

SUPREME COURT OF THE STATE OF WASHINGTON

MAYTOWN SAND AND
GRAVEL, LLC and PORT OF
TACOMA, a Washington special
purpose district,

Plaintiffs/Respondents,

v.

THURSTON COUNTY, a political
subdivision of Washington State,

Defendant/Petitioner.

No. 94452-1

RESPONDENTS'
OBJECTION TO
PETITIONER'S STATEMENT
OF ADDITIONAL
AUTHORITIES

I. Objection to Statement

Plaintiffs/Respondents Maytown Sand and Gravel, LLC and the Port of Tacoma (collectively "Maytown") object to the statement of additional authorities filed by Petitioner Thurston County on September 12, 2017. A statement of additional authorities "should not contain argument," RAP 10.8, but the County's filing is a mini-brief arguing (incorrectly) that an issue this Court apparently will review in a separate case is identical to an issue identified in the County's petition. The County's statement violates RAP 10.8 and should not be considered.

If the Court does consider the County's statement, Maytown asks that the Court also consider the following argument in response.

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II. Response to Argument

The only link between this case and *Community Treasures* is Thurston County's incorrect argument that the issues are identical. As discussed herein, they are not.

Community Treasures raises two questions, neither of which relates to the issues raised by Thurston County's petition. The primary issue *Community Treasures* asks this Court to determine is whether "a municipality's imposition of building permit application fees is a 'land use decision' under the Land Use Petition Act."¹ That question affects every local government and every permit applicant in the state, and if this Court answers in the negative, it can remand without addressing any other issue in the petition. Second, the Petitioner in *Community Treasures* asked whether, if one assumes the fees are part of the "land use decision," a permittee must delay commencing her project to challenge her own permit, administratively and then in superior court under LUPA, before having the right to seek recovery of fees charged in excess of the actual expenses incurred by staff. This issue implicates LUPA's exclusion for

¹ Quote from Supreme Court Issues, September 11, 2017. The phrase "land use decision" is defined at RCW 36.70C.020(2). Only "land use decisions" are appealable under LUPA, RCW 36.70C.030, while challenges to agency action that does not fit the definition of "land use decision" must be appealed through other means, *see Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013).

actions to recover damages, RCW 36.70C.030(1)(c), but only if the Court first concludes that the fees are a “land use decision.”

Thurston County’s Petition, by contrast, asks the Court to rule that the Land Use Petition Act bars Maytown from seeking tort damages (not overpaid fees) arising out of a concerted and years-long effort of Thurston County elected officials and staff to destroy Maytown’s business expectancy. The assumption fundamental to the second issue in *Community Treasures*—that fees related to a land use permit are part of the land use permit—cannot apply to this case. The County’s intentional action to destroy Maytown’s business in this case are completely unlike the permit fees at issue in *Community Treasures*.

The County suggests that the *Community Treasures* petitioner seeks to overrule this Court’s holding regarding LUPA’s exclusion in *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005), in favor of adopting Justice Sanders’s dissent. Contrary to this characterization, however, this Court made clear in *James* that it made no ruling on the issue raised in Justice Sanders’ dissent because the plaintiff had not raised the issue. 154 Wn.2d at 586-87. Justice Sanders argued that the Court should have relied on RCW 36.70C.030(1) even though the issue was not briefed, *id.* at 593-94, but the Court expressly declined to reach the issue, *id.* at 586-87. In fact, the *Community Treasures* petitioner asks the Court

to address the question for the first time. Maytown's case, which the Court of Appeals correctly concluded does not involve damages arising out of a land use decision, is unrelated to the issue. The Court of Appeals in this case responded to the County's argument by following the plain language of RCW 36.70C.030(1)(c) and this Court's opinion in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013). See 198 Wn. App. 560, 579-581. The Court of Appeals cited *James* only for a different, and uncontroversial, proposition that "the legislature provided for certain exemptions to LUPA's application." *Id.* at 578.

In sum, the County's argument should not be considered because it is argument made in violation of RAP 10.8. In any event, the County's attempt to manufacture a conflict with this Court's LUPA jurisprudence fails for the reasons stated herein.

DATED this 14th day of September, 2017.

s/Patrick J. Schneider

s/Steven J. Gillespie

Patrick J. Schneider, WSBA #11957

Steven J. Gillespie, WSBA #39538

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000

Seattle, Washington 98101-3292

Telephone: (206) 447-4400

Facsimile: (206) 447-9700

Email: pat.schneider@foster.com

steve.gillespie@foster.com

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*Attorneys for Plaintiff/Respondent Port of
Tacoma*

s/John E.D. Powell

John E.D. Powell, WSBA #12941
JED POWELL & ASSOCIATES, PLLC
7525 Pioneer Way, Suite 101
Gig Harbor, WA 98546
Telephone: (206) 618-1753
Email: jed@jedpowell.com
*Attorneys for Plaintiff/Respondent
Maytown Sand and Gravel, LLC*

s/Eric Christensen

Eric Christensen, WSBA #27934
CARINCROSS HEMPELMANN PS
526 2ND Ave., Suite 500
Seattle, WA 98104
Telephone: (206) 587-0700
Facsimile: (206) 587-2308
Email: echristensen@cairncross.com
*Attorneys for Plaintiff/Respondent
Maytown Sand and Gravel, LLC*

RESPONDENTS' OBJECTION TO STATEMENT OF
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CERTIFICATE OF SERVICE

I hereby certify that, on Thursday, September 14, 2017, I caused to be served, in the manner indicated below, a true and correct copy of the foregoing document on each of the following:

Elizabeth Petrich
Thurston County Deputy
Prosecuting Attorney
2000 Lakeridge Dr. SW, Bldg. 2
Olympia, WA 98502
petrice@co.thurston.wa.us
Served via electronic mail
Attorney for Thurston County

Carolyn A. Lake
Goodstein Law Group PLLC
501 S. G Street
Tacoma, WA 98405
253-779-4000
Fax: 253-779-4411
clake@goodsteinlaw.com
Served via electronic mail
Attorney for Port of Tacoma

Michael B. King
Jason W. Anderson
Rory Drew Cosgrove
Carney Badley Spellman, P.S.
701 5th Avenue, Ste. 3600
Seattle, WA 98104
(206) 622-8020
king@carneylaw.com
anderson@carneylaw.com
cosgrove@carneylaw.com
Served via electronic mail
Attorney for Thurston County

Mark R. Johnsen
Steven David Robinson
Karr Tuttle Campbell
Special Deputy Prosecuting
Attorney for Thurston County
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
mjohnsen@karrtuttle.com
sdrobinson@karrtuttle.com
Served via electronic mail
Attorney for Thurston County

Don C. Bauermeister
James Hertz
FRIEDMAN | RUBIN
1126 Highland Avenue
Bremerton, WA 98370
(360) 782-4300
don@friedmanrubin.com
jhertz@friedmanrubin.com
Served via electronic mail

Josh Weiss
Washington State Association of
Counties
206 10th Avenue S.E.
Olympia, WA 98501-1311
(360) 586-4219
jweiss@wacounties.org
Served via electronic mail
Attorney for WSAC

*Attorney for Maytown Sand &
Gravel, LLC*

Daniel G. Lloyd
Vancouver City Attorney's Office
P. O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500
dan.lloyd@cityofvancouver.us
Served via electronic mail
Attorney for Amicus WSAMA

Daniel B. Heid
City Attorney
City of Auburn
25 West Main
Auburn, WA 98001
(253) 931-3054
dheid@ci.auburn.wa.us
Served via electronic mail
Attorney for Amicus WSAMA

DATED Thursday, September 14, 2017, at Seattle, Washington



Brenda Bole

FOSTER PEPPER PLLC

September 14, 2017 - 3:55 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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- jweiss@wsac.org
- king@carneylaw.com
- mjohnsen@karrtuttle.com
- pat.schneider@foster.com
- petrice@co.thurston.wa.us
- sdrobinson@karrtuttle.com
- swatkins@karrtuttle.com

Comments:

Respondent's Objection to Petitioner's Statement of Additional Authorities with Declaration of Service

Sender Name: Brenda Bole - Email: brenda.bole@foster.com

Filing on Behalf of: Steven James Gillespie - Email: steve.gillespie@foster.com (Alternate Email:)

Address:

1111 Third Avenue, Suite 3000

Seattle, WA, 98101
Phone: (206) 447-4400

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