No. 94452-1

SUPREME COURT
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC and PORT OF TACOMA,

Plaintiffs/Respondents,

v.

THURSTON COUNTY,

Defendant/Petitioner

PETITIONER'S ANSWER TO AMICUS CURIAE MEMORANDA

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The Washington State Association of Municipal Attorneys and the Washington State Association of Counties (collectively, the "Local Government Amici") filed motions asking this Court to accept their *amicus curiae* memoranda supporting Petitioner Thurston County's Petition for Review. This Court granted the motions, accepted the memoranda, and directed that party answers should be filed no later than July 25, 2017.

Petitioner Thurston County now submits its answer, in which it will address the following points:

(1) whether the Local Government Amici based their support for review of the County's first issue (LUPA Restrictions on Civil Damages Actions) on a misunderstanding of key facts;

(2) whether the Amici have correctly described the state of Washington appellate decisional law bearing on the County's first issue; and

(3) whether the Washington State Association of Counties correctly characterized the nature of Respondent Maytown's proof on its substantive-due-process claim, in supporting review of the County's second issue (Requirements to Show a Deprivation of Substantive Due Process)

A. The Amici correctly understood the key facts bearing on the County's first issue: LUPA restrictions on civil damages actions.

Both of the Local Government Amici support granting review on the County's first issue, which concerns the obligation of a party under LUPA to exhaust administrative remedies and then pursue relief through a LUPA petition from a local government land-use action, before they can base a

damages claim on a challenge to that action, and Respondents' failure to fulfill that obligation. Both of the Amici base that support on the fact that Respondents abandoned their challenge to the County Staff's decision to refer Maytown's Special Use Permit amendment requests to the Hearing Examiner, after the Hearing Examiner ruled that the Staff had properly referred the amendments to the Hearing Examiner, only to turn around and base their damages claims on a challenge to that decision. *See* WSAMA Amicus Memorandum at 3; WSAC Amicus Memorandum at 4-5.

Respondents opposed acceptance of the Amici, claiming in relevant part that the Amici had misapprehended this fact and asserting that Respondents had no obligation to pursue relief from the Hearing Examiner's decision because Respondents supposedly won every issue in front of the Hearing Examiner. *See* Respondents' Opposition at 2. The County expects Respondents to repeat that claim in their Answer to the Amici, which they also made in their brief to the Court of Appeals and their Answer to the County's Petition. *See* Response Brief at 25 & 53; Answer at 9-10.

The record conclusively refutes Respondent's claim that they prevailed on every issue before the Hearing Examiner. The record shows instead that, at trial, Respondents forthrightly admitted that the Hearing Examiner ruled against them on the SUP amendments issue that became the core of the damages case they presented to the jury.

In their brief to the Court of Appeals, Respondents based their "we won everything" claim on the testimony of John Hempelmann, the land-use

lawyer who represented Maytown before the Hearing Examiner. Respondents cited (at pages 25 and 53 of their brief) to a statement by Mr. Hempelmann found on RP 1464, line 1. Under cross-examination by the County, and having just been asked to confirm that Respondents took no appeal from the Hearing Examiner's decision, Mr. Hempelmann stated, "We won. You don't appeal when you win."

Respondents cited only this portion of Mr. Hempelmann's testimony. Respondents ignored the following statements of Mr. Hempelmann, found just a few pages later:

> Q. But she [*i.e.*, the Hearing Examiner] also made some decisions that were contrary to your and the Port's request, isn't that true?
>
> A. Yes.
>
> * * * *
>
> Q. ...in essence, she [*i.e.*, the Hearing Examiner] rejected your argument and the Port's argument that it was improper for the County to place these amendments into the Hearing Examiner process; correct?
>
> A. That's generally correct.

RP 1474, lines 21-23 & 1476, lines 6-11 (copies of RP pages 1463-64, and 1474-76, attached as App. A).

Mr. Hempelmann had to answer this way. He knew that he had, on April 25, 2011 (shortly after the Hearing Examiner issued her decision), sent an e-mail to his clients, in evidence as Trial Exhibit 449. And he knew that in that e-mail, he explained to his clients why the lawyers had changed

their minds, and decided not to appeal the Hearing Examiner's decision on the amendments issue: because the result could "make our damages case more difficult." *See* Ex. 449 (copy attached as App. B).

Given Respondents' apparent determination to continue to press the claim that they won every issue in front of the Hearing Examiner, the County now quotes the relevant portion of Mr. Hempelmann's e-mail in full:

> As we reviewed our options and the Examiner's Decision to outline the appeal I emailed you about on Saturday, *we reconsidered our position.* The way the Examiner wrote the Decision, she said the Code was unclear about the process and the County had the option to address the 6A and 6C timing issues either administratively or through the formal SUP Amendment process. Her language leaves open to us the argument that the County staff, under pressure from FORP and the Commissioners, chose the most burdensome and lengthy approach—the formal SUP Amendment process and its attendant SEPA process that has taken so long and cost so much. Remember that the record shows the County reversed itself on the process which is further evidence of capricious acts. *If we appeal this part of the Examiner's Decision to the BOCC, we know the BOCC will rule against us and would likely use language that said the formal SUP Amendment process was REQUIRED.* ***This would make our damage case more difficult*** *so we have concluded we should not file an appeal of the Examiner's Decision.*

Ex. 449 (emphasis added).

Of course, the *ultimate* concern of the lawyers was not the County's Board of Commissioners. Their ultimate concern was that, following the expected adverse decision by the Board, Respondents would then be confronted with a statutorily-defined "land use decision" that they would have to challenge via a LUPA petition. And they further knew that they

would be asking a Superior Court judge to rule that the Hearing Examiner abused her administrative-law discretion in ruling that the Staff had the discretion under the County Code to send the *key* amendment issue—whether to require an additional year of testing, to account for pollution levels in ground water, which the Port had never tested for—to the Hearing Examiner for resolution. And they even further knew that, if they lost before the Superior Court, they would be barred from basing their damages claim on a challenge to that ruling under decisions such as *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 404-05, 232 P.3d 1163 (2010), *petition for review withdrawn*, 243 P.3d 421 (2011). Hence, the decision not to appeal, and to try in the damages action to finesse the ensuing exhaustion of remedies issue—a finesse that might (indeed, should) have failed if this Court's decision in *Durland v. San Juan County*, 182 Wn.2d 55, 66, 240 P.3d 191 (2014), had been issued before the damages case got to trial.

In sum, the Local Government Amici got it right when they represented to this Court that Respondents lost before the Hearing Examiner the key issue of the handling of the SUP amendment process, then chose to abandon the administrative process midstream, only later to base their damages case on an attack on the correctness of the Hearing Examiner's ruling that upheld the County Staff's amendment process decision. John Hempelmann forthrightly acknowledged the truth of the matter, under cross-examination by the County, and his testimony confirmed what he had told his clients, in an e-mail sent to them shortly after the Hearing

Examiner's decision: that they lost the amendment process issue, and were not going to appeal that loss lest the result of that appeal "make our damages case more difficult."[1] The record cannot reasonably be read any other way.

B. The Amici correctly identify the conflict between the Decision of the Court of Appeals in this case and other decisions of the Court of Appeals and of this Court

The Amici correctly state that the decision of the Court of Appeals in this case on the LUPA issue conflicts with other decisions of the Court of Appeals and of this Court. For example, Division One held, in *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 404-05, 232 P.3d 1163 (2010), *petition for review withdrawn*, 243 P.3d 421 (2011), that damage claims based on a challenge to the validity of local government land-use decisions are barred if the plaintiffs do not first prevail in a LUPA petition challenge to those decisions. Similarly, this Court's detailed exegesis of prior case law, set forth in footnote 11 of (now Chief) Justice Fairhurst's opinion for the Court in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013), carefully distinguishes between damage claims based on delay in making a valid decision, and damage claims based

[1] Respondents omitted their citation to Hempelmann's testimony in their Answer to the County's petition. In their opposition to acceptance of the Local Government amici submissions, Respondents again did not refer to Mr. Hempelmann's testimony, instead shifting to a claim based on the Hearing Examiner's resolution of a separate issue concerning SEPA review. But the separate SEPA review issue, on which Respondents *did* prevail before the Hearing Examiner, was irrelevant to their core theory of the case. As Respondents' Answer to the County's Petition for Review confirms, that theory concerned the supposed damaging effect of being delayed from commencing mining in 2010, and that delay supposedly stemmed from the decision by the Staff to refer the amendments issue to the Hearing Examiner. By the time the separate SEPA review issue emerged, *that damage had already been done.*

on a challenge to the validity of the decision itself: the latter, the opinion makes clear, must first be tested through a LUPA review.

Respondents tried to slip through what they evidently saw as a gap in this case law. They knew their case was based on a challenge to the validity of the County's decision on how to handle Maytown's requested SUP amendments. By bailing from the administrative process mid-stream, they at least avoided getting to a formal "land use decision" they knew would force them to pursue a LUPA petition challenge to the Hearing Examiner's adverse decision on the amendment issue—Division One's *Mercer Island* decision had been issued *well before* Respondents had to make the strategic call documented in Mr. Hempelmann's 2011 e-mail. Respondents also knew that no appellate decision had addressed the *precise* exhaustion-of-remedies issue that would be raised by their decision to bail mid-stream, and thereby avoid getting to a "land use decision." This Court needs to grant review precisely so it can close the case law loophole Respondents successfully exploited in this case, which frustrates LUPA's overarching policy and purpose.

C. The County Amicus correctly identified why this Court should also grant review of the County's substantive-due-process issue.

The jury was correctly instructed that Maytown could not prevail on its substantive-due-process claim unless the jury found that the County's conduct was "shocking to the conscience." But as the County Amicus correctly recognizes, the problem with the jury's verdict is not whether there is substantial evidence to support the jury's verdict, but the need for this

Court to provide guidance on whether the conduct Maytown set out to prove is, if proven, legally sufficient to meet the "shocking to the conscience" test.

The County Amicus is correct that the "shocking to the conscience" test is a restrictive test: proving a local government was arbitrary and capricious is not enough. As the County Amicus points out, protecting critical areas is a legitimate government goal, and an elected official responding to constituent concerns about a possible threat to that goal should not be the subject of constitutional approbation in a democratic system of government that protects the people's right to petition the government for "redress of grievances." *See, e.g.,* U.S. Const., First Amendment. Here, the "grievance" involved public concern that the County might be failing in its duty to protect critical areas. Over-zealousness actions by public officials, in the performance of their undeniable constitutional duty to respond to public concerns, should not be sufficient to subject local government to liability for actions shocking to the conscience. Yet that is the most Maytown proved to the jury. This Court needs to grant review to clarify this important point of constitutional law.

Respectfully submitted this 25th day of July, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Rory D. Cosgrove, WSBA No. 48647
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record via Email and first-class United States mail, postage prepaid, to the following:

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DATED this 25th day of July, 2017.

Allie Keihn

Allie Keihn, Legal Assistant

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF LEWIS

MAYTOWN SAND AND GRAVEL, LLC, a Washington Limited Liability Company, Petitioner/Plaintiff, vs. THURSTON COUNTY, a political subdivision of Washington State, Respondent/Defendant.	COA NO. 46895-6-II SC NO. 11-2-00395 Consolidated SC NO. 11-2-00396-3
PORT OF TACOMA, a Washington special purpose district, Petitioner/Plaintiff, vs. THURSTON COUNTY, a political subdivision of Washington State Respondent/Defendant.	

VERBATIM TRANSCRIPT OF PROCEEDINGS

TRIAL PROCEEDING VOLUME 6

June 23, 2014
Lewis County Superior Court
Chehalis, Washington

Before the
HONORABLE RICHARD BROSEY
JANE WESTLUND, RPR, CSR
OFFICIAL COURT REPORTER
Department 3

A I probably did. This is one of the faster ones.
Q After Judge Brosey issued his ruling, it wasn't appealed by your client obviously nor was it appealed by the County?
A That's right.
Q But once again an appeal was filed by FORP?
A Yes.
Q That appeal was filed to the Court of Appeals?
A Yes.
Q Eventually that was resolved and dismissed around October or November of 2011?
A Yes.
Q But at the time that Judge Brosey issued his decision in July of 2011, there were other matters that prevented Maytown from mining during that period of the LUPA appeal; correct?
A Yes.
Q In fact, the SUP amendments hearing before the Examiner occurred in March of 2011 and that too was appealed was it not by FORP?
A Yes.
Q Again, the Hearing Examiner came down pretty much entirely for Maytown in that SUP amendment hearing?
A Yes.
Q At least on most issues and Maytown did not appeal?

A We won. We don't appeal when we win.
Q We'll get back to that. But the County didn't appeal either?
A That's correct.
Q But once again FORP appealed that to Thurston County Superior Court; correct?
A Excellent, yes. You've got an excellent recollection. That's correct.
Q Well I looked at the document. Once again that wasn't resolved, until October or November of 2011.
A Yes, they lost that case in Thurston County Superior Court.
Q The timeline that you had estimated back in October of 2010 was hit on on almost every date in terms of when the various appeals and challenges would be?
A For once one of my timelines was fairly accurate.
Q Thank you. Now you have also complained about the fact that the County addressed SEPA or required you to address SEPA, in connection with at least one of the hearings namely the amendments -- SUP amendments hearing; correct?
A Yeah. We took the position first it should have been an enforcement action then it should have been a minor amendment then since there was no environmental harm SEPA should not apply.

Want more?
Q Just a moment. Now, I'd like you to go up to page 34, which is part of the conclusion of the final decision made by the Examiner and read the first paragraph. Can you read that please, John?
A "The revised March 17, 2011, Maytown Sand and Gravel ground water and surface water monitoring plan shall be adopted replacing the 2005 ground water monitoring plan and SUP conditions 6A and 6C."
Q Please continue.
A "The applicant and any successors in interest shall be required to comply with the monitoring plan established in the 2011 plan in the record as Exhibit 42A."
Q In other words, she found that the parties had collaborated in preparing a new plan that clarified confusion from the earlier plan, and she was ordering Maytown to follow that new jointly submitted plan?
A Yes.
Q But she also made some decisions that were contrary to your and the Port' request, isn't that true?
A Yes.
Q Can you turn to page 30 please? She found did she not contrary to your oral and written arguments that

an SUP amendment was required and that the process in other words to have this heard by her was appropriate?

A She found that instead of our argument they could have used enforcement proceedings that it was okay for them to require that an amendment be required, and she said as I said a long time ago the Department makes the decision, whether it is minor or major.

Q Please read that paragraph or at least the first several sentences.

A "An SUP amendment was required. Both MSG and the Port argue that the changes entailed in the instant proposal to amend the SUP could have been handled administratively by an enforcement authority that no amendment application administrative or quasi-judicial was required.

"The Department decided otherwise and its decision has several sources of support."

"While there are no criteria for special use amendment identified in the code TCC 20.54.030 expressly authorizes the review and approval of amended special use authorizations."

Q Please read the next couple sentences.

A "Pursuant to TCC 20.54.0151, administrative review

is allowed for a specified list of special uses.

"Pursuant to TCC 20.54.0152, the Hearing Examiner is the approval authority for any special use not listed and amended special use authorizations are not included in subsection 1."

Q I'll stop you there. Don't read all of it, but in essence she rejected your argument and the Port's argument that it was improper for the County to place these amendments into the Hearing Examiner process; correct?

A That's generally correct.

Q In fact, didn't you discuss with your clients that you may want to appeal that portion of her decision?

A We discussed it, but as I said, this was a big win, and even if you don't get 100 percent of what you ask for, you almost never appeal your own permit.

Q Didn't you in fact study it at some length and discuss it with the Port of Tacoma the pros and cons and decided no we're not going to appeal?

A Yes.

Q Therefore, because that conclusion was not appealed, it is final and can't be changed at this point; correct?

A Well, you and the judge and counsel have to decide whether it is challenged. The point I've always

APPENDIX B

Kelvin Lau

From: John Hempelmann
Sent: Monday, April 25, 2011 5:01 PM
To: Dan Lloyd; Jim Magstadt; Midori Dillon; Randy Lloyd; Steve Cortner
Cc: Midori Dillon; Randall Olsen
Subject: Appeal of Examiner's Decision

CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

Team,

As we reviewed our options and the Examiner's Decision to outline the appeal I emailed you about on Saturday, we reconsidered our position. The way the Examiner wrote the Decision, she said the Code was unclear about the process and the County had the option to address the 6A and 6C timing issues either administratively or through the formal SUP Amendment process. Her language leaves open to us the argument that the County staff, under pressure from FORP and the Commissioners, chose the most burdensome and lengthy approach—the formal SUP Amendment process and its attendant SEPA process that has taken so long and cost so much. Remember that the record shows the County reversed itself on the process which is further evidence of capricious acts. If we appeal this part of the Examiner's Decision to the BOCC, we know the BOCC will rule against us and would likely use language that said the formal SUP Amendment process was REQUIRED. This would make our damage case more difficult so we have concluded we should not file an appeal of the Examiner's Decision.

You should also know that the County Motion for Reconsideration of the Examiner's Decision on SEPA has "tolled" or suspended the appeal period for the entire Decision. The appeal period will run again after the Examiner decides on the Motion for Reconsideration. We are filing our Response to the Motion tomorrow, the County Reply is due May 2 and the Examiner will issue her Decision on May 4.

John

CH&
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MSG_010850

CARNEY BADLEY SPELLMAN

July 25, 2017 - 4:26 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94452-1
Appellate Court Case Title:	Maytown Sand and Gravel, LLC v. Thurston County, et al.
Superior Court Case Number:	11-2-00395-5

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Comments:

Petitioner's Answer to Amicus Curiae Memorandum

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