LAND USE
CASE LAW UPDATE

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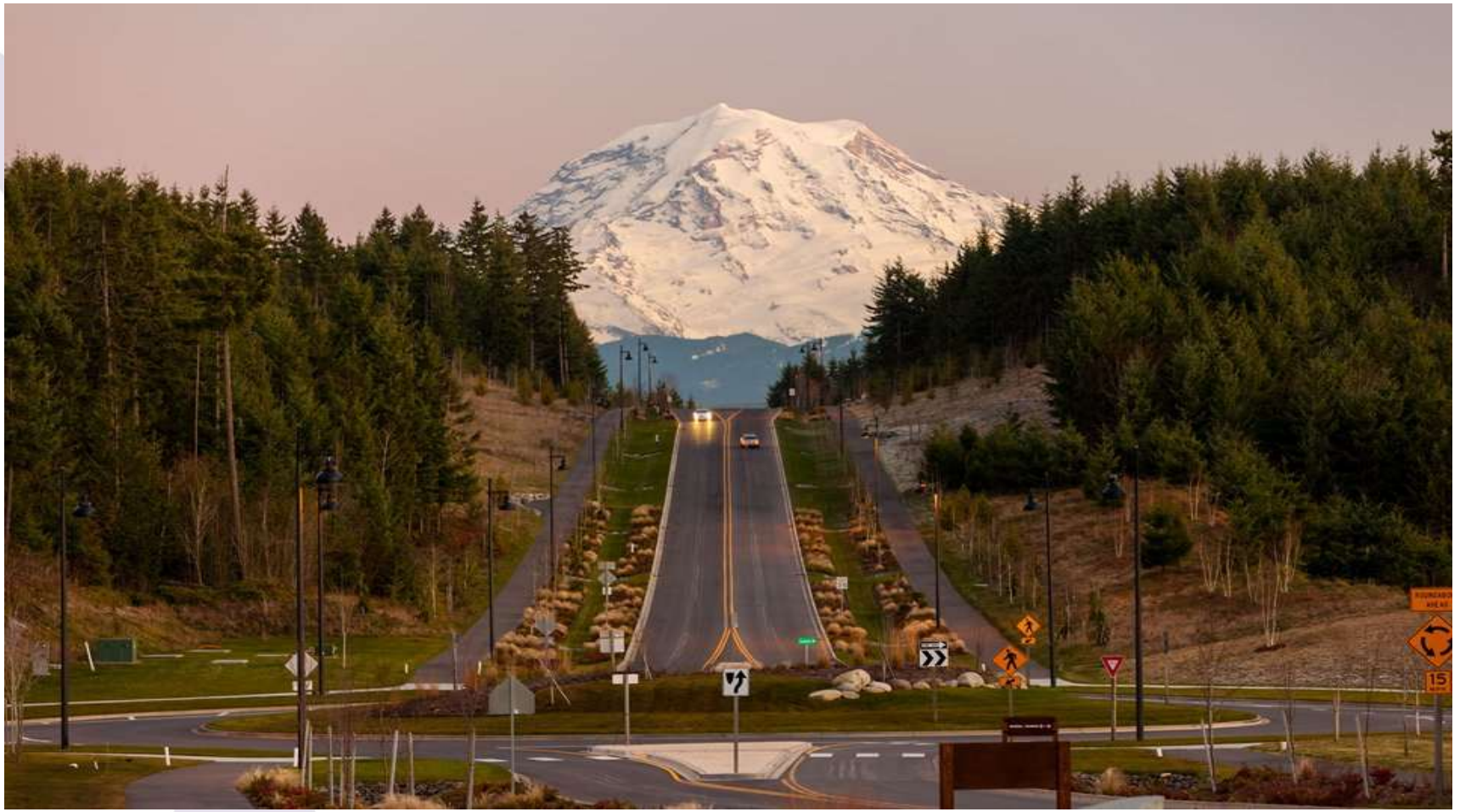

“Magnificent Entry” or Exit or Just a Round-About at Bonney Lake

Some Gross Oversimplifications:

1. Church of the Divine Earth v. City of Tacoma, 426 P.3d 268 (2018) -- 64.40 liability requires a type of negligent or knowing conduct.

2. "***Culvert Case***" – Washington State has to make culverts fish friendly.

3. ***Maytown Sand and Gravel*** – Supreme Court reaffirms that politically based decision making = major $$$$

4. ***Bonney Lake*** – Rezone not a takings just because one of several objectives may go beyond mitigating harm and instead confer an affirmative public benefit such as preserving a magnificent entry.

5. ***Schnitzer*** – Court of Appeals reversed and City-initiated rezones **are** subject to review under LUPA.

6. ***RMG*** – Cities/Counties can deem inactive permits abandoned and stop processing them under the right circumstances.

7. *Community Treasures v San Juan County*, 427 P.3d 647 (2018) – permit fee decisions subject to LUPA/

8. ***Union Gap*** – Finality of land use decision granting access right to street doesn't trump separate development agreement prohibiting access right.

9. "***Culvert Case***" the 9th Circuit prequel

Church of the Divine Earth v. City of Tacoma, 426 P.3d 268 (2018)

Primary Ruling: Invalid dedication requirement doesn't automatically lead to liability under RCW 64.40.020

Church of the Divine Earth v. City of Tacoma, 426 P.3d 268 (2018)

Facts:

Church submits building permit to construct parsonage.

The parsonage was proposed for a vacant lot. Approval of the permit was conditioned on a 30 foot right of way dedication.

The Church objected to the 30-foot condition. A City staff review panel conducted a Nollan/Dolan nexus/proportionality review and determined that the right of way dedication had to be reduced to eight feet.

The right of way dedication was appealed to superior court under the Land Use Petition Act ("LUPA"). The superior court found the dedication didn't satisfy Nollan/Dolan nexus/proportionality and struck it.

The Church had also filed a claim for damages under RCW 64.40.020. This decision addresses that claim.

Church of the Divine Earth v. City of Tacoma, 426 P.3d 268 (2018)

Law:

RCW 64.40.020(1): "*Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, ... PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.*"

Church of the Divine Earth v. City of Tacoma, 426 P.3d 268 (2018)

As identified by the Court:

"...there are three grounds for imposing liability under RCW 64.40.020: (1) the action was arbitrary or capricious, (2) the City knew or should have known that the act exceeded its lawful authority, or (3) the City knew or should have known that its act was unlawful."

Church of the Divine Earth v. City of Tacoma, 426 P.3d 268 (2018)

(1) Arbitrary and Capricious Conduct

"*An agency action is arbitrary or capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. Where there is room for two opinions, and the agency acted honestly and upon due consideration, this court should not find that an action was arbitrary and capricious, even though this court may have reached the opposite conclusion*." (citations omitted).

Church of the Divine Earth v. City of Tacoma, 426 P.3d 268 (2018)

(1) Arbitrary and Capricious Conduct

Ruling: No arbitrary and capricious conduct. City decision was not willful and it did not act unreasonably because it conducted a Nollan/Dolan analysis. The decision was made with regard to attending facts because the City had considered the impacts created by the proposed development, including to pedestrian traffic, vehicular traffic, sidewalks and driveway access.

The Court also ruled that imposing an unconstitutional condition is not per se arbitrary and capricious.

Church of the Divine Earth v. City of Tacoma, 426 P.3d 268 (2018)

(2) The City knew or should have known that the act exceeded its lawful authority

Court finds that acting without lawful authority does not mean violating the constitution, but rather means not having the authority to impose conditions or require right of way dedications in building permit review.

Ruling: City acted within its lawful authority to impose conditions on building permits.

(3) The City knew or should have known that its act was unlawful.

Court finds that simply because LUPA court found condition was unlawful doesn't mean that City knew or should have known it was unlawful. Court noted that LUPA itself provides that "[a] grant of relief by itself may not be deemed to establish liability for monetary damages or compensation." RCW 36.70C.130(2).

Ruling: City didn't know and shouldn't have known its condition was unlawful. The City had conducted its own Nollan/Dolan analysis and reasonably concluded it could impose the condition.

Culvert Case:

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE KENNEDY took no part in the decision of this case.

State of Washington et al v. United States et. al., 584 US _____ (2018)

Culvert Case Takeaways:

-- My hearing examiner decisions are way too long.

-- Reasoning of case can potentially lead to other orders for addressing environmental degradation.

-- City/county culverts vulnerable.

-- Non-fish bearing streams will have to be reclassified into fish bearing streams.

-- Appears that at least 886 WA culverts will have to be replaced at an average historical cost of $660,000 per culvert

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

In Short:

Case "Shocks the Conscience"

Stick to the Code – Land Use Decisions that Appear to be Based Upon Political instead of Code Based Reasons Will Cost you $$$$$$.

Supreme Court sustains 12 million dollar judgment in favor of gravel pit owner and Port of Tacoma. Court of Appeals reversed on ruling that gravel pit was entitled to attorney fees for administrative proceedings that shouldn't have been required by County.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Keep Your Facts Straight:

Case involves **two** gravel pit hearings:

1. SUP Amendment hearing
2. SUP Five-Year Review

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Facts:

The SUP

-- In 2005 Thurston County issues 20 year special use permit for gravel pit operation that included a condition requiring five year review by hearing examiner.

-- Because the proposed mining site is located adjacent to one of Washington's largest tracts of prairie-oak-wetland habitat, the proposed project stirred significant opposition from nearby residents, Indian tribes, and environmental conservationists.

-- Condition 6A required field testing of off-site supply wells within a year and condition 6C required collection of data from 17 monitoring wells within 60 days. Deadlines not met.

-- Port of Tacoma purchases gravel pit in 2006. County assured Port that missed deadlines don't affect validity. County "ruled" in 2008 that missed deadlines didn't invalidate permit and later determined this ruling was beyond challenge because it wasn't timely appealed.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Facts:

Maytown Sand and Gravel (MSG)

-- In 2009 MSG meets with County staff to discuss SUP in anticipation of purchasing gravel pit. County advises that SUP was still valid but that "*minor staff approvals and things…needed to be done*." Also advised that all revisions could be handled administratively, that there "*were no skeletons in the closet*" and that MSG could be mining within 30-60 days.

-- MSG enters purchase and sale agreement for gravel pit for $17 million.

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

BEWARE THE PROSPECTIVE PURCHASER!!!

City liable for giving negligent zoning advice to prospective property purchaser who relies on advice.

Rogers v. Toppenish, 23 Wash. App. 554 (1979)

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Meanwhile, back at the backroom of the ranch….

Friends of Rocky Prairie (FORP) learns of pending sale and holds private meetings with all three county commissioners.

"*…one of the Board's commissioners, ..., indicated interest in evaluating whether the permit could be revoked either because of the reasons raised by FORP or for some other yet-to-be-identified reason. ....[Commissioner] also advised Sharron Coontz (FORP's president) about the evidence that she believed was needed to persuade the Board's two other commissioners to agree to reexamine the validity of the permit*."

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Well, actually:

.-- Shortly after the "*no skeletons in the closet*" comment, County for first time advises that "letter to proceed" necessary from County confirming that all conditions satisfied and that FORP would have an opportunity to comment before issuance of letter.

-- County attorney cites TCC 17.20.160A as authority for letter, which requires a conference or inspection before commencing mineral extraction, but doesn't require a letter.

-- MSG requests the letter and two months later the letter is denied based upon the missed deadlines and inadequate water testing.

-- In April, 2010 MSG closes on the purchase and sale agreement for the gravel pit.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

More veering off course:

.-- After closing in April, MSG requested eight amendments to the SUP, including condition 6. Specifically, MSG requested an amendment of the missed deadlines in conditions 6A and 6C and the elimination of some data collection required in condition 6C.

-- In its February, 2010 memo, the County had identified the amendments to Condition 6 deadlines as minor administrative amendments.

-- Now County responds that hearing examiner review required and that new SEPA had to be done. According to the MSG attorney, the County's new position was directed by the attorney for the Board of County Commissioners.

-- The County's planning manager testified that until that point he had been classifying minor adjustments to special use permits such as those requested by MSG as administrative decisions not subject to examiner review for over 22 years.

-- To expediate review, MSG narrowed its amendment request to extending permit deadlines. Extending permit deadlines required SEPA review because they were SEPA conditions. It took County five months to do the SEPA review. County refused to do SEPA by addendum as requested by Maytown but did new threshold determination instead.

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Hearing Examiner Review of Amendments:

-- FORP appeals threshold determination.

-- Examiner agrees that SEPA review should have been addendum, not threshold determination

-- MSG disputes need for examiner review of amendments, Examiner finds she has jurisdiction and approves amendments.

-- FORP appeals SEPA decision to Board of Commissioners (that only addendum required), loses and appeal to superior court and loses.

-- Amendment process took 18 months.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

On to the Five Year Review:

--In 2010, County issues a summary report pending the five year review. The report concludes that because no land disturbing activity had yet occurred, the new 2009 critical area ordinance (CAO) should apply.

--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 from 284 acres to 180 acres.

-- TCC 17.15.355(A) provides that "[a]uthorization to undertake regulated activities within critical areas or their buffers shall normally he valid for a period of the underlying permit," which in this case was 20 years.

--In a decision issued in December, 2011, the hearing examiner concludes that new CAO doesn't apply and that CAO conclusions reached in issuance of SUP still held.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Appeal of the Five Year Review – Objectivity Issues:

--Two environmental groups appeal decision to County Board of County Commissioners (BOCC)

-- Two of the three BOCC members were members and donors of one of the environmental groups that appealed.

-- BOCC directed staff (apparently before appeal) to evaluate whether permit was still considered active or valid because it hadn't been mined yet. BOCC usually didn't direct staff on permitting issues.

-- Aforementioned private meetings

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Just gets worse:

--Another BOCC member signed a petition to rezone part of the MSG

--At the appeal hearing in March, 2011, none of the BOCC members disclose their meetings with the chair of the environmental group or their membership in the other environmental group

--BOCC remands review back to examiner, directing that she review a supplemental habitat plan to determine whether any critical areas were on the gravel pit property under the 2002 CAO and if so, requiring the site plan to be amended to exclude critical areas.

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

MSG appeals:

--MSG judicially appeals BOCC decision

--Superior Court reinstates hearing examiner five year review decision by granting a summary judgment motion in favor of MSG.

-- Hearing examiner amendment review and judicial appeal took five months.

-- Amendment and five year process caused almost two years of delay

-- MSG receives letter to proceed and business then fails. Property reverts to Port and Port unable to sell it to anyone else.

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

MSG and Port file damages claim, asserting planning department intentionally obstructed project by:

(1) introducing a new "letter to proceed" requirement suddenly in 2009,

(2) refusing to process letter to proceed until FORP had input,

(3) refusing to honor the Department's 2008 determination that the Port had already complied with all water quality testing requirements,

(4) requiring Maytown to conduct extensive and costly water quality testing beyond the four data collection points listed under condition 6C,

(5) requiring Maytown to formally amend conditions 6A and 6C, rather than address its technical noncompliance through enforcement powers.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Intentional obstruction continued:

(6) refusing to treat Maytown's proposed amendments as minor administrative adjustments as the Department said it would,

(7) issuing a SEPA threshold determination rather than an addendum, which triggered more appeals,

(8) recommending that MSG undergo a new, critical areas study,

(9) including language in the letter to proceed that Department could impose additional conditions on the permit at subsequent five-year reviews, which MSG and the Port contend was meant to scare prospective mining companies away from the property.

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

MSG asserts department actions directed by Commissioners:

-- MSG attorney testified that planning manager told him that Commissioners had made him require a letter to proceed, to delay review of the request to get FORP input, to classify the amendments as major rather than minor, and to recommend a new CAO study.

-- MSG attorney also testified that the County attorney (distinct from the Commissioners' attorney) had told him that he and the planning manager were at risk of losing their jobs because they had tried to help the mining project proceed despite Commissioners' directives to stop it.

-- Port director testified he was at hearing where staff told Commissioners that project couldn't be stopped absent emergency such as endangered butterfly and Commissioner said "find an emergency".

-- County manager testified that when Commissioner learned of seasonal stream on project site, she considered this the evidence she needed to reopen SEPA

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Jury rules in favor of MSG and Port on all claims, finding that the County:

(1) tortuously interfered with the real estate contract between the Port and Maytown,

(2) tortuously interfered with Maytown's business expectancy,

(3) made negligent misrepresentations to both the Port and Maytown,

(4) made express assurances to both the Port and Maytown giving rise to a special duty to both, and

(5) violated Maytown's substantive due process rights in violation of Section 1983.

$8 million awarded to Port; $4 million awarded to MSG plus $1.1 million to MSG for attorney fees on Section 1983 claim

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Pertinent Issues on Appeal to Supreme Court:

1. Whether MSG needed to exhaust administrative remedies for tort claims.
2. Whether there was sufficient evidence for Section 1983 claim.
3. Whether attorney fees for administrative proceedings recoverable

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Weak Sauce -- Exhaustion Issue:

MSG and Port didn't appeal examiner approval of amendments, so County asserts failure to exhaust.

Land Use Petition Act, exclusive judicial review for final land use decisions, requires exhaustion, but LUPA doesn't include damages claims per RCW 36.70C.030.

County admits LUPA doesn't apply to damages claims, but argues that authorizing independent monetary claims without exhaustion undermines LUPA statutory framework.

Port and MSG argue they're not challenging validity of decision, which is what LUPA is about. They're arguing County's conduct.

RULING: No exhaustion required. Tortious conduct at issue, which in this case didn't involve validity of decisions. LUPA is validity of decisions.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Section 1983 Issue:

42 U.S.C. § 1983:

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.

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

More Damages:

MSG Asserts Substantive Due Process Claim:

14th Amendment (Substantive Due Process):

Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

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Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Section 1983 Jury Instruction:

"*Substantive Due Process Clause violation occurs when [the] government takes action against a person that is not rationally related to a legitimate government purpose.*"

Establishing such a violation *"requires proof that Plaintiff Maytown Sand and Gravel was deprived of rights in a way that* ***shocks the conscience*** *or interferes with rights that are implicit in the concept of ordered liberty*."

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Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Section 1983:

County argues insufficient evidence of (1) protected property interest and (2) conduct that shocks conscience.

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Section 1983 Property Interest:

Existing Permit is Protected Interest: Under prior rulings, 'property' under the Fourteenth Amendment encompasses more than tangible physical property. Protected property interests include all benefits to which there is a legitimate claim of entitlement. It necessarily follows that a permit to mine constitutes a protected property interest.

Permit Application Also Can Be Protected Interest: Court holds that a a requested permit gives rise to a cognizable property interest when there are articulable standards that constrain the decision-making process, i.e. when discretion to deny the final issuance of the permit is substantially limited.

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Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Court agrees with County that since permit contained expired pre-mining conditions that permit by itself wasn't constitutionally protected property interest to mine, BUT a protected property interest was created due to letters relied upon by MSG and issued by County staff (2018 rulings???) that permit had not expired and that Condition 6 requirements were otherwise met.

RULING: Special Use Permit plus assurance letter = protected property interest.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Shocking Conduct:

Section 1983 Plaintiff must prove that deprivation of property interest is "shocking":

From the WA Appeals Court: "*...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.' "*

The [US Supreme] 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.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Shocking Conduct:

Ruling: Conduct sufficiently shocking; consistent with federal case law on Section 1983 "shocking" conduct involving similar circumstances, in particular *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999),where the City strung a developer along for five years with shifting requirements in a transparent attempt to obstruct an environmentally contentious development project.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Attorney Fees in Administrative Proceedings:

Court of Appeals granted attorney fees to MSG for unnecessary administrative proceedings (most notably Examiner hearing on amendments) – Supreme Court reverses.

As noted by the Supreme Court: *The American rule requires each party to bear its own litigation costs and fees. The primary justification for adopting the American rule is that it encourages aggrieved parties to air their grievances in court. Since litigation is at best uncertain, one should not be penalized for merely defending or prosecuting a lawsuit, and ... the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel*

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Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Attorney Fees in Administrative Proceedings:

Supreme Court notes that Washington State case law bars recoupment of administrative legal costs as damages except in narrow, inapplicable set of circumstances.

In Washington, administrative attorney fees can be recouped as damages in malicious civil prosecution claims and abuse of process claims. Neither claim was brought forth by MSG or the Port.

Another exception to the American Rule is if a claim is brought in bad faith. The bad faith exception applies where the defendants actually know their conduct forces the plaintiff to litigate and the ability of the plaintiffs to prove actual damages is difficult, an award for attorney fees may be granted. But, exception has never been applied to administrative proceedings that preceded judicial appeal. Supreme Court finds exception inapplicable.

Burien II – The $$$ Sequel

Maytown Sand and Gravel LLC v. Thurston County, 423 P.3d 223 (2018)

Takeaways:

-- Appearance of fairness violations arguably not subject to damages by themselves, but can be used to establish improper purpose for tortious interference or "shocking" conduct for substantive due process claim.

-- Avoid any appearance that land use decision based upon political as opposed to code requirements.

-- Be careful about expanding opportunities for public input.

-- Be extremely careful about giving advice for potential purchasers

-- Be consistent in review procedures required of applicants.

"Magnificent Entry"

Thun v. City of Bonney Lake, _____ Wn. App. ___ (2018, Case No. 49690-9-II)

Ruling: Rezone not a takings just because one of several objectives may go beyond mitigating harm and instead confer an affirmative public benefit.

Thanks Mayor!

Thun v. City of Bonney Lake, 3 Wash.App.2d 453 (2018)

Article I, section 16 of WA Const:

"…No private property shall be taken or damaged for public or private use without just compensation having been first made…"

"Magnificent Entry"

Thun v. City of Bonney Lake, _____ Wn. App. ___ (2018, Case No. 49690-9-II)

Facts:

-- Thun owns approximately 36 acres near Bonney Lake city limits

-- A majority of the 20 acres is on a steep hillside that slopes into the Puyallup River Valley

-- The Thun property was originally zoned C-2 (commercial), which permitted 20 du/acre

-- In 2004, the CPSGMHB ordered the City to revise its zoning designations to comply with the GMA. GMA requires cities to protect open space areas between UGAs and open spaces that protect critical areas, including areas susceptible to erosion or sliding

"Magnificent Entry"

Thun v. City of Bonney Lake, _____ Wn. App. ___ (2018, Case No. 49690-9-II)

Facts:

-- In 2005 Thun enters into a P&S with a developer to construct a 575-unit condo complex on 36 acres of property, largely composed of steep slopes.

-- On 9/13/2005 the developer submits a site plan app for the condo complex. That same day the City adopted a rezone of the Thun property that reclassified all but 5.5 acres from C-2 to RC-5 (residential/conservation) pursuant to GMA requirements. City then denies site plan app as inconsistent with RC-5.

-- Thun asserts property devalued by rezone from $2.50-6.00 per square foot (depending on location on property) to 0.35 per square foot.

-- In a later pre-app conference, the City determined that the C-2 zoning would authorize a 131 unit condo complex on the property with retail and office space.

"Magnificent Entry"

Thun v. City of Bonney Lake, _____ Wn. App. ___ (2018, Case No. 49690-9-II)

Facts:

The purposes of the ordinance were cited by the City as:

(1) manage areas that are steep and prone to geologic instability,

(2) protect tree cover on areas that cannot be densely developed due to steepness,

(3) "protect the magnificent entry to [the City]," and

(4) comply with the GMA, which requires the City to identify open space corridors between urban growth areas.

Thanks Mayor!

Thun v. City of Bonney Lake, _____ Wn. App. ___ (2018, Case No. 49690-9-II)

Developer submits a declaration from the former Mayor, who was in office during the rezone:

"It appeared to me that the primary purpose of the [City] in adopting [the Ordinance] was not to address the danger of landslides. . . . I believe that the primary purpose of the ordinance was correctly express[ed] by the staff report recommending adopting of [the Ordinance] as follows:

> *'The current entry to Bonney Lake is magnificent because one arrives at the top of the plateau and finds the small City framed by tall trees. This imparts a pleasant sense of arrival. This gateway effect is lost if development continuous from Sumner to Bonney Lake.'"*

Thanks Mayor!

Thun v. City of Bonney Lake, _____ Wn. App. ___ (2018, Case No. 49690-9-II)

Developer challenges rezone as an "as applied" regulatory takings = as applied to his property, rezone ordinance creates takings.

Contrasted with "facial takings" = application of the challenged regulation to any property constitutes a taking because it destroys a fundamental attribute of ownership.

Thanks Mayor!

Thun v. City of Bonney Lake, _____ Wn. App. ___ (2018, Case No. 49690-9-II)

For "as applied" challenge, a takings occurs if

"*the challenged regulation goes beyond preventing a real public harm that is directly caused by the prohibited use of the property to producing an affirmative public benefit.*"

Thanks Mayor!

Thun v. City of Bonney Lake, _____ Wn. App. ___ (2018, Case No. 49690-9-II)

Court acknowledges that regulations often prevent harm and confer benefit at the same time, but rules that if predominant purpose is preventing harm, there's no takings:

"*the initial decision as to whether the predominant goal of the regulation is the prevention of a real harm to the public or the conferral of a benefit upon other publicly held property must be made according to the facts of each individual case*."

Thanks Mayor!

Thun v. City of Bonney Lake, _____ Wn. App. ___ (2018, Case No. 49690-9-II)

On appeal, Thun tries to argue that the objective of the ordinance is to go beyond addressing public harm to affirmatively require a public benefit by making Thun underwrite the "magnificent entry" of the City by restricting development on his property. Court disagrees:

1. Mayor's declaration on his understanding of the purpose of ordinance is not determinative as to its purpose. Prior case law states that the comments of single legislators as to their understanding of intent is not conclusive as to intent.

2. "*The evidence in this case makes clear that the predominant goal of the Ordinance was to prevent a real public harm that is directly caused by the prohibited uses of Thun's property. By restricting high density developments on the steep slopes of Thun's property, the City is able to protect the public from the safety and environmental concern that landslides and erosion present*."

Thanks Mayor!

Thun v. City of Bonney Lake, _____ Wn. App. ___ (2018, Case No. 49690-9-II)

Takeaway:

1. Ok, but dangerous, to list "affirmative public benefits" of ordinances that restrict development rights – arguably implicit in decision is that maintaining aesthetics is a public benefit.
2. In any ordinance whereas clauses be sure to focus on harm of property that ordinance is designed to prevent.
3. Avoid using the adjective "magnificent" in your purpose clause or someone may make fun of you.

Ruling:

Land Use Petition Act Applies to City-Initiated Site specific rezones.

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

Facts:

Case involves a legal challenge to a site specific extension of an overlay zone.

In 2009, the City formally adopted an amendment to its comprehensive plan that created the "Shaw–East Pioneer Overlay Zone" (SPO), which the City considers to be a gateway area.

The City wanted to use the overlay zone to create additional performance standards to encourage quality development in that area while allowing flexibility and creativity; to create a walkable, safe, and pedestrian-friendly community; and to require use of low-impact development practices.

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

Facts:

When the City adopted the SPO zone, Schnitzer's property, composed of three parcels totaling 22 acres, was located just outside city limits adjacent to the SPO zone.

Schnitzer's property was subsequently annexed along with ten other commercially zoned properties, but the SPO overlay wasn't extended to the group of parcels upon annexation.

In 2013, a year after annexation, Schnitzer requested and was given a rezone to convert a portion of his property from Business Park to Limited Manufacturing so that Schnitzer could build a 470,000 square foot warehouse.

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

Facts:

In January 2014, following the election of two new city council members who replaced two council members who voted in favor of Schnitzer's zoning amendment, the City adopted an emergency moratorium on all parcels within the recently annexed area, including the Schnitzer Property.

The stated purpose of the moratorium was to provide the City with sufficient time to consider whether to extend the SPO into all zones within the annexation area.

In Schnitzer's view, the City had ulterior motives. Schnitzer believed that, in reality, the proposed moratorium was a retaliatory measure designed to frustrate his development proposal.

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

Facts:

In April 2014, the planning commission reviewed the potential SPO expansion during the moratorium, and determined that there was no basis to extend the SPO into any portion of the annexation area, including the Schnitzer Property.

The City Council ultimately decided to only extend a modified version of the SPO zone to Schnitzer's three parcels and no other part of the annexation area.

The modified SPO zone imposed numerous additional restrictions on Schnitzer's property, including a maximum building size of 125,000 square feet

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

Facts:

Incriminating statements:

Mayor: "*This is—I can't see this as anything but spot-zoning. If—if it's not, then I can't say where spot-zoning exists*."

Councilmember: "*I don't like spot-zoning. I don't like targeting one property owner for different zoning than everybody else has. If we're going to do a Shaw Road overlay, you do it to the whole area*."

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

Fall Out:

Schnitzel files judicial appeal of ordinance applying the modified SPO to his property under the Land Use Petition Act, Chapter 36.70C RCW.

Schnitzel's complaint alleged that the City erroneously treated the SPO ordinance as a legislative action, when in fact it was a quasi-judicial permitting action that should have been subject to quasi-judicial permitting procedures and protections.

Schnitzer also contended that the City singled out his property and unfairly targeted it because the City's constituents disfavored the proposed project.

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

City defense: LUPA only applies to "land use decisions". A City initiated site specific rezone isn't a "land use decision."

Controlling Issue:

Does a city/county initiated site specific rezone qualify as a "land use decision" under LUPA?

The law:

LUPA grants the superior court exclusive jurisdiction to review a local jurisdiction's land use decisions with the exception of decisions subject to review by bodies such as the Growth Management Hearings Board. RCW 36.70C.030(1)(a)(ii).

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

RCW 36.70C.020(2):

"Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An **application** for a **project permit or other governmental approval** required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

Prior Ruling:

"[A] site-specific rezone is a change in the zone designation of a 'specific tract' at the request of 'specific parties.' " (emphasis added)

Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd., 176 Wash.App. 555, 570, 309 P.3d 673 (2013)

Dissent: The prior ruling was only dicta.

Appellate Court Decision:

No one applied for the SPO ordinance. It was a city initiated decision. Since there was no application, the SPO ordinance does not qualify as a "land use decision" under LUPA and LUPA does not apply. Case dismissed.

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

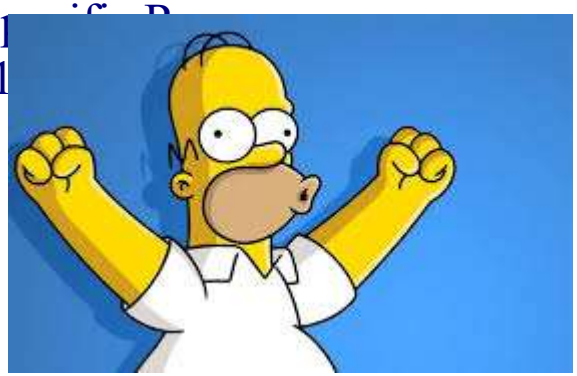
Court of Appeals Decision = Nowhere to Turn for Spot Zones:

Growth Management Hearings Boards only have authority to assess compliance with GMA and SEPA. They've specifically said they have no authority to adjudicate spot zoning issues.

Wrong! Supreme Court Reverses Court of Appeals:

There was a specific party who applied for the rezone – it was the City Council.

Change of Heart -- City Initiated Site Sp
Schnitzer West LLC v. City of Puyallup, 41



Reasoning of Supreme Court:

Only two ways to challenge land use decision: Land Use Petition Act or Growth Management Hearings Board.

The Court: *"[i]f a GMHB does not have jurisdiction to consider a petition, it must be filed in superior court under LUPA."*

I.E., Your PPT Presenter Mightily Vindicated!

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

GMHBs only have jurisdiction over amendments to comp plans or development regulations.

GMHBs don't have jurisdiction over challenges to site-specific land use decisions that don't qualify as development regulations or com plans

Challenges to site-specific land use decisions can only be brought under LUPA

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

Site specific land use decisions include site specific rezones.

What's a site specific rezone?

1. Specific tract of land,
2. Request for classification change, and
3. Specific party making the request

First Site Specific Factor: Schnitzer Property = Specific Tract of Land:

Final rezone ordinance carved his parcel out from adjacent parcels despite fact they were initially considered together with the entire annexation area.

Second Site Specific Factor: Schnitzer Property Subject to Reclassification:

SPO overlay zone limited manufacturing to ML-SPO; imposes a building size limitation; restricts the design, size, setback, and orientation of buildings; imposes landscaping, open space, and pedestrian infrastructure requirements; and establishes regulations pertaining to outdoor storage uses, storm water management, and signage.

Third Site Specific Factor: City Council is a specific party:

"the government is regularly characterized as approving its own actions. The Washington State Constitution contemplates government approval of its own actions by categorizing the governor's and the legislature's actions as "approval" prior to an act becoming law. Governmental approval for its own actions is also contemplated in the United States Constitution, which categorizes both the president's actions and Congress's actions as "approv [al]." U.S. CONST. art. I, § 7, cl. 2. Statutes also characterize the government as approving its own actions. For example, RCW 35A.12.130 requires every ordinance passed by the city council to be presented to and approved by the mayor."

Supreme Court also notes that Puyallup Municipal Code identified City Council as a party who may initiate a rezone.

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

Third Site Specific Factor: City Council is a specific party:

Supreme Court notes that "*limiting challenges exclusively to land use decisions proposed by nongovernmental parties would result in a framework under which the decision-maker's duties of fairness to an interested party change based upon the origin of the initial request.*"

If City initiated rezones are not subject to LUPA, this "*would effectively grant city councils the opportunity to make decisions with impunity, unreviewable by the superior court....*"

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

City argues that LUPA doesn't apply to legislative actions:

RCW 36.70C.020(2)(a): LUPA doesn't apply to "*applications for legislative approvals such as area-wide rezones and annexations*."

Supreme Court determines this language doesn't mean that all legislative actions are excluded, but only those similar to area-wide rezones and annexations.

Change of Heart -- City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

Speaking of Spot Zone:

A spot zone is well described in *Narrowsview Preservation Association v. City of Tacoma*, 84 Wn.2d 416, 421 (1974):

"We have recently stated that illegal spot zoning is arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for use classification totally different from and inconsistent with the classification of the surrounding land, not in accordance with the comprehensive plan"

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

Major Ruling:

Inactive permits can be deemed abandoned and on that basis a city or county can refuse to re-activate them.

Abandonment established in this case by inactivity (for 24 years) + expressed intent to abandon (choosing alternative permit) + overt acts consistent with abandonment

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

General Facts:

- In 1990 Lemay applies for rezone from General Use to Planned Development District.
- County advises can meet same objectives of rezone with unclassified use permit. Letter from planning director confirms that Lemay had been given two options (rezone and unclassified use permit) and chose unclassified use permit.
- UP permit approved in 1990 by hearing examiner for three parcels – one was for golf course and two others for residential development
- In 1994 zoning for project area was downzoned to rural densities in response to GMA and placed outside an urban growth area
- RMG purchases golf course parcel in 2005.

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

General Facts:

- Between 2005 and 2013 RMG unsuccessfully attempts to have Pierce County upzone the golf zone parcel to higher density residential

- In 2014 RMG sends proposal to Pierce County requesting development of golf course at density of 1990 requested rezone density, noting that the county had converted Lemay's rezone request to an unclassified use permit application over Lemay's objection.

- County responds with administrative determination that residential development was set at current (not 1990 rezone request) densities

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

General Facts:

- RMG appeals administrative determination to hearing examiner. Examiner concludes that Lemay was given choice of UP or rezone and chose UP and that approval of UP did not include approval of rezone.

- RMG files judicial appeal of examiner decision. At same time it requests PC to reactivate the LeMay rezone application from 24 years earlier.

- PC responds with second administrative determination that rezone application had been abandoned.

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

General Facts:

- RMG appeals second administrative determination to hearing examiner.
- Examiner concludes that rezone was abandoned based upon the following actions:
  - staff report for UP that noted change in application from rezone to UP,
  - LeMay's testified at UP hearing that application had changed to UP,
  - RMG had sought to have property rezoned in separate applications.

- Examiner also concluded that seeking rezone after 25 years is inconsistent with the emphasis upon expeditious review of permit applications, including requirements for timely processing of land use applications, doctrine of finality and 21-day appeal period.

-

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

Arguments before Court of Appeals:

- RMG asserts that UP approval included approval of rezone.

- Court finds no findings or other references in examiner UP decision that includes rezone. The County's rezone map in 1990 had a UP9-90 on the subject parcel, but the court found this could have simply been referencing the approved UP permit.

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

Arguments before Court of Appeals:

- RMG asserts that rezone not abandoned.

- Court acknowledges that issue of abandoned permits hasn't been addressed by Washington courts.

"*Here, the Pierce County Code requires all reviewing departments to 'complete an initial review within **30** days from the application filing date.' ..., 'the Director or Examiner shall issue a notice of final decision on a permit within **120** days, of County review time, after the Department accepts a complete application ..., a local government must provide a written determination within **28** days. If, as RMG suggests, the property owners did not intend to withdraw the application, then the time to request action on the application would have been at the conclusion of these time limits. **The 'property owner is responsible for monitoring the time limitations and review deadlines for the application. The County shall not be responsible for maintaining a valid application**.' PCC 18.160.050(F). After giving due deference to the hearing examiner's construction of the law, the examiner's conclusion that an application can expire or be abandoned is not an erroneous application of the law*."

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

- Court also agreed with examiner's findings that RMG and LeMay intended to abandon application.

- RMG argued that doctrine applicable to abandonment of nonconforming uses should apply = intent to abandon plus overt act of abandonment.

- Court responds that if doctrine applied, it was met – RMG expressed intent (by choosing UP option) and several overt acts as listed by examiner.

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

Takeaway – How Clear Do You have to Be?????

PC letter confirming that UP Option had been exercised:

"I wish to summarize our meeting last Tuesday in regard to the Classic Golf Course and what was necessary in order for the course to open.

I first presented you last year an[d] at this meeting with two options. The course's construction could open with the approval of either a Planned Development District (PDD) or with an Unclassified Use Permit (UP), both requiring a public hearing before a Hearing Examiner. A PDD was suggested if uses other than the golf course were to be proposed. However, a PDD was likely to take more time to complete since more factors will be examined in a multiple use project. ***Therefore, it was determined by your group to have an Unclassified Use Permit*** *requesting only the golf course with land set aside for future development. It was understood that a Major Amendment to the Unclassified Use Permit could be requested in the future and would be necessary if further land development is to take place…."*

What's missing?

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

Missing Verbiage:

"Your rezone application is understood to be withdrawn. If this understanding is incorrect, please respond in writing to this letter within ten calendar days. If I receive no response, I will send you written confirmation that your rezone application is deemed withdrawn."

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

Strategies for expiring abandoned applications (order of preference) in absence of currently existing expiration ordinances:

1. Adopt an Ordinance – provide notice, opportunity for action and written confirmation of termination.

2. Adopt administrative procedure -- provide notice, opportunity for action and written confirmation of termination.

3. Do nothing and hope that really old permit applications satisfy RMG criteria

Abandoned Permits
RMG Worldwide LLC v Pierce County, 2 Wn. App. 2d 257 (2017)

Example of Expiration Ordinance:

PCC 18.160.020:

Any [land use permit] application ... that was pending on July 28, 1996, that does not contain all submittal items and required studies that are necessary for a public hearing or has not been reviewed by the Hearing Examiner in a public hearing shall become null and void one year after registered notice is mailed to the applicant and property owner. A one time, one year time extension may be granted by the Hearing Examiner after a public hearing if the extension request is submitted within one year of the effective date of this Chapter and [the] applicant has demonstrated due diligence and reasonable reliance towards project completion.

Permit Fees
Community Treasures v San Juan County, 427 P.3d 647 (2018)

Ruling: Assessment of permit fees is a decision subject to the Land Use Petition Act and timely judicial appeals must be filed within 21 days of permit approval.

Permit Fees
Community Treasures v San Juan County, 427 P.3d 647 (2018)

Facts:

Class action lawsuit filed against San Juan County over amount of land use permit fees assessed almost three years earlier.

Permit Fees
Community Treasures v San Juan County, 427 P.3d 647 (2018)

Law:

RCW 36.70C.040(3): A petition for review of a land use decision must be filed within 21 days of the issuance of the decision.

RCW 36.70.020(2): *"'Land use decision' means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:*

(a) An ***application*** *for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used."* (emphasis added)

Permit Fees
Community Treasures v San Juan County, 427 P.3d 647 (2018)

Law:

SJCC 18.80.020, which governs project permit applications in San Juan County, states that a completed application must include the applicable permit fee. Therefore, the application fee is part of the land use permit application, and as such the fee qualifies as part of the land use decision subject to LUPA review.

Ruling: The application fee is part of the land use decision subject to the exclusive judicial review of LUPA. LUPA requires appeals to be filed within 21 days of permit approval. The appeal is dismissed as untimely.

Finality Doesn't Undermine Separate Development Agreement
City of Union Gap v. Printing Press Properties, LLC 2 Wn. App.2d 201 (2018)

Summary Facts:

Valley Mall Boulevard was built and maintained by Union Gap.

The centerline of the boulevard generally serves as the dividing line between the cities of Union Gap and Yakima.

Printing Press (a business) borders the boulevard from within the City of Yakima.

Under a development agreement between Printing Press and Union Gap, Union Gap acquired funding and coordinated improvements to Longfibre Road, which provided access to Printing Press.

The development agreement required Printing Press to acquire permission from Union Gap to access Valley Mall Boulevard

Finality Doesn't Undermine Separate Development Agreement
City of Union Gap v. Printing Press Properties, LLC 2 Wn. App.2d 201 (2018)

Summary Facts: **Fight!**

Lowes then relocates from Union Gap to the Printing Press property, a major revenue loss for the small town (pop. 6,110) of Union Gap.

Lowes wants access to Valley Mall Boulevard and tells Printing Press it will pay for the access if Printing Press gets it approved.

Printing Press asks Union Gap for access. Union Gap denies permission on basis of poor site distance. Printing press asserts this is retaliatory for Lowe's relocation.

Printing Press then gets permits from Yakima for the excavation and improvements necessary to make the access point to Valley Mall Boulevard. Union Gap doesn't appeal the permit decisions.

Finality Doesn't Undermine Separate Development Agreement
City of Union Gap v. Printing Press Properties, LLC 2 Wn. App.2d 201 (2018)

Issue: Does the doctrine of finality preclude Union Gap from enforcing its development agreement restriction on Printing Press access?

Doctrine of finality = can't challenge a land use decision if don't appeal the decision within 21 days. Too late afterwards, even if permit illegally issued.

Finality not applicable here, because Union Gap does not directly challenge the issuance of permits by Yakima. If a cause of action arises independently of the relevant land use petition, the claim is not barred.

Examples of independent claims – (1) negligent delay in permit issuance; (2) enforcement of private covenants.

Finality Doesn't Undermine Separate Development Agreement
City of Union Gap v. Printing Press Properties, LLC 2 Wn. App.2d 201 (2018)

Fact: Part of Printing Press parcel was within Union Gap when development agreement executed. Yakima annexed this portion after execution and before enforcement by Union Gap of access restriction.

Issue: Can Union Gap enter into development agreement for property located partially outside city limits?

RCW 36.70B.170: *A local government may enter into a development agreement with a person having ownership or control of real property within its jurisdiction.*

Ruling: Union Gap can enter into agreement with entire property when only a portion of the property is within its city limits. RCW 36.70B.170 doesn't require entire property to be within city limits.

Finality Doesn't Undermine Separate Development Agreement
City of Union Gap v. Printing Press Properties, LLC 2 Wn. App.2d 201 (2018)

Issue: Does Union Gap have authority to be restricting access rights outside its jurisdiction?

Ruling: Since restrictions are contractual, as opposed to exercise of police powers, Union Gap can restrict access within the City of Yakima.

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Ruling:

State of Washington owned fish barrier culverts violate Native American treaty right to fish provisions and barriers be removed to restore fish runs.

9th Circuit Court upholds District Court order requiring Washington State to replace hundreds of fish culverts to enable passage of fish.

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Facts:

In 1854 and 1855 Indian tribes entered into a series of treaties with the Isaac Stevens, Governor of the Washington Territory, covering that area that now encompasses much of Washington State relinquishing large swaths of land in exchange for off-reservation fishing rights.

A provision called the "fishing clause," of essentially identical language in all the treaties, guaranteed "*the right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory*."

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Facts:

In 2001, 21 tribes, joined by the United States, filed a complaint in federal district court contending that Washington State was violating the fishing clause by building and maintaining culverts that prevented mature salmon from returning from the sea to their spawning grounds; prevented smolt (juvenile salmon) from moving downstream and out to sea; and prevented very young salmon from moving freely to seek food and escape predators.

In 2007, the district court held that in building and maintaining these culverts Washington had caused the size of salmon runs to diminish and that Washington thereby violated its obligation under the Treaties.

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Facts:

In interpreting the fishing clause, the District Court determined as follows:

"*During the negotiations leading up to the signing of the treaties, Governor Isaac Stevens and other negotiators assured the Tribes of their continued access to their usual fisheries. Governor Stevens assured the Tribes that even after they ceded huge quantities of land, they would still be able to feed themselves and their families forever. As Governor Stevens stated, 'I want that you shall not have simply food and drink now but that you may have them forever.'"*

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Facts:

The District Court found that salmon stocks in the Case Area have declined "alarmingly" since the Treaties were signed, and "dramatically" since 1985.

The court wrote, "A primary cause of this decline is habitat degradation, both in breeding habitat (freshwater) and feeding habitat (freshwater and marine areas).... One cause of the degradation of salmon habitat is ... culverts which do not allow the free passage of both adult and juvenile salmon upstream and downstream."

The "consequent reduction in tribal harvests has damaged tribal economies, has left individual tribal members unable to earn a living by fishing, and has caused cultural and social harm to the Tribes in addition to the economic harm."

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Facts:

9th Circuit found that Washington has acted affirmatively to build and maintain barrier culverts under its roads. The State's barrier culverts within the Case Area block approximately 1,000 linear miles of streams suitable for salmon habitat, comprising almost 5 million square meters. At the time of district court trial there were 1,114 state-owned culverts in the case area and at least 886 of them blocked fish access to significant habitat.

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Facts:

A WDFW and WSDOT report to the legislature concluded that fish passage at human made barriers such as road culverts is one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington

District Court concluded that if these culverts were replaced or modified to allow free passage of fish, several hundred thousand additional mature salmon would be produced every year, several times the 200,000 salmon currently existing in the area as identified in the WDFW/WSDOT report.

District court further concluded that "*under the current State approach, the problem of WSDOT barrier culverts in the Case Area will never be solved*."

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Facts:

WA asserted that cost of replacement would be $2.3 million per culvert, District Court determined that historical cost average $660,000 per culvert

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Facts:

District court judgment:

State, in consultation with the Tribes and the United States, ordered to prepare within six months a current list of all state-owned barrier culverts within the Case Area.

DNR, State Parks, and WDFW ordered to correct all their barrier culverts on the list by the end of October 2016.

WSDOT ordered to correct many of its barrier culverts within seventeen years, and to correct the remainder only at the end of the culverts' natural life or in connection with independently undertaken highway projects.

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Legal Analysis:

9th Circuit recognizes that federal courts have long construed federal tribal treaties in favor of the tribes: *The language used in treaties with the Indians should never be construed to their prejudice*

"Because treaty negotiations with Indians were conducted by 'representatives skilled in diplomacy,' because negotiators representing the United States were 'assisted by ... interpreter[s] employed by themselves,' because the treaties were 'drawn up by [the negotiators] and in their own language,' and because the 'only knowledge of the terms in which the treaty is framed is that imparted to [the Indians] by the interpreter employed by the United States,' a 'treaty must ... be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians"

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Legal Analysis:

The 9th Circuit determined that for the Native Americans, the principal purpose of the treaties was to secure a means of supporting themselves and that an adequate supply of salmon was not much less necessary to the existence of the Indians than the atmosphere they breathed.

"The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them."

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Precedent:

9th Circuit looked to a couple cases that inferred water rights to sustain farming, fishing and hunting rights. Just as water rights inferred into those two cases, adequate fish stock inferred for treaty right to fish.

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Washington tried to argue that US had waived treaty enforcement by failing to object to plans prepared by Washington to remediate fish problems in forest roads and also by imposing culvert design standards upon WSDOT culverts that served as fish barriers.

Court determined waiver didn't apply. United States had power to abrogate treaties only through Act of Congress that clearly expresses an intent to do so. No Act of Congress involved here. Also, treaty rights belong to tribes, not Congress, so Congress can't waive them.

United States et. al. v. State of Washington, 853 F.3d 946 (2017)

Washington sought an injunction against the US requiring it to fix its culverts. WA asserted that if Washington culverts violate treaty rights, so too do US culverts. WA contended that requiring it to fix its culverts placed a disproportionate responsibility on WA to fix fish problems. 9th Circuit denies claim on basis of sovereign immunity and lack of standing to assert treaty rights of tribes.

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

Key Rulings:

Wisconsin's Lot Combination Rule Didn't Exact a Takings on Petitioners' Property

Under the right circumstances, the unit of measurement for a takings isn't confined to a single lot.

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

What is a Lot Combination/Merger Ordinance?

An Ordinance mandating merger of adjoining nonconforming lots in common ownership.

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

Examples:

Edmonds Community Development Code 17.40.030(C)

Combination. If, since the date on which it became nonconforming due to its failure to meet minimum lot size or width criteria, an undeveloped nonconforming lot has been in the same ownership as a contiguous lot or lots, the nonconforming lot is to be and shall be deemed to have been combined with such contiguous lot or lots to the extent necessary to create a conforming lot and thereafter may only be used in accordance with the provisions of the Edmonds Community Development Code, except as specifically provided in subsection (D) of this section.

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

Facts:

Regulatory Background:

- Wisconsin DNR adopts rules pursuant to the federal Wild and Scenic Rivers Act that required lot combinations along the St. Croix River to protect river resources.
- The lot combination rule requires adjoining lots in common ownership to be combined unless they each have at least one acre of land suitable for development
- The DNR rule required localities to adopt the same provision, which was adopted by St. Croix County
- The lot combination rule was adopted in 1976

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

Facts:

The Murrs

-Four Murr siblings came into ownership of adjoining lots along the St. Croix River.

-The parents of the siblings bought the two adjoining lots at two different times and subsequently conveyed them to the siblings on different dates.

-The parents bought the first lot, Lot F, in 1960 and built a cabin on it. They purchased the second lot, Lot E, in 1963.

-Lot F was conveyed to the Murrs in 1994 and Lot E in 1995

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

Facts:

The lots

- The lots have the same topography. A steep bluff cuts through the middle of each, with level land suitable for development above the bluff and next to the water below it.
- Each lot is approximately 1.25 acres in size, but because of the waterline and the steep bank they each have less than one acre of land suitable for development with a combined 0.98 acres of developable land.

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

Facts:

The Merger

- Around 2005 the siblings became interested in moving the cabin on Lot F to a different portion of the lot and selling Lot E to fund the project.
- The siblings were advised of the lot merger and attempted to get a variance, which was denied by the St. Croix Board of Adjustment
- The siblings allege a takings and lose all the way up the Wisconsin state judicial system. Petition granted to US Supreme Court.

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

Facts:

The Impact

- Government appraisals showed value of Lots E and F as separate developable lots to total $771,000. As merged, the value only dropped to $698,000. Lot F by itself was worth $373,000.
- Siblings submit "counterfactual" appraisal that if Lot E were sold as an undevelopable lot, it would only be worth $40,000 under the lot merger ordinance.

Law:

The Takings Clause of the Fifth Amendment provides that private property shall not "***be taken for public use, without just compensation***."

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

Law:

Regulatory Taking:

Compensation can be required for more than just physical appropriation. "Regulatory takings" were first recognized in the 1922 case of Pennsylvania Coal Co. v. Mahon, 260 US 393, where the court ruled that "*while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking*."

Regulatory Takings Complex and fact specific:

"*This area of the law has been characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances*.'"

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

Law:

Regulatory Taking Categorical threshold:

- *With limited exceptions, a law that denies all economically beneficial or productive use is a taking.*

Beyond the threshold – balancing public need verses private burden (Penn Central analysis):

- *If value is left a takings may still occur based upon a complex of factors including: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.*

Issue Presented:

What is the proper unit of property against which to assess the effect of the challenged governmental action?

Specifically for the Murrs, when looking at the impact on them, do you look at the reduction in value and use of Lot E, or the combination of Lots E and F?

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

Precedents Regarding Units:

Court historically doesn't just single out part of property affected by regulation and then declare total takings:

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) – Impacts of historic preservation ordinance prohibiting office tower on top of Penn Central station were assessed as to impact to value of property as a whole as opposed to just air rights above station.

Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) – Effects of 32 month moratorium not just based upon 32 month period but upon overall impact on development prospects.

Getting Murr Specific:

Court rejects approach of both Wisconsin and the Murrs:

Wisconsin: State law always sets the unit of measurement – in this case the lot combination rule merged the lots so when doing takings analysis Lots E and F should be combined, i.e. it's just a 10% reduction in value!

Murrs: Lots matter and lot lines always set the unit! The value of Lot E is reduced to almost nothing because of the lot combination rule.

Getting Murr Specific:

Court disagrees with Wisconsin argument:

"*....States do not have the unfettered authority to 'shape and define property rights and reasonable investment-backed expectations,' leaving landowners without recourse against unreasonable regulations*"

Getting Murr Specific:

Court disagrees with Murr rationale:

1. Lot combination/merger ordinances is a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago.
2. Merger provisions often form part of a regulatory scheme that establishes a minimum lot size in order to preserve open space while still allowing orderly development.
3. Relying on lot lines only would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

How to Determine Unit:

"…[N]o single consideration.." can be used to set the unit. A number of factors must be considered, including:

1. the treatment of the land under state and local law;
2. the physical characteristics of the land;
3. the prospective value of the regulated land;
4. whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts.

The reasonable expectations at issue derive from background customs and legal tradition

Murr Takings Unit is Merged Lot:

Court concludes that merged lots is appropriate unit for takings analysis based on following factors:

1. Effects of restrictions – lot merger requirements have legitimate state purpose in protecting river, consistent with widespread understanding that lot lines are not dominant or controlling in every case. The restrictions were also voluntarily assumed since the lots transferred ownership after adoption of the combination rule.
2. Physical Characteristics of Property – The lots are long and narrow with limited development potential. They are along a sensitive river where environmental regulations should be anticipated.
3. Value of Lot E to F: Combining the lots strongly mitigates against the reduction in value to E by enhancing the value of F. Privacy and recreational space is increased, as are options for building sites.

Unit of Measurement
Murr v. Wisconsin, 582 U.S. __ (2017)

No Taking When Unit is Merged Lots:

With unit regarded as combined lot, there clearly is no regulatory taking under *Penn Central* takings analysis:

1. No categorical takings – Murrs have not been deprived of all economically beneficial use.
2. Burden on Property Owner Minor - Value reduced by less than 10%.
3. No big investment backed expectations – Murrs acquired ownership after lot combination rule was adopted – they knew or should have known this was coming.
4. Nature of government action – Combination rule was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.