LAND USE
CASE LAW UPDATE

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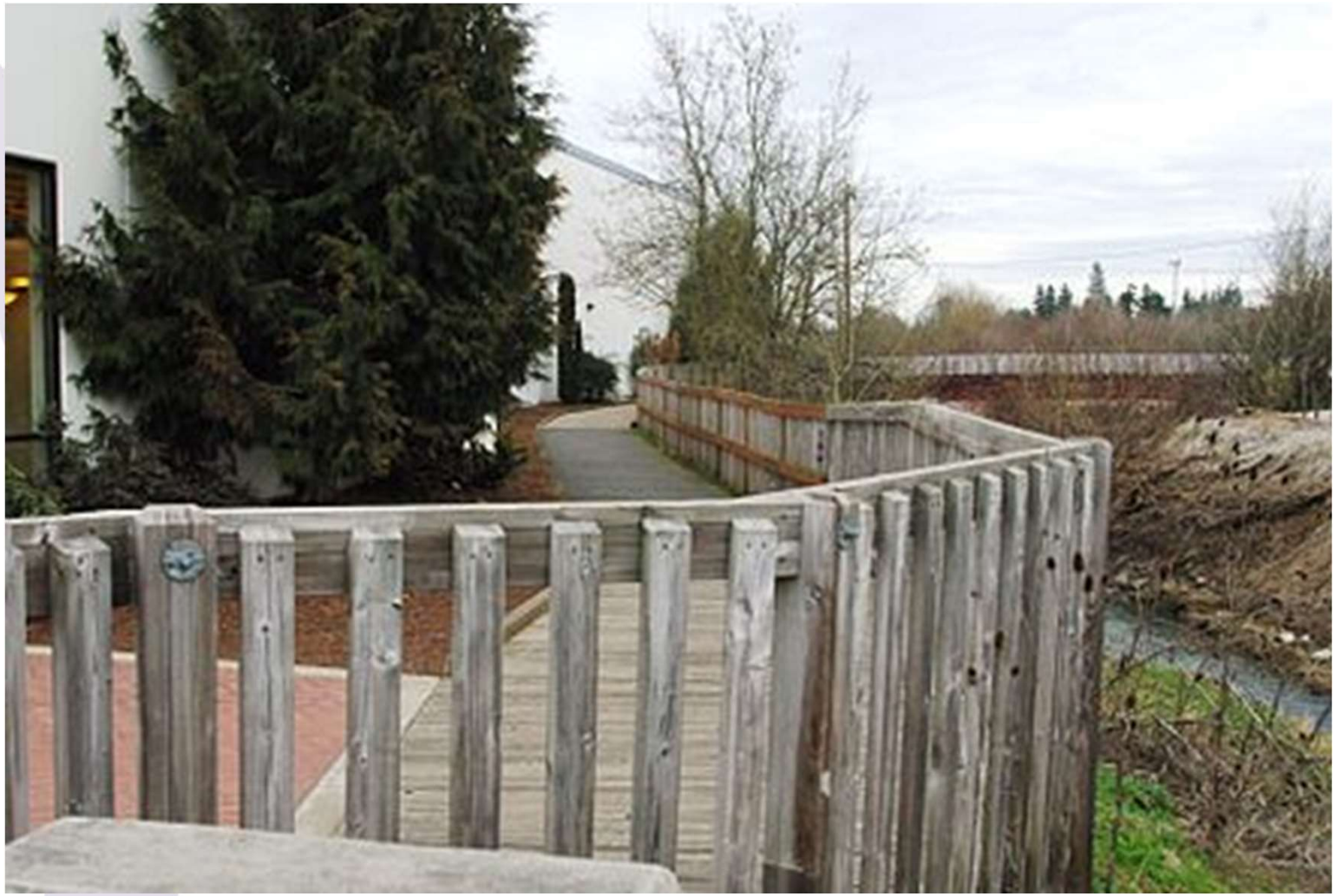

Dolan Bike Path

Some Gross Oversimplifications:

1. ***Greensun Group, LLC v. Bellevue***, making up your permitting standards as you go along = damages, damages, damages

2. ***Church of the Divine Earth v. City of Tacoma***, 426 P.3d 268 (2018) -- 64.40 liability requires unreasonable or knowing conduct.

3. ***AHO Construction I, Inc. v. City of Moxee***, ____Wn. App. _____, No. 35558-6-III (2018), City Council responsible for knowing major issues raised in exhibits of closed record review.

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

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

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

First in Time Sells a Dime
Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Facts:

- In 2012, Passage of Initiative 502 legalizes retail sale of recreational marijuana.
- In November 29, 2012, Greensun buys a shop and makes upgrades in anticipation of going into retail pot business. Complete building permit applications were filed in 2013.
- Greensun applied for state retail pot license and by March 1, 2014 was listed as one of 19 qualified applicants for Bellevue
- On March 13, 2014 Bellevue adopted its 1000 foot separation rule, which prohibits recreational pot retail shops from locating within 1,000 feet of each other.

First in Time Sells a Dime
Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Facts:

- On May 21, 2014, Par 4, another pot retail establishment, filed a complete building permit application.
- On May 27, 2014 Bellevue advised a Seattle Times Reporter that it would determine first in for purposes of the 1000 separation rule as first to file a complete building permit application.
- On June 24, 2014 Bellevue advised the marijuana license applicants that it had revised its first in rule from filing of first complete building permit application to issuance of first state retail pot license.
- On June 7, 2014 state liquor control board issues all four licenses available to Bellevue pot retailers, which includes Par 4 and Greensun. Greensun's license was issued second that day, because it had been subject to a restraining order earlier in the day by another competing retailer.

First in Time Sells a Dime
Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Facts:

- Greensun denied City business license because Par 4 established first within 1,000 feet.
- Court of Appeals subsequently invalidates "first in time" rule because it was never adopted according to formal rule making.
- Greensun subsequently seeks to amend its judicial complaint to add claim for tortious interference with a business expectancy.
- Trial court dismisses tortious interference claim via Bellevue's summary judgment motion. In doing so, trial court had to find there was no material question of fact supporting Greensun's tortious interference claim.

First in Time Sells a Dime
Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Law:

A plaintiff must prove five elements to establish a prima face case of tortious interference with a business expectancy:

1. The existence of a valid business expectancy;
2. That the defendant had knowledge of that expectancy;
3. An intentional interference inducing or causing termination of the expectancy;
4. That the defendant interfered for an improper purpose or used improper means; and
5. Resultant damage.

If a plaintiff establishes all five elements, the defendant may demonstrate a privilege protecting its actions.

First in Time Sells a Dime
Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Law:

Did Greensun have a valid business expectancy?

- To establish a valid business expectancy, courts require something less than an enforceable contract.
- Courts allow tortious interference claims "*where a defendant's acts destroy a plaintiff's opportunity to obtain prospective customers*."
- Washington courts require a plaintiff to show only that its future business opportunities are a reasonable expectation and not merely wishful thinking.

First in Time Sells a Dime
Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Law:

Did City have knowledge of business expectancy?

- The facts need merely show the defendant had awareness of some kind of business arrangement.
- Material question of fact whether City new that Greensun intended on opening pot shop and selling pot to customers.

First in Time Sells a Dime
Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Law:

Did City interfere with business expectancy?

- City argues that good faith enforcement of its 1000 foot rule doesn't constitute intentional interference. Court rules good faith not relevant.
- A party intentionally interferes with a business expectancy if it desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action.
- Material question of fact existed whether City intentionally interfered since it notified Greensun it couldn't open its retail store since Par 4 had first in status.

First in Time Sells a Dime
Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Law:

Did City interfere for an improper purpose or used improper means?

- Courts can consider a city's arbitrary and capricious actions as evidence of improper means.
- A court need not find that a defendant acted with ill will, spite, defamation, fraud, force, or coercion in order to find improper purpose or means.
- Arbitrary and capricious refers to willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.

First in Time Sells a Dime

Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Law:

Court found conduct of City to be arbitrary and capricious because it kept changing its mind when it's "first in" rule proved to be unworkable –

First it said the rule was first complete building permit application, then said building permit doesn't count if liquor control board hasn't qualified business for state license and then city changed its mind again and said first state license gave first in rights even though state had no system for determining which license was issued first.

Quote from Bellevue staff: "*We did not issue a written policy about [the "first in" rule]. We didn't publish it. We had to make decisions on the fly and—Well, that's probably not a good way to say it*."

First in Time Sells a Dime
Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Law:

Could plaintiff prove resultant damage?

- A party must prove a claim of damages with reasonable certainty. Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.
- Court found material question of fact on damages since Greensun was able to identify its sales records in a similar store it opened in Des Moines. The evidence also showed that Par 4 had made $300,000 in sales its first month in Bellevue, which was comparable to the Des Moines sales.

First in Time Sells a Dime

Greensun Group, LLC v. Bellevue, No. 77635-5-I (Wash. Ct. App. Mar. 4, 2019)

Law:

Could City prove affirmative defense of privilege if elements of tortious interference are met?

- Good faith may privilege an interferer's actions and thereby serve as an affirmative defense to a tortious interference claim. City claimed its actions were privileged because they were based upon a good faith interpretation of zoning code.
- That the interferer is reasonably mistaken about the law does not defeat the privilege. An interferer may assert the good faith privilege based on an honest but incorrect belief.
- Applying the evidence in light most favorable to city as required for summary judgment motion, Court found material question of fact regarding privilege defense, but found the City's ad hoc and constantly changing decision making "troubling."

A Teachable Moment – Nolan/Dolan Analysis

***Nollan v. California Coastal Commission*, 483 US 825 (1987):**

Nexus. California required public access across beachfront in return for converting bungalow to three-bedroom home. Court struck down condition since it wasn't reasonably related, it had no nexus, to the burden of the development – it failed to advance any legitimate state interest.

A Teachable Moment – Nolan/Dolan Analysis

Dolan v. City of Tigard, 512 US 374 (1994): Proportionality. Dedication of floodplain area required to handle increased stormwater runoff. Court had no problem with this requirement, but found a takings when the City required that the floodplain space be developed for a bicycle and pedestrian trail. City had failed to show that access requirements were reasonably related in "rough proportion" to public access requirement.

Court placed burden on City to show the relationship.

A Teachable Moment – Nolan/Dolan Analysis

Exactions – State Law – One for the County

Sparks v. Douglas County, 127 Wn.2d 901 (1995): Right of way dedication requirements for frontage improvements did not necessitate precise showing that developer's fair share merited improvements – fact that development would generate traffic along frontage enough since only need rough proportionality.

A Teachable Moment – Nolan/Dolan Analysis

Exactions – State Law – One for the Developer

Benchmark Land Co. v. City of Battleground, 103 Wn. App. 721 (2000), affirmed on other grounds, 146 Wash.2d 685 (2002): Condition requiring funding of road improvements invalidated when funding was for road along back perimeter of subdivision and there was no evidence that the subdivision contributed traffic to the road.

A Teachable Moment – Nolan/Dolan Analysis

Burton v. Clark County, 91 Wn. App. 505 (1998): "Road to nowhere". Court invalidated a stub road because County failed to show that the road stub would connect any time in the foreseeable future. Court created a four part test for determining whether a condition constitutes a takings:

1. Agency must identify the public problem(s) addressed by the condition;
2. Agency must show that proposed development will create or exacerbate public problem;
3. Agency must show that the condition tends to solve, or at least alleviate, the identified public problem.
4. Agency must establish rough proportionality.

Exactions – Landlocked Properties

Luxembourg Group, Inc. v. Snohomish County, 76 Wn. App. 502 (1995): Court invalidated condition requiring developer to provide access to landlocked parcel, where developer did not create landlocked condition.

Unlimited v. Kitsap County, 50 Wn. App. 723 (1988): Dedication of right of way to serve adjoining landlocked property takings because development didn't create landlock problem and there was no evidence that adjoining property would be developed anytime in the foreseeable future or that the road would pass through the adjoining development in the foreseeable future.

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.

(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 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.

Know the Record AHO Construction I, Inc. v. City of Moxee ____Wn. App. _____, No. 35558-6-III (2018)

Pertinent Rulings:

In order for a litigant to establish exhaustion of administrative remedies, the litigant must first raise the appropriate issues before the agency.

In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record

City Council responsible for knowing major issues raised in hearing exhibits of closed record review.

Know the Record AHO Construction I, Inc. v. City of Moxee ____Wn. App. _____, No. 35558-6-III (2018)

The Mission:

We must decide how loud, listing, learned, legally lucid, and longwinded a party's presentation of an issue or legal argument must be before an administrative agency in order to exhaust remedies. We hold that Aho sufficiently exhausted its remedies. We reverse the dismissal of Aho's LUPA action.

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

Facts:

Aho Construction submits applications to the city of Moxee to rezone and subdivide a twenty-two-acre tract into 91 single-family lots

The subdivision application plat map did not extend an existing city street, Chelan Avenue, through the subdivision. The proposed plat instead depicted Chelan Avenue terminating one-half block inside the subdivision and near the westerly border of the subdivision and recommencing in an easterly direction one-half block before Chelan Avenue would exit the subdivision.

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

Facts:

Moxee Police Chief Mike Kisner responded with concerns about the break in Chelan Avenue's continuity in written comment to the SEPA official as follows:

It appears from a logical stand-point that it [Chelan Avenue] should be extended through the plat from Faucher Road [west side of the subdivision] to the proposed stub-out on the east side of the plat…Chelan Avenue is an important local access connection through this side of the city. It starts at Centennial Street and connects to the west side of Faucher Road. This proposal makes the obvious connection on the east side of Faucher Road but does provide a continuous connection to the east. This discontinuance of street connection will reduce our response time to this area and therefore does not promote the public health, safety and welfare of the citizens of Moxee.

Facts:

Trevor Lenseigne, operations chief of East Valley Fire Department, also wrote concern to Moxee's SEPA official:

In the proposed plat, it would be necessary for our large vehicles to make additional turning movements or drive around entire blocks to access certain locations if Chelan Avenue is not extended easterly. This could delay our response times in an emergency situation.

We believe it would be in the public's best interest if Chelan Avenue were extended through the plat, as it would provide us with better access to the proposed neighborhood and to future neighborhoods to the east.

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

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We believe it would be in the public's best interest if Chelan Avenue were extended through the plat, as it would provide us with better access to the proposed neighborhood and to future neighborhoods to the east.

Facts:

Benjamin Annen, Moxee's consulting engineer, also wrote to the city SEPA official:

The preliminary plat layout should be revised to extend Chelan Avenue from Faucher Road, continuous through the length of the development to the east property line, with provisions for extending in the future. Continuity within the roadway network is important as it provides consistent roadway connectivity, a reliable block system for various modes of transportation, and improved access for emergency vehicles. Consistent with previous plats and continuity, typical block lengths should range from 250 feet to 700 feet in length. Because the distance between Charron Road and Moxee Avenue is approximately 1,300 feet, it is our recommendation to extend Chelan Avenue through the development as an additional east/west roadway, greatly improving continuity.

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

Facts:

- Aho's construction engineer wrote a report concluding that emergency vehicles would not use Chelan Avenue to access the subdivision as there were better access routes and also posited that use of Chelan would increase emergency response time.

- Aho's attorney wrote a letter asserting that the project failed both nexus under Nollan and proportionality under Dolan. The attorney asserted it failed Nollan because there was no public problem caused by the subdivision that necessitated the Chelan extension as all other roads serving the subdivision operated at LOS A and there was no evidence that the project would lower that LOS or otherwise create traffic problems.

- Attorney asserted that extension of road would result in loss of eight homes at a cost of hundreds of thousands of dollars. The attorney also cited Burton, Unlimited,

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

Facts:

- MDNS issued with condition requiring extension of Chelan Ave. Extension also recommended by staff as a condition for plat and rezone approval.

- The applications were sent to examiner for public hearing. Aho submitted its engineer report and attorney letter disputing need for Chelan extension, which were admitted as exhibits by the examiner.

- The hearing examiner decision summarized the arguments of the Aho engineer and attorney, expressly identifying the nexus takings argument.

- The examiner reversed the MDNS condition, but made the extension a condition of approval for the plat and rezone applications.

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

Facts:

- The City Council reviewed the examiner's recommendation in closed record review and approved the rezone and plat applications with a condition requiring extension of Chelan to close the gap in the subdivision.

- During the City Council review, City staff identified that the Aho attorney had submitted an exhibit arguing that the Chelan extension was a takings. The Aho attorney made a brief presentation asserting that the extension would be a takings that would cost Aho $500,00 and "*that's what the bill is going to be in a land use petition claim*."

- Beyond the general assertion that the Chelan extension would constitute a takings, no one at the City Council meeting provided any more detail on the takings claim, including any assertion that the proposal failed Nollan nexus or Dolan proportionality.

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

Facts:

- City Council approves applications with extension requirement.

- Aho files a LUPA claim and includes monetary claim under RCW 64.40, 82.02.020 and a takings claim under Washington State and United States constitutions.

- Moxee files and prevails in a motion to dismiss, successfully arguing that Aho failed to exhaust its administrative remedies by specifically raising Nollan nexus, Dolan Proportionality and it's statutory claims before the City Council.

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

Law:

RCW 36.70C.060, which applies to LUPA (Land Use Petition Act) claims, requires that a petitioner exhaust administrative remedies "*to the extent required by law*" as a precondition to filing suit.

In order for a litigant to establish exhaustion of administrative remedies, the litigant must first raise the appropriate issues before the agency. *King County v. Washington State Boundary Review Board*, 122 Wash.2d at 668, 860 P.2d 1024 (1993)

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

Law:

Issue: How far does a party have to go in raising an issue for it to qualify as exhaustion?

Ruling: More than simply a hint or slight reference to the issue in the record.

We conclude that the Washington test for exhaustion of remedies imposes a minimal burden on the challenger of the administrative agency action. Law is not a mathematical exercise. Thus, we cannot measure what constitutes more than a hint or greater than a slight reference. Nevertheless, we assemble, from Washington cases, factors germane to determining sufficiency of exhaustion, which include: the number of sentences devoted to an issue in any written brief given to the administrative agency; the amount of language devoted to the argument compared to the amount of language devoted to other arguments; the clarity of the presentation before the administrative agency; citations to statutes and case law and the accuracy of the citations; if the party asserts numerous issues in a brief, whether the issue on appeal was separated in the brief or introduced with a heading; and whether the challenger's presentation to the administrative agency applied facts to the law. We expect further cases will add to these factors.

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

Law:

Court found that Aho had sufficiently raised the takings issue to the City Council by its references to takings in its oral presentation and its exhibits. Most significant to the court, the Aho attorney letter specifically laid out the legal arguments later raised on judicial appeal and the letter was focused exclusively on these issues without burying them in a panoply of other issues.

Know the Record, AHO Construction I, Inc. v. City of Moxee,
____Wn. App. _____, No. 35558-6-III (2018)

Take Notice City Councils!

. …Presumably, Moxee only contends Aho failed to exhaust administrative remedies before the city council. Nevertheless, exhaustion of remedies before the hearing examiner should extend to exhaustion of remedies before the city council since the city council merely reviewed the hearing examiner's record and decision in a closed record meeting…The city council received the entire record from the hearing examiner, which record included the letter from Steven Madsen [Aho attorney], the report prepared by John Manix [Aho engineer], and the hearing examiner's decision. All three documents mentioned Aho's complaint about the extension of Chelan Avenue in part on taking grounds. During Moxee consultant Bill Hordan's presentation before the city council, Hordan referenced the letters from Madsen and Manix.

Know the Record, AHO Construction I, Inc. v. City of Moxee, ____Wn. App. _____, No. 35558-6-III (2018)

Takeaways on closed record review:

- Staff and hearing examiner should be highly proactive in identifying all major issues raised during public hearing.
- Ideally, Council members should at least glance through all the exhibits of a closed record review.
- Council members should not be bashful about inquiring about major issues in record that they don't fully understand.

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.

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

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?

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

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)

RCW 36.70B.020(4):

"*Project permit" or "project permit application*" means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, **site-specific rezones authorized by a comprehensive plan or subarea plan**, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.

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:

As Pointed out in Last MRSC Webinar by Your Presenter under the Header "Nowhere to Turn":

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 Specific Rezones
Schnitzer West LLC v. City of Puyallup, 416 P.3d 1172 (2018)

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 MRSC Webinar 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 comprehensive 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. A 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.

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:

"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.

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*"

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.

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.

Burien II – The $$$ Sequel
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.*"

Burien II – The $$$ Sequel
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.

Burien II – The $$$ Sequel
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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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.

Burien II – The $$$ Sequel
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.

Burien II – The $$$ Sequel
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.

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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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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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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.
6. $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
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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

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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.

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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.

Burien II – The $$$ Sequel

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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.

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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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 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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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 (2008 rulings???) that permit had not expired and that Condition 6 requirements were otherwise met.

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

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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.

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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
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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.*

Burien II – The $$$ Sequel
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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.

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

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.

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 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:

The 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."

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Precedent:

The 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.

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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.

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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.