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SUPREME COURT
OF THE STATE OF WASHINGTON

No. 46895-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC and PORT OF TACOMA,

Plaintiffs/Respondents,

v.

THURSTON COUNTY,

Defendant/Appellant

APPELLANT'S PETITION FOR REVIEW

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Treatises

I. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Defendant and Appellant Thurston County ("the County") seeks review of the published decision terminating review of Division Two of the Court of Appeals, entered on April 4, 2017 ("Slip Op."). A copy of the decision is attached as App. 1.

II. ISSUES PRESENTED FOR REVIEW

This case presents the following issues warranting this Court's review:

1. *LUPA Restrictions on Civil Damages Actions.* Must a party first pursue its administrative remedies, and upon receiving an adverse land-use decision following the exhaustion of those remedies, prevail in a land-use petition challenging that decision, before that party may pursue a civil-damage action based on that decision? The Plaintiffs and Respondents Port of Tacoma and Maytown Sand & Gravel chose not to exhaust their administrative remedies from adverse land-use actions, yet were allowed by the Lewis County Superior Court to base state-law tort claims for damages on a challenge to those actions. In affirming an award of millions of dollars in damages against the County, the Court of Appeals held that the Land Use Petition Act places no restrictions on civil damages actions. This holding conflicts with decisions of this Court and published decisions of the Court of Appeals and presents an issue of significant public interest. Review is thus warranted under RAP 13.4(b)(1), (2) and (4).

2. *Requirements to Show a Deprivation of Substantive Due Process.* The County was found to have deprived Plaintiff and Respondent Maytown of its rights to substantive due process. The Court of Appeals held that Maytown had a protected property interest in a special-use permit for gravel mining, even though that permit was subject to conditions, and even though Maytown's claimed deprivation involved being denied a particular procedure for resolving whether it was in compliance with those conditions, and Maytown had no constitutionally protected right to that procedure. The Court of Appeals also held that the County's actions could be found to have "shocked the conscience," when at most Maytown established that elected public officials had been overzealous in responding to constituent concerns about adverse environmental impacts of Maytown's proposed mining operations. These issues present significant questions of law under the Constitution of the United States, and thus warrant review under RAP 13.4(b)(3).

3. *Procedural and Substantive Requirements to Recover Attorney's Fees.* The Court of Appeals (1) adopted a new exception to the American rule on recovery of attorney's fees, holding that a party may recover pre-litigation fees as damages in a tort action against local government in the land-use context, and (2) awarded Maytown fees on appeal even though it failed to devote a separate section of its brief to its request for fees. These decisions conflict with decisions of this Court and publish decisions of the Court of Appeals. Review is thus warranted under RAP 13.4(b)(1) and (2).

III. STATEMENT OF THE CASE

The Port of Tacoma purchased 754 acres of land in Thurston County in 2006, to develop an intermodal freight-transport facility. Exh. 429 at 12; RP 741-46. The property came with a gravel-mining permit issued in 2005, subject to several conditions including water-quality monitoring, which had to be satisfied before mining could begin. Exh. 302 at 3-4.

As economic conditions worsened, the Port shelved its facility plan and, in late 2008, listed the property for sale. Exh. 429 at 13; Exh. 446 at 13-14; RP 774-75, 817, 3083-84. The Port entered into negotiations in 2009 with two individuals, who formed Maytown. RP 779-80, 790, 2208-10; Exhs. 314 ("Southwind"), 385. The Port and Maytown entered into a purchase-and-sale agreement in late 2009. RP 2398, 2541-42; *see also* Exh. 390 at MSG000244.

In February 2010, the County Staff issued a memorandum stating that further water-quality testing beyond what had been done to date would be required to bring the permit into compliance. Exh. 429 at 14; Exhs. 382, 383. The "baseline" for various elements to be established by this additional testing could not be completed until Fall 2010, which would mean mining could not begin that year. Exh. 383 at 3-4; Exh. 386 at 15, 16 n.20.

Concerned the mining venture would fail if mining did not begin in 2010, Maytown—through its land-use lawyer John Hempelmann—asked the Staff in April 2010 to dispense with the additional water testing

through a "minor" amendment. Exh. 429 at 15; Exh. 394 at 1, 3-4. If the Staff granted this amendment, Maytown would be able to begin mining even if mine opponents appealed the granting of the amendment. RP 1168-69, 1358.

The Staff refused, and instead in June 2010 sent the requested water-testing amendment (along with other requested amendments) to the County Hearing Examiner for determination. Exh. 446 at 15; Exh. 55 at 1; RP 1154-55. Because the amendment would consequently be deemed a "major" amendment, this meant that, even if the Hearing Examiner eventually ruled in Maytown's favor, Maytown could not start mining until mine opponents' appeals were resolved. Exh. 371 at 2; Exh. 386 at 15, 16 n.20; RP 1168-69, 1358; *see* Thurston County Code § 20.60.020 ("major adjustment").

By now, Maytown possessed evidence it believed showed the Staff's refusal to grant the requested water-testing amendment was driven by pressure from members of the Board of County Commissioners, whose constituents opposed the mine. Maytown, joined by the Port, argued to the Hearing Examiner that the Staff had succumbed to political pressure and asked the Hearing Examiner to rule that the Staff should not have sent the water-testing amendment to the Hearing Examiner. CP 7530-31, 7533-38 (App. 3), 7543-46 (App. 4); Exh. 446 at 2, 15 n.9 (App. 5).

The Hearing Examiner ruled there was a need for additional testing, Exh. 446 at 30 ("An SUP amendment was required."), and that the Staff had the authority to send the issue of whether to eliminate that

testing to the Hearing Examiner. Exh. 446 at 30-31. Although the Hearing Examiner had ruled against them, Maytown and the Port decided to drop the issue rather than take it to the Board of County Commissioners (the final level of administrative review), concerned that doing so might undermine a future damages case. Exh. 449 (App. 2).

The 2005 special-use permit also required a "five-year review" no later than December 2010. Exh. 303 at 43; Exh. 429 at 10. At the hearing on that review, the Staff proposed that the permit be subject to a more restrictive amended "critical areas" ordinance than the one in effect when the permit had been granted. Exh. 429 at 17, 25-26; RP 1214-15. The Hearing Examiner ruled against the Staff on this point, Ex. 429 at 46, and in April 2011, the Board affirmed that ruling. CP 107; RP 1281. But the Board remanded for further proceedings to ascertain whether all critical areas had previously been identified. CP 107-10.

Maytown and the Port filed LUPA petitions challenging the Board's remand order. CP 1-54, 7643-82. On July 20, 2011, just over four months after the Board's remand order, the Superior Court (Lewis County, Hon. Richard L. Brosey), ruled that the decision to remand for further critical-area inspection had been arbitrary and capricious. CP 111-16.

On July 7, 2011, following the Hearing Examiner's ruling on amendments to the permit, the Board rejected a challenge by mine opponents to a resolution of the water-testing dispute reached by agreement between Maytown and the Staff and approved by the Hearing

Examiner. Exh. 454. Under the agreed resolution, Maytown would continue to monitor levels of various elements, the baseline for which had been established by the additional testing ordered by the Staff in 2010. Exh. 446 at 22, 34.

In November 2011, after Maytown had satisfied all pre-mining conditions, the Staff issued a letter authorizing Maytown to start mining.[1] Exh. 1. Maytown contended that the issuance of this letter should not have been a precondition to start mining, and further contended that the letter contained language that cast an economic pall over the project, and contributed materially to its failure the following year. RP 1501, 1664-65, 3277, 7533 n.3. But Maytown did not pursue administrative relief from these conditions.[2]

Maytown and the Port sued for tortious interference and misrepresentation, and Maytown also sued for deprivation of substantive due process under 42 U.S.C. § 1983. CP 117-40, 163-85. Before trial, the trial court denied the County's motions to dismiss based on LUPA preemption, collateral estoppel, and insufficient evidence to establish a due process claim. CP 1950-53. The court denied the County's renewed motions at trial. RP 2882-86. Following the 20-day trial, over which Judge Brosey presided, a Lewis County Superior Court jury returned a verdict in favor of the Port and Maytown on their state-law claims, and in

[1] The letter authorized Maytown to take steps to satisfy remaining pre-mining conditions, and then start mining.

[2] The only decision Maytown challenged under LUPA was the remand order in the five-year review.

favor of Maytown on its substantive due process claim. CP 6388-91. The jury awarded the Port $8,000,000 and Maytown $4,000,000. CP 6391. The trial court awarded Maytown $1,130,030 in fees and costs under 42 U.S.C. § 1988. CP 7551-62.

The County appealed, and the Port and Maytown cross-appealed the denial of attorney's fees they had incurred during the permit-conditions dispute. CP 7469, 7482. The Court of Appeals affirmed on the County's appeal and awarded Maytown fees under 42 U.S.C. 1988, and ruled in favor of Maytown on the cross-appeal.

IV. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The Court of Appeals' decision undermines the uniformity policy of the Land Use Petition Act.

The purpose of the Land Use Petition Act, as expressed by the legislature, is to "establish[] uniform, expedited appeal procedures and uniform criteria for reviewing [land-use] decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010; *see also Durland v. San Juan County*, 182 Wn.2d 55, 64, 240 P.3d 191 (2014). Consistent with that purpose, this Court has ruled that LUPA's exhaustion-of-administrative remedies requirement must be strictly enforced. *Durland*, 182 Wn.2d at 66.

The Court of Appeals excused the Port's and Maytown's failure to exhaust their administrative remedies—their deliberate choice not to do so, in fact—on the ground that "Washington courts have made it clear that LUPA does not apply to '[c]laims provided by any law for monetary

damages or compensation.'" Slip Op. at 16. The Court of Appeals cited and quoted LUPA subsection 030(1)(c) (RCW 36.70C), and also cited this Court's decision in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013), and the Court of Appeals' decisions in *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 352 P.3d 807, *rev. denied*, 184 Wn.2d 1015 (2015), and *Libera v. City of Port Angeles*, 178 Wn. App. 669, 316 P.3d 1064 (2013).

The Court of Appeals is wrong about what Washington courts have made clear. The decision in this case conflicts with decisions of this Court and published decisions of the Court of Appeals.

To begin, the Court of Appeals misreads *Lakey*. In *Lakey*, this Court held that not first seeking relief through LUPA did not bar an inverse-condemnation claim because that claim sought only "compensation rather than a reversal or modification of a land use decision." 176 Wn.2d at 927. Here, by contrast, the centerpiece of the Port's and Maytown's state-law tort claims was an attack on the correctness of the County's land-use actions, particularly (1) the Staff's decision to require the additional water testing and then not itself dispense with those tests by a minor amendment but instead refer the matter to the Hearing Examiner, and (2) the decision of the Hearing Examiner to uphold the Staff's decisions as a reasonable exercise of discretionary authority.[3]

[3] John Hempelmann's testimony about the land-use procedure choices of the Staff was absolutely clear, *e.g.*, RP 1137-38, 1141-43, 1156-58, 1329-30, 1464 (App. 6), and it was buttressed by the attack on the need for any additional water testing by Charles "Pony" Ellingson, the Port's and Maytown's environmental expert. RP 947, 958-59,

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This distinction between a damages claim that is based on a land-use action not challenged via LUPA and a claim that is independent of a land-use action was expressly recognized by this Court in (now Chief) Justice Fairhurst's opinion for the Court in *Lakey*. Justice Fairhurst reviewed several decisions of this Court and the Court of Appeals bearing on the issue and made clear that a damages action *would* be held barred for not first seeking relief through LUPA, if the claim for damages rested on attacking the correctness of the land-use action taken by the local government being sued for damages: "The cases the City cites all involved damage claims where the relief required a judicial determination that the land use decision was invalid or partially invalid; none involved damages claims generally." 176 Wn.2d at 927.[4] Moreover, unlike the inverse-condemnation claimant in *Lakey*, the relief sought by the Port and Maytown plainly *did* "require…a judicial determination" that the land-use actions of the County were invalid.

In short, the Court of Appeals' decision here conflicts with this Court's comprehensive explication in *Lakey* of how a failure first to pursue relief through LUPA can bar a claim for damages. The decision also conflicts with the holding of the Court of Appeals in *Mercer Island*

967-68, 990. Hempelmann also took issue with the Hearing Examiner's upholding the Staff's referral of the issue as contrary to common sense. RP 1211-13.

[4] Justice Fairhurst reviewed the particulars of those cases in a footnote (number 11), immediately following the language the County just quoted: *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005), *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010), *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), and *Shaw v. City of Des Moines*, 109 Wn. App. 896, 37 P.3d 1255 (2002).

Citizens for Fair Process v. Tent City 4, 156 Wn. App. 393, 401-03, 232 P.3d 1163 (2010), in which a damages claim was held to be barred because the claim was based on challenges to the validity of land-use actions and the claimants had failed first to seek relief through LUPA.[5] Finally, upholding the Port's and Maytown's state-law damages awards conflicts with this Court's decision in *Durland*, 182 Wn.2d at 66, which held that LUPA's exhaustion-of-administrative remedies requirement must be strictly enforced. The Port and Maytown asked the Hearing Examiner to rule that the Staff erred in sending the water-testing issue to the Examiner rather than resolving it themselves, claiming that the Staff had failed in their duty because they knuckled under to political pressure.[6] After the Hearing Examiner rejected this challenge, the Port and Maytown deliberately chose to bail from the administrative process midstream, lest the outcome undermine a future damages case. This is not merely a failure to exhaust administrative remedies—it is a *deliberate frustration* of the administrative process.[7]

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[5] The Court of Appeals' reliance on *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 25, 352 P.3d 807, *rev. denied*, 184 Wn.2d 1015 (2015), and *Libera v. City of Port Angeles*, 178 Wn. App. 669, 675 n.6, 316 P.3d 1064 (2013), is misplaced, because in both of those cases the plaintiffs sought damages strictly for delay in issuing decisions that were favorable to them. 188 Wn. App. at 25.

[6] The record leaves no doubt on this point. CP 7534-35, 7545-46; Exh. 446 at 2, 15 n.9. The Court of Appeals says otherwise. *See* Slip Op. at 20. The court is wrong.

[7] Although the County is not seeking review of the Court of Appeals' collateral-estoppel determination as such, principles of collateral estoppel nonetheless buttress why the Port and Maytown should not have been allowed to escape the legal consequences of their defeat on the crucial issues before the Hearing Examiner. *See Reninger v. Dep't of Revenue*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998) ("Decisions of administrative tribunals may have preclusive effect under Washington law."); *see also* Appellant's

(Footnote continued next page)

Finally, by relying on the language of RCW 36.70C.030(1)(c), the Court of Appeals has aligned itself with Justice Sanders' *dissent* in *James v. Kitsap County*, 154 Wn.2d 574, 115 P.3d 286 (2005). Justice Sanders would have had this Court transform subsection 030(1)(c) into a substantive exemption for all damage actions, a result that can be reached only by reading that provision in isolation from the rest of LUPA—an approach to statutory interpretation that conflicts with our state's "context" rule. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002) (modifying Washington's "plain meaning" rule and adopting the "context" approach). Justice Sanders incorrectly ignored LUPA's express purpose 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; *see G-P Gypsum Corp. v. State, Dep't of Revenue*, 169 Wn.2d 304, 309-13, 237 P.3d 256 (2010) (holding that statements of purpose are to be considered part of statutory context).

The trial court allowed the Port and Maytown to make the same arguments to the jury that the Hearing Examiner had rejected, as the central basis for recovering damages from the County.[8] Allowing a jury in

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Opening Brief at 56-59, 66, 68; Appellant's Consolidated Reply & Response Brief at 19-25, 31, 34-35.

[8] The Port and Maytown's closing arguments leave no doubt on this point. After Maytown's land-use lawyer, John Hempelmann, had testified that dealing with the requested amendments without referral to the Hearing Examiner was a matter of common sense, RP 1211-13, counsel in closing argument made exactly the same point using exactly the same language. RP 3740-41, 3873-74 (App. 7). Yet the Hearing Examiner

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a civil-damages action to second guess, long after the fact, a hearing examiner's—*unappealed*—decision on an issue of land-use law plainly conflicts with LUPA's express purpose 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. Subsection 030(1)(c) should not be read, as Justice Sanders would have had this Court do in *James* and as the Court of Appeals has now done here, to allow such a result.[9] This subsection should instead be read as merely clarifying that a claim for monetary damages or compensation need not be asserted and prosecuted in a land-use petition proceeding.

In addition, the Court of Appeals' decision that the Port and Maytown were not required to exhaust available administrative remedies as to the part of the Hearing Examiner's decision that was adverse to them because the Hearing Examiner granted the requested amendment of the permit, Slip Op. 17, conflicts with decisions of this Court and of the Court of Appeals holding that a party must challenge a decision that is partially

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had rejected exactly this claim, when ruling that referring amendments to the hearing examiner was a proper exercise of staff discretion. Exh. 446 at 30-31.

[9] At one point the Court of Appeals seemed to suggest that this outcome is acceptable because there is no obligation to pursue relief via a land-use petition except from a "land use decision," and the Hearing Examiner's decision was not a land-use decision because it was not the decision of the highest land-use authority in the county. Slip Op. at 17. While the Court of Appeals is correct that the Hearing Examiner's decision was not a "land use decision" as LUPA defines such a decision, the Court of Appeals ignores that the Port and Maytown deliberately evaded being confronted with such a decision by bailing from the administrative process midstream. And that, of course, is exactly what the exhaustion requirement *is designed to prevent*.

adverse if it wishes to seek damages based on the adversely decided issue. *E.g.*, *James*, 154 Wn.2d at 586 (holding that parties who failed to challenge under LUPA the imposition of impact fees in a decision that granted a permit waived the right later to seek reimbursement of the fees in a damages action); *Harrington v. Spokane County*, 128 Wn. App. 202, 209-15, 114 P.3d 1233 (2005) (holding that a property owner's damages action was barred because he failed to exhaust administrative remedies as to the part of a decision that was adverse to him, even though the same decision also granted a permit).

In sum, the decision of the Court of Appeals, allowing the Port and Maytown to base their damages claim on a challenge to the validity of the County's land-use actions, conflicts with decisions of this Court and published decisions of the Court of Appeals and presents an issue of significant public interest. This Court should thus grant review under RAP 13.4(b)(1), (2), and (4).

B. The Court of Appeals' decision abrogates fundamental limits on the scope of substantive due process claims arising out of land-use disputes.

The Supreme Court of the United States has placed strict limits on the scope of substantive-due-process claims arising out of land-use decision making, to maintain the proper deference for local authority over land-use decision making demanded by our federalism. Thus, in *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003), the Court held "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'"

and thus result in local-government liability for deprivation of substantive due process arising out of a land-use decision. *Id*. at 198 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (requiring a finding of conduct that "shocks the conscience")).

Since then, the federal Circuit Courts of Appeals have made clear that showing mere arbitrary-and-capricious action will not suffice; if local land-use wrongdoing involves nothing more than allegations of arbitrary action of a kind typically lodged against the government in such disputes, the claim must fail. *See, e.g.*, *Onyx Props., LLC v. Bd. of County Comm'rs of Elbert County*, 838 F.3d 1039, 1048-49 (10th Cir. 2016); *United Artists Theatre Circuit v. Township of Warrington, PA*, 316 F.3d 392, 399-401 (3d Cir. 2003) (Alito, J.). And even before a party is allowed to try to meet the heavy burden of showing misconduct "shocking to the conscience," it must show it has been deprived of a constitutionally protected property interest. *Dorr v. Butte County*, 795 F.2d 875, 877-78 (9th Cir. 1986).

Maytown plainly failed to establish either element. To begin, Maytown failed to establish deprivation of a protected property interest. The Court of Appeals committed a fundamental error in ruling that Maytown was deprived of its protected interest in its mining permit when it was not allowed to begin mining in 2010. Slip Op. 23-24. The court ignored that Maytown had a *conditional* permit, under which it was not allowed to mine unless all of the conditions had been met. And if the

County ruled that Maytown was not in compliance with all conditions (here, the water-testing requirement), under the permit Maytown's only remedy was to appeal that ruling.[10] Maytown's complaint was that it should not have been forced to go to the Hearing Examiner to seek relief. But the courts have made clear that a permit applicant has no constitutionally protected interest in a procedure. *Dorr*, 795 F.2d at 877-78. Maytown thus could have no protected interest in avoiding the Hearing Examiner.

In addition, Maytown failed to show misconduct shocking to the conscience. All Maytown proved was that certain county officials acted overzealously in seeking to achieve the desires of their constituents who were concerned about the environmental consequences of mining in the sensitive area where the property is located. That local government can be held accountable under state law when officials act arbitrarily and capriciously in trying to meet the demands of their constituents is not disputed; but to render that government liable for a deprivation of substantive due process under the Fourteenth Amendment, more must be shown. The misconduct must rise—or perhaps more precisely, sink—to a level that implicates constitutional protections fundamental to our system of government. *City of Cuyahoga Falls*, 538 U.S. at 198; *Onyx Props.*, 838 F.3d at 1048-49; *United Artists*, 316 F.3d at 399-401.

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[10] The County never withdrew or sought to nullify the permit. It only required that established permit conditions be satisfied and that requested amendments be decided by a qualified Hearing Examiner.

In addition, the Court of Appeals mistakenly conflated the Board's five-year review remand decision, which the trial court found was arbitrary and capricious, with the Staff's determination that the Hearing Examiner process was necessary to determine the water-quality testing changes. The remand decision was promptly overturned by the superior court well before Maytown was even ready to mine and caused no actual damage. Importantly, the remand order was the only decision by the Board of County Commissioners that was not in Maytown's favor. All other rulings were contrary to the mine opponents' positions. To allow a determination that the Board's action was shocking to the conscience under federal law, as the Court of Appeals did here, upsets the balance that must be struck between state and national authority under our federal system.

These are significant questions arising under the federal Constitution, and they warrant review under RAP 13.4(b)(3).

C. The Court of Appeals' decision conflicts with precedent regarding awards of attorney's fees.

1. The Court of Appeals' decision to adopt a new exception to the American rule that allows recovery of attorney's fees as damages conflicts with prior decisions of this Court and of the Court of Appeals.

Washington follows the "American rule" that attorney's fees are not recoverable as costs or damages unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity. *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997). As

summarized by this Court in *McCready*, 131 Wn.2d at 275, 278, this Court has authorized recovery of attorney's fees *as damages* in limited circumstances: (1) wrongful issuance of temporary injunction, *Cecil v. Dominy*, 69 Wn.2d 289, 291-94, 418 P.2d 233 (1966); (2) wrongful action by a third party subjecting a party to litigation (the "ABC rule"), *Wells v. Aetna Ins. Co.*, 60 Wn.2d 880, 882-83, 376 P.2d 644 (1962); (3) slander of title, *Rorvig v. Douglas*, 123 Wn.2d 854, 862-83, 873 P.2d 492 (1994); and (4) wrongful garnishment, *James v. Cannell*, 135 Wash. 80, 82-83, 237 P. 8, *aff'd*, 139 Wash. 702, 246 P. 304 (1926); *see also Aldrich v. Inland Empire Tel. & Tel. Co.*, 62 Wash. 173, 176-77, 113 P. 264 (1911) (malicious prosecution).

The Court of Appeals here presumed to adopt a new exception to the American rule to allow recovery of attorney's fees as damages in tort actions against local governments in the land-use context. Slip Op. 28. The court then held that the trial court abused its discretion in not allowing Maytown to present evidence of the fees it incurred before commencing its tort action against the County for the purpose of seeking to recover those fees as damages under this new exception. *Id*. This is only the second new exception adopted in the past 50 years and the first ever adopted by the Court of Appeals.

As support for its unprecedented decision, the Court of Appeals cited two decisions: *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989), and *Brandt v. Superior Court*, 37 Cal.3d 813, 693 P.2d 796 (1985). But neither of those decisions provides any support for the Court

of Appeals' holding. The Court of Appeals cites the *statement of facts* in *Pleas*, in which this Court merely observed that the trial court had awarded damages that included attorney's fees. 112 Wn.2d at 799. Nothing in this Court's decision in *Pleas* indicates that whether such an award was authorized by law was raised as an issue on appeal, let alone addressed by this Court. As for the California case, *Brandt*, it addressed the recoverability of fees as damages in an insurance-bad faith action—not in the land-use context. 693 P.2d at 798.

The Court of Appeals decision conflicts with *McCready* and other decisions by this Court and of the Court of Appeals adhering to the American rule except in the limited circumstances previously authorized. Review is thus warranted under RAP 13.4(b)(1) and (2).

2. The Court of Appeals' decision to award Maytown fees on appeal where it failed to devote a separate section of its brief to the request conflicts with precedent.

Maytown requested fees on appeal only in the "Conclusion" section of its principal brief.[11] RAP 18.1 requires that a party seeking fees on appeal "devote a section of its opening brief to the request." RAP 18.1(b). Holding that "[t]his requirement is mandatory," this Court has declined to award fees where the request was made in the conclusion of a brief rather than a separate section. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). Citing *Wilson*, other panels of Division Two of the Court of Appeals previously

[11] Respondent/Cross-Appellants' Joint Response & Opening Brief at 98-99.

rejected fee requests made only in the conclusion of a brief. *See City of Vancouver v. State Public Empl. Rel. Comm'n*, 180 Wn. App. 333, 366-67, 325 P.3d 213 (2014); *Whidbey Gen. Hosp. v. State*, 143 Wn. App. 620, 637 & n.11, 180 P.3d 796 (2008). The Court of Appeals' decision here to award Maytown fees on appeal conflicts with this precedent, and review is thus warranted under RAP 13.4(b)(1) and (2).

V. CONCLUSION

This Court should grant the County's petition, reverse the Court of Appeals, and remand to the trial court with directions that the Port's and Maytown's claims be dismissed with prejudice.

Respectfully submitted this 4th day of May, 2017.

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CERTIFICATE OF SERVICE

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

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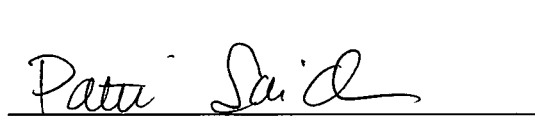
DATED this 4th day of May, 2017.



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APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

April 4, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MAYTOWN SAND AND GRAVEL LLC, Respondent/Cross Appellant, v. THURSTON COUNTY, Appellant/Cross Respondent, BLACK HILLS AUDUBON SOCIETY and FRIENDS OF ROCKY PRAIRIE, Additional Defendants, PORT OF TACOMA, a Washington special purpose district, Respondent/Cross Appellant.	No. 46895-6-II PUBLISHED OPINION
PORT OF TACOMA, a Washington special purpose district, Respondent/Cross Appellant, v. THURSTON COUNTY, Appellant/Cross Respondent, BLACK HILLS AUDUBON SOCIETY and FRIENDS OF ROCKY PRAIRIE, Additional Defendants, MAYTOWN SAND AND GRAVEL LLC, Respondent/Cross Appellant.	

MELNICK, J. — Thurston County (County) appeals the trial court's orders denying its motions for summary judgment, judgment as a matter of law, and for a new trial, and the jury's verdict in favor of Maytown Sand and Gravel, LLC (MSG) and the Port of Tacoma (the Port).[1] Maytown's lawsuit against the County involved claims for tortious interference, negligence, negligent misrepresentation, and a violation of substantive due process[2] arising out of the County's interference with MSG's ability to begin gravel mining on property MSG had purchased from the Port. We conclude that the trial court did not err because neither the Land Use Petition Act (LUPA)[3] nor collateral estoppel barred the tortious interference claim, and MSG presented sufficient evidence of a substantive due process violation to avoid judgment as a matter of law.[4]

Maytown cross-appeals the trial court's order granting the County's motion in limine to exclude evidence of attorney fees as damages. Because the "American rule," which generally precludes a prevailing party from recovering attorney fees, does not apply to attorney fees incurred in a different proceeding that are claimed as damages, the trial court erred by granting the motion.

We affirm the jury's finding of liability and award of damages for the tortious interference claim, but remand solely on the issue of attorney fees as damages on Maytown's tortious interference claim.

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[1] For clarity, we refer to Maytown Sand and the Port collectively as "Maytown." When referencing either individually, we will use "MSG" or "the Port."

[2] Under 42 U.S.C. § 1983. Only MSG alleged the substantive due process claim.

[3] Ch. 36.70C RCW

[4] Because of this conclusion, we do not consider the arguments on the negligence or the negligent misrepresentation claims.

FACTS

I. FACTUAL BACKGROUND

A. GRAVEL MINE PROPERTY

The Port owned property in Thurston County. The property had a final, vested special use permit (SUP) that the County had issued to the Port in January 2006. The SUP allowed gravel mining on the property if certain conditions were satisfied. The SUP had a 20-year duration from the date mining began and included a mandatory review by a hearing examiner every five years.

The SUP included explicit preconditions before mining could begin. In particular, condition 6 required the permittee to adhere to the "Maytown Aggregates Groundwater Monitoring Plan." Condition 6A required field verification of off-site supply wells within a year of the SUP issuing. Condition 6C required installation of 17 monitoring wells to check on water levels, water temperature, and water quality. The monitoring was to begin within 60 days of the SUP's issuance. The Port did not comply with these deadlines.

B. DISCUSSIONS BEFORE PURCHASE

In 2009, MSG became interested in purchasing the property from the Port. MSG wanted to develop and operate a gravel mine on the property.

In October, the owners of MSG and their attorney, John Hempelmann, met with Mike Kain, the County's Resource Stewardship Department planning manager. Kain told MSG that the SUP was valid, and that "minor staff approvals and things . . . needed to be done."[5] 10 Report of Proceedings (RP) at 2148. He further stated that after MSG filed an application for amendments, the staff would handle them administratively. According to MSG, Kain stated that the SUP had

[5] A few of the conditions required amendments because the Port failed to complete them within the time requirements listed in the SUP.

no "skeletons in the closet," and it could be mining within 30-60 days. 10 RP at 2227. Kain denied making this statement.

After this meeting, MSG and the Port entered into a purchase and sale agreement on the property. MSG agreed to pay $17 million to purchase the property.

In December, Kain e-mailed MSG and informed it of its lack of compliance with the conditions of the SUP. The e-mail stated that staff could approve minor amendments to the SUP, but major amendments would need approval by a Thurston County Hearing Examiner.

On February 16, 2010, Kain sent Maytown a memorandum outlining its compliance status with each of the SUP's conditions. When referencing a condition that required a minor timeline change, Kain stated it "may be approved by staff upon submittal of an application for amendment." Ex. 62, at 5. The document provided that "it is the staff assessment that the applicant is substantially in compliance with the conditions of [the State Environmental Policy Act of 1971] SEPA and the SUP at this time." Ex. 62, at 22.

On April 1, MSG and the Port closed on the purchase and sale agreement for the property. MSG made a $1 million down payment to the Port.

C. REQUEST FOR SUP AMENDMENTS

In late April, MSG requested eight amendments to the SUP, including condition 6.[6] Specifically, MSG requested an amendment of the missed deadlines in conditions 6A and 6C and

[6] MSG requested to amend six SUP conditions relating to timing, extent, and notification requirements on the water monitoring issue, and amendments related to the freeway turn-pocket and the removal of a noise berm. The Port worked closely with MSG throughout the process.

the elimination of the background testing required in condition 6C.[7] Because it only asked for minor amendments, MSG asked the County to process the amendments administratively.

Kain wrote to Maytown's lawyers that after County staff reviewed the application for amendments, they determined the amendments were major and required hearing examiner approval. County staff also planned to require SEPA review of the already issued "Mitigated Determination of Non-Significance" (MDNS) for the SUP. MSG appealed the County's decision to a hearing examiner and challenged the need to conduct a SEPA review.

MSG withdrew some of the proposed amendments in an effort to have the remaining amendments classified as minor. It did not withdraw the amendments to conditions 6A and 6C, which Kain had labeled in his February memorandum as minor timeline changes to be approved upon application for amendments.

On June 17, Kain informed Maytown that the requested amendments could not be addressed at the administrative level and would be deemed major, which meant that they would be referred to a hearing examiner for a decision. Hempelmann said that Kain told him that the attorney for the Board of County Commissioners (BOCC) directed Kain to label MSG's requested amendments as major.

[7] On July 1, MSG withdrew its request to eliminate the background testing required in condition 6C.

In April 2011, the Hearing Examiner issued a decision on the SUP amendment requests.[8] The Hearing Examiner approved the SUP amendment application, which the County supported, and adopted Maytown Sand's water monitoring plan to replace the 2005 groundwater monitoring plan and conditions 6A and 6C. The Hearing Examiner did not approve any other amendments.

D. FIVE YEAR REVIEW HEARING

In 2010, the County's Resource Stewardship Department issued a summary report on MSG's pending five year review. The report expressed an opinion that because no land disturbing activity had yet occurred, the new 2009 critical area ordinance (CAO) should apply.[9] The County took this same position before the Hearing Examiner at the five year review hearing. The report stated that complying with the new critical area ordinance would likely reduce the mining area, potentially by 100 acres.

The Hearing Examiner conducted the five year review hearing in December 2010. The Hearing Examiner issued a written decision at the end of the month. In its findings of fact, the Hearing Examiner stated that:

> The County asserted that entire site should be re-reviewed for compliance with new codes every five years. In the alternative, the County argued that if the interim CAO provisions are held not to apply to the mine, the entire [property] should be studied for critical areas that currently meet or in 2002 would have met the 2002 CAO definitions and that any areas determined to be critical areas in those studies should be excluded from the mine boundary.

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[8] The Hearing Examiner combined this review with MSG's appeal of the need for SEPA review. The Hearing Examiner determined that MSG successfully proved that the proposed amendments to the water monitoring conditions would not impact the environment. Accordingly, the Hearing Examiner concluded that SEPA review was "superfluous" because it was not considered an action under SEPA. Ex. 127, at 31.

[9] Roy Garrison, an expert witness before the Hearing Examiner, testified at trial about his involvement in studying the property for the Port after the County issued the permit. Garrison opined that this was the first instance of a county seeking to apply new critical areas regulations to an existing permitted mine.

Ex. 11, at 30. The Hearing Examiner concluded this interpretation of the Thurston County Code, "would have the same effect as requiring mines to re-apply every five years," and that "credible evidence supports the conclusion that no critical areas that should have been protected pursuant to the 2002 CAO were missed." Ex. 11, at 46. The Hearing Examiner granted the five year review subject to minor conditions. "The Applicant has demonstrated compliance with all conditions except MDNS 6.A, 6.C, and 10. Compliance with those conditions can be ensured by new conditions of approval." Ex. 11, at 47.

Friends of the Rocky Prairie (FORP) and the Black Hills Audubon Society (BHAS), groups opposed to the mine, appealed the Hearing Examiner's decision to the BOCC, arguing that the BOCC should reverse the decision in its entirety.

Commissioners Sandra Romero, Karen Valenzuela, and Cathy Wolfe comprised the BOCC. Commissioners Romero and Valenzuela belonged to and were donors of BHAS. Generally, the BOCC commissioners became involved in a permit only if it was appealed to them from the Hearing Examiner. The commissioners did not direct the staff on permit issues. However, the BOCC directed staff in this case to continue to determine whether the permit was "considered active" or valid because the property had not been used for mining yet.[10] 15 RP at 3042.

[10] At trial, two County staff members, Cliff Moore and Donald Krupp, testified that the BOCC did not pressure County staff on the request for amendments. The BOCC did not try to invalidate the permit or delay MSG from starting to mine. County staff did not recall any evidence of "missed critical areas" or why the permit should have been held up for additional studies. 14 RP at 2976. The County communicated with Sharon Coontz of FORP about any progress made by MSG on the SUP, but it did not inform Maytown about those communications.

Each of the commissioners conducted private meetings with Sharon Coontz, FORP's representative, about the SUP and the property. However, Coontz denied conspiring with the commissioners to "kill" or "delay" the mine. 17 RP at 3396.

Romero did not disclose her membership in BHAS or her frequent correspondence with Coontz about the SUP to Maytown. After a BOCC meeting and learning about FORP's position from Coontz, Romero expressed interest in submitting a written request to open the SEPA review process for the SUP.

Valenzuela also had meetings with Coontz about the SUP, but did not inform Maytown of those meetings. In particular, Valenzuela invited Coontz, but not Maytown, to attend a BOCC meeting to explain why FORP believed the SUP was illegal. Valenzuela told the County staff that she wanted "strict adherence to SEPA" because it was "meaningful" to her that BHAS objected to the requested amendments to the SUP.[11] 8 RP at 1701. Valenzuela also signed a petition to rezone part of MSG's property.

Commissioner Wolfe denied ever directing staff on a permit issue. She did meet with Coontz about Maytown once.

On March 3, 2011, the BOCC heard the appeal by FORP and BHAS. During the BOCC hearing, Romero disclosed that she was "sympathetic" to FORP during her election, but said she could make a "fair and impartial decision." 9 RP at 1904. When asked to declare that she could fairly and impartially judge the case, Valenzuela did not disclose any of her communications with

[11] At trial, Valenzuela testified that she did not know it was illegal for the County to seek to apply a new ordinance to an already permitted mine. She was impeached by her own deposition testimony that she knew at the time the BOCC issued the decision that new ordinances did not apply retroactively. Valenzuela also testified that she directed the County to argue the 2009 CAO should apply.

FORP or her membership in BHAS. None of the commissioners disclosed their meetings with Coontz about the property on the record.

The BOCC affirmed the Hearing Examiner, but determined that the

> matter shall be remanded back to the hearing examiner for purposes of determining whether critical areas, as specified below, and as defined in the 2002 CAO, are protected within the mine area. . . . If the hearing examiner determines that the supplemental habitat management plan reveals the above identified jurisdictional critical areas, the final site plan shall be amended to delineate the jurisdictional critical areas and their buffers before mining can commence. The hearing examiner shall also determine whether or not any other conditions need to be amended or added as a result of the supplemental habitat management plan.

Ex. 7, at 5.

According to Valenzuela, before the hearing on the five year review, the BOCC did not have verifiable facts to support the County's suspicion that critical areas were missed, and the staff repudiated Coontz's statement that there were streams on the property (critical areas) for months. Wolfe knew the Hearing Examiner had found that the critical areas were studied thoroughly in 2002 through 2005, but she remanded the case to "ask[ ] the Hearing Examiner to look at anything that could have happened, since that decision was made, because there were indications of new vegetation." 18 RP at 3658.

II. PROCEDURAL FACTS

MSG filed a LUPA petition in Lewis County Superior Court appealing the BOCC's decision requiring a remand.[12] In the alternative, it petitioned for declaratory judgment and constitutional writ, injunctive relief, and a complaint for damages against Thurston County for a review of a land use decision made by the County pursuant to LUPA.[13]

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[12] The Port was listed as an "Additional Party" for this petition. 1 Clerk's Papers (CP) at 1.

[13] Ch. 36.70C RCW; ch. 64.40 RCW.

The trial court granted summary judgment on Maytown's LUPA petition and reinstated the Hearing Examiner's decision from December 30, 2010.[14] The trial court also ruled that the disposition of the LUPA petition did not render Maytown's complaint for damages moot.

Maytown filed an amended complaint for damages. The amended complaint asserted the same causes of action as the original complaint: negligence, negligent misrepresentation, tortious interference with a business expectancy, and violations of chapter 64.40 RCW and 42 U.S.C. § 1983. The complaint excluded the LUPA petition because Maytown deemed the issue resolved.

The tortious interference with a business expectancy claim alleged that Maytown had a business relationship or expectancy with a probability of future economic benefit, the County knew of the expectancy and improperly and intentionally induced or caused the termination of the expectancy, and caused damages to Maytown. MSG's substantive due process claim under 42 U.S.C. § 1983 alleged that while acting under color of state law, the BOCC actions deprived MSG of its valuable property right (the SUP) without due process, and MSG was entitled to damages and attorney fees under 42 U.S.C. § 1988 as a result.

The County filed an answer and counterclaim to Maytown's amended complaint. The County pleaded some affirmative defenses and defenses, including that some or all of the claims were barred by statutes of limitations, failure to exhaust remedies, lack of standing, res judicata and/or collateral estoppel, and immunity. In addition, the County alleged that Maytown did not suffer compensable damages.

[14] MSG began mining in November 2011. On October 8, 2012, the Port sent MSG a notice of default under the real estate contract.

A. COUNTY'S MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS

The County filed a motion for summary judgment on all claims. The trial court heard arguments on the County's motion for summary judgment and denied the motion.

B. MAYTOWN'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

1. ARBITRARY AND CAPRICIOUS ACTS

Maytown filed a motion for partial summary judgment seeking a finding of liability by the County for "arbitrary and capricious actions and for knowingly unlawful actions." 4 CP at 1413, 1767. The trial court granted Maytown's motion for partial summary judgment, concluding that the BOCC's actions were arbitrary and capricious. It also denied the County's motion for summary judgment.

2. MSG'S MOTION ON SUBSTANTIVE DUE PROCESS CLAIMS

MSG filed another motion for partial summary judgment on the County's violations of MSG's substantive due process rights. The County also cross-moved for summary judgment. The trial court denied both motions because disputed issues of material facts existed.

III. TRIAL

A. MOTIONS IN LIMINE

In its motions in limine, the County sought to exclude testimony and argument for any attorney fees sought as damages because the American rule[15] prohibited such evidence.

Maytown sought to introduce evidence at trial of the attorney fees they spent defending against the actions of the County staff and the BOCC. Maytown argued that the American rule did not preclude such damages. The trial court granted the County's motion in limine.

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[15] Washington follows the American rule, which provides that generally each party in a civil action will pay its own attorney fees and costs. *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296, 149 P.3d 666 (2006).

Maytown filed a supplemental brief on the issue of attorney fees as damages. Maytown explained that they only sought recovery of the attorney fees spent to protect the validity of the SUP, fees that were the proximate and foreseeable result of the County's tortious acts.

The trial court entered a written order granting the County's motion in limine and excluded evidence of attorney fees as damages.

B. COUNTY'S MOTIONS FOR JUDGMENT AS A MATTER OF LAW

At the close of Maytown's case-in-chief, the County moved for judgment pursuant to CR 50 on all of Maytown's claims. The trial court denied the motion because factual disputes needed to be resolved.

At the close of the County's case, the County renewed its motion for judgment on all of Maytown's claims. The trial court denied the motion.

C. VERDICT AND JUDGMENT

The jury found in favor of Maytown. By special verdict, the jury found that the County tortuously interfered with the contract between MSG and the Port and MSG's business expectancy, the County made negligent misrepresentations to Maytown, the County was negligent, and the County, acting through the BOCC, violated MSG's substantive due process rights. Based on the special verdict form, the damages awarded by the jury could have been based solely on finding the County liable for one tort claim. The jury awarded $8 million to the Port and $4 million to MSG. The jury also found that MSG owed the County money for unpaid permit fees, and awarded the County $63,000. The trial court entered the judgment.

IV. POST-TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL

The County filed a motion for judgment as a matter of law pursuant to CR 50(b) or in the alternative for a new trial or amendment of judgment under CR 59(a)(5), (6), (7), (8), (9) and/or RCW 4.76.030. The trial court filed a written order denying the County's motions.

The County appealed, and Maytown cross appealed.

ANALYSIS

I. STANDARD OF REVIEW

The County seeks review of the trial court's denial of multiple different motions throughout the pretrial, trial, and post-trial proceedings. We review an order for summary judgment de novo, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). We also review a trial court's denial of a CR 50 motion for judgment as a matter of law de novo, engaging in the same inquiry as the trial court. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). "'Substantial evidence' is evidence sufficient to persuade a fair-minded, rational person that the premise is true." *Hawkins v. Diel*, 166 Wn. App. 1, 13, 269 P.3d 1049 (2011). Finally, we review a denial of a new trial based on CR 59 an issue of law de novo. *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn. App. 919, 927, 332 P.3d 1077 (2014), *review denied*, 182 Wn.2d 1021 (2015).

The issues raised by the County at each stage of the proceedings were decided by the trial court as a matter of law. Therefore, we review all of the issues de novo.

II. TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

The County argues that the trial court erred by denying its motions for summary judgment, judgment as a matter of law, and for a new trial because LUPA barred Maytown's claim of tortious interference with a business expectancy and that they failed to exhaust their administrative remedies. The County also argues that collateral estoppel barred the tortious interference claim. We disagree.[16]

A. ELEMENTS

> A party claiming tortious interference with a contractual relationship or business expectancy must prove five elements: "(1) the existence of a valid contractual relationship or business expectancy, (2) that defendants had knowledge of that relationship, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) that defendants interfered for an improper purpose or used improper means, and (5) resultant damage."

Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 351, 144 P.3d 276 (2006) (quoting *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997)).

B. LUPA

The County argues that the trial court erred by refusing to dismiss the tortious interference claim because LUPA barred it. We disagree.

[16] Maytown asserted tort claims for tortious interference with a business expectancy, negligent misrepresentation, and negligence. But the special verdict form asked the jury to determine damages if the jury found for Maytown on any of the tort claims. Because we conclude that sufficient evidence supported the jury's verdict in favor of Maytown on tortious interference, we need not address the negligent misrepresentation and negligence claims.

1. STANDARD OF REVIEW

LUPA is generally the exclusive remedy for land use decisions. RCW 36.70C.030(1). Under LUPA, a superior court may grant relief from a land use decision only if the party seeking relief has shown:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). "A superior court hearing a LUPA petition acts in an appellate capacity and has only the jurisdiction conferred by law." *Durland v. San Juan County*, 182 Wn.2d 55, 64, 340 P.3d 191 (2014). RCW 36.70C.020(2) defines a land use decision as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on: (a) [a]n application for a project permit."

However, the legislature provided for certain exemptions to LUPA's application. *James v. Kitsap County*, 154 Wn.2d 574, 583, 115 P.3d 286 (2005).

This issue raises questions of statutory interpretation, which we review de novo. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007).

2. LUPA Does Not Bar the Tortious Interference Claim

Washington courts have made it clear that LUPA does not apply to "[c]laims provided by any law for monetary damages or compensation." RCW 36.70C.030(1)(c); *see also Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013); *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 352 P.3d 807, *review denied*, 184 Wn.2d 1015 (2015); *Libera v. City of Port Angeles*, 178 Wn. App. 669, 316 P.3d 1064 (2013). RCW 36.70C.030 specifically exempts claims for monetary damages from land use decisions.

In *Lakey*, the appellants sought monetary compensation rather than a reversal of a land use decision. 176 Wn.2d at 926. The appellants alleged a taking by the local government, but did not challenge the taking in a LUPA action. *Lakey*, 176 Wn.2d at 925. Instead, the appellants filed a separate action for their inverse condemnation claim. *Lakey*, 176 Wn.2d at 926. The *Lakey* court held that LUPA provides for judicial review of a local jurisdiction's land use decision, but the appellants made a claim they were unable to raise before a hearing examiner, and did not invoke the superior court's appellate jurisdiction. 176 Wn.2d at 927-28. Consequently, LUPA did not bar their claim. *Lakey*, 176 Wn.2d at 928.

In *Woods View II*, the plaintiffs brought an action against Kitsap County alleging multiple tort claims. 188 Wn. App. at 18. The County argued that the plaintiff's failure to bring an action under LUPA barred any damages actions arising from its permitting activity. *Woods View II*, 188 Wn. App. at 24. We held that where a claim did not challenge the actual land use decision, but instead sought damages for the delay in rendering those decisions, LUPA did not bar the claim. *Woods View II*, 188 Wn. App. at 25.

Similarly, in *Libera*, we concluded that LUPA did not apply because the appellant appealed dismissal of "only his damages claim for intentional interference with business expectancy by government delay." 178 Wn. App. at 676 n.6.

Here, the portion of the Hearing Examiner's April 2011 decision that discussed the procedure for amendment review by the County was not a land use decision. Maytown sought monetary damages for tortious interference. They did not seek judicial review of the land use decision. The original complaint included a request for review of the LUPA action, but after the trial court granted Maytown's summary judgment motion under LUPA, only a complaint for damages remained.

Therefore, because the tortious inference claim for monetary damages did not constitute a challenge to the land use decision, LUPA did not bar it. Accordingly, we hold that LUPA does not apply, and the trial court did not err by determining LUPA did not bar the tortious interference claim.

C. COLLATERAL ESTOPPEL

The County also argues that the trial court erred by refusing to dismiss the tortious interference claim because it was barred by collateral estoppel. We disagree.

1. STANDARD OF REVIEW

We conduct de novo review on whether collateral estoppel applies to bar relitigation of an issue. *State v. Vasquez*, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001).

"'The doctrine of collateral estoppel is well known to Washington law as a means of preventing the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal.'" *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001) (quoting *Reninger v. Dep't of Corrs.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998)). It is distinguished from

claim preclusion, or res judicata, "'in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted.'" *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983) (emphasis added) (quoting *Seattle First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978)). But, "[c]ollateral estoppel is not a technical defense to prevent a fair and full hearing on the merits of the issues to be tried." *Hadley*, 144 Wn.2d at 311. "'Washington courts focus on whether the parties to the earlier proceeding had a full and fair hearing on the issue.'" *Hadley*, 144 Wn.2d at 311 (quoting *Neff v. Allstate Ins. Co.*, 70 Wn. App. 796, 801, 855 P.2d 1223 (1993)).

We apply a four-part test to analyze whether a previous litigation should have a collateral estoppel effect on a subsequent litigation. *Hadley*, 144 Wn.2d at 311. Collateral estoppel requires:

> "'(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.'"

Hadley, 144 Wn.2d at 311 (quoting *Southcenter Joint Venture v. Nat'l Democratic Policy Cmty.*, 113 Wn.2d 143, 148, 780 P.2d 1282 (1989) (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987))). If we find that any element is not satisfied, we need not address the others. *Hadley*, 144 Wn.2d at 311.

> [A]pplication of collateral estoppel is limited to situations where the issue presented in the second proceeding is *identical in all respects* to an issue decided in the prior proceeding, and "where the controlling facts and applicable legal rules remain unchanged." Further, issue preclusion is appropriate only if the issue raised in the second case "involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment," even if the facts and the issue are identical.

LeMond v. Dep't of Licensing, 143 Wn. App. 797, 805, 180 P.3d 829 (2008) (emphasis added) (citation and internal quotation marks omitted) (quoting *Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974)).

"Decisions of administrative tribunals may have preclusive effect under Washington law." *Reninger*, 134 Wn.2d at 449. An administrative decision may have preclusive effect on a later civil action where the parties had ample incentive to litigate issues. *Thompson v. Dept. of Licensing*, 138 Wn.2d 783, 796, 982 P.2d 601 (1999); *Reninger*, 134 Wn.2d at 437. "Three additional factors must be considered under Washington law before collateral estoppel may be applied to agency findings: (1) whether the agency acted within its competence [made a factual decision], (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations." *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 308, 96 P.3d 957 (2004) (citing *Reninger*, 134 Wn.2d at 450). However, "disparity of relief may be so great that a party would be unlikely to have vigorously litigated the crucial issues in the first forum and so it would be unfair to preclude relitigation of the issues in a second forum." *Christensen*, 152 Wn.2d at 309.

2. COLLATERAL ESTOPPEL DID NOT BAR THE CLAIM

The only parts of the test contested here are whether the issues were identical and whether the doctrine would work an injustice against Maytown.

The tort claim of tortious interference with a business expectancy is not identical to any issue heard before the Hearing Examiner. Jury instruction 14 instructed the jury on the elements of tortious interference with a business expectancy. Jury instruction 11 further instructed the jury on the elements of tortious interference with a business expectancy for the Port's claim that the County interfered with MSG's performance under their contract. The County's argument focuses

solely on one element of tortious interference: that the County's interference was for an improper purpose or by improper means.

At the April 2011 hearing, the Hearing Examiner did not hear or decide whether the County acted for an improper purpose or by improper means. The hearing involved MSG's proposed amendments to the SUP and whether they "could have been handled administratively via enforcement authority and that no amendment application (administrative or quasi-judicial) was required." Ex. 446, at 30. The Hearing Examiner concluded:

> Because the County Code does not explicitly state criteria establishing whether SUP amendments are administrative or quasi-judicial, the Department exercised discretion in deciding which process applied. Its decision is due substantial deference because the ordinance is unclear, the Department is charged with administration of the ordinance, and the decision is within the Department's expertise.

Ex. 446, at 31. The Hearing Examiner's decision indicated only that the County's decision to send amendments to the Hearing Examiner was within its discretion; it is silent as to the motive behind the use of that discretion. The Hearing Examiner did not hear or decide whether the County acted with an improper purpose or by improper means.

Therefore, because the issues heard by the Hearing Examiner were not identical to the jury's issues, collateral estoppel did not bar the claim. Accordingly, the trial court did not err by refusing to dismiss the claim.

D. SUMMARY

The County only challenges the tortious interference with a business relationship claim based on LUPA and collateral estoppel arguments. Because we reject those arguments, we affirm the jury's finding of liability and award of damages for the tortious interference claim.

III. SUBSTANTIVE DUE PROCESS—42 U.S.C. § 1983 CLAIM

The County argues that the trial court erred by refusing to dismiss MSG's federal due process claim under 42 U.S.C. § 1983. The County argues that MSG presented insufficient evidence to establish two elements of substantive due process: that the County deprived MSG of a cognizable property interest and that any action by the County shocked the conscience. The County also argues that the issue should not have gone to the jury because its actions "were not shocking to the conscience[,] as a matter of law" and thus, the trial court erred by denying its motion for a new trial. Br. of Appellant at 77.

We disagree and conclude that sufficient evidence existed to support the jury's verdict of a substantive due process violation and that whether the County's actions shocked the conscience was a question for the jury.

A. SUMMARY JUDGMENT

As an initial matter, the County assigns error to the trial court's denial of its motion for summary judgment to dismiss MSG's substantive due process claim. However, once a trial on the merits is held, we review a pretrial order denying summary judgment only if it involved a question of law. *Johnson v. Rothstein*, 52 Wn. App. 303, 306, 759 P.2d 471 (1988). Here, the trial court denied the County's motion for summary judgment because issues of material fact remained. Therefore, we do not review the trial court's denial of the summary judgment motion.

B. SUFFICIENCY OF THE EVIDENCE AT TRIAL

1. LEGAL PRINCIPLES

When reviewing a jury verdict for substantial evidence, we view the evidence in the light most favorable to the nonmoving party. *Gorman v. Pierce County*, 176 Wn. App. 63, 87, 307 P.3d 795 (2013). We cannot substitute our judgment for that of the jury. *Gorman*, 176 Wn. App. at 87.

Accordingly, we do not "overturn the jury's verdict unless it is clearly unsupported by substantial evidence, i.e., evidence that, if believed, would support the verdict." *Gorman*, 176 Wn. App. at 87. Further, any "inconsistencies in evidence are matters which affect weight and credibility and are within the exclusive province of the jury." *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.3d 156 (2007).

To prevail on a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty, or property interest. *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). 42 U.S.C. § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Here, the trial court instructed the jury that proving a substantive due process violation

> requires proof that [MSG] was deprived of rights in a way that *shocks the conscience* or interferes with rights that are implicit in the concept of ordered liberty.
>
> To prevail on its Substantive Due Process violation claim, [MSG] has the burden to prove by a preponderance of the evidence that:
>
> 1. [The County] took action against [MSG] that was not rationally related to a legitimate government purpose; and
> 2. The action taken was an abuse of power lacking in reasonable justification.

15 CP at 6376 (emphasis added). In addition, the trial court instructed the jury that MSG had to prove: "(1) some person deprived [MSG] of a federal constitutional or statutory right, and (2) that person must have been acting under color of state law." 15 CP at 6375. Neither party appealed these instructions and they are the law of the case. Jury instructions not objected to at trial are treated as the properly applicable law for purposes of appeal, thus, becoming the law of the case.

Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). As a result, we analyze the issue using the jury instructions which included the shocks the conscience standard.

In addition, we review an order denying a motion for a new trial on the ground that the verdict was contrary to the evidence for an abuse of discretion by the trial court. *Palmer v. Jensen*, 132 Wn.2d 193, 198, 937 P.2d 597 (1997). CR 59(a)(7) allows the trial court to vacate a jury's verdict and grant the moving party a new trial if the trial court finds that "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." We review the record in the light most favorable to the nonmoving party to determine whether sufficient evidence supported the verdict. *Palmer*, 132 Wn.2d at 197-98.

2. PROPERTY INTEREST

As a threshold issue to asserting a viable substantive due process claim under 42 U.S.C. § 1983, "a plaintiff must prove that the conduct complained of deprived the plaintiff of a cognizable property interest without due process." *Durland*, 182 Wn.2d at 70. "In other words, the plaintiff must identify a property right, show that the state has deprived him or her of that right, and show that the deprivation occurred without due process." *Durland*, 182 Wn.2d at 70.

"'Property' under the Fourteenth Amendment encompasses more than tangible physical property." *Durland*, 182 Wn.2d at 70; U.S. CONST. amend. XIV. The right to use and enjoy land is a property right. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998). Permit holders have a vested property interest. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 228, 858 P.2d 232 (1993).

Here, MSG had a clear property interest because it had a valid, vested permit. *See Rettkowski*, 122 Wn.2d at 228. MSG had a right to use its property for mining because it acquired the SUP to use the land as permitted. *See Mission Springs*, 134 Wn.2d at 962-63. On appeal, the

County also concedes "[MSG] had a property interest in the SUP itself." Br. of Appellant at 69. During closing argument, the County argued to the jury that "[a]n issued permit to use land is a valuable property right protected by the Constitution of the United States and the Constitution of the State of Washington." 19 RP at 3785.

The County misidentifies the property right at issue. The County incorrectly asserted that the property right MSG claims was a right to a certain procedure. The property right MSG actually alleged the County violated is the use of the property as permitted, and that the County used the process and procedures to destroy that property right.

The BOCC's remand on the issue of critical areas continued to delay MSG's ability to use the SUP and begin mining. MSG presented sufficient evidence of its property interest when it presented substantial evidence of its ownership of a valid permit at trial.

3. SHOCKING TO THE CONSCIENCE

The County also challenges whether MSG presented sufficient evidence that any action by the County shocked the conscience sufficient to constitute a substantive due process violation. The County argues that its actions were not shocking to the conscience as a matter of law. We disagree.

To prove that BOCC's decision violated its substantive due process rights, MSG had to prove that it possessed a protected property in interest in the SUP and that the BOCC deprived MSG of its rights under the SUP in a way that "shock[ed] the conscience" or "interfere[d] with rights that are implicit in the concept of ordered liberty." 15 CP at 6376 (Instr. 24).

In reference to what constitutes action that "shocks the conscience," the United States Supreme Court noted that the substantive component of the Due Process Clause is violated by executive action only when it "'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 847, 118 S. Ct. 1708,

140 L. Ed. 2d 1043 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 128, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)). Yet, the Supreme Court has admitted that "the measure of what is conscience shocking is no calibrated yard stick." *Lewis*, 523 U.S. at 847. The Court also made clear that the cases that dealt with abusive executive action always emphasized, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.' . . . [W]e said that the Due Process Clause was intended to prevent government officials 'from abusing [their] power, or employing it as an instrument of oppression.'" *Lewis*, 523 U.S. at 846 (internal quotations omitted) (quoting *Collins*, 503 U.S. at 129, 126).

The trial court granted Maytown's summary judgment motion on the issue of whether the BOCC's decision was arbitrary and capricious. Maytown presented evidence of the BOCC's biases to the interest groups opposed to the mine, and the commissioners' lack of disclosure of their communication with representatives of the interest group. Finally, this arbitrary decision caused a significant delay in MSG's ability to utilize the SUP and begin mining.

Therefore, we conclude that MSG presented substantial evidence to support the jury's verdict that the BOCC's arbitrary and capricious decision and subsequent remand shocked the conscience in a constitutional sense. Further, the trial court did not abuse its discretion by denying the County's motion for a new trial because MSG presented substantial evidence of a substantive due process violation.

CROSS-APPEAL ANALYSIS

Maytown argues that the trial court erred by granting the County's motion in limine excluding evidence of attorney fees expended in the effort to preserve the SUP and to avoid additional damages at trial. They argue that the American rule, which generally precludes a prevailing party from recovering attorney fees, does not apply in this case. We agree.

We review a trial court's ruling on a motion in limine for an abuse of discretion. *Colley v. Peacehealth*, 177 Wn. App. 717, 723, 312 P.3d 989 (2013). An abuse of discretion occurs where the trial court's action is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Portch v. Sommerville*, 113 Wn. App. 807, 810, 55 P.3d 661 (2002). However, "a court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). "If the trial court abuses its discretion, the error will not be reversible unless the appellant demonstrates prejudice." *Colley*, 177 Wn. App. at 723. "The choice, interpretation, and application of statutes are matters of law reviewed de novo." *Lund v. Benham*, 109 Wn. App. 263, 267, 34 P.3d 902 (2001).

Generally, Washington follows the American rule, which provides that each party in a civil action will pay its own attorney fees and costs unless recovery of attorney fees is allowed by contract, statute, or a recognized ground in equity. *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296-97, 149 P.3d 666 (2006).

Maytown cites *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989), for support. In *Pleas*, a developer, Parkridge, sought to build an apartment building, which had opponents in the community. 112 Wn.2d at 796. The Washington Supreme Court found that the City of Seattle, "through its officers, intentionally prevented, blocked, and delayed construction of Parkridge's apartment complex merely because they thought it politically expedient for them to cater to those opposing an apartment house on the property." *Pleas*, 112 Wn.2d at 799 (internal quotation omitted). In addition, the City failed to process Parkridge's application for permits "promptly and diligently and in good faith." *Pleas*, 112 Wn.2d at 799.

> As a result of the City's tortious interference, the court determined that Parkridge had been *damaged* in the total amount of $969,468, which included lost profits, loss

> of favorable financing, increased construction costs due to inflation, the costs of the first EIS which was discarded by the City, and *attorney fees*.

Pleas, 112 Wn.2d at 799 (emphasis added). The court awarded attorney fees incurred in defending against the City's actions before litigation began. *Pleas*, 112 Wn.2d at 799.

Maytown also cites to a California Supreme Court insurance bad faith case to support its argument: *Brandt v. Superior Court*, 37 Cal.3d 813, 817, 693 P.2d 796, 798 (1985). The California Supreme Court stated that "[w]hen an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense." *Brandt*, 693 P.2d at 798. The court held that those specific attorney fees were recoverable as damages resulting from the tort "in the same way that medical fees would be part of the damages in a personal injury action." *Brandt*, 693 P.2d at 798. Maytown argues that the Washington cases that established the equitable exceptions to the American rule follow this common theme that if the "defendant's actions force the plaintiff into litigation separate from the damages action, the fees incurred in the other action are recoverable."[17] Br. of Resp'ts/Cross-Appellants at 95.

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[17] Maytown cited to our supreme court's discussion in *Rorvig v. Douglas*, 123 Wn.2d 854, 862, 873 P.2d 492 (1994):

> In malicious prosecution and wrongful attachment or garnishment, we have held attorney fees are recoverable as special damages. In malicious prosecution, it has long been the rule that damages include the attorney fees for the underlying action made necessary by the defendant's wrongful act. Similarly, in wrongful attachment or garnishment actions, and in actions to dissolve a wrongful temporary injunction, attorney fees are a "necessary expense incurred" in relieving the plaintiff of the wrongful attachment or temporary injunction, and are recoverable.

(Internal citations omitted). The Washington Supreme Court held that slander of title was analogous because "[a]ttorney fees incurred in removing the cloud from the title and restoring vendibility are necessary expenses of counteracting the effects of the slander." *Rorvig*, 123 Wn.2d at 863.

Here, the American rule does not bar the attorney fees alleged as damages by Maytown because the fees were not accumulated in the current proceeding. The attorney fees they allege as damages were incurred in seeking the SUP amendment and handling the consequences of the BOCC's arbitrary and capricious decision. Maytown asked to present evidence of the attorney fees incurred in the land use case, not the current case.

We hold that when an intentional tort causes damage that requires legal action to repair the damages, then the attorney fees for the legal action to defend can be considered as damages in a different and subsequent proceeding. This is an evidentiary issue, and Maytown should have had the opportunity to present evidence of the attorney fees from the land use case as damages. We remand for a trial solely on the issue of attorney fees as damages, not as costs or fees incurred in this litigation. Whether any damages were sustained in this respect was an issue for the factfinder.

Therefore, the trial court abused its discretion by granting the County's motion in limine because the American rule did not bar Maytown from presenting evidence of attorney fees accrued as damages before litigation as a matter of law.

ATTORNEY FEES ON APPEAL

Maytown requests attorney fees on appeal pursuant to 42 U.S.C. §§ 1983, 1988 and RAP 18.1.

RAP 18.1(a) allows a prevailing party to recover attorney fees on appeal if "applicable law grants to a party the right to recover reasonable attorney fees." Maytown bases their request on 42 U.S.C. § 1988, which allows us to award attorney fees to the "substantially prevail[ing] party." *Staats v. Brown*, 139 Wn.2d 757, 781, 991 P.2d 615 (2000). Maytown is the substantially prevailing party in this case.

Accordingly, we grant Maytown's request for appellate costs, including reasonable attorney fees for responding to the County's appeal.

CONCLUSION

We affirm, but remand solely on the issue of attorney fees as Maytown's damages on its tortious interference claim.

Melnick, J.

We concur:

Worswick, J.

Maxa, A.C.J.

APPENDIX 2

449

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

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EXHIBIT
WITNESS
DATE
Gamell-Pumnea/CCR-RPR

MSG_010850

APPENDIX 3

BEFORE THE HEARING EXAMINER IN AND FOR THE COUNTY OF THURSTON

In the Matter of the Application of MAYTOWN SAND & GRAVEL, LLC, For Amendments to a Mineral Extraction Special Use Permit (SUPT-02-0612)	Hearing Examiner Sharon A. Rice No. 2010101170 PORT OF TACOMA'S PRE-HEARING BRIEF

I. INTRODUCTION AND RELIEF REQUESTED

The Examiner's decision on the proposed clarifying amendments should be the last regulatory hurdle that Applicant Maytown Sand and Gravel, LLC ("MSG") must clear prior to commencing mining. Party of Interest/Interested Party Port of Tacoma ("Port") and Applicant Maytown Sand and Gravel, LLC ("MSG") consistently have taken the position that these amendments are unnecessary because (1) the County had administratively required a much more rigorous water testing and monitoring regime in place of the original SUP conditions and (2) both the County and the Department of Ecology ("Ecology") expressly recognized that literal noncompliance with the original testing and monitoring conditions had caused no environmental harm whatsoever and the substituted requirements were more protective of the environment. The County has substantial discretion in administering and enforcing permit terms and conditions. The County exercised its discretion to substitute more rigorous testing and monitoring requirements for those originally contained in the SUP Conditions. That is, the County properly disregarded and waived literal noncompliance with the original testing and monitoring conditions in light of its imposition and MSG's compliance with much more rigorous

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requirements. Under these circumstances, the original provisions became unenforceable as a result of the County's administrative actions.

Nevertheless, the County, after first recognizing that simple administrative housekeeping clarification of the SUP conditions would suffice, changed its position and required formal amendment of the SUP Conditions by the Hearing Examiner with potential appeal to the Board of County Commissioners. While the Port and MSG disagree with the County's position and the resulting unnecessary delay, MSG has applied for the required amendments to avoid further delay in the commencement of mining. The Port submits that MSG is legally entitled to the amendments and requests that the Examiner approve MSG's application. The rigorous testing and monitoring requirements reflected in the proposed amendments represent the culmination of a great deal of work by hydrogeologists working for the County and MSG, and they should be completely non-controversial. All who have studied the question from a scientific standpoint, including the Department of Ecology and the hydrogeologists working with the County and with MSG, agree: the failure to comply with the technical timing requirements of MDNS Condition 6 produced no environmental harm and the substituted more rigorous requirements are more protective of the environment. The Port does not abandon its long-held position that this formal amendment process is unnecessary and unauthorized, but concludes nevertheless that supporting these amendments is the most expedient way to begin mining and avoid additional damages. The Port respectfully requests that the Examiner limit the scope of the hearing to the narrow issues of the proposed amendments and the SEPA appeals and issue a decision on the issues properly before the Examiner in this proceeding.[1]

II. STATEMENT OF FACTUAL BACKGROUND

The proposed amendments would simply update environmentally irrelevant timing provisions of SUP/MDNS Conditions 6A and 6C, conform these conditions to the more rigorous

[1] The Port has read and agrees with MSG's pre-hearing brief and incorporates the same herein by reference.

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measures the County already has administratively imposed and finally will allow MSG to commence mining.

A. The Examiner Should Grant the Requested Amendments

The Port consistently has taken the position that the County lacks authority to require these formal amendments, and discusses that position below. Even though these amendments are unnecessary, now that the County has required the formal amendment process and MSG has elected to apply for the amendments to avoid further delay in mining, the Examiner should grant the request. The Port agrees with the Staff Report's analysis of the requested amendments.[3] The County, as the SEPA responsible official, has determined that the requested amendments are appropriate and will produce no environmental harm. The evidence at the hearing will support the County's determination. Additionally, granting the requested amendments will allow MSG to begin mining and mitigate additional damages to MSG and the Port.

The evidence and testimony at the hearing will establish that granting the amendments will benefit the public and serve the purposes of the SUP. The County has long held the opinion, confirmed again by the Staff Report, that Examiner Driscoll, when he approved the SUP in 2005, anticipated that mining would commence within one year. The necessary implication of this assumption was that one year of groundwater monitoring data would suffice to establish the "background" conditions. Instead, systematic groundwater monitoring now has been conducted for more than **three** years, including a full year of testing under the County's more extensive groundwater monitoring regime imposed in 2010. All the experts who have reviewed the question agree that the course of groundwater monitoring that actually has occurred is more

[3] The Port strongly disagrees, however, with the County's continued assertion of authority to require MSG to seek "written approval" prior to commencing mining, made once again in the last page of the Draft Staff Report. As the Port has argued repeatedly, the Code does not authorize the County to issue a written affirmative finding of compliance with permit conditions that authorizes mining to commence. Rather, the Code provision cited by the County authorizes the County to inspect mines periodically, and prior to mining. Obviously, the County may "red tag" a mining operation for non-compliance with permit conditions or the Mineral Extraction Code, but this is a very different power from the authority the County asserts. The County has previously stated that a "letter to proceed" would constitute an appealable event under TCC 20.60.060. Given the level of opposition to this mine, it is entirely likely that allowing the County to impose an additional unauthorized appeal point will result in yet more delay. The Code does not support this result.

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may be jeopardized with immense potential damages to the Port. Granting the requested amendments will remove the last regulatory hurdle to the commencement of mining.

B. This Amendment Hearing is not Authorized by Code

Although the Port disagrees that the County has the authority to require MSG to go through this process, the Port does not request that the Examiner simply dismiss the action without addressing the merits of the Amendments. Rather, the Port requests that the Examiner rule on the question of whether this Amendment proceeding was proper and also, in her written decision, address the merits of the requested amendments regardless of her disposition on the process questions. The Port offers the briefing in this section in support of this request and to preserve its arguments.

The County already exercised its enforcement authority over the SUP by requiring compliance with new and stricter groundwater monitoring requirements for an additional year before MSG would be allowed to mine. The Port and MSG complied with the County's new requirements in full, in addition to complying with the substance of the MDNS and the GMP. Any earlier missed deadlines contained in MDNS 6 are immaterial because they caused no environmental harm whatsoever. There is no need and no authority to require MSG and the Port to apply for these SUP amendments.[4]

1. The County already exercised its enforcement authority over this matter

Compliance with timing requirements of MDNS 6 and the consequences of any noncompliance are enforcement questions. The County Code clearly grants staff the power and duty to enforce MDNS and SUP conditions. *See, e.g.*, TCC 20.60.010; 17.20.160; 17.20.280. In

[4] This hearing represents the culmination of a series of improper County decisions. First, the County required the Applicant to seek amendments to nullify a technical permit violation, even though the County already had administratively required substitute, more-rigorous requirements and acknowledged that the new requirements cured any technical noncompliance with the original SUP conditions. Second, the County reversed its earlier, unappealed position that the amendments could be handled at the staff level and instead required a much more extensive process, including a hearing before the Hearing Examiner and potential appeal to the Board of County Commissioners. Third, the County subjected the proposed amendments to a new threshold determination and appeal under SEPA, despite the County's uncontradicted conclusion that the amendments would cause no adverse environmental impact.

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this case, the County has exercised its enforcement authority, whether or not it chooses to label its actions as "enforcement." In response to literal noncompliance with immaterial provisions of the permit conditions, the County administratively imposed substitute groundwater testing and monitoring requirements and determined that compliance with the new requirements sufficed. Any noncompliance with permit conditions was administratively cured or waived.

The County required (a) monitoring of a whole new suite of potential pollutants, without regard to whether the level of those pollutants could be affected by gravel mining; and (b) an additional year of groundwater monitoring before significant earth-disturbing activity would be allowed. These are significant requirements, costing tens of thousands of dollars in direct monitoring and testing fees, and much more as a result of lost opportunities to mine. All involved agree that there has been full compliance with the County's new requirements.

Now, in addition to this enforcement-in-fact, the County has required MSG to seek formal amendments of the SUP conditions. 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. The County stated in writing that the decision was prompted by the scope of MSG's request, but County staff orally informed MSG that the switch was made due to the high volume of opposition to the requests. Although this sort of regulatory decision may not be made to quell project opposition, *Maranatha Min., Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990) ("Community displeasure cannot be the basis of a permit denial."), the County persisted.

By taking curative enforcement action, the County already had waived the right to further address any noncompliance with the environmentally irrelevant timing provisions prior to this amendment proceeding. The County's enforcement actions rendered the literal terms of the timing provisions simply unenforceable against MSG, though MSG must still comply with the County's new requirements. Alternatively, MSG is now legally entitled to have the conditions simply clarified to conform to the circumstances and reflect the County's enforcement decisions.

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Because the clarification is legally required, it is not discretionary and there is no reason to require a formal amendment process.

2. The Staff Report does not support the County's decision to require MSG to seek amendments.

Although the Staff Report correctly describes the process for amending an SUP for gravel mining, it does not establish the County's authority to require such amendments under the circumstances of this case. The Code provision it relies upon applies only if the applicant proposes to enlarge, extend, increase in intensity, or relocate the use. TCC 20.54.030. MSG does not propose any of these. Rather, MSG simply seeks a clarification of confusing and environmentally irrelevant timing provisions of the conditions. The Staff Report asserts that a Type III SUP amendment was required, but this argument assumes its own conclusion—that the non-compliance must be addressed through amendment rather than enforcement.[5]

Non-compliance with MDNS or SUP conditions triggers a duty in the County to require the permittee to return to compliance. It does not trigger a post-enforcement requirement to amend the conditions to retroactively erase the non-compliance. The Staff Report argues that a County order to achieve compliance "typically requires a permit," but it did not here. MSG achieved full compliance with the substance of the original GMP and the County's additional groundwater monitoring requirements without additional permits.

Finally, the Staff Report statements regarding the status of the SUP are unsupported by law. For a variety of reasons, denial of the requested amendments would not inexorably lead to the revocation of the SUP.[6] In particular, stating that MSG is "out of compliance" with the SUP "until and unless an amendment to the [timing provisions] is approved by the Hearing Examiner" does not justify the conclusion that the SUP must be amended or invalidated. The Staff Report

[5] The County previously cited SUP Condition T as justification, but that provision applies only to site plan changes, not changes in groundwater testing requirements.

[6] In particular, given the County's multiple assurances of validity upon which the Port and MSG reasonably relied, a reviewing court would agree that the County is estopped under these circumstances from denying the continuing validity of the SUP.

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statements that unless amendments are granted, the County "will be unable to provide notice to commence mining" and that "[i]n such case, the 2005 approval would lapse" similarly finds no support in law. In our legal system, literal noncompliance is often not substantial or meaningful enough to justify certain remedial actions. Thus, in contract law, a literal breach of contract often does not rise to the level of "material breach" that would justify nonperformance by the other party. In tort law, conduct that violates a duty often is not actionable unless actual damages result. And here, under constitutional substantive due process, RCW 82.02.020, RCW 64.40.020, and common law tort theories, not every instance of literal noncompliance with a regulatory condition can justify revocation of the permit or denial of permission to proceed under the permit. The Staff Report acknowledges once again that the failure to comply with the timing requirements of MDNS 6 produced no environmental harm and that MSG is now in full compliance with administratively imposed, more extensive, groundwater testing and monitoring requirements. The County's enforcement authority has resolved any technical noncompliance with the timing provisions of SUP/MDNS Condition 6, and there is no rational basis for either declaring the SUP invalid based on environmentally irrelevant breaches or requiring MSG to endure a burdensome amendment process and potential additional appeals.

V. CONCLUSION

There is no reason to deny the requested amendments and every reason to grant them. The amendments simply ratify the enforcement actions the County already has taken. Even project opponents cannot seriously assert that the proposed amendments (as opposed to the mine itself, which already is authorized by the SUP that may not be collaterally attacked, as the Staff Report explicitly acknowledges)[7] will have any affect whatsoever on the environment. This amendment process, whether it is authorized or not, can terminate a succession of regulatory

[7] As the County writes in the Staff Report, "[t]he law does not allow the County to re-examine issues the County failed to appeal (after it issued the 2005 MDNS) when the proposed amendments do not involve the issues FORP would like re-examined." (citing *Chelan County v. Nykreim*, 146 Wn.2d 904, 932-33, 53 P.3d 1 (2002); *DeTray v. City of Olympia*, 121 Wn. App. 777, 785-92, 90 P.3d 1116 (2004)).

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delays and will allow mining to proceed. The Port respectfully requests that the Examiner grant the requested amendments.

DATED this 2nd day of March, 2010.

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APPENDIX 4

BEFORE THE HEARING EXAMINER OF THURSTON COUNTY

In the Matter of the Application of MAYTOWN SAND AND GRAVEL, LLC Amendments of SUP 02-0612	No. 2010101170 **AMENDMENTS:** MAYTOWN SAND & GRAVEL'S BRIEF IN SUPPORT OF GRANTING SUP AMENDMENTS

I. INTRODUCTION

The only issue in the SUP[1] amendment Hearing is whether the Examiner should approve adoption of water monitoring requirements that ensure better and more complete water monitoring data than ever anticipated by the original SUP conditions.[2] The answer is obvious. The Examiner should approve the SUP amendments, which increase environmental protections at the site and provide clear water monitoring guidelines for the County, Maytown Sand and Gravel ("MSG") and the interested public.

The January 19, 2011 MDNS identifies four SUP amendments which can be broken into two parts. The first is the verification of off-site supply wells, which was intended to be completed prior to mining so that any negative effects of mining on off-site supply wells can be

[1] Special Use Permit 02-0612 ("SUP").

[2] There is also an issue that relates to the County's amendment process. MSG consistently has taken the position that the County lacks authority to require these formal SUP Amendments. To preserve MSG's rights, we include arguments on this issue in this Brief.

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value because the purpose of Condition 6C was to establish background conditions immediately before mining commences.

Since March of 2010, all of the background data—including the additional water monitoring data required by County hydrologist Nadine Romero—has been continuously collected and continues to be collected. Indisputably, one year of complete background monitoring data will have been gathered prior to any mining activity. Despite this fact, and because the monitoring conditions under the SUP were technically out of compliance and needed to be revised, the County and MSG have agreed to the 2011 Plan, which continues to provide more and better data than what would have been available had monitoring and mining commenced as anticipated in 2005. In fact, it is the failure to commence background water monitoring in 2006 which has led to the creation of a clearer, more complete monitoring plan that will lead to the existence of better background and foreground monitoring data. The Examiner should approve the SUP amendments.

C. The SUP Amendment Process Is Unlawful.

The County's SUP amendment process is not authorized by law. In the County's February 16, 2010 Compliance Memo ("Compliance Memo"), the County reviewed the missed deadlines under SUP and MDNS Condition 6. The County concluded that "Such minor timeline changes may be approved by staff upon submittal of an application for amendment." Compliance Memo at 4-5. On April 22, 2010, MSG applied for the administrative amendments discussed in the Compliance Memo. FORP submitted approximately 100 pages[4] of comments and additional documents. Largely based on FORP's comments, the County changed its mind about the ability to amend the SUP through an administrative action and determined that "the April 22, 2010 application to amend SUP 020612 must be submitted to the Hearing Examiner for

[4] FORP Comments to April 22, 2010 MSG Application for Administrative Amendments. The exact number of pages is difficult to discern because FORP's comments were not placed on numbered pages and the attachments were not identified and enumerated.

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decision-making." Five Year Review, Exhibit 1, attachment v (June 17, 2010 Letter from Mike Kain to Tayloe Washburn and John Hempelmann).

The County's decision to impose a SUP amendment hearing in addition to the Five Year Review Compliance Hearing cannot be based solely upon public opposition to the changes. *Maranatha Mining v. Pierce County*, 59 Wn. App. 795 (1990); *see also, Sunderland Services v. Pasco*, 127 Wn.2d 782 (1995). Thus, the County must have some legal basis for requiring the SUP amendment hearing. The Thurston County Code and the original 2005 SUP conditions, however, contemplate amendments to a special use permit only if the use is enlarged, extended, increased in intensity, or relocated. TCC 20.54.030 explains that issued SUPs are deemed "permitted uses" and that "[o]nce a special use has been authorized, however, the use shall not be enlarged, extended, increased in intensity, or relocated unless an application is made for a new or amended special use authorization." This provision is mirrored in the original SUP conditions. SUP condition "T" states that "[a]ny expansion or alteration of this use will require approval of a new or amended Special Use Permit" and the "Development Services Department will determine if any proposed amendment is substantial enough to require Hearing Examiner approval."

At no point has the SUP been enlarged, extended, increased in intensity, relocated, or altered. The only proposed changes are to timing and increases to existing water monitoring requirements. County Staff and the County Hydrogeologist have repeatedly stated there is no harm, but only benefits, from the proposed changes. Clearly, these changes are not of the type encompassed by TCC 20.54.030 and SUP Condition T. Consequently, there is no basis in the County Code or the original SUP conditions for the County's decision to require the SUP amendment proceeding. It is beyond the County's authority and should have been handled as a compliance matter either administratively or, at the latest, during the Five Year Review Hearing.

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Under TCC 20.54.040(4)(d), the Examiner had the authority to approve the changes during the Five Year Review Hearing[5], but in response to citizen opposition the County chose to create an unlawful process with the result of providing opposition groups additional appeal opportunities and subjecting MSG to additional prejudicial delay. At the end of the March 7, 8, and 9 hearings, the Examiner should rule that the SUP amendment procedure is unlawful. But to avoid the potential for remand, MSG urges the Examiner to proceed to approve the SUP amendments.

III. CONCLUSION

The SUP amendments themselves cannot be controversial. In short, they ensure better and more complete water monitoring data than ever anticipated by the original SUP conditions. All expert hydrogeologists agree that the SUP amendments will provide more data and better information than would have existed had monitoring began within a year of SUP issuance and mining commenced as anticipated.

FORP does not object to requiring MSG to undertake more water monitoring. Instead, FORP focuses its arguments on stopping mining activity under the SUP. The limited issue of whether to approve the SUP amendments is an easy one. The amendments should be approved.

DATED this 2nd day of March, 2011.

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Randall P. Olsen, WSBA No. 38488
Attorneys for Maytown Sand & Gravel, LLC

[5] The Examiner also has the authority to approve these additional conditions. TCC 20.54.040(21)(e) states that at the time of the Five Year Review "the approval authority may impose additional conditions upon the operation if the approval authority determines it is necessary to do so to meet the standards of this chapter, as amended."

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APPENDIX 5

THURSTON COUNTY
WASHINGTON
SINCE 1852

COUNTY COMMISSIONERS

Cathy Wolfe
District One
Sandra Romero
District Two
Karen Valenzuela
District Three

HEARING EXAMINER

Creating Solutions for Our Future

BEFORE THE HEARING EXAMINER
FOR THURSTON COUNTY

In the Matter of the Application of	)	
	)	Project # 2010101170
Maytown Sand & Gravel, LLC	)	
	)	App. No. 11-101508VE
For Approval of a Amendment	)	
Special Use Permit SUPT-02-0612; and	)	App. No. 11-101509VE
	)	
In the matter of the Appeals of	)	
	)	**Maytown Aggregates**
Maytown Sand & Gravel, LLC	)	
	)	**Maytown Sand and Gravel**
and	)	**SUP Amendment (SUPT-02-0612)**
	)	
Friends of Rocky Prairie	)	
	)	
Of the County's January 19, 2011	)	
SEPA Threshold Determination	)	

SUMMARY OF DECISIONS

Because neither Appellant met the burden of proving that the County SEPA Responsible Official's environmental threshold determination was in error, both appeals of the SEPA Mitigated Determination of Non-Significance (MDNS) issued January 19, 2011 are **DENIED**.[1]

The request for an amendment of special use mining permit SUPT-02-0612 to alter the approved ground water monitoring plan for the 284-acre mine within a 497-acre project boundary southeast of the Maytown Road/Tilley Road intersection is **GRANTED**, subject to conditions.

SUMMARY OF RECORD

Request

Maytown Sand & Gravel, LLC (MSG, Applicant) requested approval of a amendments to the groundwater monitoring plan approved during review of a mining operation approved by the

[1] See Conclusion II.A.2.

EXHIBIT
2
2040
8-8-12

Thurston County Hearing Examiner in 2005. The amendments would alter requirements established in conditions of approval 6A and 6C implemented through a October 24, 2005 MDNS and made conditions of permit approval for the mine. The December 16, 2005 special use permit (SUPT-02-0612), authorized the excavation of approximately 20.6 million cubic yards of sand and gravel from a mine area totaling 284 acres within a 497.3-acre project site south of Millersylvania State Park. The mine site is addressed as 13120 Tilley Road SW in Thurston County, Washington.

Appeals

Thurston County reviewed the proposed amendments for compliance with the requirements of the State Environmental Policy Act (SEPA) and issued a mitigated determination of non-significance (MDNS) on January 19, 2011.

Two appeals of the MDNS were filed with the Resource Stewardship Department (Department).

I. Appeal 11-101508VE, filed by Maytown Sand & Gravel, LLC (MSG, Applicant/Appellant) was received by the Department on February 9, 2011[2], alleging the following (paraphrased) errors in the MDNS:

1. The proposed amendments do not require a formal amendment process pursuant to the Thurston County Code, and the County erred in subjecting them to a formal SUP Amendment application process;
2. The proposed amendments should have been handled as enforcement matter (enforcing conditions of SUPT-02-0612 permit approval) during Five Year Review of the mining permit;
3. Assuming the formal amendment process is required, the proposed amendments to groundwater monitoring do not constitute an "action" for SEPA purposes and the threshold determination was unnecessary and therefore unlawful; and
4. Assuming the formal amendment process is required, the proposed amendments to groundwater monitoring have no environmental impact, and the decision to subject them to a threshold determination was unlawful.

MSG requested that the Examiner conclude that no review pursuant to SEPA was required for the proposed amendments and to set aside the MDNS.

II. Appeal 11-101509VE, filed by Friends of Rocky Prairie (FORP, Appellant), was received by the Department on February 9, 2011, alleging the following (paraphrased) errors in the MDNS:

[2] The appeal form and appeal notice are both dated January 9, 2011. However, the MDNS was issued January 19, 2011, its appeal period expired February 9, 2011, the appeal notice reference a letter (attached) written January 25, 2011. It is assumed the dates on the form and notice are clerical errors. The Hearing Examiner Clerk indicated the appeal was received February 9, 2011.

2005 Plan, Charles "Pony" Ellingson[12], testified that the only testing parameters implied in the use of the word background in the original plan were water temperature and water level. In contrast, Ms. Romero interpreted the use of the word background as a hydrogeological term of art that encompasses more than the two parameters suggested by Mr. Ellingson. In an internal memorandum dated February 19, 2010, Ms. Romero stated:

> Generally, we require any facility that can have a potentially significant impact to an aquifer both in terms of water quality and hydrologic budget dynamics to monitor for water quality parameters and hydraulic head (elevation). We want to establish ambient or background aquifer conditions including basic geochemistry and contaminant concentrations and determine ground water flow direction. First we want to know the natural ground water chemistry as controlled by major cations and anions (Ca, Mg, Na, K, Mn, Fe, bicarbonate, sulfate, nitrate, chloride) and other water quality indicator parameters such as total dissolved solids, temperature, specific conductivity, pH, and dissolved metals. In addition, we require a background sampling of organic volatiles and semi-volatiles. ... At least two years of ground water sampling, semi-annually, should be performed [consistent with] Appendix I, II, and III... .

Exhibit 1, Attachment aa. Attached to the memo were the three appendices listing the intended volatile organic, semi-volatile organic, and dissolved metal/conventional constituents testing parameters. *Exhibit 1, Attachment aa.*

31. The February 19, 2010 Romero memorandum required testing for approximately 160 parameters that were not specified in the 2005 Plan. The Applicant objected to the County adding new or additional testing parameters because: a) the 2005 Plan was approved, is final, and may not be added to, and b) mining does not use the extensive list of compounds they would be required to test pursuant to the additional parameters. *Ellingson Testimony; Exhibit 10.*

32. Given 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. *Romero Testimony; Exhibit 1, Attachment dd.*

33. Desiring to commence mining, the Applicant began the required additional parameter testing in March 2010 and agreed to complete the second year of testing under protest. *Ellingson Testimony; Exhibit 10.*

34. In the wake of the December 2010 Five Year Review hearing, Mr. Ellingson, Ms. Romero, and Department Staff jointly developed a new Groundwater and Surface Water Monitoring Plan (the 2011 Plan). The 2011 Plan, dated January 18, 2011, does the following: changes the timing for commencing field verification of off-site wells and for commencing water monitoring; adds additional water quality parameters beyond those

[12] See Exhibit 9.

2. The Port of Tacoma moved to dismiss appeal issues 8, 9, 10, and 11 as stated in FORP's notice of appeal (noted in full in the summary of record, above). The four issues pertain to the validity of the SUP and are not issues appropriately within the scope of a SEPA appeal. Further, the same four grounds for SUP termination/vacation/invalidation were argued by FORP at the 2010 Five Year Review hearing. The Hearing Examiner's December 30, 2010 decision expressly concluded that the SUP was not invalidated on those four grounds. This conclusion was upheld by the Board of County Commissioners when FORP appealed the five year review. This motion was granted and FORP SEPA appeal issues 8, 9, 10, and 11 were excluded from the SEPA appeal portion of the proceedings.

3. In post-hearing briefing, MSG and the Port both requested that FORP's comments in Exhibit 45 that exceed the restrictions in Post-Hearing Order not be admitted. Sections 1, 3, and 4 (conclusion) in Exhibit 45 failed to adhere to the parameters of the post-hearing order and are not admitted.

4. On April 4, 2011, MSG submitted a post-hearing motion to strike FORP's Post-Hearing Brief, on the grounds that it argued issues for the first time and that it attempted to introduce new evidence. That motion was not considered timely. However, for the record, any post-hearing argument that exceeds the scope of issues briefed and argued at hearing was not relied on.

II. SEPA Appeals

A. MSG APPEAL

1. **An SUP amendment was required.** Both MSG and the Port argue that the changes entailed in the instant proposal to amend SUPT-02-0612 could have been handled administratively via enforcement authority and that no amendment application (administrative or quasi-judicial) was required. The Department decided otherwise and its decision has several sources of support. While there are no criteria for "special use amendment" identified in the code, TCC 20.54.030 expressly authorizes the review and approval of "amended special use authorizations." Pursuant to TCC 20.54.015(1), administrative review is allowed for a specified list of special uses. Pursuant to TCC 20.54.015(2), the hearing examiner is the approval authority for any special use not listed, and amended special use authorizations are not included in subsection (1). SUPT-02-0612 itself, at condition T, states that "any expansion or alteration" of the use would require submittal of a new or amended special use permit. Permission to mine was predicated on compliance with water monitoring conditions. Changes in the number and nature of monitoring sites specified in the conditions of permit approval, even if intended to increase consistency with the 2005 Plan, are still "alterations" to the use as approved. Condition T also reserves to the Department the discretion to decide whether a given amendment requires administrative or quasi-judicial review. At the Five Year Review hearing, the Applicant characterized the proposed changes as "clerical" in nature. The County Code is silent as to clerical corrections to conditions in issued permits. Case law

suggests that the County is bound by the permit as issued absent further process. *Chelan County v. Nykreim, 146* Wn.2d 904 (2002).

While it may arguably have been in accordance with County Code for the Applicant's technical non-compliance with water monitoring deadlines to be handled as an enforcement action, changes to the nature and number of required monitoring sites fall less clearly within the scope of enforcement. Because the County Code does not explicitly state criteria establishing whether SUP amendments are administrative or quasi-judicial, the Department exercised discretion in deciding which process applied. Its decision is due substantial deference because the ordinance is unclear, the Department is charged with administration of the ordinance, and the decision is within the Department's expertise. *Bostain v. Food Exp., Inc.,* 159 Wn.2d 700, 716, 153 P.3d 846 (2007).

2. **MSG has successfully demonstrated that the proposed changes to the water monitoring conditions would not impact the environment and should not be considered an "action" pursuant to the SEPA regulations, rendering environmental threshold review superfluous. However, it is not clear that the Hearing Examiner has jurisdictional authority to hear challenges to the SEPA Responsible Official's procedural determination of whether a proposal is an "action" requiring SEPA review.** *TCC 17.09.160.A; WAC 197-11-680(3)(a)(iii); Chaussee v. Snohomish County Council*.[16] **In the event that conclusion II.A.2 is reversed by a reviewing body for lack of jurisdiction or on other grounds, the remaining conclusions are entered based on the evidence in the record.**[17]

B. FORP APPEAL

1. **The County did not amend the 2005 MDNS.** (FORP Issue 1) MDNS mitigation measures become conditions of permit approval once a permit is issued and the SEPA appeal period ends. They may be enforced in the same manner as any other permit condition. *TCC 17.09.090.G.* The instant SUP amendment does not constitute an amendment of the 2005 MDNS.

2. **The County did not adopt or incorporate the 2005 MDNS by reference; it prepared a new environmental threshold determination.** (FORP Issues 2 and 3) Part Six of the SEPA regulations (WAC 197-11-600) speaks to situations in which the reviewing agency uses existing environmental threshold determination documents for subsequent action on the same proposal. In the instant case, the County concluded that the SUP amendments

[16] TCC 17.09.160.A: Only final threshold determinations in the form of a determination of significance (DS) mitigated determination of non-significance (MDNS), or a determination of non-significance shall be appealable to the hearing examiner.... WAC 197-11-680(3)(a)(iii): Appeals on SEPA procedures shall be limited to review of a final threshold determination and final EIS. *Chaussee v. Snohomish County Council,* 38 Wn. App. 630, 636, 689 P.2d 1084 (1984) "[examiners are] creatures of the legislature without inherent or common-law powers [that] may exercise only those powers conferred either expressly or by necessary implication."

[17] The Applicant requested a full disposition of the issues of both appeals in case of remand. *Hempelmann argument; Exhibit 2b, page 11.*

Arguments relating to alleged violations of the 2005 Settlement Agreement between BHAS and the former property owner are outside the scope of Hearing Examiner authority and do not constitute a basis for denial of the instant application.

2. The proposed amendments to the approved water monitoring program would not render the approved mine inconsistent with the applicable zoning standards. The record contains no evidence of adverse impacts to adjacent properties, uses, the natural environment, or the public health, safety, and welfare. To the contrary, with the adoption of the 2011 Plan, water monitoring would include many more parameters (measuring for approximately 160 additional compounds in water quality testing), would extend for a longer period of time, and would be conducted under a more organized (thus more easily enforced) system than the approved 2005 Plan. Finally, the amended water monitoring plan would not increase reliance (if any) on improvements, facilities, utilities, or services existing or planned to serve the area. The Applicant has demonstrated compliance with the SUP criteria for approval of the requested amendments. *Findings 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, and 41.*

3. Conditions 6A and 6C are amended as proposed. To implement the amendments, the 2011 Plan is adopted to govern water monitoring for the life of the mine and the post-closure period. Due to scrivener and organizational errors discovered during testimony in the January 18, 2011 Plan (upon which the MDNS was based), a condition of approval is necessary to ensure that the correct version 2011 Plan is used. *Findings 37, 38, 39, 40, 41, and 42.*

DECISIONS

Based on the preceding findings and conclusions, the appeals of the January 19, 2011 mitigated determination of non-significance are **DENIED** and the SUP Amendment application is **APPROVED,** subject to the following conditions:

1. The revised March 17, 2011 Maytown Sand and Gravel Groundwater and Surface Water Monitoring Plan shall be adopted, replacing the 2005 Groundwater Monitoring Plan and SUPT-02-0612 conditions 6A and 6C. The Applicant and any successors in interest shall be required to comply with the monitoring program established in 2011 Plan in the record at Exhibit 42.a.

2. No other amendments to SUPT-02-0612, issued December 16, 2005, are granted. All on-site activities shall comply with the requirements of SUPT-02-0612 as modified in the instant approval and as amended through the Five Year Review process (File No. 2010102512).

DECIDED this 8th day of April 2011.

Sharon A. Rice
Thurston County Hearing Examiner *pro tem*

THURSTON COUNTY
WASHINGTON
SINCE 1852

Project No. 20101011 70 SUP Amendment
Appeal Sequence No.: _____

☐ Check here for: RECONSIDERATION OF HEARING EXAMINER DECISION

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examir take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

(If more space is required, please attach additional sheet.)

☐ Check here for: APPEAL OF HEARING EXAMINER DECISION

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW _____

on this _____ day of _____ 20___, as an APPELLANT in the matter of a Hearing Examiner's decisi rendered on _____, 20___, by _____ relating to _____

_____

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does now, under tl provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of Thurston County Commissione of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance _____
2. Platting and Subdivision Ordinance _____
3. Comprehensive Plan _____
4. Critical Areas Ordinance _____
5. Shoreline Master Program _____
6. Other: _____

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review of such decisior will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the Heanr Examiner decision.

STANDING

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted to tl appellant. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

_____
APPELLANT NAME PRINTED

_____
SIGNATURE OF APPELLANT

Address _____

_____ Phone _____

Please do not write below - for Staff Use Only:
Fee of ☐ $595.00 for Reconsideration or $820.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
Filed with the Development Services Department this _____ day of _____ 20___. \\MC1\Data\DevServ\Track\Planning\Forms\03.09_Appeal-Rec form.he.DOC

THURSTON COUNTY

PROCEDURE FOR RECONSIDERATION AND APPEAL OF HEARING EXAMINER DECISION TO THE BOARD

TE: THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

If you do not agree with the decision of the Hearing Examiner, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).

A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.

2. Written Request for Reconsideration and the appropriate fee must be filed with the Development Services Department **within ten (10) days of the written decision.** The form is provided for this purpose on the opposite side of this notification.

B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.

   Written notice of Appeal and the appropriate fee must be filed with the Development Services Department **within fourteen (14) days of the date of the Examiner's written decision.** The form is provided for this purpose on the opposite side of this notification.

3. An Appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.

4. The notice of Appeal shall concisely specify the error or issue which the Board is asked to consider on Appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.

5. Notices of the Appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.

6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

C. STANDING All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

D. FILING FEES AND DEADLINE If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of $595.00 for a Request for Reconsideration or $820.00 an Appeal). Any Request for Reconsideration or Appeal must be received in the Permit Assistance Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 and B2 above. Postmarks are not acceptable. If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.

APPENDIX 6

1 exhibit at this time.
2 MR. JOHNSEN: No objection?
3 THE COURT: 59 is admitted as Exhibit 59.
4 BY MR. BAUERMEISTER:
5 Q All right, sir. Now you have read the SUP the jury
6 heard from this morning. You have read the document
7 listing all of the problems or limiting the problems
8 however you think of it that the County has
9 determined that you just went through and now you
10 are responding to the County, is that correct, or do
11 I have the timing off here?
12 A Well, there was a lot of important stuff that went
13 on between the middle of February and the middle of
14 April, but this is an application for minor
15 amendments on 6A and 6C and a few other things that
16 I was talking to Mr. Kain and the County Attorney
17 Mr. Fancher about that I thought were minor
18 amendments that could be fixed.
19 Q Let's go through what's important here. You can see
20 the blowups of this?
21 A This is my letter April 22, 2010 to Mike Kain. It
22 references the Special Use Permit. We are writing
23 submit Maytown LLC's request for minor
24 administrative amendments. You will see that we are
25 specifically requesting minor amendments, which can

1 be processed administratively. I wanted to be very
2 clear we're not requesting anything that goes to the
3 Hearing Examiner.
4 Q Can you read the footnote please?
5 A "Because approving this application for minor
6 amendments to SEPA conditions will not substantially
7 change the analysis of environmental impacts, a SEPA
8 addendum under WAC" -- that's Washington
9 Administrative Code -- "197.11.600.4 C is
10 appropriate. A SEPA addendum does not require a
11 particular format so the County's decision on the
12 request should suffice."
13 Q So now you have also a heading there -- the middle
14 third paragraph. This is a title inside your letter
15 in the forthcoming discussion, correct?
16 A Right, what this letter does is list the specific
17 request for minor amendments that at this point I
18 had discussed with Mr. Kain and Mr. Fancher on
19 several occasions prior to sending this letter.
20 Q Read this section please.
21 A "MDNS 5 right turn pocket in I-5 southbound offramp
22 at Maytown Road SE 121."
23 Q Why are you writing him about that issue?
24 A Well the analysis by Hefron, the transportation
25 engineers and the State was that this turn pocket

1 it is okay with the State it is okay with us, no
2 problem, so go ahead submit it, request it, we'll
3 fix it, and that's why it's here.
4 Q Is that where the matter ended?
5 A No, they later told us this was a major amendment
6 and had to go to the Hearing Examiner so I withdrew
7 it. We built the turn pocket to try to get on with
8 it.
9 Q Would you go the MDNS 6A at the bottom of the page?
10 A "Complete off-site well field verification issue
11 within one year of SUP issuance. This was one of
12 the two minor amendments the County said we should
13 apply for in February 17, 2010 compliance report.
14 They would handle it administratively.
15 It says, "As stated in the County memorandum
16 dated February 16, 2010, County memo, although, the
17 Port of Tacoma complied more than one year after the
18 SUP issuance, the delay caused no harm to the
19 environment and complied with the intent of the
20 condition.
21 "Mining still has not commenced and no work
22 has taken place below the water table. Maytown
23 believes that no further County action is required,
24 but consistent with the County memo Maytown LLC
25 requests that the County amend the timing of the

1 MDNS condition to reflect that the required survey
2 of the off-site wells has been completed."
3 Q You were proposing language and that language is
4 shown?
5 A Yeah. I suggested they could do it a different way,
6 but I suggested amend MDNS 6A language to say prior
7 to any mining activity the operator will field
8 verify off-site supply wells in the following areas.
9 Well, they had already done it and we hadn't started
10 mining, so the that would be a no brainer. We'd be
11 done.
12 Q Was the no brainer accomplished?
13 A No.
14 Q What happened?
15 A The County told us it was a major amendment, it was
16 significant, and we had to go through the Hearing
17 Examiner on it, and they were going to do new SEPA
18 analysis on it.
19 Q Next heading MDNS 6C background testing of ground
20 water, do you see that?
21 A Yep, this is another amendment that the County said
22 you need to fix the timing on and so submit it to
23 us. We'll do it administratively because no harm.
24 Q Ultimately did that happen?
25 A No, they told us this was a major amendment and it

1 had to go to the Hearing Examiner and they had to do
2 SEPA on it and have common periods and appeal
3 periods and it was appealed of course.
4 I at this point, counsel, I had learned
5 about 16 and 17 those monitoring stations. I mean
6 if you look at my suggested amendment on page 4, I
7 change it back to stations, from wells to stations.
8 I distinguished between the different kinds of
9 stations.
10 Q That would have made it accurate in terms of the
11 SUP, is that right?
12 A Yes.
13 Q You were not asking for something different. You
14 were trying to make that document match the original
15 hearing officer's order?
16 A Yes, it was clear from the SUP and the ground water
17 monitoring plan exactly what is in here is exactly
18 in the 2005 plan. Pony -- he said it is here. 16
19 and 17 they weren't in existence. They couldn't be
20 in existence because 16 --
21 MR. JOHNSEN: Your Honor I think he's going
22 beyond the original question.
23 THE COURT: Follow-up then.
24 BY MR. BAUERMEISTER:
25 Q So there's two wells for which you can't get to

1 that were already done, and 6 C was that the water
2 monitoring start within 60 days of the issuance of
3 the SUP when it started in 2008 instead of 2006, and
4 the Department had said in writing in several
5 different places that it was no problem and they
6 could fix it with a minor amendment, so I was back
7 to that figuring --
8 MR. JOHNSEN: Objection. Non-responsive.
9 THE COURT: Sustained. Follow-up.
10 BY MR. BAUERMEISTER:
11 Q What was your understanding of the rational basis
12 for that referral? What point would there be in
13 those items going into this major process?
14 MR. JOHNSEN: Objection. Testifying about
15 what's rational is not within this witness's factual
16 testimony.
17 MR. BAUERMEISTER: It is, if it is within the
18 purview of his testimony.
19 THE COURT: I'm going to allow the question. Go
20 ahead.
21 THE WITNESS: Well, at this point I'd been told
22 he'd been told to send them to the Hearing Examiner. I
23 knew I had a problem, but we discussed a way to fix it,
24 which is to pull out. They said there's too many
25 amendments, and together -- they take them all together

they rise to the level of a major amendment. Well, that's what this letter says, but what that letter doesn't say is I'm told by the attorney for the Board to send it to the Hearing Examiner. That's a separate attorney not Mr. Fancher.

So I said well at least I can address the stated rationale for this, which is together they amount to too big a deal, and I start withdrawing the amendments. We'll build the turn pocket. We'll build the berm, whether it is needed or not. We'll go through the County storm water regulations, along with the state and the federal. I couldn't fix 6A and 6C by doing something. I couldn't do it by myself.

I didn't think they needed an amendment. That's why I said earlier, the Port of Tacoma took the position in writing and I agreed with it this is an enforcement action. They could have said simple thing you didn't do it on time, but you have already done it, therefore, don't make a mistake again. But they said, no, it had to be a minor amendment. Okay. I applied for the minor amendment.

People can judge for themselves whether this was significant or insignificant, but I couldn't fix the dates by myself. I couldn't rewrite condition 6C to say "stations" instead of "wells." I couldn't say get the

1 data from 15 stations instead of 17, even though there
2 wasn't going to be a 16 and 17 for a substantial period of
3 time. I couldn't do that by myself. I could deal with
4 everything else, so we went down that road to try to get
5 back to the minor amendment.
6 BY MR. BAUERMEISTER:
7 Q At this point, have I covered in the letter what
8 made sense to you at the time as being important to
9 attempting to understand why this was being
10 required?
11 A One more thing --
12 MR. JOHNSEN: Objection. What's the question
13 before?
14 THE COURT: The question called for a "yes" or
15 "no" answer. Sustained.
16 BY MR. BAUERMEISTER:
17 Q What additional information is important to you in
18 your understanding at this time of how to give
19 advice to your client, in response to what the
20 County is asking you to do?
21 A Page 2 of the letter -- I can read the whole
22 paragraph.
23 "Additionally because all of the requested
24 amendments are also SEPA conditions, the October 24,
25 2005, mitigated determination of non-significance

all the verification, it's done, and the staff report says, we've decided it's got to go to the Hearing Examiner, and, therefore, 6 A is out of compliance.

"The amendment has been formally requested by the applicant. A hearing on this request will occur in January or February of 2011. No substantial land disturbing activity shall occur on this site until the requested amendment is granted."

Q Last quote on this page?

A This is referring to the verification of the off-site wells. "This information was required to be submitted by December, 2006, but was not submitted until December 2009, therefore, unless an amendment is granted, this condition will remain out of compliance."

Q What did that mean to you at the time?

A Well, what is says here is you don't get to mine, until that amendment is granted, and if it isn't granted, you won't get to mine at all, ever. That's what it says.

Then we get to 6 C. We're all pretty familiar with 6 C now. Pursuant to the ground water monitoring plan -- you know, I don't want to repeat all this, again. It says you got to.

Q Let's not do it then.
A You have 17 monitoring wells.
Q That includes one for a water body that doesn't exist?
A Yeah, and surface water monitoring stations that are not going to be wells. So it is saying, the staff is saying,

"The requirement has not yet been made. Water monitoring requirements must be met prior to any substantial land disturbing activity."

"Again, it is the staff assessment that the deadline attached to this condition presumed that mining activities were imminent, meaning within 12 months. There is no evidence in the record to indicate that the deadline was related to an environmental issue.

"In a letter of October 7, 2010, from the State Department of Ecology, they state, 'The changing of the deadlines for the water quality monitoring does not appear to have any impact on the results for the environment.'"

Q What did that mean to you at the time when you read this?
A DOE is saying what Mike said earlier and what Jeff Fancher said and what everybody with common sense

1 understood, which is they started water monitoring
2 two years before we even bought the mine. They had
3 reams of data. They're way ahead of where the
4 condition was, and Mr. Ellingson was saying you have
5 more than you need to start mining and the
6 Department of Ecology --
7 MR. JOHNSEN: Your Honor, this is cumulative.
8 This is cumulative.
9 THE WITNESS: The Department of Ecology --
10 THE COURT: The objection is overruled. It is
11 not cumulative.
12 THE WITNESS: The Department of Ecology is
13 saying the same thing. They are the real experts.
14 Additionally, the County hydrogeologist, in
15 a report submitted November 10, 2010, stated "I don't see
16 any environmental impacts as the intent of background is
17 to show ambient conditions immediately prior to facility
18 operations."
19 So at this point, even Nadine Romero is
20 saying we're way ahead. We have all this data. There's
21 no problem that you didn't start it 60 days after the SUP
22 was issued, in 2006. Those statements were in response to
23 a request from the applicant to amend the deadline
24 condition, but that question is not part of the five year
25 review. The hearing for that request will likely occur in

1 rules and the issued permit?
2 A When a permit is issued and either the appeal
3 doesn't occur or if there's an appeal and it is
4 resolved, as in this case there was no appeal, and
5 the appeal period ran out in January 2006, the
6 permit is determined to be final. It is over. So
7 that's a second way that you are protected. The
8 rules can't change, after the time of application
9 and they sure as heck can't change after you have
10 gone through the process and gotten the permit.
11 They call it the "rule of finality." It's the
12 English word that properly describes the legal
13 outcome.
14 Q You described at the last action by the Hearing
15 Examiner in this case was the approval of the
16 amendments to 6A and6 C; is that correct?
17 A Yes.
18 Q That happened in early 2011?
19 A I think the decision was April.
20 Q April of 2011?
21 A Her decision.
22 Q Did you ever agree that those amendments were
23 necessary or appropriate?
24 A No. We took the position that they were not
25 necessary that the Court could use -- the Department

1 could use its enforcement authority particularly in
2 the case of 6A and 6C. It was so obvious everybody,
3 but Black Hills Autobahn Society and Friends of
4 Rocky Prairie agreed, even when Nadine Romero
5 finally got to understand she said no issue here, so
6 it did not in our view require a minor amendment.
7 They said they would do it as a minor
8 amendment and short of me appealing that decision,
9 which would have been -- we'd never do it because it
10 would be slowing down your own permit process. We
11 said okay we'll do it. But we constantly did it
12 under protest, and when they said SEPA was going to
13 be applied, we said this shouldn't be SEPA. There's
14 no environmental harm. There's no action here. You
15 are not doing anything that would have any impact on
16 the environment. Everybody agrees to that.
17 But Mike said I said I would do it, I have
18 to do it. I said okay we'll do it, because there is
19 an adage that's partly true and sometimes you can't
20 fight city hall. You are better off just doing it.
21 Get it over with.
22 Q As part of your representation of your clients did
23 you submit a public records' request?
24 A I submitted several. Again, that's something we do
25 in normal course, because when we have opponents and

A I probably did. This is one of the faster ones.
Q After Judge Brosey issued his ruling, it wasn't appealed by your client obviously nor was it appealed by the County?
A That's right.
Q But once again an appeal was filed by FORP?
A Yes.
Q That appeal was filed to the Court of Appeals?
A Yes.
Q Eventually that was resolved and dismissed around October or November of 2011?
A Yes.
Q But at the time that Judge Brosey issued his decision in July of 2011, there were other matters that prevented Maytown from mining during that period of the LUPA appeal; correct?
A Yes.
Q In fact, the SUP amendments hearing before the Examiner occurred in March of 2011 and that too was appealed was it not by FORP?
A Yes.
Q Again, the Hearing Examiner came down pretty much entirely for Maytown in that SUP amendment hearing?
A Yes.
Q At least on most issues and Maytown did not appeal?

A We won. We don't appeal when we win.
Q We'll get back to that. But the County didn't appeal either?
A That's correct.
Q But once again FORP appealed that to Thurston County Superior Court; correct?
A Excellent, yes. You've got an excellent recollection. That's correct.
Q Well I looked at the document. Once again that wasn't resolved, until October or November of 2011.
A Yes, they lost that case in Thurston County Superior Court.
Q The timeline that you had estimated back in October of 2010 was hit on on almost every date in terms of when the various appeals and challenges would be?
A For once one of my timelines was fairly accurate.
Q Thank you. Now you have also complained about the fact that the County addressed SEPA or required you to address SEPA, in connection with at least one of the hearings namely the amendments -- SUP amendments hearing; correct?
A Yeah. We took the position first it should have been an enforcement action then it should have been a minor amendment then since there was no environmental harm SEPA should not apply.

1 Want more?
2 Q Just a moment. Now, I'd like you to go up to
3 page 34, which is part of the conclusion of the
4 final decision made by the Examiner and read the
5 first paragraph. Can you read that please, John?
6 A "The revised March 17, 2011, Maytown Sand and Gravel
7 ground water and surface water monitoring plan shall
8 be adopted replacing the 2005 ground water
9 monitoring plan and SUP conditions 6A and 6C."
10 Q Please continue.
11 A "The applicant and any successors in interest shall
12 be required to comply with the monitoring plan
13 established in the 2011 plan in the record as
14 Exhibit 42A."
15 Q In other words, she found that the parties had
16 collaborated in preparing a new plan that clarified
17 confusion from the earlier plan, and she was
18 ordering Maytown to follow that new jointly
19 submitted plan?
20 A Yes.
21 Q But she also made some decisions that were contrary
22 to your and the Port' request, isn't that true?
23 A Yes.
24 Q Can you turn to page 30 please? She found did she
25 not contrary to your oral and written arguments that

1 an SUP amendment was required and that the process
2 in other words to have this heard by her was
3 appropriate?
4 A She found that instead of our argument they could
5 have used enforcement proceedings that it was okay
6 for them to require that an amendment be required,
7 and she said as I said a long time ago the
8 Department makes the decision, whether it is minor
9 or major.
10 Q Please read that paragraph or at least the first
11 several sentences.
12 A "An SUP amendment was required. Both MSG and the
13 Port argue that the changes entailed in the instant
14 proposal to amend the SUP could have been handled
15 administratively by an enforcement authority that no
16 amendment application administrative or
17 quasi-judicial was required.
18 "The Department decided otherwise and its
19 decision has several sources of support."
20 "While there are no criteria for special use
21 amendment identified in the code TCC 20.54.030
22 expressly authorizes the review and approval of
23 amended special use authorizations."
24 Q Please read the next couple sentences.
25 A "Pursuant to TCC 20.54.0151, administrative review

1 is allowed for a specified list of special uses.
2 "Pursuant to TCC 20.54.0152, the Hearing
3 Examiner is the approval authority for any special
4 use not listed and amended special use
5 authorizations are not included in subsection 1."
6 Q I'll stop you there. Don't read all of it, but in
7 essence she rejected your argument and the Port's
8 argument that it was improper for the County to
9 place these amendments into the Hearing Examiner
10 process; correct?
11 A That's generally correct.
12 Q In fact, didn't you discuss with your clients that
13 you may want to appeal that portion of her decision?
14 A We discussed it, but as I said, this was a big win,
15 and even if you don't get 100 percent of what you
16 ask for, you almost never appeal your own permit.
17 Q Didn't you in fact study it at some length and
18 discuss it with the Port of Tacoma the pros and cons
19 and decided no we're not going to appeal?
20 A Yes.
21 Q Therefore, because that conclusion was not appealed,
22 it is final and can't be changed at this point;
23 correct?
24 A Well, you and the judge and counsel have to decide
25 whether it is challenged. The point I've always

1 made is the County said in writing they would do an
2 administrative minor amendment and then under
3 pressure they changed their position. We should
4 never have been here, it should have been an
5 administrator minor amendment as they said on
6 February 16, 2010.
7 Q But, Mr. Hempelmann, you made that argument to the
8 Hearing Examiner, she rejected it, and it is final;
9 correct?
10 A Well, in the permit process it is final. I don't
11 know whether it is final in this courtroom.
12 Q Can you turn to exhibit 449 please? You recognize
13 this is an E-mail from yourself to your clients,
14 regarding whether to appeal that portion of the
15 Examiner's decision?
16 A Yes.
17 Q Can you read the first sentence please of that?
18 THE COURT: Are you offering it?
19 MR. JOHNSEN: Offering identification 449.
20 THE COURT: Any objection?
21 MR. POWELL: No.
22 THE COURT: 449 is admitted as exhibit 449. Now
23 you can testify about it.
24 THE WITNESS: "As we reviewed our options and
25 the Examiner's decision to outline the appeal, I E-mailed

APPENDIX 7

1 Thurston County Code. He required amendments to the SUP
2 to the ground water monitoring plan. This is the famous
3 6A and 6C amendments that Mr. Hempelmann talked so much
4 about. He required those amendments instead of treating
5 them as an enforcement issue. You remember the
6 testimony. The ground water monitoring was supposed to
7 start within the six months of when the SUP was issued.
8 But its purpose was to establish a baseline before
9 mining began. Mr. Ellingson said by the time they got
10 around to going in, Maytown had the property, and ask
11 for permission for mining, they had much more of a
12 baseline than was needed or he had expected when he
13 prepared that plan. So that the substance of the
14 condition had been complied with. And Mr. Kain had
15 already said in an unappealed decision, "I'm going to
16 require an amendment, but it's a minor amendment." But
17 he shouldn't have required an amendment in the first
18 place. It was an enforcement issue. No harm had been
19 done. The condition had been complied with. What
20 happened to the common sense Mr. Kain said he had the
21 right to exercise?
22 It's like a cop pulling you over for doing 56 miles
23 an hour in a 55-mile-an-hour zone, and instead of giving
24 you a warning or giving you a ticket, treating it like
25 an enforcement action, the cop reaches into the car and

pulls out your keys and says, "You can't drive again until you go to the legislature and get the law changed to allow you to drive at 56 miles an hour." It was that unreasonable, that lacking in common sense, that preposterous, as John Hempelmann tried to explain to you, to even require an amendment in the first place when the ground water monitoring had been done better than it was required to do in the original plan.

And remember, by saying that an amendment is required, he's saying the SUP is invalid. He already conclusively said in an unappealed decision it was invalid. He said, "You don't get the amendment. You can't mine." And then after making another unappealed decision that the amendments were minor, that he could approve them, he said no, they have to go to the hearing examiner. And remember Mr. Hempelmann's frustration. He kept wanting to get the amendments out of the way so they could start mining before the five-year review. Mr. Hempelmann testified that if the amendments -- minor amendments could have been granted, yes, someone could have appealed that decision to grant the minor amendments, but it wouldn't have prevented them from mining. They could have started. They would've been underway. Mine Area 1 would have no longer been a priority habitat because it would be an active mine.

1 to proceed or whether you're going to have to go back and
2 do another year's worth of study looking for critical areas
3 that there was no evidence of the existence of?
4 Mr. Johnsen asserts that Kain and Moore never took
5 direction from the BOCC. You were here yesterday and you
6 heard all of the evidence to the contrary. You saw the
7 evidence to the contrary. Mr. Johnsen makes a point that
8 the county helped out the Port by deciding that the permit
9 had not expired as FORP wanted the county to determine.
10 But that determination happened in 2008 before Valenzuela
11 and Romero were put -- one was elected, one was appointed
12 to the Board of County Commissioners, and that's when the
13 county's conduct started to change.
14 Mr. Johnsen makes a point that the railroad wouldn't
15 let them start work right away because of the appeals.
16 Again, the appeal that was pending was the appeal of the
17 SUP. There never should have been an appeal of an
18 amendment to the SUP because that should have been handled
19 as an enforcement issue. Mr. Johnsen put up on the board
20 this morning language from the hearing examiner's decision,
21 but he only put up the first paragraph. He didn't put up
22 the second that was relevant to this issue. The second
23 paragraph that was not displayed is the paragraph that said
24 the reason she's saying the amendments were necessary is
25 because the Department had discretion and she was deferring

1 to the exercise of that discretion. As we discussed
2 yesterday, what happened to common sense? Why wasn't it
3 treated as an enforcement issue when the county itself had
4 agreed in writing that no harm was done? The evidence is
5 undisputed that the information the county needed was
6 better than it would have been if mining had started six
7 months after the SUP was issued, as was understood and
8 intended at the time.
9 THE COURT: I need to stop you. We need to take the
10 lunch recess.
11 MR. SCHNEIDER: Thank you, Your Honor.
12 THE COURT: Ladies and gentlemen, we're going to
13 break for lunch at this time. Again, do not discuss the
14 case, do not allow anyone to discuss it with you or in your
15 presence. Don't read about it if there's anything in the
16 newspaper. Don't listen to it. Don't do any research.
17 Try to be back at 1:15. We'll get started promptly at 1:30
18 with the resumption of the rebuttal argument, and then
19 we'll send you out to deliberate on your verdicts. So
20 follow the bailiffs out and enjoy your lunch.
21 (Jury exits.)
22 THE COURT: I have two 1 o'clock hear ings. You can
23 leave your stuff. I don't think anyone will bother it.
24 We'll resume at 1:30.
25 (Court at recess)
(Court reconvened)

CARNEY BADLEY SPELLMAN

May 04, 2017 - 10:10 AM

Filing Petition for Review

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