

No. 94452-1

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SUPREME COURT OF THE STATE OF WASHINGTON

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

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MAYTOWN SAND AND GRAVEL, LLC and PORT OF TACOMA,

Plaintiffs/Respondents,

v.

THURSTON COUNTY,

Defendant/Appellant.

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**ANSWER TO MEMORANDUM OF AMICUS WASHINGTON  
STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN  
SUPPORT OF PETITION FOR REVIEW**

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## I. INTRODUCTION

This is a tort action, sounding chiefly in tortious interference. There is no exhaustion requirement in tort, and nothing about the facts of this case should cause the Court to create one. As the jury found, the highest ranking elected officials in Thurston County, together with County staff, intentionally interfered with Maytown's business enterprise with the goal of preventing a permitted mine from opening. As the jury also found, these intentional acts succeeded in killing the mine and defeating Maytown's business expectancy.

The Washington State Association of Counties (WSAC) fails to recognize the distinctions between tort and land use law and therefore offers no reason for the Court to grant review under RAP 13.4.

## II. RESPONSE TO INTEREST OF *AMICUS CURIAE*

Although an amicus memorandum should "alert this Court that the decision of the Court of Appeals implicates interests broader than those of the parties to the case,"<sup>1</sup> WSAC's memorandum merely repeats arguments Thurston County has already made rather than highlighting policy implications of the case. Those implications WSAC does discuss depend chiefly on its misapprehension of the facts of the case and the applicable law and do not warrant review.

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<sup>1</sup> Thurston County's Reply in Support of Motions for Leave to File Amicus Memoranda in Support of Petition for Review at 1.

### III. STATEMENT OF THE CASE

Maytown incorporates by reference the facts it recited in its answer to Thurston County's Petition for Review, as augmented by the recitation in Maytown's answer to the WSAMA memorandum.

### IV. ARGUMENT

WSAC's memorandum rests on the same flawed foundation as the WSAMA memorandum, and Maytown incorporates by reference its arguments in opposition to the memorandum filed by WSAMA. In this answer, Maytown responds to WSAC's unique arguments.

**A. WSAC's attempt to turn land use appeals into the liability phase of a damages action contradicts the legislature's decision to decouple damages actions from land use appeals**

WSAC's argument ignores one of the principal reasons the Legislature adopted LUPA in the first place: to de-couple land use processes from damages actions. In 1992, in *Lutheran Day Care v. Snohomish County*, this Court held that, where a land use decision is reversed as arbitrary and capricious (the standard for reversal under the writ of certiorari), the government is collaterally estopped to deny liability for damages under RCW 64.40.020(1) and 42 U.S.C. § 1983. 119 Wn.2d 91, 116-17, 125, 829 P.2d 746 (1992). The use of the same standard – arbitrary and capricious – for liability as for reversal of a land use decision had the practical effect of turning every administrative land use appeal into the liability phase of an action for damages. But administrative

appeals are intended to be comparatively quick, informal, and inexpensive, and are often conducted by staff, applicants, and citizens without the presence of attorneys. In 1995 the Legislature responded by adopting LUPA, which superseded the problem identified by *Lutheran Day Care* by separating judicial review of land use decisions from damages litigation. LUPA did so by (1) replacing the writ of certiorari for review of land use actions, RCW 36.70C.030(1); (2) abandoning the arbitrary and capricious standard, RCW 36.70C.130(2); (3) requiring expedited review of land use decisions, RCW 36.70C.090; (4) allowing limited or no discovery, RCW 36.70C.120; and (5) expressly excluding from its coverage actions for damages, RCW 36.70C.030(1)(c).

Land use appeals require speed and predictability, which LUPA provides. Damages actions require discovery and time, which the Civil Rules and the common law provide. Yet WSAC, like Thurston County before it, asks the Court to ignore LUPA's plain language and purpose, and to write the damages exception out of existence. The Court should decline the invitation.

**B. The purported conflict in case law depends on a misreading of the facts of this case**

Relying heavily on *Durland v. San Juan County*, 182 Wash.2d 55, 340 P.3d 191 (2014), WSAC asks the Court to require applicants to pursue land use appeals with no land use purpose, in order to recover tort

damages for actions that were not land use decisions. But *Durland* involved no action for damages. This Court in *Durland* decided only whether the lack of notice excused the failure to timely appeal an adverse land use decision. *Id.* at 66-68. The harm the plaintiffs alleged in *Durland* flowed directly from the County decision to grant their neighbor a building permit, and plaintiffs' failure to timely appeal the permit precluded a later challenge. *Id.* at 61.

Contrary to WSAC's assertion that Maytown sought a "land use decision" in the superior court, Mem. at 4, Maytown sought *damages* in superior court. All the land use issues were resolved nearly three years before the damages trial, by the end of 2011. Earlier that year, the Board of County Commissioners issued two land use decisions regarding the Maytown mine. The first, the five-year review decision, was adverse to Maytown; Maytown immediately appealed it under LUPA; and the superior court summarily reversed it (then later, in the damages action, held it to have been arbitrary and capricious). The other land use decision, regarding amendments to the mining permit, was in Maytown's favor, so Maytown could not have appealed under LUPA even if it wanted to.

WSAC inaccurately characterizes the amendments ruling when it writes that "at issue in the amendments ruling was whether amendments requested by Maytown were major or minor." Mem. at 4. What was

actually at issue in the amendments ruling was whether the Hearing Examiner should grant the amendments, which she did, and whether she should rule that the County illegally required SEPA review, which she also did. The question of major or minor process was relevant only to Maytown's SEPA appeal, which the Hearing Examiner granted. Staff required amendments before allowing Maytown to commence work on the site, and Maytown accepted the Hearing Examiner's decision to approve the amendments, as Maytown had asked her to do, then moved forward with its mine.

WSAC leaps to the conclusion that if the amendments process was not illegal, then "Thurston County was justified in delaying Maytown's mining activities, and Maytown's tortious interference claim would fail." Mem. at 4-5. This leap ignores the evidence that Maytown presented to the jury, including the evidence that staff repeatedly exercised its authority at the direction of the Commissioners, for the very purpose of causing delay and expense to Maytown. *See* RP 3302:24-3310:18. WSAC also ignores the evidence that one of these actions was the staff's decision to subject the amendments to SEPA review, which the Hearing Examiner determined to be unlawful. WSAC also ignores the volumes of evidence about County actions that eroded the certainty of the mining permit, regardless of whether those actions directly caused any delay. For

example, Commissioner Valenzuela directed staff to “find me an emergency” that would allow her to prevent mining pursuant to the issued mining permit.<sup>2</sup> Such hostility by the Commissioners to the County’s own issued mining permit undermined confidence in the mining permit, even though that statement did not itself directly cause delay.

Finally, both Thurston County and WSAC erroneously suggest that creation of a process is a condition on the resulting land use permit.<sup>3</sup> This is incorrect. A condition on a permit sets the terms under which the activity authorized by the permit may proceed. *See, e.g., James*, 154 Wn.2d at 580 (requirement of payment of impact fees a condition on building permit). For example, the permit at issue here contained conditions requiring treatment of stormwater, among many others. *See Ex. 303* at 44. Maytown did not challenge any conditions on its permit. Creation of an amendments process, by contrast, was neither a condition on the ultimate approval of the amendments nor a “land use decision” as defined in RCW 36.70A.020(2). The creation of the process was legislative in nature. Legislative acts were never challenged through the writ of certiorari and are not challenged under LUPA.

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<sup>2</sup> RP 801:12; 892:25-894:6.

<sup>3</sup> Mem. at 4 n.2. WSAC and Thurston County both rely on *James v. Kitsap County*, 154 Wn.2d 574, 115 P.3d 286 (2005), to support the undisputed proposition that a condition on a land use decision is part of the decision.

**C. WSAC’s repetition of the County’s constitutional argument merely disagrees with the jury’s factual findings and creates no conflict with existing law**

WSAC, like Thurston County’s Petition for Review, casts the facts surrounding the Commissioners’ interference in the light most favorable to the *County*, attempting to minimize multiple actions the jury found to shock the conscience as merely “overzealous” and “in pursuit of a legitimate government interest.” Mem. at 8. But WSAC ignores the evidence showing that the County Commissioners directed staff to ignore the facts and law and to abuse the County’s regulatory authority in furtherance of the Commissioners’ political agendas.

For example, County Commissioner Karen Valenzuela was impeached by her own deposition testimony more than twenty times,<sup>4</sup> and at no point did she (or any other witness) deny that she directed staff to “find me an emergency”<sup>5</sup> that would allow her to stop the mine. She directed staff to impose new critical areas regulations on the issued permit,<sup>6</sup> despite knowing that was not allowed.<sup>7</sup> Explaining his reasoning for denying the County’s motion for judgment at the close of Maytown’s case, the trial judge said, “I think this jury could easily conclude that certainly, with respect to Ms. Valenzuela that her testimony could be

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<sup>4</sup> RP 1534-1594; 1690-1820.

<sup>5</sup> RP 801:12; 892:25-894:6.

<sup>6</sup> RP 1729:1-1731:21.

<sup>7</sup> RP 1734:12-1735:9.

characterized as evasive and self-serving and not consistent with what other evidence has established the actual facts of the circumstances that were going on at the time.” RP 2884-2885.

WSAC’s argument simply asks the Court to disagree with the jury’s conclusion without meeting the applicable burden of showing that the jury’s verdict was “clearly unsupported by substantial evidence, i.e., evidence that, if believed, would support the verdict.” *Maytown v. Thurston County*, 189 Wn. App. 560, 585, 395 P.3d 149 (2017) (quoting *Gorman v. Pierce County*, 176 Wn. App. 63, 87, 307 P.3d 795 (2013)). The Court views the evidence in the light most favorable to the nonmoving party, and does not substitute its judgment for that of the jury. *Id.* WSAC does not explain how Thurston County meets this burden.

In addition, as demonstrated in *Maytown’s* Answer to the Petition for Review (at 14-15), both this Court and the federal courts have regularly awarded damages under 42 U.S.C. § 1983 for substantive due process violations involving government misconduct less egregious than the County’s misconduct in this case. In every one of those cases, the relevant local agency was pursuing the same kind of government interest that WSAC cites here. Nonetheless, those courts all concluded that this government interest could not justify conduct intended to destroy vested property rights.

Further, as this Court has noted, “[t]he test for whether a particular action shocks the conscience must be appropriately tailored to the factual context at hand and ‘must be determined by balancing . . . liberty interests against the relevant state interests.’ *Braam v. State*, 150 Wn.2d 689, 704, 81 P.3d 851, 859 (2003). WSAC’s argument fails both tests. First, it relies on criminal and other cases with vastly different contexts, whereas Maytown’s Answer cites exclusively cases from the land use context. And the U.S. Supreme Court has made clear that in a context like this one, when government officials have the “luxury” to reach “unhurried judgments,” as opposed to the high-speed police chase involved in *County of Sacramento v. Lewis*, the “protracted failure even to care” and “indifference,” such as that shown to Maytown’s constitutional rights here, is “truly shocking.” 523 U.S. 833, 853 (1998). Second, the County’s argument focuses only on the state interest allegedly involved to the exclusion of Maytown’s liberty interests. It therefore fails to recognize the necessity for balancing these liberty interests required by *Braam*.

The Court of Appeals’ decision upholding the jury’s award of damages under 42 U.S.C. § 1983 was fully consistent with both Washington law and federal law, and with the facts. There is no justification for the Court’s review of this issue.

## V. CONCLUSION

WSAC's position depends on a flawed understanding of the facts of the case and does not merit review. For the reasons explained herein and in Maytown's other filings, Maytown respectfully requests that the Court decline to review the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 25th day of July, 2017.

*s/Patrick J. Schneider*

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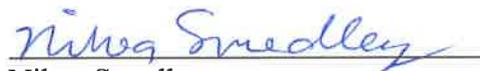
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