

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 STATEMENT OF ADDITIONAL AUTHORITY IN
SUPPORT OF PETITION FOR REVIEW**

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Under RAP 10.8, Petitioner Thurston County submits an additional authority on the issue of whether this Court should grant review of the first issue set forth in the County's petition:

1. LUPA Restrictions on Civil Damages Actions. Must a party first pursue its administrative remedies, and upon receiving an adverse land-use decision following the exhaustion of those remedies, prevail in a land-use petition challenging that decision, before that party may pursue a civil-damage action based on that decision? The Plaintiffs and Respondents Port of Tacoma and Maytown Sand & Gravel chose not to exhaust their administrative remedies from adverse land-use actions, yet were allowed by the Lewis County Superior Court to base state-law tort claims for damages on a challenge to those actions. In affirming an award of millions of dollars in damages against the County, the Court of Appeals held that the Land Use Petition Act places no restrictions on civil damages actions. This holding conflicts with decisions of this Court and published decisions of the Court of Appeals and presents an issue of significant public interest.

Petition for Review at 1.

On September 5, 2017, Department 2 of this Court granted review in *Community Treasures v. San Juan County*, Cause No. 94463-6. The second issue for which review has been granted in that case is as follows:

If a county's decision on the size of the processing fee is a "land use decision" under LUPA, are challenges to the overcharge of that fee excepted from LUPA as claims for "monetary damages or compensation"?

Petition for Review in *Community Treasures* at 1 (Issue 2). A review of the petition discloses that Petitioner is urging this Court to adopt Justice Sanders' reading of Section .030 of LUPA in his dissent in *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005):

The trial court and the Court of Appeals rest on the mere connection between the application processing fees and the land-use purpose of the applications themselves. Even if this connection is sufficient to render the County's imposition of processing fees "land use decisions" under LUPA, challenges to the size of these fees are "[c]laims provided by any law for monetary damages or compensation." RCW 36.70C.030(1)(c), attached as Appendix D. Monetary claims are not traditionally brought using the writ of certiorari, which LUPA was enacted to replace. *James*, 154 Wn.2d at 591-92 (Sanders J., dissenting); see also RCW 36.70C.030 ("LUPA replaces the writ of certiorari for appeal of land use decisions."). Thus, LUPA's restrictions on land use challenges do not apply to Plaintiffs' claim.

Petition for Review in *Community Treasures* at 14-15.

In the present case, the Court of Appeals adopted, albeit without express attribution, Justice Sanders' reading of Section .030(1) in his dissent in *James*. The County's first issue (previously quoted) expressly identifies that adoption as a reason for granting review under several of the criteria set forth in RAP 13.4(b), and the argument in support of granting review of that issue develops the reasons for why the County contends that this reading of Section 030(1) frustrates the purposes of LUPA. See County's Petition for Review at 11 (criticizing Justice Sanders' reading for, *inter alia*, disregarding the stated purpose of LUPA).

The County submits the fact of this Court's granting review in *Community Treasures* of the same issue raised by the County in its petition for review as additional authority for (1) granting review of the County's first issue, and (2) setting this case for argument and submission on the same date as *Community Treasures* is set for argument and submission.

Respectfully submitted this 12th day of September, 2017.

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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 12th day of September, 2017.

Patti Saiden

Patti Saiden, Legal Assistant

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September 12, 2017 - 10:44 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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