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DIVISION II
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STATE OF WASHINGTON
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NO. 49073-1-II

COURT OF APPEALS – DIVISION II
OF THE STATE OF WASHINGTON

CAVE PROPERTIES, a Washington Partnership and
MARCIA WICKTOM,

Appellants,

Vs.

CITY OF BAINBRIDGE ISLAND, a Washington corporation, and JOHN
and ALICE TAWRESEY, husband and wife and the marital community
comprised thereof,

Respondents.

APPELLANTS OPENING BRIEF

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I

INTRODUCTION

Appellants Cave Properties and Wicktom seek reversal of the trial court's dismissal of their LUPA and writ of review Petition. The Petition was filed after the City of Bainbridge Island after a public hearing erroneously imposed upon Appellant's real property a reimbursement assessment if and when their property connects to a new water main installed by developer Tawresey. The Petition was timely filed by Appellants. The trial court determined that the appeal is not a land use decision reviewable under LUPA or a writ of review and dismissed the appeal.

II

ASSIGNMENT OF ERROR

The trial court erred in granting the City of Bainbridge Island's motion to dismiss Appellants' LUPA and writ of review petitions, holding that a challenge to imposition of latecomer fees on Appellant's real property for a developer installed water main extension by Respondent

City of Bainbridge Island (“COBI”) was not a land use decision and not reviewable by the Superior Court.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Does LUPA govern the appeal by a burdened property owner of a City assessment for a land use mandated water main project?

III.

STATEMENT OF THE CASE

Respondents Tawresey submitted a land use application to develop real property on Bainbridge Island. COBI required a new water main be constructed to serve the project. After the water main was constructed, COBI and the developer executed a reimbursement agreement imposing latecomer fees on Appellants’ property. CP 22-49 The fees were appealed to the COBI City Council as violative of RCW 35.91 and COBI Ordinances.

A public hearing was held for the Bainbridge Island City Council on petitioner’s appeal on February 16, 2016. At Petitioner’s request, the public hearing was continued to March 8, 2016. CP 22-49

The record includes a Declaration of the City Clerk attaching exhibits of the City Council identifying these hearings as public hearings. At the conclusion of the public hearings, the City Council voted to approve the Developer Extension Agreement pursuant to RCW Chapter

35.91 and Chapter 13.32 of the Bainbridge Island Municipal Code. CP 22-49

The Court will note from the minutes attached to the Declaration of the City Clerk that Petitioner objected to approval of the Latecomers Agreement based upon several deficiencies. CP 22-49 These are summarized as follows:

1. Statutory timeframes were not complied with.
2. The costs claimed by the developer were not documented by invoices supplied to the City of Bainbridge Island.
3. The assessment method was improper.

Notice of the public hearing was provided pursuant to ordinance and statute. The hearing was opened by the Council President, testimony was taken and the hearing was closed. Respondents Tawresey were represented by counsel who argued in support of the agreement. The Council then voted based upon the evidence and the record presented at the hearing. CP 22-49

Appellants sought judicial review of the hearing and decision of the Bainbridge Island City Council. Appellants timely filed their appeal under the Land Use Procedure Act or alternatively under a Writ of Review. CP 1-7

COBI then filed a Motion to Dismiss. CP 13-21 COBI argued that the action of the City council in imposing a latecomer assessment against

Appellants' property was not a land use decision and was not quasi-judicial. CP 57-63 The trial court granted the Motion to Dismiss. This appeal follows.

IV. ARGUMENT

COBI contends that review requested under the Land Use Procedure Act (LUPA) or statutory Writ of Review is not available to Appellants whose property is now encumbered with a Latecomer Extension Agreement recorded by COBI. Such an interpretation deprives property owners of any ability to obtain judicial review of a public hearing where a Latecomer Agreement is approved by a City Council.

The Washington State Legislature has implemented land use review by statute (LUPA) for land use decisions regardless of their character. RCW 36.70C. A Writ of Review procedure applies to quasi-judicial decisions of local legislative bodies.

LUPA pertains to judicial review of all land use decisions (legislative, quasi-judicial and ministerial) with some exceptions noted in the statute. Prior to enactment of LUPA, an aggrieved person could

challenge a county's land use decision through a writ of certiorari. In enacting LUPA in 1995, the Legislature replaced the writ of certiorari for appeal of land use decisions as stated in RCW 36.70C.030 and determined that LUPA "shall be the exclusive means of judicial review of land use decisions," with certain specific exceptions.

LUPA's stated purpose "is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review. *Chelan v Nykreim*, 146 Wn.2d 90, 52 P.3d 1(2002)

The instant dispute challenges the amount and method of pay back assessment placed on Petitioners' property by a developer extension agreement between the developer and COBI. COBI ordinances require an application for a developer extension agreement be filed with the Public Works Department concurrently with a land use application, as defined in BIMC 2.16.020.C for the same real property. BIMC 15.32.040.

The City argued in its motion to dismiss that the approval of the Latecomer Agreement is not a quasi-judicial action. What COBI fails to note is if the decision was a "land use decision" LUPA applies regardless of its nature as legislative or quasi-judicial.

In support of its argument, COBI relies on *Kerr-Belmark Const. Co. v. City Council of City of Marysville*, 36 Wn.App. 370, 674, P.2d 684 (Div. I 1984). *Kerr-Belmark*, challenged a resolution by the City of Marysville to reduce the service area for its sewer utility based upon the operational capacity of a sewer lagoon. The decision to reduce the service area was not based upon a “process of applying existing law to past or present facts.” This decision was solely legislative and not related to a particular land use application. The Court reviewed the legislative decision to reduce the sewer service area in Marysville pursuant to the constitutional provision providing for review by certiorari.

RCW 36.70C provides for review of land use decisions concerning “applications for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used. Respondents Tawresey submitted a request for construction of an extension to the City domestic water system *as part of its land use application*. The developer extension agreement application specifically indicates that the respondents sought governmental approval to construct a water main extension necessary for Tawreseys’ development.

This is clearly a land use decision under LUPA. It is also a quasi-

judicial decision adjudicating the rights of two competing parties reviewable by Writ of Review.

There are many LUPA decisions addressing similar disputes to the one in the case at bar. Where infrastructure improvements are required for a project, any issues relating to that infrastructure are reviewable under LUPA. For example in *Stanzel v. Puyallup*, 150 WnApp. 835, 209 P3^d 534 (2009), the Court employed LUPA to review a challenge to water and sewer connections and utility services outside of the city limits of Puyallup.

The applicability of LUPA to latecomer agreements was recently addressed in *Sims v. Burlington No. 73608-6-I (2016)*, an unpublished decision of Division I of the Court of Appeals. *Sims* involved a contract entered into between a city and property owners developing their property. A contract between the City and the developing property owner allowed it to be reimbursed for any benefit created by street improvements made during the course of development. Like here, property owners who were subject to a preliminary assessment pay back requested a hearing before the city council. The city council voted to deny the property owners' appeals. The property owners then filed a complaint for declaratory judgment and further requested issuance of a writ of certiorari and

injunctive relief. The developer filed a Motion to Dismiss claiming that the property owners claims were subject to LUPA and were time barred. The trial court agreed and dismissed the property owners' complaint. On appeal, the Court of Appeals upheld dismissal of the lawsuit finding that the imposition of reimbursement charges to adjacent property owners is a land use decision and was subject to appeal only under LUPA.

This instant case is virtually identical as to the land use aspect of the reimbursement agreement and applicability of LUPA. Although the *Sims* opinion is unpublished, the Supreme Court recently revised its rule to allow citation to unpublished opinions. See *General Rule 14.1*.

CONCLUSION

The trial court erred in dismissing Appellant's LUPA Petition. The Developer Extension Agreement and the imposition of reimbursement charges against Appellants' property by the City Council of COBI was a land use decision. This Court should remand this matter to the trial court for further proceedings.

DATED this 1st day of November, 2016.

Respectfully submitted

William H. Broughton, WSBA#8858
Attorney for Appellants

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DECLARATION OF MAILING

I, Cherril Hill, certify that on the 1st day of November, 2016, I
mailed a true and correct copy of the attached Appellants Opening
Brief, and this Declaration of Mailing, to:

Clerk of Court
Division II, Court of Appeals
State of Washington
950 Broadway, No. 300
Tacoma, WA 98402

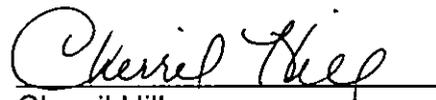
And to:

David A. Weibel, Attorney for Respondents Tawresey
3212 NW Byron Street No. 104
Silverdale, WA 98383

And to:

Ann Marie Soto, Attorney for Respondent Bainbridge Island
11 Front Street South
Issaquah, WA 98027-3820

DATED THIS 1st day of November, 2016, at Silverdale, WA.


Cherril Hill