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No. 94452-1

SUPREME COURT OF THE  
STATE OF WASHINGTON

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MAYTOWN SAND AND GRAVEL, LLC and PORT OF TACOMA,

*Plaintiffs/Respondents,*

v.

THURSTON COUNTY,

*Defendant/Petitioner.*

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BRIEF OF AMICI CURIAE WASHINGTON STATE ASSOCIATION  
OF MUNICIPAL ATTORNEYS AND WASHINGTON STATE  
ASSOCIATION OF COUNTIES

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## I. INTRODUCTION

Local governments frequently hear from developers and other land use permit applicants that consistency, predictability, and timeliness are critical to their businesses and viability of their projects. Judicial review of land use decisions is an extension of the permitting process. The Land Use Petition Act (chapter 36.70C RCW) (LUPA) was enacted in 1995 for the purpose of establishing a uniform set of appeal procedures and review criteria for reviewing permitting decisions, “to provide consistent, predictable, and timely judicial review.” RCW 36.70C.010. The purpose of LUPA not only benefits land use permit applicants, but also local governments and citizens interested in the local permitting process. As intended by the Legislature in enacting LUPA, the permitting process is more efficient and fair when everyone plays by the same rules.

Maytown Sand and Gravel, LLC (“Maytown”) and the Port of Tacoma (“Port”) (collectively, “Respondents”) introduce instability and surprise into the permitting process by purposefully and strategically avoiding LUPA. Although the Thurston County Hearing Examiner (“Examiner”) ruled against Respondents on the very land use issue they claim caused them monetary damages, they determined to avoid judicial review by a judge under LUPA and instead have this land use issue decided by a jury in a damages action. Respondents’ litigation approach is

inconsistent with both the purpose of LUPA and its plain language that LUPA be “the exclusive means of judicial review of land use decisions.” RCW 36.70C.030(1). Amici curiae ask the Court reinforce this general rule by finding it is not trumped by the narrow monetary damages exception.

## **II. IDENTITY AND INTEREST OF AMICI CURIAE**

The Washington State Association of Municipal Attorneys (WSAMA) is a non-profit organization of municipal attorneys whose members represent many of Washington’s 281 cities and towns. The Washington State Association of Counties (WSAC) is a non-profit association whose membership includes elected county commissioners, council members and executives from all of Washington’s 39 counties.

LUPA is a procedural statute governing the judicial review of land use decisions. It applies to every city, town, and county in the state that makes land use decisions. The purpose of LUPA is to provide consistent, predictable, and timely judicial review of land use decisions. Consistent, predictable, and timely judicial review of land use decisions benefits applicants for land use permits, local governments reviewing land use permit applications, and citizens interested in the local permitting process. The universally-beneficial purpose of LUPA will be frustrated if litigants are allowed to manipulate the definition of “land use decision,” carving

out those pieces of the decision perceived as inconvenient or disadvantageous for them to challenge under LUPA. Cities, towns, and counties all have an interest in avoiding this outcome and ensuring LUPA is implemented as intended by the Legislature.

### III. STATEMENT OF THE CASE

Amici curiae adopt the statement of the case set forth in Thurston County's Petition for Review and the additional facts contained in the County's Supplemental Brief. However, because amici curiae focus on the limited issue of whether Respondents were required to exhaust their administrative remedies and seek judicial review under LUPA before seeking to claim damages arising from the Examiner's decision, this brief consolidates the salient facts related to that discrete issue.

Although the scope of any particular examiner's jurisdiction varies among local governments,<sup>1</sup> each examiner generally has original jurisdiction over some land use matters and appellate jurisdiction over others. On complicated projects, an examiner sometimes operates under both original and appellate jurisdiction.<sup>2</sup> That is the case here.

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<sup>1</sup>*Chaussee v. Snohomish County Council*, 38 Wn.App. 630, 636-37, 689 P.2d 1084 (1984) (the authority of a hearing examiner is derived from the ordinance establishing the hearing examiner system).

<sup>2</sup> In their original jurisdiction, examiners render a decision on a permit application after receiving a recommendation by the agency processing the application. In their appellate jurisdiction, examiners review a permit issued or SEPA decision made by the agency processing the application.

The Examiner issued a decision on April 8, 2011, that implicated both her original and appellate jurisdiction. First, the Examiner exercised her original jurisdiction regarding Maytown's application for amendments to its Special Use Permit (SUP) related to groundwater monitoring. Thurston County's Resource Stewardship Department ("Department") recommended approval of the amendments to the Examiner. As part of her decision regarding the amendments, the Examiner was specifically asked by Respondents to determine whether the process of the Examiner making a decision on the amendments was lawful or authorized under the Thurston County Code. In pre-hearing briefing, Respondents argued such process or procedure was both unlawful and unauthorized.<sup>3</sup>

Second, the Examiner exercised her appellate jurisdiction by hearing two appeals challenging the Mitigated Determination of Nonsignificance (MDNS) issued by the Department under the State Environmental Policy Act (SEPA) (chapter 43.21C RCW). One appeal of the MDNS was brought by Maytown; the other was brought by an environmental group.

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<sup>3</sup> The Port made its argument regarding the legality of the amendment process in its pre-hearing brief on the amendments to the SUP, not the SEPA appeal. CP 7530-38. Maytown also made its argument that the amendment process was unlawful in its pre-hearing brief on the SUP amendments. CP 7543-46. The Port asserts throughout its Supplemental Brief that the lawfulness of the amendment process is a SEPA issue, however, it did not think that was true when briefing the issue to the Examiner. *See, e.g.*, Port Supp. Br. at 15. The Port's Supplemental Brief improperly conflates the land use and SEPA issues. How to process an application to amend a land use permit is a land use issue; whether to require environmental review for that application is a SEPA issue.

As part of its SEPA appeal, Maytown argued the SUP amendments did not constitute an “action” under SEPA requiring environmental review.

The Examiner’s decision combined issues related to the SUP amendments and the SEPA appeals. The Examiner concluded the Department appropriately exercised its discretion under the County code by requiring the amendments be processed by the Examiner rather than administratively by the Department. Separately, the Examiner concluded while the amendment process invoked by the Department was appropriate, the Department was not justified in concluding the amendments amounted to an “action” requiring a SEPA threshold determination.

Maytown was aware it had an opportunity to appeal the Examiner’s determination that she had authority to review and approve the amendments. Such an appeal would be heard by the Thurston County Board of Commissioners. The Commissioners’ action on such an appeal would constitute a “land use decision” which then could be subject to judicial review under LUPA. However, Maytown made the deliberate, fully-informed, strategic decision not to exhaust its administrative remedies and seek judicial review of a land use decision under LUPA. Ex. 449. Instead, Maytown decided to pursue damages under various state law tort theories, among other things. It is this deliberate choice to avoid LUPA that is of concern to amici curiae and inconsistent with LUPA.

#### IV. ARGUMENT

LUPA is a short statute with scant legislative history. But despite its brevity, much can be ascertained by reviewing LUPA's provisions as a whole. When LUPA is properly read together with case law interpreting it, the Court should conclude: (1) Respondents were required to exhaust their administrative remedies and appeal the SUP amendment process issue under LUPA; and (2) the "monetary damages or compensation" exception does not apply to substantive land use issues when those issues form the basis of liability for monetary damages or compensation.

**A. The Examiner's Conclusion Regarding the Lawfulness of the Procedure to Approve the SUP Amendments Is Subject to Judicial Review under LUPA.**

It is uncontested that LUPA is the "exclusive means of judicial review of land use decisions." RCW 36.70C.030(1); *Samuel's Furniture, Inc. v. Dept. of Ecology*, 147 Wn.2d 440, 449, 54 P.3d 1194 (2002). Respondents argue a "land use decision" is confined to the discrete act of granting or denying a permit. Their argument, assumed without analysis, is not consistent with the plain language of the statute. A statute must be construed "so as to carry out its manifest object." *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). In accomplishing this task, courts must construe a statute as a whole, so that effect is given to all of the language used. *Id.*; *Dep't of Ecology v. Campbell & Gwinn*,

*LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). LUPA contains several provisions that, when read as a whole, dictate that Respondents should have filed an administrative appeal of the Examiner’s decision.<sup>4</sup> Such an appeal would have resulted in a “land use decision” under LUPA that encompassed the determination the process used to review and approve the amendments was lawful.

LUPA contains a definition of “land use decision” (“a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination . . .”), but that brief definition does not articulate what constitutes a decision that must be reviewed under LUPA.<sup>5</sup> RCW 36.70A.020(2). Looking solely to the statutory definition without reviewing it in the context of the whole statute would inappropriately narrow the applicability of LUPA, particularly in this circumstance where LUPA was purposefully avoided by Respondents. Instead, what constitutes a land use decision also must be informed by the multiple standards for granting relief in RCW 36.70C.130(1):

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

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<sup>4</sup> The law regarding the requirement to exhaust administrative remedies was thoroughly briefed to the Court, and amici curiae will not repeat the content of that briefing here.

<sup>5</sup> The Court of Appeals concluded, with absolutely no discussion, that “the portion of the Hearing Examiner’s April 2011 decision that discussed the procedure for amendment review by the County was not a land use decision.” Slip Op. at 17.

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

Any aspect of a land use decision implicating these standards is subject to review under LUPA. To determine whether any of the standards were violated, a court must review the findings, conclusions, and conditions leading to the granting or denying of an application. The act of granting or denying a permit application is not independent from the facts, the law, and the process employed to grant or deny the application. The decision maker's analysis is a critical component of the land use decision.

Particularly fatal to Respondents' claim that they were prohibited from challenging the granting of the SUP amendments is RCW 36.70C.130(1)(a), which allows a court to grant relief when the

“body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless.” Additionally, RCW 36.70C.130(1)(e) allows for relief when the land use decision “is outside the authority or jurisdiction of the body or officer making the decision.” These grounds for relief are not tied to the outcome of the land use decision. These grounds for relief anticipate the situation presented in this case, where an applicant obtains the desired result but at increased cost due to an alleged unlawful procedure or process (RCW 36.70C.130(1)(a)), or because the land use decision allegedly was not authorized by the local code (RCW 36.70C.130(1)(e)). Once grounds for relief under one of the standards set forth in RCW 36.70C.130(1) is established by a judge under LUPA, the applicant then can prove their damages in a subsequent phase of litigation.

Respondents knew they could challenge the amendment process under RCW 36.70C.130(1)(a) and (e). In fact, they were establishing the record to argue these grounds for relief. In its briefing to the Examiner, the Port stated: “The Port consistently has taken the position that the County lacks authority to require these formal amendments....” CP 7533. Further, the Port requested the Examiner “rule on the question of whether this Amendment proceeding was proper and also, in her written decision, address the merits of the requested amendments regardless of her

disposition on the process questions. The Port offers the briefing in this section in support of this request and to preserve its arguments.” CP 7534. Thus, the Port explicitly acknowledged that RCW 36.70C.130(1)(a) and (e) would apply to a final determination on the SUP amendments by asking the Examiner to rule on the lawfulness of the SUP amendment process. Similarly, Maytown argued: “The County’s SUP amendment process is not authorized by law.” CP 7544. Further, Maytown asserted: “[T]he Examiner should rule that the SUP amendment procedure is unlawful.” CP 7546. The Port and Maytown knew the SUP amendment process could be challenged under LUPA.

Once Respondents had an appealable issue under RCW 36.70C.130(1)(a) and (e), they were *required* to exhaust their administrative remedies and seek judicial review of that issue under LUPA. The Legislature proclaimed LUPA is the “exclusive means of judicial review of land use decisions.” RCW 36.70C.030(1); *Samuel's Furniture*, 147 Wn.2d at 449. Thus, to the extent Respondents wanted to challenge the SUP amendment process as an “unlawful procedure” or “outside the authority” of the County, the challenge had to be made through LUPA. The statute does not provide litigants a choice regarding the process for judicial review of land use issues.

The Port argues it was “prohibited” from challenging the Examiner’s decision regarding the amendment process because the Port was not “aggrieved.” Pet. Supp. Br. at 16. This position is wrong for three reasons. First, there is no requirement in LUPA that an applicant for a permit or an owner of property be aggrieved, injured, or adversely affected by a land use decision before the decision can be challenged under LUPA. Unlike any other person wishing to challenge a land use decision, an applicant and a property owner are granted automatic standing under LUPA. RCW 36.70C.060(1). Respondents had standing regardless of whether they were aggrieved.

Second, although Respondents were not aggrieved by the granting of the amendments, *of course* they were aggrieved if they indeed were subjected to an “unlawful procedure” (RCW 36.70C.130(1)(a)) and were required to obtain SUP amendments that were “outside the authority” of the Examiner to grant (RCW 36.70C.130(1)(e)). Throughout this litigation, a fundamental premise of Respondents’ damages claim was the delay in mining caused by the alleged unlawful process killed the project.

Third, a party can be aggrieved by a land use decision even when the land use decision is in their favor. The granting of a permit might be

accompanied by illegal conditions of approval.<sup>6</sup> Or an applicant, anticipating legal challenges from opposition groups, may appeal an examiner decision to correct flawed analysis in the decision and thereby increase the chances of the land use decision surviving the challenge. Or an applicant may challenge a favorable land use decision because flawed legal analysis establishes a negative precedent for future projects the applicant intends to develop in the jurisdiction.

This Court recognizes a party can be aggrieved by a favorable judicial decision. Under Rule on Appeal 3.1, “Only an aggrieved party may seek review by the appellate court.” In granting Snohomish County’s petition for review in *Stafne v. Snohomish County*, 174 Wn.2d 24, 234 P.3d 225 (2012), the Court agreed Snohomish County was aggrieved by a favorable Court of Appeals decision based on questionable legal analysis. The Court acknowledged that although Snohomish County “agrees with the result the Court of Appeals ultimately reached, it generally disagrees with two sections of the court’s analysis.” *Id.* at 30. Just as appellants are not prohibited from challenging a favorable decision based on adverse reasoning, Respondents are not prohibited from challenging a land use decision based on adverse reasoning.

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<sup>6</sup> See, e.g., *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) (developer brought action under LUPA challenging legality of condition imposed for approval of a preliminary plat on the basis it violated RCW 82.02.020).

Respondents were required to challenge whether the SUP amendment process constituted an unlawful procedure or was not authorized by the local code under LUPA, as LUPA was the exclusive means for judicial review of that issue. Their failure to do so, in addition to violating RCW 36.70C.030(1), frustrates the purpose of the statute to establish “uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.” RCW 36.70C.010. This purpose can be carried out only if all aspects of a land use decision are subject to the statute, not just granting or denying a permit application. Once an applicant or property owner is permitted to break out those pieces of a land use decision that are inconvenient or disadvantageous to challenge under LUPA, consistency and predictability are vanquished. LUPA provides the rules of engagement applicable to review of land use decisions. If the Court of Appeals’ decision in this case is affirmed and litigants no longer must challenge land use decisions under LUPA, the rules of engagement no longer apply, and the purpose of the statute is meaningless.

**B. The “Monetary Damages” Exception did not Relieve Respondents from Challenging under LUPA the SUP Amendment Process Alleged to Damage Them.**

The exception in LUPA for claims seeking monetary damages or compensation cannot be read to swallow the rule that LUPA be the

“exclusive means” of obtaining “judicial review of land use decisions.” RCW 36.70C.030. And yet that is precisely what the Court of Appeals did when it concluded this exception excused Respondents from subjecting their claim regarding the lawfulness of the SUP Amendment process to the requirements of LUPA. The Court of Appeals reached conclusions unsupported by case law and the plain language of LUPA.

As discussed above, LUPA authorizes courts to grant relief from a land use decision in six instances, including cases where the body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, and when the decision is outside the authority or jurisdiction of the body or officer making the decision.

RCW 36.70C.130(1)(a) & (e). LUPA expressly provides that review of these issues be made by the courts “*acting without a jury.*”

RCW 36.70C.130(1) (emphasis added).

Respondents repeatedly assert the damages they suffered were caused by the process or procedures employed by Thurston County, including the requirement for Examiner review in its consideration of the SUP amendments. But the statute specifically provides that LUPA is available to challenge a local government’s actions based on an assertion that it “engaged in unlawful procedure or failed to follow a prescribed process” and that the decision “is outside the authority or jurisdiction of

the body or officer making the decision.” RCW 36.70C.130(1)(a) & (e). Therefore, LUPA expressly contemplates that a judge—not a jury—would decide under LUPA the very things the Respondents allege caused them damage: unlawful procedure and lack of decision-maker authority.

The exception for claims of monetary damages does not trump the requirement that substantive land use issues be reviewed under LUPA.

The statute provides that LUPA does not apply to:

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

RCW 36.70C.030(1)(c). This exception must be construed narrowly.

*Foster v. Dept. of Ecology*, 184 Wn.2d 465, 473, 362 P.3d 959 (2015)

(“statutory exceptions are construed narrowly in order to give effect to the legislative intent underlying the general provisions”).

The exception is limited to a legislative acknowledgement that a different record and different process will be necessary for claims for damages. By providing this exemption, LUPA permits damages claims to be opened up to the traditional rules of civil procedure, including

discovery, and to a trial before a jury. But the exemption does not authorize parties to proceed directly to damages claims and circumvent the LUPA process when the basis for the claim for damages falls under one of the grounds for relief provided in RCW 36.70C.130(1). The monetary damages exception does not permit the Respondents to “ignore the well-established rule that where statutes prescribe procedures for the resolution of a particular type of dispute, state courts have required substantial compliance or satisfaction of the spirit of the procedural requirements before they will exercise jurisdiction over the matter.” *James v. County of Kitsap*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005).

LUPA requires a judge evaluate the validity of land use decisions, including a challenge to the procedures employed in reaching a land use decision (RCW 36.70C.130(1)(a)) or that the decision was outside the authority of the deciding body or officer (RCW 36.70C.130(1)(e)). Only then can a claim for damages that attacks those elements of a land use decision proceed. *See Durland v. San Juan Cnty.*, 182 Wn.2d 55, 68, 340 P.3d 191 (2014) (noting the doctrine of exhaustion insures against premature interruption of the administrative process and that individuals

are not encouraged to bypass local government procedures by resorting to the courts).<sup>7</sup>

The statute anticipated that a trial for damages would follow a successful challenge of a decision under LUPA. It provides the judge hearing the land use petition may preside at a trial for damages and compensation. It also provides: “A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.” RCW 36.70C.130(2). This means that, even if a plaintiff prevails in a LUPA action, damages or compensation are not guaranteed. Instead, “if the plaintiff prevails at the LUPA hearing, the remaining compensation claim must be allowed to proceed to trial.” *Shaw v. City of Des Moines*, 109 Wn. App. 896, 901–02, 37 P.3d 1255 (2002). On the other hand, when a LUPA decision is favorable to a local government, there is a collateral effect. Specifically, “[i]f the petitioner loses the LUPA appeal, the damages case is moot and the matter is over.” *Id.* at 901; *see also Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 405, 232 P.3d 1163 (2010) (noting that “claims for damages based on a LUPA claim must be dismissed if the LUPA claim fails”). This is

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<sup>7</sup> The logic of this exhaustion requirement is further supported by other legislative enactments. Where the legislature has codified damages claims against local governments, the legislature has explicitly required exhaustion of administrative process before bringing such damages claims. *See* RCW 64.40.030.

contrary to the Port's assertion that LUPA decisions have no collateral estoppel effect on damages actions. Port Supp. Br. at 9.

This Court recognizes that a party's failure to challenge a land use decision through LUPA forecloses damages claims arising from the land use decision. *See James*, 154 Wn.2d at 586, 588-89 (holding that the "imposition of impact fees as a condition on issuance of building permits became valid once the opportunity passed to challenge those decisions" and could not be challenged by separate action); *see also Mercer Island Citizens for Fair Process*, 156 Wn. App. at 405 (holding plaintiff's damages claims must be dismissed because those claims challenged the validity of a temporary use agreement and were therefore subject to LUPA); *Asche v. Bloomquist*, 132 Wn. App. 784, 801, 133 P.3d 475 (2006) (holding plaintiff's due process and public nuisance claims failed because the claims depended upon a finding that the challenged permit was invalid which could only be determined under LUPA). Respondents attempt to distinguish their situation by asserting the damages they claim do not depend on the incorrectness of the land use decision. But according to Respondents' own allegations, the process deemed lawful by the Examiner was the cause of the damages they claim to have suffered.

The Examiner's decision, which was not appealed, should collaterally estop Respondents from challenging the propriety of the SUP

amendment process in a damages action. Counsel for Maytown conceded the Examiner's decision on the process issue was final as a land use issue, because Respondent failed to exhaust their administrative remedies. At trial he stated: "Well, in the permit process it is final. I don't know whether it is final in this courtroom." RP 1477. The Court of Appeals erred in not finding the amendment process issue was final in the damages action, as well. The issue was required to be challenged under LUPA as an "unlawful procedure" or outside the authority of the County under its own code. RCW 36.70C.130(1)(a) & (e). None of the cases cited by Respondents stand for an opposite conclusion. *See Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013) (homeowners alleged neither procedural error nor lack of authority or jurisdiction in the land use decision); *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 24-25, 352 P.3d 807, *review denied*, 184 Wn.2d 1015 (2015) (damages claim may be controlled by LUPA if it is dependent on an interpretive decision regarding the application of a zoning ordinance).

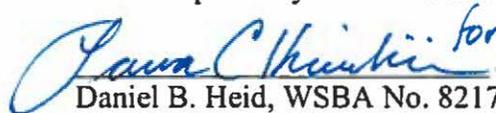
The monetary damages and compensation exception to the general rule that land use decisions must be judicially reviewed under LUPA must be narrowly construed. Court decisions interpreting this provision are consistent with the general rule, and reject those claims for damages that rely on resolution of a land use issue that could have been determined

under one of the standards contained in RCW 36.70C.130(1). By failing to challenge in a timely LUPA petition the Examiner's decision about the appropriate process for reviewing the SUP amendments, Respondents lost their right to challenge the validity of that process in any damages claims.

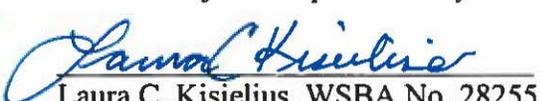
## VI. CONCLUSION

LUPA was intended to provide a uniform and consistent means for judicial review of land use decisions. Allowing land use permit applicants to skirt this process on a case-by-case basis when they believe jury review of their case may be more favorable defeats the purpose of the statute. Amici curiae ask the Court restore the purpose of the statute and narrowly construe the monetary damages exception to the general rule that LUPA provides the exclusive means of judicial review of land use decisions.

Respectfully submitted this 11th day of December, 2017.

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*Attorneys for Washington State Association of Counties*

# SNOHOMISH COUNTY PROSECUTORS-LAND USE DIVISION

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## 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:

Motion for Leave to File Amici Curiae Brief of Washington State Association of Municipal Attorneys and Washington State Association of Counties; Brief of Amici Curiae Washington State Association of Municipal Attorneys and Washington State Association of Counties; Certificate of Service

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