

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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**ANSWER TO OBJECTION TO PETITIONER'S STATEMENT OF  
ADDITIONAL AUTHORITY**

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The Respondents have submitted what they entitled an “Objection to Petitioner’s Statement of Additional Authorities.” The “Objection” asks this Court not to “consider...” Petitioner’s Statement of Additional Authority. *See* Objection at 1. The County assumes that this Court will treat the Respondents’ “Objection” as a motion to strike the Petitioner’s Statement, and therefore submits this Answer to that “motion.”

The Respondents are correct that Statements of Additional Authorities under RAP 10.8 are not to include argument. And the County did not include argument in its Statement. *All* the County did was to bring to this court’s attention the fact that Department Two of this Court had granted a petition for review in a case that included an issue that is the same as the first issue that the County asks to be reviewed. This is not argument, but a statement of two, irrefutable procedural facts: (1) this Court granted review in *Community Treasures*; and (2) the Petition for Review in *Community Treasures* includes as its second issue the same issue that is the first issue in the County’s Petition.

The statement of these facts is not advocacy “spin.” That they are facts can be confirmed simply by comparing the portions of the Petition for Review submitted in *Community Treasures* and the County’s Petition for Review here. To be sure, the County does go on to assert that these facts support granting review of issue one in Petition for Review, but that kind of “argument” has long been recognized not to violate the prohibition against argument set forth in RAP 10.8.

The Respondents go on at some length giving reasons why the facts in *Community Treasures* can be distinguished from the facts in this case. But even if the Respondents are correct, such distinctions cannot change the procedural fact that the petitions in both cases have raised *the same issue*. Moreover, that there may be differences between the facts in the two cases actually shows why the grant of review in *Community Treasures* supports granting review of the first issue in the County's Petition for Review. Having two cases before the Court for simultaneous consideration of the same issue will allow the Court to explore possible nuances that may bear on the resolution of the issue on its merits, and this in turn will afford the Court an opportunity to prepare an opinion that will provide broader guidance to counsel and the courts who find themselves confronting that issue in future cases.

From time to time this Court finds itself having granted a petition raising an issue, only to be confronted with another petition having been filed that presents the same issue. This Court often resolves this procedural situation by holding the later filed petition for resolution pending the outcome of the first case. But that resolution typically is adopted when the alternative is to delay for several months the setting of the first case for argument until a Department can determine whether in fact to grant review in the second case. Here the two cases were set for disposition on the same day.

Moreover, yesterday the Respondent in *Community Treasures* filed a motion to delay the oral argument in that case in order to allow amicus

curiae with an undeniable interest in the resolution of the overlapping issue<sup>1</sup> sufficient time to prepare and submit amicus curiae briefs in *Community Treasures* on a schedule that would not prejudice this Court's ability to give due consideration to those submissions. Should this Court grant that motion, and reset argument in the Winter 2018 Term, this Court will then be able to grant review of the first issue in the present case and set the case for argument the same day as *Community Treasures*, and the amicus curiae will be able to weigh in on the issue in both cases (and, among other things, address the supposed differences that the Respondents in this case now claim should affect the resolution of the issue on the merits in each case).

In sum, the Respondents' objection to the County's Statement of Additional Authorities is meritless. This Court should accept the Statement.

Respectfully submitted this 15<sup>th</sup> day of September, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By 

Michael B. King, WSBA No. 14405

• Jason W. Anderson, WSBA No. 30512

*Attorneys for Petitioner*

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<sup>1</sup> The amicus curiae in question are the Washington State Association of Municipal Attorneys and the Washington State Association of Counties, who submitted amicus curiae memoranda both supporting review of the first issue raised by the county in its petition. This Court accepted those memoranda, over an objection to them by the Respondents. It is apparent that neither group was aware that the same issue had also been raised in the petition for review filed in *Community Treasures*, which should come as no surprise given that the Court of Appeals' decision in that case was unpublished and predated the published decision by the Court of Appeals in the present case.

## 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 15<sup>th</sup> day of September, 2017.

*Patti Saiden*

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Patti Saiden, Legal Assistant

# CARNEY BADLEY SPELLMAN

September 15, 2017 - 11:04 AM

## 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:

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