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NO. 94463-6

IN THE 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,

vs.

SAN JUAN COUNTY, a political subdivision of the state of Washington,

Respondent.

BRIEF OF *AMICI CURIAE*
WASHINGTON STATE ASSOCIATION OF COUNTIES AND
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS IN SUPPORT OF RESPONDENT

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The Washington State Association of Counties (WSAC) is a voluntary, non-profit association serving all of Washington's 39 counties. WSAC members include elected county commissioners, council members and executives from all of Washington's 39 counties. The Association provides a variety of services to its member counties including advocacy, training and workshops, and a forum to network and share best practices.

The Washington State Association of Municipal Attorneys (WSAMA) is a nonprofit Washington corporation whose membership is comprised of the attorneys who represent cities and towns in this state, and that provides education and training in the areas of municipal law to its members.

Important to the members of both WSAC and WSAMA are administrative procedures related to their land use actions and the crucial need to depend upon the framework of the Land Use Petition Act, ch. 36.70C RCW (LUPA), including not only the requirement of any appeal under LUPA, but also full recognition of all aspects of the land use application process related to the LUPA statute.

Every county, city and town in this state, must be able to rely on and depend upon the applicability of LUPA and its requirements to applications for land use permits. For this reason, WSAC and WSAMA submit this brief as *amici curiae* and asks this Court to uphold the decision of the Court of Appeals.

II. STATEMENT OF THE CASE

Amici adopts the Statement of Facts provided and described by San Juan County in its pleadings now before this Court.

III. ARGUMENT

A. IMPORTANCE OF LUPA TO LOCAL GOVERNMENT

Every county, city, and town in this state is responsible for processing applications for land uses within its jurisdictional boundaries, and responsible for making land use decisions related thereto.

Historically, quasi-judicial land use decisions had been reviewable pursuant to a writ of certiorari under RCW Ch. 7.16. Other statutory remedies relied upon included writs of mandamus or prohibition, injunctive relief, and declaratory judgments. Constitutional writs and other equitable devices were also used. These devices and their present use are discussed in more detail below. In 1995 the legislature enacted RCW Ch. 36.70C, the Land Use Petition Act (LUPA) to replace the writ of certiorari for the judicial review of land use decisions of a local jurisdiction, “by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.” RCW 36.70C.010; see also 36 *Wash. Prac.*, Wash. Land Use § 7:1 (2016 ed.).

RCW Ch. 36.70C, governs “land use decisions” by a “local jurisdiction.” A land use decision is defined 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.” RCW 36.70C.020(1); *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 680, 86 P.3d 1169 (Div. 1 2004). A local jurisdiction “means a county, city, or incorporated town.” RCW 36.70C.020(3).

RCW 36.70C “replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions.” RCW 36.70C.030(1); *Prosser Hill Coalition v. County of Spokane*, 176 Wn. App. 280, 288, 309 P.3d 1202 (Div. 3 2013); *Benchmark Land Co. v. City of Battle Ground*, 146 Wn. 2d 685, 693, 49 P.3d 860 (2002).

RCW 36.70C has been found to apply to both ministerial and quasi-judicial decisions of local governments. *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 101, 38 P.3d 1040, 159 O.G.R. 1181 (Div. 1 2002) (“We hold that LUPA provides the exclusive means of review for land use decisions, whether they are quasi-judicial or ministerial.”). *See also* 36 Wash. Prac., Wash. Land Use § 7.3. (2016 ed.).

As noted in § 7.3, the wide variety of decisions to which LUPA applies includes the issuance of a boundary line adjustment,¹ a building permit,² granting a special use permit,³ a quasi-judicial decision such as the approval of a site-specific rezone,⁴ the imposition of conditions upon a project permit,⁵ the decision of a historic preservation board,⁶ the imposition of an impact fee on the issuance of a building permit,⁷ the interpretation of the process required under a local government's development code provisions,⁸ the determination a property was not within the shoreline boundary and therefore not subject to the Shoreline Management Act of 1971 (SMA),⁹ and the adoption of a development agreement pursuant to RCW 36.70B.170.¹⁰ Even illegal decisions must be

¹ *Chelan County v. Nykreim*, 146 Wn. 2d 904, 927, 52 P.3d 1 (2002).

² *Asche v. Bloomquist*, 132 Wn. App. 784, 791, 133 P.3d 475 (Div. 2 2006), as amended, (Apr. 4, 2006); *Chelan County* 146 Wn. 2d at 929. However, if an administrative challenge is available, the issuance is not a final decision subject to LUPA. See *Durland v. San Juan County*, 182 Wn. 2d 55, 64–65, 340 P.3d 191 (2014).

³ *Habitat Watch v. Skagit County*, 155 Wn. 2d 397, 409, 120 P.3d 56 (2005).

⁴ *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 2d 169, 180–81, 4 P.3d 123 (2000); see also *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn. 2d 820, 827–28, 256 P.3d 1150 (2011); *Woods v. Kittitas County*, 162 Wn. 2d 597, 610, 174 P.3d 25 (2007); RCW 36.70C.020(4).

⁵ *Benchmark Land Co. v. City of Battle Ground*, 146 Wn. 2d 685, 693, 49 P.3d 860 (2002); *Baumgardner v. Town of Ruston*, 712 F. Supp. 2d 1180, 1198–99 (W.D. Wash. 2010); *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 24–25, 352 P.3d 807 (Div. 2 2015).

⁶ *Conner v. City of Seattle*, 153 Wn. App. 673, 679, 223 P.3d 1201 (Div. 1 2009).

⁷ *James v. County of Kitsap*, 154 Wn. 2d 574, 584, 115 P.3d 286 (2005).

⁸ *Naumes, Inc. v. City of Chelan*, 184 Wn. App. 927, 339 P.3d 504 (Div. 3 2014).

⁹ *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn. 2d 440, 463–64, 54 P.3d 1194 (2002), amended on denial of reconsideration, 63 P.3d 764 (Wash. 2003).

¹⁰ *Cedar River Water and Sewer Dist. v. King County*, 178 Wn. 2d 763, 784, 315 P.3d 1065 (2013), as modified, (Jan. 22, 2014).

challenged in a timely manner under the Act.¹¹ LUPA has also been found to be the appropriate means of appeal where a local government granted approval of an application but the property owner challenged a condition of that approval.¹²

These cases illustrate the importance of LUPA to local government land-use related decisions. The frequency with which local governments address the various types of LUPA implicated decisions, as well as the uniqueness and variations among such decisions mandate that LUPA must be dependably consistent in use and effect.

B. CLAIMS FOR MONETARY DAMAGES OR COMPENSATION

While LUPA is the exclusive remedy for land use decisions, RCW 36.70C.030 does provide an exception. That statute states as follows:

36.70C.030 Chapter exclusive means of judicial review of land use decisions—Exceptions.

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that *this chapter does not apply to*:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;

¹¹ *Brotherton v. Jefferson County*, 160 Wn. App. 699, 703–04, 249 P.3d 666 (Div. 2 2011) citing *Habitat Watch v. Skagit County*, 155 Wn. 2d 397, 407, 120 P.3d 56 (2005), citing *Pierce v. King County*, 62 Wn. 2d 324, 334, 382 P.2d 628 (1963).

¹² *Harrington v. Spokane County*, 128 Wn. App. 202, 212, 114 P.3d 1233 (Div. 3 2005).

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) *Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.*

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

[2010 1st sp.s. c 7 § 38; 2003 c 393 § 17; 1995 c 347 § 704.]

RCW 36.70C.030(1)(c) (emphasis added).

Thus, although LUPA may not apply to “[c]laims provided by any law for monetary damages or compensation”¹³ this is not a strict bar: as this court has recognized, a damage claim may still be controlled by LUPA if it is dependent on “an interpretive decision regarding the application of a zoning ordinance.” *Asche v. Bloomquist*, 132 Wn. App. 784, 801, 133 P.3d 475 (2006), review denied, 159 Wn.2d 1005, 153 P.3d 195 (2007).

In *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 352 P. 3d 807 (2015), the court allowed a claim to be pursued that was unrelated to the land use decision (a separate tort). Similarly, in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013), this Court ruled that the

¹³ *Id.*

appellants were not required to file a LUPA petition to pursue their claims for damages where the appellants were only seeking money compensation (inverse condemnation) rather than a reversal or modification of a land use decision.

On the other hand, in *Asche v. Bloomquist*, the court ruled that LUPA applies to interpretative decisions regarding the application of zoning ordinances to specific property, RCW 36.70C.020(b). *Asche v. Bloomquist*, 132 Wn. App. at 791. In *Asche*, it did not matter whether the Asches were challenging the validity of the permit or the interpretation of the County zoning ordinance as applied to the subject property; LUPA covers both. *Id.*

Furthermore, even if an applicant obtains the requested permit approval the applicant must still file a LUPA appeal if he or she intends to challenge the propriety of any conditions placed on issuance of the permit. *James v. Kitsap County*, 154 Wn.2d 574, 590, 115 P.3d 286 (2005). In *James v Kitsap County*, the case that appears most helpful to the issues now before the Court – in this case, this Court ruled that imposition of impact fees as a condition on the issuance of a building permit was a land use decision under Land Use Petition Act (LUPA).

Consistent with our holdings in *Isla Verde [Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wnh.2d 740, 49 P.3d 867 (2002)], *Nykreim [Chelan County v. Nykreim*, 146

Wn.2d 904, 52 P.3d 1 (2002).], and *Wenatchee Sportsmen* [*Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000)], we find that the imposition of impact fees as a condition on the issuance of a building permit is a land use decision and is not reviewable unless a party timely challenges that decision within 21 days of its issuance. As stated in *Isla Verde*, development conditions “must be tied to a specific, identified impact of a development on a community,” 146 Wn.2d at 761, 49 P.3d 867, whether the condition is an open space set aside or an impact fee.

James v. Kitsap County, 154 Wn.2d at 586.

In connection with the Petitioners’ apparent request that this Court overrule *James*, *Amici* respectfully submit that any action that might erode the utility and consistency of LUPA should be taken very cautiously. In keeping with the purposes for which LUPA was enacted,¹⁴ local governments need a mechanism giving prompt, uniform, consistent and predictable review criteria. This is especially so in connection with land use permit fee components, where most land use application fees are paid up front, and where the administrative services of those processing applications are tied to those fees.

Consistent with *James v. County of Kitsap*, the San Juan County Code requires payment of the applicable fee as a condition for issuing a

¹⁴ RCW 36.70C.010 Purpose.

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review. [1995 c 347 § 702.]

building permit. SJCC 18.80.020(C)(4); Supplemental Brief of Respondent San Juan County, page 2. Just as the impact fees imposed in *James* were inextricably linked to the land use decision, and thus subject to LUPA, (*James*, 154 Wn.2d at 586), so too are the land use permit application fees inextricably tied to the land use decisions, and thus subject to LUPA.

Respondent, San Juan County, has done a very capable job of identifying and chronicling the San Juan County fee ordinances, and , for that matter, describing not only the relationship between the San Juan County fees and fees under RCW 82.02.020, their legal distinction. It is not necessary, nor particularly helpful to reiterate the information regarding San Juan County fee ordinances, other than to make reference to them. (*See* multiple exhibits appended to Respondent's Supplemental Brief.) The Respondent has clearly identified and chronicled the fees and demonstrated that they are integral to the land use decision on the permit. With that, in *James v. Kitsap County*, this Court held RCW 82.02.020 did not create a damage claim, independent of LUPA, to challenge conditions on land development. Again,

[T]he imposition of impact fees as a condition on the issuance of a building permit is a land use decision and is not reviewable unless a party timely challenges that decision within 21 days of its issuance.

James, 154 Wn.2d at 586.

The same conclusion is appropriate here because RCW 82.02.020 did not create a self-executing cause of action. The clause has no express mechanism and no basis for starting a lawsuit independent from another statute.

RCW 82.02.020 is considered "supplemental authority" and the court's jurisdiction will be determined by compliance with the statutory framework provided for challenging the underlying action. *Trimen Development Co. v. King County*, 65 Wn. App. 692, 700, 829 P.2d 226 (1992) affirmed on other grounds, 124 Wn.2d 261, 877 P.2d 187 (1994). See e.g., *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 753, 49 P.3d 867 (2002) (LUPA applied to claim that land set aside condition violated RCW 82.02.020); And *James v. Kitsap County*, supra, (LUPA applied to claims that impact fees violated RCW 82.02.020).

The Petitioners base their entire argument for money damages on the supposition that fees were overcharged on four permits because of a difference between accounting of certain revenues and expenses averaged out over three years ¹⁵. Unfortunately, that approach, even if is eventually

¹⁵ In 2014 the Department's general ledger indicates that the total building division fund revenues were \$933,535. Building division fund expenses for the same period were \$766,628. Petitioner's Complaint, page 10 (CP 10) . . . In 2013 building division fund revenues were \$749,552 and expenses were \$677,607. Based on it. The 2013. General ledger totals, the building division collected excess revenues of \$71,944. Petitioner's Complaint, pages 10 - 11 (CP 10 - 11).

found to be complete and correct, ignores the proposition that notwithstanding best efforts, calculating what time and energy will be expended on a future permit application is utterly impossible. Time and energy can be usurped by a greater number of questions (or a lesser number) by the applicant or the permit administrator. Likewise, changes, even multiple changes during the course of a land use permit application process, can be sought or requested. In some cases, and not in others, all of which would occur after the application and fees were paid. But even more than that, the petitioners cannot identify what permits arguably should have been charged more, or charged *less*. In the Petitioners' Complaint (First Amended Class Action Complaint) no dollar amount is identified in their prayer for relief for any Plaintiff. (CP 15-16). Additionally, the Petitioners, in their Complaint, make multiple statements about the fees, but none of those statements are tied to any specific over-payments (or under-payments).(CP 5, 6, 7, 8, 9, 10, 13).

Additionally, none of these statements, purports to show that payments made by any one of the Petitioners were contrary to or inconsistent with the fee schedules approved by San Juan County ordinance. Contrary to the suggestions made by Petitioners, the fees charged were in accordance with San Juan County fee ordinances.

C. OBLIGATION TO EXHAUST ADMINISTRATIVE REMEDIES

In the underlying case decisions, the court ruled:

LUPA “applies to the claims for refund of application fees allegedly paid by Plaintiffs as set forth in the First Amended Complaint.” Because Evans did not comply with the LUPA requirement to exhaust administrative remedies or file a complaint within 21 days of the land use decision, the court dismissed the lawsuit. Evans appeal[ed].

Community Treasures v. San Juan County, 198 Wn. App. 1032 (2017), Unpublished Opinion, Page 1.

This Court has long applied “the general rule that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene.” *Wright v. Woodard*, 83 Wn.2d 378, 381, 518 P.2d 718 (1974) (citing *State ex rel. Ass’n of Wash. Indus. v. Johnson*, 56 Wn.2d 407, 353 P.2d 881 (1960)). Professor Louis L. Jaffe of the University of Buffalo School of Law and Harvard Law School aptly explained the reasons why exhaustion is so important:

Exhaustion has its analogue in the usual requirement of finality as a condition of review by an upper court of the rulings of a lower court. The traditional finality rule covers a variety of hypothetical situations and is a rough compromise of the competing considerations which differ in their balance from case to case ... It can be seen from the analysis that an absolute rule of finality would be far too crude a resolution of these competing considerations and that in any case the requirement of finality is a rough compromise, a kind of slapdash presumption as to the net saving of money and time.

Louis L. Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFF. L. REV. 327, 327 (1962). If the party seeking relief has an administrative remedy and did not pursue the remedy before turning to the court, the trial court commits error by entertaining the action. *Wright*, 83 Wn.2d at 381.

The exhaustion rule confirms the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997); *South Hollywood Hills Citizens Ass'n for Preservation of Neighborhood Safety & Env't v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984).

LUPA expressly requires that parties exhaust administrative remedies with respect to land use permit decisions before turning to the courts. Under LUPA, the petitioner must exhaust all available administrative remedies and file an appeal in superior court within 21 days of the final decision. RCW 36.70C.020(2), 36.70C.040(3), 36.70C.060(2)(d); *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 185 Wn.2d 594, 602, 374 P.3d 151 (2016). To this end, *Durland v. San Juan County*, 182 Wn. 2d 55, 340 P.3d 191 (2014), provides a useful analysis of the precepts under which LUPA was created:

The legislature enacted LUPA in 1995 to replace the writ of certiorari as the exclusive means of appealing a local land use decision. RCW 36.70C.030. LUPA's purpose is to

ensure uniform and expedited judicial review of land use decisions. RCW 36.70C.010.

Id., at 64. In that case, Durland skipped San Juan County's administrative appeals process and filed a land use petition directly in superior court. This Court held that the Superior Court did not have jurisdiction to hear the appeal where a failure to exhaust administrative remedies deprived the superior court of a land use decision. *Durland* also held that there are no equitable exceptions to the exhaustion requirements. *Id.* at 60.

The requirement for exhaustion of administrative remedies, and the purpose of LUPA are consistent with good governance. Together they provide for prompt review, and consistent, predictable, and uniform treatment of the decisions with which they deal. This was most recently confirmed with respect to decisions with respect to building permits in *Durland v. San Juan County*:

[W]here the permitting authority creates an administrative review process, a building permit does not become "final" for purposes of LUPA until administrative review concludes. Only then is there a final land use decision that can be the subject of a LUPA petition. *Ferguson v. City of Dayton*, 168 Wn. App. 591, 277 P.3d 705 (2012) (no land use decision prior to final determination by planning commission, which was entity with the last word on the permit). This comports with the plain reading of the statute, which requires that the "final determination" come from the "officer with the highest level of authority..., including those with authority to hear appeals." RCW 36.70C.020(2).

Durland, 182 Wn. 2d at 64-65.

D. RESPONDENT’S FEE ORDINANCES PRESUMED VALID

Insofar as the petitioners appear, among their arguments, to be challenging the validity of San Juan County’s fee ordinances, these ordinances are entitled to the presumption of validity.

As with the San Juan County Council, the legislative body of every County, city and town in the state adopts ordinances (legislative action), covering fees, including those for land-use permitting. This action sets the stage for what fees are to be collected and is a necessary component of consistent and uniform permitting by local government. According to *Department of Ecology v. State Finance Comm.*, 116 Wn.2d 246, 253, 804 P.2d 1241 (1991), legislative enactments enjoy a strong presumption that they are valid. *See also State v. Dixon*, 78 Wn.2d 796, 479 P.2d 931 (1971.) That presumption continues unless the party challenging it proves that it is invalid beyond a reasonable doubt. *State v. Smith*, 130 Wn. App 721, 726-27, 123 P.3d 896 (2005). *See also Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

These presumptions apply to legislative enactments of county, city and town councils or commissions just as they do to those of the State legislature. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009); *City of Pasco v. Shaw*, 161 Wn.2d 450, 462, 166 P.3d 1157 (2007); *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709 (2001). *See also*

State v. Immelt, 150 Wn. App 681, 686, 208 P.3d 1256 (2009); *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005). *See also* RCW 36.70A.320.

The party challenging a legislative enactment carries the heavy burden of demonstrating its invalidity beyond a reasonable doubt; *State v. Watson*, 160 Wn.2d 1, 11, 154 P.3d 909 (2007) (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). The presumption in favor of a law's constitutionality should be overcome only in exceptional cases. *Watson*, 160 Wn.2d at 11, 154 P.3d 909 (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 28, 759 P.2d 366 (1988)). *See also State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008); *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000), cert. denied, 532 U.S. 920, 121 S.Ct. 1356, 149 L.Ed.2d 286 (2001); *State v. Blank*, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997). *See also State v. Melcher*, 33 Wn. App 357, 655 P.2d 1169 (1982) (where legislation tends to promote health, safety, morals or welfare of the public, and the legislation bears a reasonable and substantial relationship to that purpose, every presumption will be indulged in favor of the legislation). With that, it would thus seem that ordinances setting fees for building and development codes would seem to be of the type of ordinances (promoting public health, safety and welfare) deserving of having every presumption indulged in their favor.

IV. CONCLUSION

For the reasons set forth above, and as argued by San Juan County, WSAC and WSAMA respectfully request this Court uphold the decision of the Court of Appeal in this matter.

RESPECTFULLY SUBMITTED this _____ day of December, 2017.

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