Case No: 94452-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 46895-6-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC, and PORT OF TACOMA,

Plaintiffs/Respondents,

v.

THURSTON COUNTY,

Defendant/Appellant.

AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS/RESPONDANTS AND AFFIRMANCE

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ISSUES ADDRESSED BY AMICUS

1. Whether traditional property rights are among those fundamental rights and liberties subject to the substantive protections of the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution; and

2. Whether the jury's findings that the Thurston County Board of County Commissioner's actions against Maytown Sand & Gravel's vested land use permit were abusive, lacked any reasonable justification or relation to a legitimate government purpose, and "shocked the conscience" were sufficient to support the trial court's conclusion that the County violated Maytown's due process rights.

INTEREST OF AMICUS

Pacific Legal Foundation (PLF) was founded over 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark cases before the U.S. Supreme Court and Washington Supreme Court in defense of the right of individuals to make reasonable use of their property. *See*, *e.g.*, *Horne v. Department of Agriculture*, __ U.S. __, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015); *Koontz v. St. Johns River Water Management District*, __ U.S. __, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 133

S. Ct. 511, 184 L. Ed. 2d 417 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 238 P.3d 1129 (2010); *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005); *Manufactured Hous. Communities of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000); *Guimont v. Clarke*, 121 Wn. 2d 586, 854 P.2d 1 (1993). PLF believes that its perspective and experience with property rights litigation will aid this Court in the consideration of the issues presented in this case.

INTRODUCTION

At issue in this case is whether the Thurston County Board of County Commissioners (BOCC) violated Maytown Sand & Gravel's substantive due process rights under the U.S. Constitution when the commissioners used their quasi-judicial authority to interfere with a lawfully permitted gravel mining operation. At trial, Maytown put on evidence showing that the commissioners were biased in favor of two special interest groups opposed to the mine that had intervened in Maytown's 5-year permit review proceedings. *Maytown Sand & Gravel, LLC v. Thurston County*, 198 Wn. App. 560, 589, 395 P.3d 149 (2017). The jury also learned that two of the three commissioners met in secret with representatives from those groups to discuss the litigation and strategies for

stopping the mine. *Id*. at 572, 589. After holding those meetings, in 2011, the BOCC (acting in its appellate capacity) reversed a hearing examiner's decision finding that Maytown was in compliance with all permit conditions, and directed the examiner to reopen a 2006 permit decision to re-determine whether the application had complied with the County's critical areas ordinance. *Id*. The commissioners did so without any verifiable facts indicating that critical areas were missed during the 2002-2006 proceeding, and staff had advised the BOCC that the interest groups' claims to the contrary were wrong. *Id*. Nonetheless, the commissioners remanded the matter to "ask the Hearing Examiner to look for anything that could have happened, since that determination was made, because there were indications of new vegetation." *Id*. at 573.

After hearing this and other evidence of the commissioners' bias, a Lewis County jury found that the BOCC's actions against Maytown were abusive, lacked any reasonable justification or relation to a legitimate government purpose, and "shocked the conscience." *Id*. at 586. The jury further found that the BOCC's actions deprived Maytown of its fundamental right to use its property in accordance with the lawfully issued special use permit. *Id*. The trial court concluded that the BOCC violated substantive due process and entered judgment in favor of Maytown and awarded damages under 42 U.S.C. § 1983. *Id*. Thurston County appealed,

arguing that the trial court should never have submitted the substantive due process question to the jury because (1) Maytown had no protected property interest in the gravel mine, and (2) the BOCC's actions "were not shocking to the conscience[,] as a matter of law." *Id*. at 584 (quoting Thurston County Appellant's Br. at 77). Division One of the Court of Appeals rejected both arguments, concluding that, as a matter of law, Maytown held a protected property interest in its vested permit (*id*. at 587-88) and that substantial evidence in the record supported the jury's finding that the BOCC's actions shocked the conscience, which establishes a violation of substantive due process. *Id*. at 588-89. Thurston County's petition reasserts the same failed arguments.

ARGUMENT

I

MAYTOWN'S PERMITTED RIGHT TO USE ITS LAND IS A FUNDAMENTAL RIGHT PROTECTED BY SUBSTANTIVE DUE PROCESS

The U.S. Supreme Court has long recognized that traditional property rights, including the right to make profitable use of one's land, are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 540, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); *Nectow v. Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928); *Village of*

Euclid v. Ambler Realty Co., 262 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). Due process embraces the fundamental concept that all government actions affecting a property or liberty interest must relate to a legitimate end of government. *See Nectow*, 277 U.S. at 188; *Lawton v. Steele*, 152 U.S. 133, 136-37, 14 S. Ct. 499, 38 L. Ed. 385 (1894). Due process is thus "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) (citation omitted); Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old versus New Property in Land Use Regulation*, 3 Wash. U.J.L. & Pol'y 61, 66 (2000) ("Substantive due process provides the basis for reviewing claims that a municipality's land use decision does not serve legitimate governmental interests because the decision is arbitrary.").

Indeed, *Euclid*, often cited for recognizing government zoning authority, also held that an exercise of land use authority must comport with substantive due process. *Euclid*, 272 U.S. at 395 (Regulatory restrictions on an owner's right to use his land will violate due process if the regulations are "clearly arbitrary and unreasonable, having no substantial relations to the public health, safety, morals, or general welfare."). The Supreme Court reaffirmed that conclusion two years later in *Nectow*, 277 U.S. at 187-88. There, the Court invalidated a zoning regulation where the decision to

rezone industrial property located among factories for residential use bore no relationship to a legitimate government purpose. *Id*. Since those landmark decisions, the Supreme Court has consistently held that property rights are protected by substantive due process. *See*, *e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) ("*Euclid* held that land-use regulations violate the Due Process Clause if they are 'clearly arbitrary and unreasonable, having no substantial relations to the public health, safety, morals, or general welfare'."); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (recognizing a "right to be free of arbitrary or irrational zoning actions").

Most recently, in its 2005 *Lingle* decision, the U.S. Supreme Court reaffirmed its long-standing rule that a regulatory restriction on the right to use one's property must "substantially advance a legitimate state interest" to satisfy due process. 544 U.S. at 540; *see also id*. at 542 ("[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."). Writing separately, Justice Kennedy noted that nothing in the Court's case law should be construed to limit "the possibility that a [property] regulation might be so arbitrary or irrational as to violate due process." *Id*. at 548 (Kennedy, J., concurring). There is no question that, under binding U.S.

Supreme Court precedent, property rights are among those fundamental rights protected by due process.[1] *City of Pasco v. Mace*, 98 Wn.2d 87, 89, 653 P.2d 618 (1982) (Decisions of the U.S. Supreme Court interpreting the Federal Constitution are binding on this Court.).

A. A Lawfully Issued, Conditional Use Permit Establishes a Vested Property Right and Is Subject to the Protections Guaranteed by Due Process

Washington case law confirms that the specific right at issue in this case—a lawfully issued, conditional use permit—is a vested property right,

[1] *See also Colony Cove Prop. v. City of Carson*, 640 F.3d 948, 960 (9th Cir. 2011) (recognizing the viability of a property-based substantive due process claim); *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851, 852-53 (9th Cir. 2007) (a substantive due process claim challenging a "wholly illegitimate" land use regulation may be a viable claim); *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1175 (10th Cir. 2011) (property rights-based substantial advancement challenge "is properly brought as a due process claim"); *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (the Takings Clause does not subsume a property owner's right to challenge a permit denial as a violation of substantive due process); *FM Priorities Operating Company v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996) (property owners have a right to be free of arbitrary government action affecting their property rights); *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 601 (3d Cir. 1995) ("[W]here the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached."); *Gamble v. Eau Claire Cty.*, 5 F.3d 285, 287 (7th Cir. 1993) ("Statutes or other exertions of governmental power that lack a rational basis, in the sense of some connection however tenuous to some at least minimally plausible conception of the public interest, are held to violate due process even if there is no procedural irregularity; so if they deprive someone of life, liberty, or property, they give rise to a claim under the due process clause."); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1223 (6th Cir. 1992) (the ownership of property is a "protected liberty" subject to due process); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989) (property ownership is protected by the Due Process Clause of the Fourteenth Amendment); *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988) (allowing a substantive due process claim where the government denied a building permit because of the applicant's political activities).

and is entitled to due process.[2] *Maytown Sand & Gravel*, 198 Wn. App. at 587 (citing *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962-63, 954 P.2d 250 (1998); *Rettowski v. Dep't of Ecology*, 122 Wn.2d 219, 219, 228, 858 P.2d 232 (1993)); *see also Beach v. Board of Adjustment,* 73 Wn.2d 343, 347, 438 P.2d 617 (1968); *Alliance Inv. Grp. of Ellensburg, LLC v. City of Ellensburg*, 189 Wn. App. 763, 766, 358 P.3d 1227 (2015); *Potala Vill. Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 198, 334 P.3d 1143 (2014); *Kelly v. Cty. of Chelan*, 157 Wn. App. 417, 425, 237 P.3d 346 (2010); *Caswell v. Pierce Cty.*, 99 Wn. App. 194, 196, 992 P.2d 534 (2000); *Weyerhaeuser v. Pierce Cty.*, 95 Wn. App. 883, 894-95, 976 P.2d 1279 (1999). As the Court of Appeals explained, Maytown "had a right to use its property for mining because it acquired the [special use permit] to use the land as permitted." *Maytown Sand & Gravel*, 198 Wn. App. at 587. Indeed, Thurston County conceded that very point of law in its closing argument, stating that "[a]n issued permit to use land is a valuable property right protected by the Constitution of the United States and the Constitution of the State of Washington." *Id*. (citing 19 RP 3785).

Thurston County does not address the lower court's holding, and does not address the large body of case law supporting it. Instead, the

[2] *See Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot*., 560 U.S. 702, 707, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (property is defined by state law).

County sets up a strawman argument, claiming that Maytown's lawsuit should be construed as alleging a right to a "specific procedure," rather than alleging the right to mine in accordance with the permit. Then, based on that misrepresentation, the County argues that Maytown was required to demonstrate an entitlement to "a specific [permit review] procedure" before the property owner will be entitled to due process. TC Supp. Br. at 12-15. That argument is manufactured in an attempt to shoehorn Maytown's lawsuit into a line of cases holding that there is no entitlement to a specific procedure—so long as the government proceeding provides adequate notice and opportunity to be heard, it will comply with procedural due process. *Id.* at 13-14 (citing three procedural due process cases).

This case does not raise procedural due process claims; it alleges a violation of substantive due process. *See Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216-18, 143 P.3d 571 (2006) (discussing the difference between procedural and substantive due process). Those doctrines focus on very different questions: an administrative process may satisfy procedural due process by providing notice and an opportunity to be heard, but still violate substantive due process by engaging in fundamental procedural irregularities that deprive an individual of a property interest. *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 789 (2d Cir. 2007) (Decision to institute

revocation proceedings on a vested special use permit without lawful authority may violate substantive due process.).

B. The County's Reliance on *Roth v. Board of Regents* Is Misplaced; *Roth* Did Not Alter the Court's Traditional Understanding of Property Rights

As one might expect when encountering an argument that so markedly departs from well-settled due process law, Thurston County's "entitlement" argument is premised on a misunderstanding of the U.S. Supreme Court's decisions in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), and its companion case, *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). *See* Supp. Br. at 13-15; App. Br. at 69.

Neither of those cases concerned an owner's rights in her land. Instead, *Roth* and *Perry* answered the question whether an individual's expectations in a government benefit program (*e.g.*, public employment, social security, welfare, public housing, etc.) can ever rise to the level of a constitutionally protected entitlement. *Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 601. For the sake of clarity, courts and legal scholars often refer to the entitlement interests at issue in *Roth* and *Perry* as "new property," while referring to traditional property rights as "old property." *See Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1200-01 (9th Cir. 1998) (explaining the difference between "new" and "old" property); *see also* Charles Reich,

Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245 (1965); Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964).

The entitlement approach of *Roth* and *Perry* has no application where the plaintiff asserts an "old property" interest. *Schneider*, 151 F.3d at 1200 ("The *Roth* Court's recognition of the unremarkable proposition that state law may affirmatively create constitutionally protected 'new property' interests in no way implies that a State may by statute or regulation roll back or eliminate traditional 'old property' rights."). "Old property" rights exist despite statutes that seek to limit, restrict, or even deny their existence. *Id.* at 1199 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-64, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998)). "The States' power vis-a-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer 'new property' status on interests located outside the core of constitutionally protected property, but they may not encroach upon traditional 'old property' interests[.]" *Schneider*, 151 F.3d at 1200-01 (citing Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 329 (1993)). "Were the rule otherwise, States could unilaterally dictate the content of—indeed,

altogether opt out of—both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts." *Schneider*, 151 F.3d at 1201; *cf. Palazzolo*, 533 U.S. at 627 (explaining that government cannot redefine property by regulation).

The distinction between traditional forms of property and newer forms of property arising from public benefits is crucial. Property owners who submit land use applications are not requesting a government-established benefit when they seek to make use of their property. Indeed, fifteen years after deciding *Roth* and *Perry*, the U.S. Supreme Court emphatically stated that "[t]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'government benefit.'"[3] *Nollan*, 483 U.S. at 833 n.2. Instead, the owner is claiming the right to use property in a reasonable manner. A local government's permit decision constitutes its decision to impose, or not to impose, restrictions and /or conditions on the

[3] The suggestion that property rights are merely government benefits is flawed. *See* Ilya Somin, *Federalism and Property Rights*, University of Chicago Legal Forum 53, 86 (2011) (*Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907357). "In reality, the institution of private property long predates the existence of American states, or indeed modern states of any kind." *Id.* The U.S. Supreme Court has long recognized that the "fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657, 7 L. Ed. 542 (1829). Thus, the "prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

owner's right to use her property—a decision must comply with due process to guard against arbitrary or irrational governance. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the property interest but are legal restrictions on the use of property.").

By contrast, when an individual applies for new property, she is asking for a benefit that did not exist before it was created by the government. Thus, her application will only be protected by due process if she can show an entitlement to the applied-for benefit. The *Roth*/*Perry* "entitlement approach" focuses, therefore, on the degree of discretion the government reserved to itself when it established an entitlement program. *Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 601. The reasoning is simple: where the government creates a discretionary benefit purely out of its largesse, an applicant cannot claim a right to that benefit. *Id.*

Thus, the type of government discretion that may be present in a "new property" case is substantively different from the discretion that a local government exercises when asked to apply land use regulations to a particular parcel of property as part of its permitting process. In the "new property" context, the discretion goes directly to the character of the statutorily created benefit—*i.e.*, whether the benefit can be characterized as

an entitlement. *Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 601. In the context of "old property," the property interest preexists land use regulations; discretion is exercised only as part of a process of determining the degree to which regulatory restraints may limit the owner's exercise of her property rights and, therefore, such decisions must comply with due process. *See Euclid*, 272 U.S. at 386; *River Park*, 23 F.3d at 166. Thurston County's reliance on *Roth* and *Perry* is plainly mistaken, and its argument should be rejected.

II

DUE PROCESS PROTECTS AGAINST ARBITRARY AND IRRATIONAL RESTRICTIONS ON THE USE OF PRIVATE PROPERTY

Thurston County does not challenge the jury's finding that the BOCC's actions against Maytown's vested conditional use permit were arbitrary and capricious, abusive, not rationally related to a legitimate government purpose, lacking in reasonable justification, and shocked the conscience. *See Maytown Sand & Gravel*, 198 Wn. App. at 586; TC Supp. Br. at 15-19. Instead, the County argues that those findings are inadequate to support a conclusion that the BOCC violated substantive due process. TC Supp. Br. at 18-19. According to the County, the jury was also required to find that the BOCC's actions were motivated by self-dealing or corruption.

TC Supp. Br. at 18-19. Not so. Each of the jury's findings, standing alone, would support a conclusion that the BOCC violated due process under U.S. Supreme Court case law. *See*, *e.g.*, *Nectow*, 277 U.S. at 187-88 (an arbitrary and irrational zoning law violates substantive due process); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (Due process demands the government's actions "shall not be unreasonable, arbitrary or capricious, and . . . shall have a real and substantial relation to the objective sought to be attained."). Indeed, in *County of Sacramento v. Lewis* the Court emphasized that "shocks the conscience" test is only one way to show a violation of due process. 523 U.S. 833, 847, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (A government action will violate due process "when it can properly be characterized *as arbitrary, or conscience shocking*, in a constitutional sense.") (citation omitted, emphasis added).

Rather than discussing on-point Supreme Court case law, the County bases its argument on dicta from a federal district court opinion, wherein the trial court observed that evidence of self-dealing or corruption would support a conclusion that the government violated substantive due process. TC Supp. Br. at 17 (quoting *Giuliani v. Springfield Twp.*, 238 F. Supp. 3d 670, 696 (E.D. Pa. 2017)). The County fails to grasp that evidence of improper motive is only one way of showing the type of arbitrary or

irrational action that will violate the Constitution. Case law shows that there are many other ways to prove a violation of substantive due process. For example, in *Cine SK8*, the Second Circuit concluded that evidence that the government acted without legal authority to revoke a special use permit authorizing teen dances (in response to community opposition) could establish a substantive due process violation. 507 F.3d at 784-89. Critically, *Cine SK8* rejected an argument that the property owner must prove improper motive to sustain a substantive due process claim, explaining that it is all too easy for "public officials motivated by racial animus or other unconstitutional purposes [to] hide their true intentions and thereby prevent injured parties from obtaining the redress to which they are entitled." *Id*. at 786; *see also United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA*, 316 F.3d 392, 400 (3d Cir. 2003) (Rejecting the "improper motive" test as being too lax of a standard and less stringent than the "shocks the conscience" test.). The court also concluded that evidence of a fundamental procedural irregularity that deprives an individual of a property interest, standing alone, may be sufficient to prove a violation of substantive due process. *Cine SK8*, 507 F.3d. at 789.

Cine SK8 is consistent with U.S. Supreme Court case law, which has repeatedly emphasized that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Lewis*, 523 U.S. at

845 (quoting *Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)). Thus, in *Lewis*, the Supreme Court explained that an abuse of power will violate due process when it offends the "traditional ideas of fair play and decency." 523 U.S. at 847 (quoting *Breithaupt v. Abram,* 352 U.S. 432, 435, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957)).

Importantly, the U.S. Supreme Court declined to adopt a precise formula for the "shocks the conscience" inquiry, stating instead that "[w]hile the measure of what is conscience shocking is no calibrated yard stick, it does . . . point the way." *Lewis*, 523 U.S. at 847 (quoting *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir. 1973)) (alterations omitted). In this regard, the Court explained that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Lewis*, 523 U.S. at 849 (citing *Daniels,* 474 U.S. at 331 ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.") (emphasis in original)). The Court reasoned that "conscience shocking" behavior may include conduct that is "less than intentional" or "deliberately indifferent" (particularly where deliberation is called for, as is the case in a land use proceeding), depending on the circumstances. *Lewis*, 523 U.S. at 849-51 (concluding, however, that

deliberate indifference was not an appropriate measure where the acts companied involved a police officer responding to an emergency).

The U.S. Supreme Court's arbitrariness touchstone is particularly appropriate in the context of Washington's longstanding policy favoring finality in land use permitting. *Deschenes v. King Cty.*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974) ("If there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property."). Arbitrary governance, after all, is the antithesis of finality and certainty because it results in the "unstable" or "unpredictable" administration of the law.[4] The jury's unchallenged findings establish that the BOCC acted in a biased and abusive manner designed to deprive Maytown of its lawful right to mine gravel in accordance with its vested special use permit; the BOCC acted without reasoned justification and without demonstrating any rational relationship between its actions and a legitimate government purpose. That is precisely the type of arbitrary governance that due process protects against.

CONCLUSION

[4] *See, e.g.*, John Locke, *Second Treatise of Civil Government, in* Two Treatises of Government 405 (Peter Laslett ed., Cambridge Univ. Press rev. ed. 1963) (1690) (defining "Arbitrary Power" as "Governing without *settled standing Laws*"); 1 William Blackstone, *Commentaries*, at *44 ("[Law] is a rule: not a transient sudden order from a superior . . . ").

There are many ways to show that a government land use action is so arbitrary or irrational that it violates due process. The jury's unchallenged findings that the BOCC actions were abusive, lacked any reasonable justification or relation to a legitimate government purpose, and "shocked the conscience" were more than sufficient to support the trial court's conclusion that the County violated Maytown's due process rights. This Court should affirm the Court of Appeals' well-reasoned decision.

DATE: December 8, 2017.

Respectfully submitted,

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