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COA No. 74738-0-I

SUPREME COURT
OF THE STATE OF WASHINGTON

COMMUNITY TREASURES d/b/a CONSIGNMENT TREASURES, a
Washington not for profit corporation, JOHN EVANS and BONITA
BLAISDELL, on behalf of themselves and all others similarly situated,
Petitioners

v.

SAN JUAN COUNTY, a political subdivision of the State of Washington,
Respondent

PETITIONERS' ANSWER TO AMICI CURIAE

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III. INTRODUCTION

Petitioners answer the brief filed by Amici Washington State Association of Counties and Washington State Association of Municipal Attorneys. *See* Brief of Amici Curiae, filed December 11, 2017 [hereinafter “Amici”]. Amici have not provided any greater illumination of the issues before the Court than that provided by Respondent San Juan County. Therefore, Petitioners’ answer to the Amici’s brief is limited.

IV. ARGUMENT

A. All prior cases applying LUPA involved decisions affecting the use of land.

As did Respondent San Juan County, Amici list several cases in which the courts have held that the Land Use Petition Act (LUPA) applies. *See* Amici at 4. In each of these cases, the decision being appealed was a decision that affected the use of land.¹ Amici do not cite the one case reviewing a decision related to a permit application where the decision did not affect the use of land. *See Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn. App. 777, 964 P.2d 1211 (1998) (holding LUPA does not apply to a hearing examiner’s discovery order). The cases that Amici cite do not support their conclusion that any decision related to

¹ Amici labeled one of the cases, “the interpretation of the process required under a local government’s development code provisions.” *See* Amici at 4 (citing *Naumes, Inc. v. City of Chelan*, 184 Wn. App. 927, 339 P.3d 504 (2014)). The underlying government decision in that case was to reject a developer’s binding site plan. *Id.* at 929–30.

a permit application, whether or not that decision affects the use of land, is “inextricably linked” to the resulting land use decision. And, *Pacific Rock* demonstrates that LUPA does not apply to all decisions related to a permit application.

B. Petitioners do not request that the Court overrule *James* but do suggest addressing the *Asche* rule.

Amici claim that Petitioners are requesting that the Court overrule *James v. Kitsap County*. See Amici at 7–9 (discussing *James v. Kitsap County*, 154 Wn.2d 574, 115 P.3d 286 (2005)). This is not true.

Petitioners do suggest that the exception for claims for “monetary damages or compensation,” provided in RCW 36.70C.030, applies only when the matter involves the review of a land use decision. Therefore, Petitioners suggest that *Asche* and its progeny, which hold that claims for monetary relief must be made under LUPA when that relief requires review of land use decisions, are incorrect.² See Suppl. Br. of Pet., filed October 6, 2017, at 13–20 (discussing, e.g., *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006)).

As previously explained, application of the LUPA “monetary damages or compensation” exception to impact fees, as in *James*, is

² *James* did not so hold, noting that the developers in that case did not claim that the “monetary damages or compensation” exception applied. *James*, 154 Wn.2d at 586–87.

analytically problematic. *See* Suppl. Br. of Pet. at 18. What is clear is that the nature of application fees is different than the nature of impact fees, which are permit conditions directly affecting the use of land and therefore are “inextricably linked” to the permit. *See James*, 154 Wn.2d at 586. Application fees do not affect the use of land. Indeed, payment of application fees is not a condition of the enjoyment of the permit, as is the payment of impact fees, but rather is a prerequisite to application processing.

Amici’s link of application fees to permits in the same way that impact fees are linked to permits does not have a compelling policy underpinning. Contrary to Amici’s assertions, government does not need a short limitations period when it charges fees to fund its own operations. *See* Amici at 8. Decisions that directly affect land use, whether affecting a citizen’s use of land or the government’s use of land (as in *James*), require the short limitations period due to the permanent nature of land use. Monetary claims not affecting land use do not raise this issue.

C. Petitioners’ burden to prove a violation of RCW 82.02.020 is not before the Court.

As did San Juan County, Amici make two assertions in an effort to foreclose any cause of action to enforce the limitations on fees charged for processing permit applications found in RCW 82.02.020. Amici argue

that (1) it is improper to base a claim for compensation on aggregate values, and (2) it is impractical to determine the cost of processing an application on a case-by-case basis.³ *See* Amici at 10–11. This issue was partly addressed in *Home Builders Assoc. of Kitsap County v. City of Bainbridge*, 137 Wn. App. 338, 153 P.3d 231 (2007).

Nevertheless, the issue of whether or not San Juan County’s application fees were reasonable under RCW 82.02.020 is not before the Court. Assuming that Petitioners’ claims are not barred under LUPA—which would effectively require an impractical case-by-case determination of application fee charges in excess of the limits in RCW 82.02.020—the trial court must determine whether the charges were reasonable under *Home Builders*.

Similarly, the presumption of validity of the San Juan County ordinance and Petitioners’ burdens of proof regarding the merits of this matter are not before the Court. *See* Amici at 15–16.

D. Petitioners need not exhaust administrative remedies.

Amici dedicate a section of their brief on an alleged obligation to exhaust administrative remedies. *See* Amici at 12–14. However, Amici

³ Amici also allege that Petitioners claimed that the fees charged Petitioners were not in accordance with the San Juan County ordinance authorizing the fees. *See* Amici at 11. Petitioners have made no such allegation.

base this obligation on the applicability of LUPA. *Id.* at 13. Petitioners agree that, if LUPA applies to their claim, then they were required to exhaust administrative remedies.

It is interesting that Amici argue on the one hand that a challenger to application fees should exhaust administrative remedies, and on the other hand that a case-by-case determination of an appropriate application fee is impractical. This inconsistent argument highlights the problem with San Juan County's position: Application of LUPA forecloses any practical remedy to the overcharge of application fees.

V. CONCLUSION

Amici have made it clear that counties and municipalities in Washington State would like to prevent any challenges to the fees they charge to process land use permit applications. Any overcharge goes to their general funds.

Application of LUPA to claims that government has overcharged these fees meets this purpose, as Amici have explained. Stretching LUPA to apply to governmental decisions on what application fees to charge prevents any practical method of enforcing RCW 82.02.020's limitations.

The Court should hold that LUPA does not apply to Petitioners' claims and therefore reverse the trial court and remand for further proceedings.

Respectfully submitted,

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Dated: January 8, 2018

By: 

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PETITIONER'S ANSWER TO AMICI
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