (Hempelmann). As compared with the 2005 plan, the new plan changed (1) the timing for the required monitoring, (2) added new water quality parameters, (3) clarified that the 17 monitoring sites were a combination of wells and surface water stations, (4) clarified that the 17th station would be established after the start of mining, and (5) confirmed the additional year of groundwater monitoring before mining could begin. Exh. 446 at

¹⁸ Maytown was fully supported by the Port in all proceedings before the hearing examiner. See Exh. 429 at 2, 15; Exh. 446 at 4, 14.

21-22; *see* Exhs. 501-03. The compromise was effective going forward, as Maytown had already performed the additional required groundwater monitoring, as set forth in the 2010 compliance memo. Exh. 446 at 23. The County issued an MDNS consistent with the compromise. Exh. 446 at 18.

After a hearing in March 2011, at which the hearing examiner took evidence addressing the proposed compromise, the hearing examiner issued a decision on the amendments issues on April 8, 2011. Exh. 446 at 3, 35. Although Maytown supported the compromise during the hearing, Maytown challenged the County's amendment process.

Maytown argued that several of the issues addressed by the amendments should originally have been handled as an enforcement matter rather than by amendment. CP 7545; Exh. 446 at 2. Maytown also contended that the County erred in declaring Maytown's proposed amendments to be "major," and therefore referring the matter for a decision by the hearing examiner rather than directly by the staff. Exh. 446 at 2. Maytown asserted that the County was bound by its "decision" in February 2010 that amendments, if required, could be approved by staff. Exh. 446 at 15 n.9. Maytown further asserted that the "unlawful" switch to the major amendment process "*was in response to citizen opposition[.]*" CP 7546 (emphasis added). In conclusion, Maytown urged

the hearing examiner to rule that the County's "SUP amendment procedure *is unlawful*." *Id.* (emphasis added).¹⁹

The hearing examiner rejected Maytown's claims, ruling that the County staff had properly acted within its discretion and expertise in deciding which process applied. Exh. 446 at 30. The hearing examiner granted the requested amendments of the deadlines in MDNS Conditions 6A and 6C. Ex. 446 at 34. As to the substantive requirements of Condition 6C, the hearing examiner found that the discrepancies between the language of the condition and the groundwater monitoring plan had resulted in "substantial confusion" with respect to compliance. Exh. 446 at 17. The hearing examiner adopted the agreed groundwater monitoring plan, noting that it required monitoring of additional water quality parameters and an additional year of monitoring prior to mining. Exh. 446 at 22, 34. The hearing examiner found that, "[g]iven the site's history of extensive contamination from historical industrial uses, testing for the additional County parameters *is necessary to determine whether operations contribute to the release of pre-existing contaminants into groundwater*." Exh. 446 at 21 (emphasis added).

¹⁹ Contrary to the claims made by Plaintiffs to the trial court in this case, the record leaves no doubt that they challenged the referral decision and asked the hearing examiner to rule that the referral had been improper. *Compare* CP 7520, 7526-28 *with* CP 7534, 7546. The *one* contention that appears to have held back during proceedings before the hearing examiner was the claim that Kain had knuckled under to pressure from "on high" to refer the amendments to a hearing examiner for decision, out of fear that he would lose his job if he did not do so. As the record of the trial in this case confirms, to make *that* claim before the hearing examiner, John Hempelmann would have had to step out of his role as counsel presenting Maytown's case and become a material witness.

Plaintiffs initially were inclined to appeal the hearing examiner's determination that County staff had properly exercised their discretion to set the amendments for public hearing. Exh. 449 (copy attached as the sole appendix to this brief). But they reconsidered their position and eventually elected not to appeal, because they concluded that doing so "would make our damage case more difficult." Exh. 449.

On April 25, 2011, John Hempelmann wrote to his clients to explain this decision:

As we reviewed our options and the Examiner's Decision to outline the appeal I emailed you about on Saturday, we reconsidered our position. The way the Examiner wrote the Decision, she said the Code was unclear about the process and the County had the option to address the 6A and 6C timing issues either administratively or through the formal SUP Amendment process. Her language leaves open to us the argument that the County staff, under pressure from FORP and the Commissioners, chose the most burdensome and lengthy approach -- the formal SUP Amendment process and its attendant SEPA process that has taken so long and cost so much. Remember that the record shows the County reversed itself on the process which is further evidence of capricious acts. *If we appeal this part of the Examiner's Decision to the BOCC, we know the BOCC will rule against us and would likely use language that said the formal SUP Amendment process was REQUIRED. **This would make our damage case more difficult** so we have concluded we should not file an appeal of the Examiner's Decision.*

Exh. 449 (e-mail from John Hempelmann, 4/25/2011) (emphasis added).

In other words: Plaintiffs made a strategic decision not to exhaust their administrative remedies. If Maytown had appealed to the BOCC, and the BOCC had decided against Maytown (as Maytown anticipated), Maytown would have been confronted with an adverse "land use decision"

that Maytown would then have been required under LUPA to appeal to the superior court. There, review would have been limited to a closed-record review before a superior court judge; Maytown would have had to persuade that judge that, under the standards for review of land use decisions set forth in the Land Use Petition Act, the hearing examiner erred in deciding that the County staff had properly referred the decision on the scope of groundwater monitoring requirements to the hearing examiner.

Unwilling to risk making a follow-on damages case “more difficult,” Plaintiffs instead chose to abort the administrative review process.

FORP appealed the approval of the compromise groundwater monitoring plan, but the BOCC rejected FORP’s challenge in a decision issued on July 7, 2011. Exh. 454. FORP did not appeal from that decision.

J. The hearing examiner resolved the five-year review of the permit favorably to Maytown.

The permit required review by the hearing examiner every five years “to determine whether the conditions of approval have been complied with or should be amended.” Exh. 303 at 43. To maintain the permit’s validity, the five-year review needed to be completed regardless of whether significant earth-disturbing activities or mining had yet occurred. *See* Exh. 429 at 10; RP 1423. As stated, the hearing on the five-

year review occurred in December 2010 and preceded what became a separate hearing on the amendments. *See* Exh. 446.

The SEPA review of critical areas for the 2002 permit application had been conducted under the County critical areas ordinance in effect in 2002 (2002 CAO). The County adopted a substitute, interim critical areas ordinance in 2009 (2009 CAO). Exh. 429 at 28. Protection of critical areas was significantly broader under the 2009 CAO than under the 2002 CAO. *See id.*

The County staff report asserted that, because no mining had yet occurred, the 2009 CAO could be applied.²⁰ Exh. 429 at 17-18, 26. The County first disclosed it was taking this position in November 2010, ten days before the hearing on the five-year review was scheduled to be held before the hearing examiner. RP 1206, 1214-15. Hempelmann testified that, during a break at the five-year review hearing, Kain told him that the staff took this position because the BOCC wanted them to. RP 1269.

In the alternative to applying the 2009 CAO, the County maintained that the property should be evaluated for additional critical areas that would have met the criteria for protection under the 2002 CAO but had not been delineated. Exh. 429 at 30. During an October 2010 site visit, County staff observed critical areas in mine areas one and two -- including wetlands, a stream, and an oak grove -- that the County said

²⁰ The Thurston County Code authorized imposition of additional conditions upon a mine operation in the context of five-year review of a mine “if the approval authority determines it is necessary to do so to meet the standards of this chapter, as amended.” Exh. 429 at 40, citing TCC § 20.54.070(21)(e).

appeared to have been missed by Citifor's consultants and County staff before the 2005 permit approval, as well as prairie in mine area one that may have developed since the initial site studies. Exh. 429 at 27.

WDFW supported the County's position and identified and prioritized areas for conservation, particularly identifying mine area one as first priority. Exh. 429 at 29. FORP urged the County to protect as much prairie as possible. Exh. 429 at 37-38. FORP further asserted that the permit had expired and the MDNS conditions could not be amended. Exh. 429 at 37-38.

The hearing examiner resolved the five-year review in Maytown's favor. The hearing examiner rejected the notion that the critical areas assessment could be reopened, whether under the 2002 or 2009 CAO, concluding that the County and Maytown were "equally bound by the issued permit." Exh. 429 at 46.

K. On appeal of the five-year review, the BOCC remanded to the hearing examiner for additional studies, but the Superior Court reversed on a LUPA petition just four months later, reinstating the hearing examiner's decision.

FORP and BHAS appealed the hearing examiner's five-year review determinations to the BOCC. CP 106; Exh. 446 at 16. On March 14, 2011, the BOCC affirmed the hearing examiner's decision in all respects but one. CP 107; RP 1282; Exh. 446 at 16. The BOCC remanded to require further studies before commencement of mining, to determine whether additional critical areas existed under the 2002 CAO criteria which were not protected under the 2005 MDNS. CP 107. *See* Exh. 429 at 27.

Maytown and the Port filed petitions in Lewis County Superior Court for judicial review under LUPA. *See* CP 1, 7643. They included claims for damages under RCW Chapter 64.40. CP 38, 7668-80. Maytown's petition described the hearing examiner's decision on the five-year review as "thoroughly and carefully written." CP 2. On the Plaintiffs' joint motion for summary judgment, the superior court granted the LUPA petitions and entered a partial final judgment reinstating the hearing examiner's decision on the five-year review. CP 111-16.

The judgment was entered on July 20, 2011, just over four months after the BOCC's remand order. CP 116. FORP appealed the judgment to the Court of Appeals, but subsequently abandoned the appeal. RP 1422.

L. Maytown started mining in 2011 but the venture failed and the Port ultimately took back the property. The Port and Maytown pursued damages claims against the County, and a Lewis County jury awarded \$12 million.

In November 2011, the County determined that all pre-mining conditions had been satisfied and authorized Maytown to proceed with mining. Exh. 1.²¹ Maytown started mining but production levels were dismal (less than 10 percent of the volume projected in Maytown pro formas); consistent with the final projections that production needed to

²¹ Maytown had sought to amend pre-mining conditions other than those pertaining to groundwater monitoring, as reflected in Hempelmann's April 22, 2010, request for eight amendments. For instance, Maytown had requested (1) to delay construction of the freeway turn pocket up to 18 months, (2) forego construction of a noise attenuation berm, and (3) waive the SUP storm water management conditions. Exh. 394. All amendment requests, other than those pertaining to groundwater monitoring, were withdrawn by Maytown in July and October 2010. Exhs. 21, 50.

start in 2010 if the project was to succeed, the mine proved undercapitalized and lacking in equipment needed to be profitable. RP 2466-71, 2489-96. Maytown never made a cash payment to the Port after its down payment on April 1, 2010; it made one partial payment in the form of gravel. RP 2478. The Port repossessed the property in 2013, before trial. RP 2223-24.

Plaintiffs amended their complaints to delete the LUPA allegations, and add claims for damages based on tortious interference with contractual relations and a business expectancy, negligent misrepresentation, and general negligence. CP 117-40, 163-85; RP 2332, 2423. Plaintiffs also alleged a claim for damages under RCW Chapter 64.40, asserting that the BOCC acted in an arbitrary and capricious and unlawful manner when it remanded the five-year review to the hearing examiner. CP 137-38, 183. Maytown also alleged deprivation of federal constitutional due process rights, under 42 U.S.C. § 1983. CP 139-40.

Plaintiffs alleged that the BOCC, as well as County staff acting at the BOCC's behest, under political pressure from mine opponents such as FORP and BHAS, erected "regulatory hurdles" and otherwise sought to stop Maytown from mining, or at least delay mining long enough to allow mine opponents time to raise funds to purchase mine area 1. CP 119, 130, 132, 135-36, 164, 176, 178, 180-82. Plaintiffs alleged that these actions caused Maytown to default on its contract with the Port. CP 128-29, 174. Plaintiffs alleged that, absent the County's alleged intentional, negligent and unconstitutional conduct, mining would have commenced in 2010 and

Maytown therefore would have been able to perform its contract with the Port. CP 137, 3745-46, 3774.

The County moved for a summary judgment dismissal of Plaintiffs' claims. As to Plaintiffs' state law tort claims, the County urged (in relevant part) that LUPA provided Plaintiffs' exclusive remedy, that Plaintiffs' claims were precluded under the doctrines of collateral estoppel and waiver, that Plaintiffs' negligent misrepresentation and general negligence claims were barred by the public duty doctrine, and that Plaintiffs' negligent misrepresentation claim failed as a matter of law. CP 187-229, 1375-1412, 1807-17, 1926-38. As to Maytown's due process claim, the County urged (in relevant part) that Maytown had no cognizable property interest, had received procedural due process, and could not show misconduct "shocking to the conscience" and therefore could not establish a denial of substantive due process protections. CP 206-10, 1398-1401.

The trial court dismissed the Port's claim under RCW Chapter 64.40 for lack of standing, refused to dismiss Maytown's claim under that statute, and found as a matter of law that the BOCC acted in an arbitrary and capricious and unlawful manner when it remanded the five-year review to the hearing examiner. CP 2590-92; RP 101-03, 250. The trial court denied summary judgment on the balance of Plaintiffs' claims. CP 1950-53. The case then proceeded to trial, where Plaintiffs presented the following theory of the case:

For their claim of tortious interference, an intentional tort, Plaintiffs' theory of the case was that the County deliberately imposed

unlawful requirements and acted for the improper purpose of causing delay and expense to appease mine opponents, affording them procedural opportunities to challenge the permit and time to raise funds in the hope they ultimately would be able to buy the property and preserve it as a prairie. RP 3715, 3736-37, 3745. Plaintiffs alleged that the compliance issues under MDNS Conditions 6A and 6C could have been dealt with expeditiously through enforcement procedures or “minor” amendments approved by staff, but the County instead required formal amendments of MDNS Conditions 6A and 6C, and then deemed the amendments to be “major” requiring determination by a hearing examiner. RP 1157, 3740-41. Plaintiffs also criticized County staff for taking the position in the five-year review that the 2009 CAO applied, RP 1241-43, 2871-72, 3732-33, and criticized the BOCC’s decision to remand to the hearing examiner to reopen the critical areas review for additional studies, RP 1291-92, 3785, 3719-20.

For negligent misrepresentation, Plaintiffs’ theory of the case was that the County reneged on express assurances, relied upon by Plaintiffs, that no significant impediments to mining existed, that a letter to proceed would be issued within 30 to 60 days of being requested, and that any amendments to permit conditions would be deemed minor and approved by staff without a public hearing. RP 1124, 2227, 2865-71, 3721, 3724-27, 3741, 3746-47, 3783-85.

For general negligence, Plaintiffs’ theory of the case focused on their allegations that the County had tasked Nadine Romero, a

hydrogeologist said to be inexperienced with mines, with analyzing compliance with the water monitoring MDNS conditions without giving her a copy of the groundwater monitoring plan, and then adopted her analysis to require water monitoring beyond that required under the groundwater monitoring plan adopted by the hearing examiner in 2005. RP 958-59, 968, 3739.

For federal constitutional due process, Maytown's theory of the case was that the County deprived Plaintiffs of a meaningful opportunity to be heard, while wrongfully allowing FORP and BHAS to influence County policy, taking the position that the 2009 CAO applied, and remanding the five-year review to the hearing examiner. RP 2860-61, 3785.

As to causation, Plaintiffs' theory of the case for all their claims was that Maytown was wrongfully prevented from commencing mining during 2010, and that Plaintiffs were damaged because commencement of mining in 2010 was essential to the success of the Port-Maytown real estate mining deal. John Hempelmann's testimony repeated the arguments that Maytown had made before the hearing examiner, again asserting that most permit compliance issues should have been handled as a matter of enforcement only, and that any amendments should have been treated as minor and decided by the staff. RP 1137-38, 1141-43, 1156-58, 1329-30, 1340, 1464. Hempelmann also testified that commencement of mining in 2010 was critical to the success of the Port-Maytown venture. RP 1171-73, 1323-24, 1422, 1514, 1531.

The trial court denied the County's motion for judgment as a matter of law at the close of Plaintiffs' case in chief. RP 2882-86. In addressing the applicability of LUPA, the trial judge commented that, while "somewhat troubled with the overarching issue of LUPA and the non-appeal of a number of decisions," the court also thought the Legislature probably did not intend the "draconian impacts" on the ability of parties to pursue damage claims seen in the Washington appellate court decisions cited by the County. RP 2882-83. Before the case was submitted to the jury, the parties agreed to submit Maytown's claim for damages under RCW Chapter 64.40 for determination by the trial court in the event the jury rejected the federal constitutional due process claim.

The jury found that the County committed tortious interference with contractual relations and a business expectancy, negligent misrepresentation and general negligence, and had violated Maytown's constitutional due process rights. CP 6388-91. The jury awarded \$8 million in damages to the Port and \$4 million to Maytown.²² CP 6391. The trial court entered judgment on the verdict against the County totaling some \$12 million. CP 6392. The court denied the County's motion for judgment as a matter of law or (in the alternative) for a new trial or amendment of the judgment. CP 6399-6423, 7448-49. The trial court awarded Maytown approximately \$1.1 million in attorney's fees and costs under 42 U.S.C. § 1988. CP 7551-62.

²² The jury found that the County was owed \$63,000 in unpaid permit fees. CP 6391.

The County timely appealed. CP 7469. Plaintiffs timely filed a notice of cross appeal from the trial court's refusal to allow them to present evidence of, and to recover attorney's fees they expended attempting "to save the Special Use Permit, their real estate deal, and MSG's business." CP 7482.

IV. STANDARD OF REVIEW

The denial of summary judgment is reviewed *de novo*, performing the same inquiry as the trial court. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 407-08, 282 P.3d 1069 (2012). A party moving for summary judgment bears the burden of demonstrating there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Where a pretrial order denying summary judgment is premised on a question of law, the appellate court may review that order even after a trial on the merits. *Weiss v. Lonquist*, 173 Wn. App. 344, 354, 293 P.3d 1264 (2013). The decision whether to grant or deny a new trial is reviewed *de novo* where the decision is based on legal, rather than factual, issues. *Smith v. Orthopedics Int'l, Ltd.*, 170 Wn.2d 659, 664, 244 P.3d 939 (2010).

In reviewing a jury's special verdict, the appellate court determines whether it is supported by substantial evidence. *Winbun v. Moore*, 143 Wn.2d 206, 213-14, 18 P.3d 576 (2001). The verdict must be overturned if it is not supported by substantial evidence, which means a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question. *Id.*; *Canron, Inc. v. Fed. Ins. Co.*, 82 Wn. App.

480, 486, 918 P.2d 937 (1996). When a fact must be proved at trial by clear, cogent, and convincing evidence, the appellate court will reverse unless a reasonable trier of fact could find the truth of that alleged fact to be “highly probable.” *In re Matter of H.J.P.*, 114 Wn.2d 522, 532, 789 P.2d 96 (1990) (citation and quotation omitted); *In re Dependency of C.B.*, 61 Wn. App. 280, 283, 810 P.2d 518 (1991) (op. per Morgan, J.); *In re Marriage of Mueller*, 140 Wn. App. 498, 505, 167 P.3d 568 (2007) (where the “evidentiary standard is clear and convincing, [the court of appeals] uphold[s] the trial court’s findings of fact if they are supported by ‘highly probable’ substantial evidence.”).

V. ARGUMENT

A. **Plaintiffs’ state law tort claims were barred by their decision to abandon their administrative remedies, and thereby avoid the legal test of the validity of the underlying basis for those claims through the LUPA process.**

In 2009 the Port and Maytown decided to embark on a gravel mining venture -- during the worst economic downturn since the Great Depression. When they did so, they knew the economic margin for error had been sliced so thin that, if mining did not start by the middle of the very next year, their venture would fail. But mining could not start by then, because essential permit conditions (above all, groundwater monitoring requirements) could not be satisfied that quickly. Facing failure, the Port and Maytown tried to set up a follow-on damages case against the County during the administrative process, only to have the hearing examiner reject the very claim that was to be the linchpin of their

damages case. But instead of soldiering on through the remaining administrative process and trying to overturn that determination under LUPA, the Port and Maytown bailed from the process, midstream -- gambling they could avoid the dismissal of their follow-on damages claims and get to a jury.

The gamble paid off in a \$12,000,000 jury verdict. But as the County will now show, that verdict that should never have been allowed to happen in the first place.

1. LUPA establishes the process for challenging land use determinations.

The Land Use Petition Act provides “the exclusive means of judicial review of land use decisions[.]” RCW 36.70C.030(1). LUPA represents a grand bargain under which property owners, as well as members of the public, adhere to a strict process for challenging land use determinations in exchange for a consistent, predictable, and timely process of judicial review. LUPA thus reflects Washington’s “strong public policy favoring administrative finality in land use decisions.” *Samuel’s Furniture, Inc. v. State*, 147 Wn.2d 440, 459, 54 P.3d 1194 (2002), quoting *Skamania County v. Columbia River Gorge Comm’n*, 144 Wn.2d 30, 48, 26 P.3d 241 (2001) (internal quotation marks omitted)..

LUPA requires that a “land use decision” be appealed to superior court within 21 days of issuance of the decision. RCW 36.70C.040(3). If no appeal is filed within the 21-day period, the land use decision is deemed valid and lawful, and any challenge is forever barred. *Wenatchee*

Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 181-82, 4 P.3d 123 (2000). This rule is strictly applied in light of the Legislature's express purpose in enacting LUPA, which was to establish uniform, expedited procedures and thus eliminate the sometimes decades-long litigation seen in cases such as *Pleas v. City of Seattle*²³ and *Westmark v. City of Burien*²⁴:

The purpose of this chapter is 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; see *G-P Gypsum Corp. v. Dept. of Revenue*, 169 Wn.2d 304, 309-10, 237 P.3d 256 (2010) (holding that the court should consider a statement of legislative purpose in interpreting the plain meaning of a statute under Washington's context rule of statutory interpretation).

2. Plaintiffs' decision not to exhaust the administrative remedies provided by Thurston County bars their state law tort claims.

A "land use decision" under LUPA means "a final determination made 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[.]" RCW 36.70C.020(2). The grounds for a LUPA challenge to a land use decision include, among others, that the decision is not supported by substantial evidence, is a clearly erroneous application of the law to the

²³ 112 Wn.2d 794, 774 P.2d 1158 (1989).

²⁴ 140 Wn. App. 540, 166 P.3d 813 (2007).

facts, or violates the constitutional rights of the party seeking relief. RCW 36.70C.130(1)(c), (d), (f). A decision that may be appealed administratively, however, may not be the subject of a LUPA petition: a party must first exhaust all available administrative remedies. RCW 36.70C.020(2), .060; *Durland v. San Juan County*, 182 Wn.2d 55, 66, 240 P.3d 191 (2014); *Ward v. Bd. of County Comm'rs*, 86 Wn. App. 266, 270, 936 P.2d 42 (1997).

Moreover, unlike the general exhaustion requirement of the Administrative Procedure Act, LUPA's exhaustion requirement has no equitable exceptions, such as lack of notice or futility. *Durland*, 182 Wn.2d at 66-67. As Justice Wiggins wrote for a unanimous Supreme Court in December 2014:

We decline to recognize equitable exceptions to LUPA's exhaustion requirement because the exhaustion requirement furthers LUPA's stated purposes of promoting finality, predictability, and efficiency. This is in keeping with our LUPA case law; generally, we have required parties to strictly adhere to procedural requirements that promote LUPA's stated purposes. For example, we require strict compliance with LUPA's bar against untimely or improperly served petitions. In *Habitat Watch v. Skagit County*, we held that LUPA's 21-day appeals window barred a citizens' group's challenge to a construction project, despite the fact that the county mistakenly failed to provide public notice for two public hearings on permit extensions for the project. 155 Wn.2d 397, 406–10, 120 P.3d 56 (2005). We explained that “*even illegal decisions must be challenged in a timely, appropriate manner.*” *Id.* at 407, 120 P.3d 56.

Durland, 182 Wn.2d at 67-68 (emphasis added).²⁵

²⁵ Justice Stephens' concurrence disagreed with the majority opinion only as to a subsidiary attorney's fees issue. See 182 Wn.2d at 81 (op. per Stephens, J).

This is the fundamental legal flaw with Plaintiffs' damages lawsuit. Plaintiffs elected to abandon the administrative remedies available for challenging the supposed illegal decisions of the County, because they feared the completion of the administrative process might (in the words of John Hempelmann to his clients) "make our damage case more difficult." Exh. 449. They *refused* to exhaust what were undeniably their available administrative remedies, to avoid undermining the legal basis for claims they believed to be worth millions of dollars in damages.²⁶

Consider Plaintiffs' claim for tortious interference with contractual relations or a business expectancy. To establish this claim, a "plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a 'duty of non-interference; *i.e.*, that he interfered for an improper purpose ... or ... used improper means.'" *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), quoting *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371 (1979). To do so here, Plaintiffs argued that the County interfered for the improper purpose of "prevent[ing] mining for as long as possible so the

²⁶ Numerous courts have refused to allow damages actions to proceed under similar circumstances. *See Tracy v. Central Cass Pub. Sch. Dist.*, 574 N.W.2d 781, 783 (N.D. 1998) (affirming dismissal of teacher's tortious interference claim based on recommendations that his teaching certificate not be renewed, where teacher then failed to apply for renewal or pursue administrative remedies); *Schwartz v. Society of N.Y. Hosp.*, 605 N.Y.S.2d 72, 73, 199 A.D.2d 129 (1993) (reversing order granting physician leave to allege tortious interference claim where physician elected to forgo administrative appeal of revocation of hospital privileges, which were essential to his employment); *Bennett v. Bd. of Trustees of Employees' Ret. Sys. of State of Georgia*, 258 Ga. 201, 633 S.E.2d 287, 288-89 (1988) (affirming dismissal of public employee's tortious interference claim, which alleged he was passed over for a position because of improper political influence, because the plaintiff failed to exhaust his administrative remedies).

mine could be acquired, either by a conservation organization or a state agency.” RP 3745, 3769-70, 3775-76, 3778 (closing argument of counsel). As to improper means, Plaintiffs argued that County staff, at the instance of the BOCC, imposed unnecessary process and conditions to satisfy prior to mining. RP 3475, 3769-70, 3774 (closing argument of counsel). John Hempelmann’s testimony constituted the centerpiece of Plaintiffs’ attack on the County’s process, and in that testimony he attacked that process using the same claims he had made on Maytown’s behalf before the hearing examiner, asserting that the County responded to public opposition by imposing unnecessary procedural requirements. RP 1137-38, 1141-43, 1156-58, 1329-30, 1340, 1464.

A party who becomes aware that a decision-making process might be affected by improper political influence or bias must raise the issue at the earliest possible opportunity. *City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978) (holding that a party should raise allegations of bias or impropriety “at the earliest possible stage of proceedings”). In the federal courts, the United States Court of Appeals for the D.C. Circuit has emphasized “the value of establishing a full scale administrative record which might dispel any doubts about the true nature of the agency’s action.” *Aera Energy, LLC v. Salazar*, 642 F.3d 212, 221 (D.C. Cir. 2011) (citation and quotation marks omitted) (holding that, by ordering an evidentiary hearing, the quasi-judicial body involved “took just the sort of steps to cure even the

appearance of political impropriety that we have encouraged or credited in our previous cases”).

Here, before the hearing examiner, Plaintiffs *did* raise the allegations that eventually formed the basis of their tortious interference claims. They argued that the amendments were not legally required (improper means) and that the County required Maytown to apply for the amendments and set them for public hearing to appease public pressure (improper purpose). Exh. 446 at 2, 15 n.9; CP 7535, 7545-46. Plaintiffs expressly asked the hearing examiner to “rule” that the County had acted for improper purposes and by improper means. CP 7546 (Maytown: “[T]he Examiner should rule that the SUP amendment procedure is unlawful.”); CP 7534 (Port: “[T]he Port requests that the Examiner rule on the question of whether this Amendment proceeding was proper[.]”).²⁷

But after the hearing examiner upheld the County’s decision to refer the amendments to the hearing examiner for decision, *Plaintiffs abandoned the administrative process*. See TCC § 20.60.060(2) (providing for appeal to the BOCC from a hearing examiner decision). Plaintiffs decided not to appeal the hearing examiner’s ruling to the BOCC because they believed doing so “*would make our damage case more*

²⁷ As stated, the *sole* allegation that the Port and Maytown appear to have held back during the hearing before the Hearing Examiner was the charge that County staffer Mike Kain had acted as he had because he feared for his job -- a claim that could only have been made before the Hearing Examiner if John Hempelmann abandoned his role as counsel for Maytown and became a material witness. During the follow-on damages claims trial, Hempelmann did not act as Maytown’s counsel, and testified about the alleged threat to Kain’s job.

difficult.” Exh. 449 (emphasis added). At the time, Plaintiffs expressly focused on the possibility that the BOCC would go beyond the hearing examiner’s ruling, and state that referral to the examiner had been “required.” *See id.* But Plaintiffs also had to have been concerned that an adverse decision by the BOCC would have been a “land use decision” triggering their obligation to appeal to the superior court under LUPA. They would have ended up with their challenge to *the* critical decision of the County -- the decision by the staff referring Maytown’s proposed amendments to the hearing examiner -- being reviewed by a judge applying strict land use legal standards. They would have needed that judge to rule that the referral to the hearing examiner was illegal, and that a decision *by the staff* was instead “required.” And if the judge ruled the other way, the legal legs would have been cut out from under their damages case.

Faced with this risk to the viability of their damages case, Plaintiffs elected to short-circuit the administrative process. Yet that is precisely the kind of tactical choice that LUPA was intended to foreclose. And if there was any doubt about that under the state of LUPA law at the time of trial in the Summer of 2014, the Supreme Court’s subsequent decision in *Durland* has laid those doubts to rest.

To be sure, Plaintiffs argued at trial that the County used improper means other than requiring Plaintiffs to seek amendments and then referring them to a hearing examiner for a decision. Thus, even though it was swiftly rejected by the hearing examiner, Plaintiffs made a great deal

of the County's contention in the five-year review that the 2009 critical areas ordinance could be applied. But under Plaintiffs' own theory of the case, by the time the critical areas issue arose in November 2010, the damage had already been done -- Maytown had been prevented from mining in 2010 and could start no sooner than April 2011. Plaintiffs' witnesses -- most notably, John Hempelmann -- hammered away that what mattered was the inability of Maytown to start mining in 2010. *See* RP 1170-73, 1323-24, 1422, 1514, 1531 (Hempelmann). And that inability was squarely blamed on the County's February 2010 decision to require additional background testing for a new "suite" of pollutants, and the County's June 2010 decision that Maytown's proposed amendments (including a request to do away with the additional background testing) would be treated as "major" and therefore would have to be referred for decision to a hearing examiner.

Maytown, however, withdrew its amendment seeking relief from the new testing requirement during 2010, and ultimately reached a compromise on the scope of testing going forward that required more testing than Maytown had said was necessary. To be sure, Maytown acceded to the scope of the testing during 2010 under protest, and challenged the propriety of the County's imposition of that requirement. But in approving the compromise, the hearing examiner also held that the County had acted properly when it imposed the new tests in 2010, finding those additional tests were *necessary* to protect against potential pollution of the groundwater. Exh. 446 at 21. As for the determination that

Maytown's proposed amendments were "major" in character, and therefore would be referred to the hearing examiner for a decision, the hearing examiner again held that the County had acted properly. *Id.* at 30.

Plaintiffs' state law damages claims were based on precisely the attack on the County's determinations that the hearing examiner rejected. Plaintiffs' subsequent decision to bail from the administrative process, and not pursue a challenge to those holdings through that process, should now compel the dismissal of their state law tort claims. LUPA's strict rule of exhaustion of administrative remedies requires no less.

3. Damage claims are not excepted from the prohibitive effect under LUPA of a failure to exhaust administrative remedies, where the claims are based on alleged errors in a local government's land use decisions.

LUPA states that it does not apply to "claims for monetary damages or compensation." RCW 36.70C.030(1)(c). The Supreme Court has made clear, however, that this clause of the statute should not be read to mean a plaintiff is exempt from first going through the LUPA process, when they are making a claim for monetary damages based on an allegedly illegal land use determination.

Thus, in *James v. County of Kitsap*, 154 Wn.2d 574, 589, 115 P.3d 286 (2005), the Supreme Court held that an action for reimbursement of impact fees was barred where the plaintiffs had failed to file a LUPA petition. 154 Wn.2d at 589. The court held that the imposition of impact fees was a land use decision subject to LUPA, and that the action for

reimbursement of those fees, which challenged the propriety of their imposition, was barred by the failure to pursue relief under LUPA. *Id.* at 586. In so holding, the court rejected the notion advanced by the dissent that, simply because the action sought damages or compensation, LUPA did not apply. *See id.* at 591 (Sanders, J., dissenting).

Since *James*, the Supreme Court has recognized that damages claims are barred under LUPA in cases “where the relief required a judicial determination that the land use decision was invalid or partially invalid” and the damages claimant failed to pursue relief under LUPA. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 926-27 & 926 n. 11, 296 P.3d 860 (2013).²⁸ In turn, the Court of Appeals has refused to apply the ensuing LUPA bar only where the plaintiff’s claims for monetary damages or compensation were premised on mere delay in making a decision, and did not challenge the legal propriety of the underlying decision. *See, e.g., Woods View II, LLC v. Kitsap County*, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 3608691 at *9-10 (2015); *Libera v. City of Port Angeles*, 178 Wn. App. 669, 675 n.6, 316 P.3d 1064 (2013).²⁹

²⁸ Justice Fairhurst’s opinion for a unanimous Supreme Court in *Lakey* engaged in a comprehensive survey of the post-*James* case law to date, and during the course of that survey reaffirmed the correctness under *James* of dismissing damages claims that “depend on the invalidity” of the local government’s land use decisions, where the claimant failed to pursue relief from those decisions under LUPA. *See* 176 Wn.2d at 927, n.11 (discussing cases).

²⁹ *Compare Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 404-05, 232 P.3d 1163 (2010) (affirming the dismissal of damages claims which were based on a challenge to the validity of land use decision not timely asserted under LUPA), citing *Asche v. Bloomquist*, 132 Wn. App. 784, 799-802, 133 P.3d 475 (2006), and *Shaw v. City of Des Moines*, 109 Wn. App. 896, 37 P.3d 1255 (2002)). The County acknowledges that *Asche*, as well as the decision in *Libera v. City of Port Angeles*, both
(Footnote continued next page)

Here, Plaintiffs did not ground their damage claims on mere delay, *i.e.*, they did not allege that the County made proper, but untimely, decisions. Rather, they premised their claims on allegations of improper decisions, involving improper bases and purposes, negligent misrepresentation, and negligent decision-making. Moreover, they litigated all of those contentions before the hearing examiner, then abandoned the administrative process after the hearing examiner upheld the decisions challenged on those grounds. This conduct should have foreclosed Plaintiffs' state tort claims as a matter of law, and barred them from being submitted to the jury.

B. Plaintiffs' state law claims are also barred on grounds independent of LUPA.

1. Plaintiffs' tortious interference claims are precluded under the doctrine of collateral estoppel

"Decisions of administrative tribunals may have preclusive effect under Washington law." *Reninger v. Dept. of Revenue*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Id.*, quoting

contain *dicta* arguably to the effect that LUPA does not preclude claims for damages generally, with both decisions citing to RCW 36.70C.030(1)(c) as the sole authority for this proposition. *See Asche*, 132 Wn. App. at 800; *Libera*, 178 Wn. App. at 675 n.6 Any such reading of that provision, however, would be identical to the reading Justice Sanders and his co-dissenters wanted to give to it in *James*, and that reading was rejected by majority. Neither the result in *Asche* nor the result in *Libera* depends on Justice Sanders' reading of LUPA. Moreover, both *Asche* and *Libera* were decided prior to *Durland*.

United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966) (internal quotation marks omitted).

Collateral estoppel applies where “(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.” *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). These elements were met here.

First, as already discussed, the hearing examiner decided the issues underlying Plaintiffs’ tortious interference claims, and ruled that the County did not act for an improper purpose or by improper means. The hearing examiner found that the amendments were “required” and that holding a hearing to amend the permit conditions was an appropriate means under the circumstances, which included public pressure and expectation of a hearing after one was set in response to Maytown’s initial application for eight amendments. Exh. 446 at 30.

Second, the hearing examiner issued a final decision on the merits. That it was appealable to the BOCC does not mean it was not final. A “final decision” is one “which leaves nothing open to further dispute and which sets at rest [the] cause of action between parties.” *Samuel’s Furniture*, 147 Wn.2d at 452 (citation and quotation omitted). “[A] judgment or non-interlocutory administrative order becomes final for res

judicata purposes at the beginning, not the end, of the appellate process, although res judicata can still be defeated by later rulings on appeal.” *Lejeune v. Clallam County*, 64 Wn. App. 257, 266, 823 P.2d 1144 (1992).

Third, Plaintiffs were parties to the administrative proceeding.

Finally, applying collateral estoppel will not work an injustice. The injustice component is concerned with procedural irregularity, as opposed to the substantive correctness of the prior decision. *Christensen*, 152 Wn.2d at 309, 317. Injustice may be found where the disparity of relief available in each forum is “so great that a party would be unlikely to have vigorously litigated the crucial issues in the first forum.” *Id.* at 309. Here Plaintiffs were sufficiently motivated to litigate all issues before the hearing examiner. Indeed, they each expressly requested that the hearing examiner “rule” on the issues of improper purpose and improper means. CP 7534, 7546.

Three additional factors are considered in determining whether to apply collateral estoppel to the findings of an administrative body: “(1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations.” *Christensen*, 152 Wn.2d at 308. These factors support application of collateral estoppel here.

First, the County, through its hearing examiner, plainly acted within its competence to decide land use and related procedural matters. Second, the hearing examiner held an evidentiary hearing not unlike a

trial. For example, the amendments hearing lasted three days, the parties were represented by able counsel, eleven witnesses were examined and cross-examined, 50 exhibits were admitted, and the hearing examiner issued comprehensive findings of fact and conclusions of law comprising 35 pages. *See* Exh. 446 at 3-11. (Indeed, at the trial of this case, John Hempelmann likened the hearing examiner proceeding to a trial with about the only difference being that the hearing examiner did not wear a robe. RP 1051, 1056, 1252-54.) Third, the public policy considerations overlap with the general concern that applying collateral estoppel will not work an injustice. *See Christensen*, 152 Wn.2d at 318. Public policy supports applying collateral estoppel here, as the underlying policy is to “afford every party one but not more than one fair adjudication of his or her claim.” *Lejeune*, 64 Wn. App. at 266. Plaintiffs had a full and fair opportunity to present their challenge to the hearing examiner, and accordingly they should not have been allowed to ask the jury to disregard the hearing examiner’s decisions, and award damages as if those decisions did not exist.

The trial court erred in ruling that the doctrine of collateral estoppel did not preclude Plaintiffs from alleging tortious interference claims when the underlying issues were litigated to a final decision at the administrative level.

2. Plaintiffs’ negligent misrepresentation claims are barred for several reasons independent of LUPA.

(a) Plaintiffs’ negligent misrepresentation claims were barred under the public duty doctrine.

The public duty doctrine reflects the general tort law principle that, for a breach of a duty to be actionable, the duty must be one owed to the injured plaintiff in particular as opposed to the public in general. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). The doctrine further recognizes that “[t]raditionally state and municipal laws impose duties owed to the public as a whole and not to particular individuals.” *Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988). The public duty doctrine does not confer absolute immunity, but rather is a tool for determining whether the municipality owed a duty to a “nebulous public” or a particular individual. *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006), quoting *Taylor*, 111 Wn.2d at 166.

An exception to the general “public duty” rule exists where a special relationship was formed between a public official and the plaintiff. *Taylor*, 111 Wn.2d at 166. This exception requires the plaintiff to establish (1) direct contact in which he sought an express assurance from the government, (2) the government “unequivocally” provided that assurance, intending that it be relied upon, and (3) the plaintiff justifiably relied upon the assurance to his detriment. *Meaney*, 111 Wn.2d at 179-80; *see also Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). An unsolicited statement does not qualify as an express assurance, nor does an equivocal or qualified representation: “The

plaintiff must seek an express assurance and the government must unequivocally give that assurance.” *Babcock*, 144 Wn.2d at 789; *see also Mull v. City of Bellevue*, 64 Wn. App. 245, 252-53, 823 P.2d 1152 (1992) (affirming summary judgment for city under public duty doctrine where alleged written assurance was unsolicited and alleged oral assurance was equivocal and qualified).

Here, Plaintiffs failed to establish that the County made an express assurance, upon which Plaintiffs justifiably relied, that amendments to the permit conditions would be approved by staff. At most, the County made a qualified prediction to the effect that the deadlines in MDNS Conditions 6A and 6C could be amended without a hearing before the county hearing examiner. The County’s statement in Mr. Kain’s February 16, 2010 letter, that there were “no unmet requirements that rise to the Hearing Examiner level” was prefaced by the legally crucial qualification, “[a]t this point, our analysis is... .”³⁰ Exh. 429 at 14; Exh. 382 at 1 (emphasis added). The County had previously told Maytown, however, that the actual determination whether amendments were major or minor would be made only upon submission of a formal application to amend, Exh. 371, and it is undisputed that no such application had been submitted at the time Mr. Kain made his statement. It is well-established that an equivocal or qualified statement is not an express assurance. *Meaney*, 111 Wn.2d at

³⁰ The compliance memo similarly expressed the possibility rather than an assurance of amendment approval by staff, stating, “Such minor timeline change *may* be approved by staff upon submittal of an application for amendment.” Exh. 383 at 3 (emphasis added).

180; *Mull*, 64 Wn. App. at 249, 252-53. Plainly, Kain's statements were no more than the kind of equivocal or qualified statements that cannot, as a matter of law, sustain a claim against a local government that are otherwise barred by the public duty doctrine.³¹

Moreover, even assuming that the County had expressly assured Plaintiffs that the 6A and 6C deadlines would be modified by staff without a hearing, as a matter of law Plaintiffs would not have been justified in relying on such representation to conclude that mining could commence by July 2010. The same document that contained the alleged express assurance also informed Plaintiffs that, not only had the deadline to commence groundwater monitoring not been met, but insufficient parameters also had been monitored, *meaning that mining could not start for at least a year*. Exh. 383 at 4. And rather than taking the memo as an assurance that mining could start soon, ***the Port filed an appeal complaining that restarting the water monitoring would mean that mining could not begin in 2010***. Exh. 386 at 15, 16 n.20.³²

³¹ Although Plaintiffs presented testimony at trial that Mr. Kain had stated at an October 2009 meeting that he saw no issues that should prevent commencement of mining in 30 to 60 days, RP 2227, that alleged statement was followed by the qualified and equivocal statement in Kain's February 16, 2010 letter enclosing the compliance memo. Under no conceivable theory of reasonable reliance could Plaintiffs thereafter justifiably rely upon Kain's prior statements.

³² The Port even went so far as to observe that this presented "a very real possibility of ***killing the real estate deal***." Exh. 386 at 16. n.20 (emphasis added). And by the time of trial in this case, Plaintiffs' theory of the case had gone from concern about the possible effect of the water monitoring requirements to the definite certainty that preventing mining in 2010 was ***the cause*** of their venture's demise. See RP 1171-73, 1323-24, 1422, 1514, 1531 (Hempelmann).

Finally, Plaintiffs presented no evidence that the County provided an express assurance, before Plaintiffs entered into their real estate contract on April 1, 2010, that the County would ease the water monitoring requirements so that mining could start sooner. When they proceeded to enter into the real estate contract, Plaintiffs expressly recognized in their agreement that the outcome of the pending appeal and their planned request to amend the water monitoring and other permit conditions were “uncertain.” Exh. 390 at MSG000285.

In sum: Because the County made no express assurance upon which Plaintiffs justifiably relied in entering into their real estate contract, no special relationship formed between Plaintiffs and the County, and the trial court erred in refusing to dismiss Plaintiffs’ negligent misrepresentation claims under the public duty doctrine.

(b) Even if the public duty doctrine did not apply, Plaintiffs failed to establish the elements of negligent misrepresentation by clear, cogent, and convincing evidence.

Even where a special relationship is established, this only resolves the existence of a duty. The plaintiff must still prove the elements of the specific cause of action alleged, “just as if they were suing a private defendant.” *Munich v. Skagit Emergency Comm’n Ctr.*, 175 Wn.2d 871, 885, 288 P.3d 328 (2012).

To prove negligent misrepresentation, a plaintiff must establish that (1) the defendant supplied information that was false, (2) the defendant knew or should have known that the information was for the

purpose of guiding the plaintiff in a business transaction, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 180, 876 P.2d 435 (1994), citing RESTATEMENT (SECOND) OF TORTS § 552 (1977). Each element of negligent misrepresentation must be proven by clear, cogent, and convincing evidence. *Havens*, 124 Wn.2d at 180. This standard of proof requires the plaintiff to establish not merely that a proposition is more probably true than not, as is required under the more lenient preponderance of the evidence standard, but that it is "highly probable." *E.g., In re Dependency of C.B.*, 61 Wn. App. at 283 (op. per Morgan, J.).

For purposes of a negligent misrepresentation claim, the false representation by the defendant must have been made as to a presently existing fact. *Havens*, 124 Wn.2d at 182. A promise of future conduct cannot form the basis of a negligent misrepresentation claim. *Id.*; *see also Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 197-98, 49 P.3d 912 (2002) (affirming dismissal of negligent misrepresentation claim because a promise to procure insurance was not a representation of a presently existing fact); *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 436, 40 P.3d 1206 (2002) (affirming dismissal of negligent misrepresentation claim because a representation to a client of accounting firm as to who would make decisions was not a representation of a presently existing fact).

Here, Plaintiffs alleged that the County represented that it would process amendments administratively without a public hearing. Assuming such a representation had been made, it would have been at best a promise of future conduct, and thus not a basis for a negligent misrepresentation claim. *See* CP 1405. Justifiable reliance was also not proven, certainly not to a high degree of probability, where Plaintiffs themselves acknowledged that the outcome of the amendments application and the appeal from the compliance memo were “uncertain.” Exh. 390 at MSG000285.

Moreover, even assuming the County made an actionable representation that amendments would be ruled on by staff, the decision to set them for public hearing instead was not a proximate cause of damages because Plaintiffs’ own actions ensured that mining could not commence in 2010. At the beginning of July 2010, Plaintiffs withdrew their requests to amend the groundwater monitoring requirements under Condition 6C, ensuring that mining could not start before the spring of 2011. And while Plaintiffs asserted that they applied for the amendments under protest, they abandoned the protest in unconditionally acceding to the County’s requests, giving up the right to claim later that those requests were a proximate cause of damage. In sum, the trial court erred in allowing Plaintiffs to proceed with claims of negligent misrepresentation and in denying a new trial. The verdict is not supported by substantial evidence.

(c) Plaintiffs' negligent misrepresentation claims were precluded under the doctrine of collateral estoppel.

Similar to the issues underlying the tortious interference claims, the issue underlying the negligent misrepresentation claims was raised before and rejected by the hearing examiner. The hearing examiner noted that Plaintiffs “argued that the County was bound by its February 2010 decision that amendments, if required, could be decided administratively.” Exh. 446 at 15, n.9. For instance, the Port argued: “After first concluding that the technical amendments could be done at the staff level (a decision that was unappealed), the County reversed itself and determined that a full SUP amendment process before the Hearing Examiner was required.” *See* CP 7535; *see also* CP 7544-45 (Maytown). The hearing examiner rejected this argument in deciding that amendments were “required” and that the County properly exercised its discretion in setting the amendments for hearing. Exh. 446 at 30-31. Consequently, Plaintiffs were precluded from re-litigating this issue at trial, and the trial court erred in allowing Plaintiffs to assert negligent misrepresentation by the County.

3. Plaintiffs' general negligence claims were barred for several reasons independent of LUPA.

(a) Plaintiffs' negligence claims were barred by the public duty doctrine.

Plaintiffs relied on the same evidence to establish a special relationship in the context of their general negligence claims as in the context of their negligent misrepresentation claims. *See* CP 3606. Indeed, on the special verdict form, the negligence claims were phrased in terms

of “negligence by Thurston County in making, or arising from, an express assurance[.]” CP 6390. As already discussed, as a matter of law, there was no special relationship. Plaintiffs’ general negligence claims were barred by the public duty doctrine, and the trial court erred in refusing to dismiss those claims.

(b) Plaintiffs waived their negligence claims by compromise and settlement.

The law favors settlements and their finality. *Haller v. Wallis*, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978). “A compromise or settlement is res judicata of all matters relating to the subject matter of the dispute.” *In re Phillips’ Estate*, 46 Wn.2d 1, 13-14, 278 P.2d 627 (1955) (citation omitted); see also *Bellevue Pac. Ctr. Ltd. P-ship v. Bellevue Pac. Tower Condo. Owners Ass’n*, 171 Wn. App. 499, 506, 287 P.3d 639 (2012).

Plaintiffs’ general negligence claims focused on Nadine Romero’s analysis that constituted the root of the compliance memo’s groundwater reporting requirements. They alleged that she failed to look behind the MDNS conditions and apply the 2005 groundwater monitoring plan incorporated by the MDNS. See CP 3606. Plaintiffs’ hydrogeologist, “Pony” Ellingson, who prepared the 2005 groundwater monitoring plan, testified that MDNS Condition 6C was not consistent with that plan. RP 947, 990. He blisteringly criticized Ms. Romero for following the MDNS rather than the underlying groundwater monitoring plan, and for determining that Maytown was required to test for numerous substances not relevant to gravel mining. RP 958-59, 968. He did not go so far as to

accuse Ms. Romero of intentionally wrongful conduct, but he did characterize her work as “not...reasonable” and “bad practice.” RP 1009.

Plaintiffs, however, compromised all issues relating to Ms. Romero’s work, by stipulating to a new groundwater monitoring plan that was jointly submitted to the hearing examiner, and adopted. Exh. 446 at 21, 34; RP 1001 (Ellingson), 1523 (Hempelmann). John Hempelmann went so far as to testify expressly that the result was a “compromise.” RP 1622-23. Nevertheless, the trial court allowed Plaintiffs to present to the jury the case that otherwise would have been presented to the hearing examiner but for the compromise. The trial court erred in refusing to dismiss Plaintiffs’ general negligence claims on the ground that they had waived those claims by compromise and settlement.

(c) Plaintiffs’ negligence claims were precluded under the doctrine of collateral estoppel.

The hearing examiner’s adoption of the stipulated groundwater monitoring plan was a final decision on the merits as to the issue of the reasonableness of the groundwater monitoring requirements. In adopting the plan, the hearing examiner found that, “[g]iven the site’s history of extensive contamination from historical industrial uses, testing for the additional County parameters is necessary to determine whether operations contribute to the release of pre-existing contaminants into groundwater.” Exh. 446 at 21. This decision should have precluded Plaintiffs from challenging the reasonableness of the monitoring

requirements. The trial court erred in refusing to dismiss Plaintiffs' negligence claims under the doctrine of collateral estoppel.

C. Plaintiff Maytown's federal substantive due process claim brought under 42 U.S.C. § 1983 should have been dismissed.

1. Maytown was not deprived of any cognizable property interest.

As a threshold matter, Maytown never established a critical element of a claim for deprivation of due process under 42 U.S.C. § 1983. Such a claim may only be premised upon the deprivation of a *cognizable property right* without due process. *Durland*, 182 Wn.2d at 70. Protected property interests may be created by (1) contract, (2) common law, or (3) statutes and regulations. *Id.* A protected property interest requires having more than a mere abstract need or desire, or a unilateral expectation; it requires a "legitimate claim of entitlement." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *see also Durland*, 182 Wn.2d at 70. There is no protected property interest in the outcome of a discretionary decision-making process. *Dorr v. Butte County*, 795 F.2d 875, 878 (9th Cir. 1986). Nor is there a protected property interest in having required procedures followed, as "a substantive property right cannot exist exclusively by virtue of a procedural right." *Id.* at 877.

While Maytown had a property interest in the SUP itself, it had no property interest in having the County follow any particular procedure or decision-making process, such as having amendments approved by staff as opposed to the hearing examiner. Nor was Maytown deprived of any

property interest when the BOCC remanded the five-year review to the hearing examiner for further studies under the 2002 CAO. At most, this created the possibility that Maytown's property interests could be limited by the County's future actions, depending on the outcome of the studies. Accordingly, Maytown's claim should have been dismissed.

2. Maytown failed to show any action that could be said to shock the conscience -- the legal prerequisite to establishing a denial of federal substantive due process.

(a) The jury was properly instructed that the actions of Thurston County in its land use decisions must be so outrageous as to shock the conscience, in order to constitute a violation of Maytown's substantive due process rights.

The "Due Process Clause is intended, in part, to protect the individual against 'the exercise of power without any reasonable justification in the service of a legitimate governmental objective[.]'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). The standard for liability is whether the arbitrary government conduct shocks the conscience. *Lewis*, 523 U.S. at 846-47 (citation omitted) ("[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."). When executive action is at issue, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849. "[O]nly the most egregious

official conduct can be said to be ‘arbitrary in the constitutional sense.’” Id. at 846 (citation omitted). The benchmark substantive due process case is *Rochin v. California*, where the Supreme Court held that the forced pumping of a suspect’s stomach shocked the conscience and violated the “decencies of civilized conduct.” See *Lewis*, 523 U.S. at 846, quoting *Rochin v. California*, 342 U.S. 165, 172-73, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952).

In 2003, the United States Supreme Court confirmed that the standard from *Lewis* applies to evaluations of allegedly abusive executive action in the land use context, reiterating that “‘only the most egregious official conduct can be said to be arbitrary in the constitutional sense.’” *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003), quoting *Lewis*, 523 U.S. at 846 (citations omitted).

The jury was properly instructed in the law regarding Maytown’s substantive due process claims. CP 6376 (jury instruction no. 24). Maytown itself conceded that “shocking to the conscience” was the proper standard. CP 7159-60 (joint response to motion for new trial); RP 3944. Earlier in the case Maytown attempted to assert a violation of due process rights based on a lesser arbitrary and capricious standard, see, e.g., CP 2088, but by the time the jury was instructed Maytown recognized it had to meet the more demanding “shocking the conscience” standard. See RP 3705-09 (no exception to instruction no. 24).

- (b) To shock the conscience and therefore constitute a violation of federal constitutional due process, a local government’s land use actions must be so wrongful as to “shake the foundations of this country” (*EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 862 (6th Cir. 2012)).**

Among the themes that emerge from federal circuit cases applying the “shocks the conscience” standard to land use decisions is the principle that merely showing that a land use decision is arbitrary and capricious, as measured by state law standards, is not sufficient to establish a violation of federal substantive due process rights. *See, e.g., Mongeau v. City of Marlborough*, 492 F.3d 14, 17-19 (1st Cir. 2007) (rejecting application of arbitrary and capricious standard and affirming dismissal on the pleadings where the landowner alleged that the city official denied the building permit and interfered in the zoning process for improper reasons); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006) (due process claims involving local land use decisions must demonstrate something more than that the action was arbitrary and capricious, or in violation of state law, to satisfy the shocks-the-conscience standard).

Accordingly, erroneous decisions that violate state law are insufficient to establish substantive due process violations. *SFW Arcibo Ltd. v. Rodriguez*, 415 F.3d 135, 137-38, 141 (1st Cir. 2005) (affirming dismissal of substantive due process claim under the shocking to the conscience standard), *overruled on other grounds by San Geronimo Caribe Project, Inc. v. Acevedo-Vila*, 687 F.3d 465 (1st Cir. 2012) (*en banc*); *see also Torromeo v. Town of Fremont*, 438 F.3d 113, 118 (1st Cir.

2006) (affirming Rule 12(b)(6) dismissal of claim that town’s violation of state law caused harm to developer); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221-22 (6th Cir. 1992) (adopting the shocks-the-conscience standard to emphasize that “‘arbitrary and capricious’ in the federal substantive due process context means something far different than in state administrative law.”). Likewise, the fact a regulatory board could make decisions for erroneous reasons, or make demands which exceed its statutory authority, does not shock the conscience. *Licari v. Ferruzzi*, 22 F.3d 344, 349-50 (1st Cir. 1994).

Making land use decisions with an improper motive also does not constitute a federal due process violation under the “shocking to the conscience” test. *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 401-02 (3d Cir. 2003) (Alito, J.) (holding that land-use disputes “should not be transformed into substantive due process claims based only on allegations that government officials acted with ‘improper’ motives.”). Thus, allegations that “hostility and animus” motivated the revocation of a building permit and the issuance of certain enforcement orders will not support a § 1983 claim brought by a developer frustrated by town planning and permitting authorities. *Licari*, 22 F.3d at 349-50 (citations omitted). Nor do “allegations of political interference with the permitting process[.]” motivated by community opposition, give rise to a substantive due process claim. *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45-46 (1st Cir. 1992) (affirming summary judgment dismissal of substantive due process claims for

absence of proof of a “truly horrendous” deprivation of rights). And it does not shock the conscience that a permitting authority would “engage...in delaying tactics” during the permitting process. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 32 (1st Cir. 1991) (affirming Rule 12(b)(6) dismissal of developer’s claims “[e]ven assuming that [the permitting authority] engaged in delaying tactics and refused to issue permits for the [] project based on considerations outside the scope of its jurisdiction under Puerto Rico law[.]”), *overruled not in relevant part by San Geronimo Caribe Project*, 687 F.3d at 490, n.20..

As the Third Circuit aptly stated: “[E]very appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but ‘[i]t is not enough simply to give these state law claims constitutional labels such as ‘due process’ or ‘equal protection’ in order to raise a substantial federal question under section 1983.’” *United Artists Theatre Circuit, Inc.*, 316 F.3d at 402, quoting *Creative Env’ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982). Dismissal therefore is mandated where there are no allegations of corruption or self-dealing, or interference with constitutionally protected activity at the project site, or bias against an ethnic group. *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 286 (3d Cir. 2004).

The following exemplar decisions conclusively demonstrate that developers must show truly egregious official conduct to prevail on a

federal substantive due process claim, and that proof of arbitrariness or capriciousness, or other violation of state law, will not suffice:

- In *Torromeo v. Town of Fremont*, a developer received approval from the town planning board for planned housing subdivisions, but the developer was denied the permits after the town subsequently enacted an ordinance allowing the planning board to limit the number of building permits it would issue. The developer successfully challenged the enactment of the growth ordinance on state law grounds and received an injunction compelling the town to issue the permits. The town's unjustified delay in issuing the previously approved building permits did not shock the conscience, even after the state court determined that the town did not follow the procedures required by state law in enacting the ordinance allowing denial of the building permits. 438 F.3d at 118 (affirming Rule 12(b)(6) dismissal);
- In *SFW Arecibo Ltd. v. Rodriguez*, two real estate developers sued after a state planning board incorrectly determined that their building permit had expired. 415 F.3d at 137-38. Though the state court had already determined that the permit was wrongly revoked, the First Circuit affirmed the dismissal of the substantive due process claim because the complaint stated "[i]n its strongest form ... that the [p]lanning [b]oard made an erroneous decision in violation of state law," which is insufficient to establish a substantive due process violation. *Id.* at 141;

- In *Eichenlaub v. Township of Indiana*, the Third Circuit held that a developer’s substantive due process claim should not go to a jury where the zoning officials allegedly “applied subdivision requirements to their property that were not applied to other parcels; that they pursued unannounced and unnecessary inspection and enforcement actions; that they delayed certain permits and approvals; that they improperly increased tax assessments; and that they maligned and muzzled [the developers].” 385 F.3d 274, 286 (3d Cir. 2004);
- In *Chesterfield Development Corp. v. City of Chesterfield*, the Eight Circuit held that the allegations that the city arbitrarily applied a zoning ordinance were insufficient to state a substantive due process claim, and stated that the “decision would be the same even if the City had knowingly enforced the invalid zoning ordinance in bad faith. . . . A bad-faith violation of state law remains only a violation of state law.” 963 F.2d 1102, 1104–05 (8th Cir. 1992).

The Sixth Circuit recently, and aptly, summed up the shocks-the-conscience standard, when applied to local land use decisions. Rejecting a substantive due process claim involving an alleged solicitation of a bribe by a public official, the Sixth Circuit recalled the shocking facts of the stomach-pumping in *Rochin v California* and then stated:

Perhaps it is unfortunate that the solicitation of a bribe by a public official does not shock our collective conscience the way that pumping a detainee's stomach does. But, although we can condemn

[the public official] for his misconduct, we simply cannot say that his behavior is so shocking *as to shake the foundations of this country*.

EJS Properties, LLC v. City of Toledo, 698 F.3d 845, 862 (6th Cir. 2012)
(emphasis added).

- (c) **The due process claim never should have gone to the jury because the actions of Thurston County were not shocking to the conscience, as a matter of law.**

In opposition to Thurston County's motion for a new trial, Maytown singled out five allegedly actionable choices made by the BOCC, CP 7158, but none of the courts applying the shocks-the-conscience standard have allowed a jury to decide to impose liability for similar actions. None of the exemplar actions were more egregious or more shocking to the conscience than the scenarios where courts following the shocks-the-conscience test found no substantive due process violation as a matter of law.

Other than the limited remand for further study of critical areas, the BOCC decisions favored Maytown. The BOCC otherwise affirmed the favorable five-year review decision and the granting of the amendments. That the superior court determined that the BOCC's remand decision was arbitrary and capricious under state law is insufficient as a matter of law to prove that the BOCC's actions violated federal substantive due process protections. The trial court thus erred in allowing the jury to decide the substantive due process issue on the basis that the jury could find the County's remand decision was arbitrary and capricious. *See* RP 2886.

Similarly, crediting Maytown's accusations that the BOCC was motivated by community opposition, that BOCC members acted in knowing disregard of Maytown's permit rights, or that a County staffer (Mike Kain) was put in fear of his job if he did not act to delay the project -- none of these, taken individually or together, constitute conduct that (in the words of the Sixth Circuit) "shakes the foundations of this country." Maytown's due process claim should never have gone to the jury, and should now be dismissed with prejudice as a matter of law.

VI. CONCLUSION

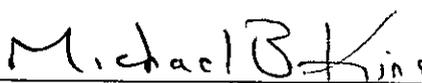
This Court should vacate the judgment on jury verdict and Maytown's attorney fee award under 42 U.S.C. § 1988, and remand with directions that the Port and Maytown's state law tort claims, and Maytown's due process claim, be dismissed with prejudice. This Court should remand for further proceedings on Maytown's RCW Chapter 64.40 claim, with directions it be limited to what damages, if any, Maytown can prove were caused by the BOCC's remand decision.

Respectfully submitted this 30th day of June, 2015.

KARR TUTTLE CAMPBELL

CARNEY BADLEY SPELLMAN, P.S.

By 
Mark R. Johnsen, WSBA No. 11050
Steven D. Robinson, WSBA No. 12999

By 
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Justin P. Wade, WSBA No. 41168

Attorneys for Appellant Thurston County

APPENDIX

14/9

Kelvin Lau

From: John Hempelmann
Sent: Monday, April 25, 2011 5:01 PM
To: Dan Lloyd; Jim Magstadt; Midori Dillon; Randy Lloyd; Steve Cortner
Cc: Midori Dillon; Randall Olsen
Subject: Appeal of Examiner's Decision

CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

Team,

As we reviewed our options and the Examiner's Decision to outline the appeal I emailed you about on Saturday, we reconsidered our position. The way the Examiner wrote the Decision, she said the Code was unclear about the process and the County had the option to address the 6A and 6C timing issues either administratively or through the formal SUP Amendment process. Her language leaves open to us the argument that the County staff, under pressure from FORP and the Commissioners, chose the most burdensome and lengthy approach—the formal SUP Amendment process and its attendant SEPA process that has taken so long and cost so much. Remember that the record shows the County reversed itself on the process which is further evidence of capricious acts. If we appeal this part of the Examiner's Decision to the BOCC, we know the BOCC will rule against us and would likely use language that said the formal SUP Amendment process was REQUIRED. This would make our damage case more difficult so we have concluded we should not file an appeal of the Examiner's Decision.

You should also know that the County Motion for Reconsideration of the Examiner's Decision on SEPA has "tolled" or suspended the appeal period for the entire Decision. The appeal period will run again after the Examiner decides on the Motion for Reconsideration. We are filing our Response to the Motion tomorrow, the County Reply is due May 2 and the Examiner will issue her Decision on May 4.

John

CH&

John Hempelmann
Attorney
Cairncross & Hempelmann
524 Second Ave., Ste. 500
Seattle, WA 98104-2323
jhempelmann@cairncross.com
Direct phone 206-254-4400
Office fax 206-587-2308

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0-25500-5-1



CARNEY BADLEY SPELLMAN

June 30, 2015 - 2:09 PM

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL,
LLC and PORT OF TACOMA,

Respondents,

v.

THURSTON COUNTY,

Appellant

NO. 46895-6-II

DECLARATION OF
SERVICE

(Consolidated with No. 11-2-
00396-3)

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 *Appellant's Motion for Leave to File Overlength Opening Brief; Opening Brief; CD of the Verbatim Report of Proceedings and Declaration of Service* on the below-listed attorney(s) of record by the method(s) noted:

- Email and first-class United States mail, postage prepaid, to the following:

Patrick John Schneider
Steven J. Gillespie
Foster Pepper PLLC
1111 3rd Ave Ste 3400
Seattle WA 98101-3264
gills@foster.com
schnp@foster.com

Elizabeth Petrich
Thurston County Prosecuting
Attorney's Office
2000 Lakeridge Dr SW Bldg 2
Olympia WA 98502-6001
PetricE@co.thurston.wa.us

Donald C. Bauermeister James A. Hertz Friedman Rubin 1126 Highland Ave Bremerton WA 98337-1828 <u>don@friedmanrubin.com</u>	John E.D. Powell Cairncross & Hempelmann PS 524 2nd Ave Ste 500 Seattle WA 98104-2323 <u>JPowell@cairncross.com</u>
Carolyn A. Lake Goodstein Law Group, PLLC 501 S G St Tacoma WA 98405-4715 <u>clake@goodsteinlaw.com</u>	Mark R. Johnsen Karr Tuttle Campbell 701 Fifth Ave., Ste. 3300 Seattle, WA 98104 <u>mjohnsen@karrtuttle.com</u>

DATED this 30th day of June, 2015.



 Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

June 30, 2015 - 2:10 PM

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king@carneylaw.com
anderson@carneylaw.com
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