

**FILED**

JUL 06 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**No. 331598**

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**MARK and JENNIFER HANNA, husband and wife,**

**Appellants,**

**v.**

**ALLAN AND GINA MARGITAN, husband and wife, and HAROLD  
L. AND PATRICIA CROWSTON, husband and wife, DAN R. BOND  
and JANE DOE BOND, Husband and wife, DAN M. BOND and  
JANE DOE BOND, husband and wife, RYKEN LIVING TRUST 18  
and Trustees Carl and Carole Ryken, STEVE and SHANNON  
MOSER, husband and wife, and AVISTA CORPORATION,  
INLAND POWER AND LIGHT CO.,**

**Respondents**

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**APPELLANTS' BRIEF**

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## INTRODUCTION

In general, Respondents argue that privately granted easements are exempt from both the Land Use Petition Act, RCW 36.70C (“LUPA”) and RCW 58.17 (Plats--Subdivisions—Dedications). As a consequence, the Respondents posit, a “land use decision” as defined in LUPA, creating a short plat cannot have any effect on pre-existing privately granted easements and private easements may be legally added to an existing short plat without amending the short plat. On the other hand, Appellants, Mark and Jennifer Hanna (“Hannas”), contend that there are no statutory exemptions under LUPA and RCW 58.17 for “private” easements. To conclude otherwise would thwart the emphasis on the finality of land use decisions under LUPA, make a mockery of the long held idea that “land use” should be planned and subvert the entire extensive subdivision process created by the passage of RCW 58.17. The Respondents’ fundamental position is that so long as private parties agree on the creation and placement of easements on platted land, land use planning statutes, ordinances and regulations, such as LUPA and RCW 58.17, do not apply.

The Hannas purchased a lot in Spokane County Final Short Plat 1227-00 (“Short Plat”) in 2002 with only a single 40 foot wide egress, ingress and utility easement showing on the face of the Short Plat (CP 33). The Hannas claim that because the Short Plat was subject to the Land Use

Petition Act (“LUPA”) (CP 258-263) and was an un-appealed “land use decision”, that no other legal easements now can exist on the Short Plat without a formal amendment. Some of the Respondents with recorded easements existing before the Short Plat “land use decision” argue that the “land use decision” creating the Short Plat had no legal effect on their easements because they were private easements, even though their easements were intentionally excluded from the Short Plat. See Preliminary Short Plat versus Final Short Plat. (CP 372-374) The Respondents further argue their easements were “private” rather than “public” easements and hence unaffected by LUPA. (CP 568-578, CP 619-635, CP 583-586, CP 649-656, CP 716-719) The other Respondents, Allan and Gina Margitan (“Margitans”) and Inland Power and Light Co. (“Inland Power”), argue that they were not required to amend the Short Plat to have their easements added to the Short Plat even though received after the Short Plat was created. (CP 431-448, CP 720-736) Inland Power and the Margitans also claim private easements are not within the purview of RCW 58.17 and are exempt. (CP 431-448, CP 720-736 ) Of course, none of the Respondents easements appear anywhere on the Final Short Plat. (CP 12)

Final Short Plat 1227-00 (“Short Plat”) was created pursuant to a land use decision made by Spokane County Building and Planning on

May 12, 2000 (“Decision”). (CP 364-372). The Decision specifically provided for further refinement in the form of a final Short Plat, culminating in April of 2002. (CP 364-372). The Final Short Plat is part and parcel of the Decision, as stated. Before the Short Plat was finally approved by Spokane County the un-platted land area contained several recorded easements belonging to Respondents Ryken, Ryken Trust, Crowston, Moser, Avista and the Bonds (“Ryken et al”). (CP 1-15, CP 374) Four additional easements were recorded in reference to the Short Plat, and without amending the Short Plat, after its creation and given to the Margitans and Inland Power. (CP 359) In essence, there are easements recorded before the Final Short Plat was created and after but none of these easements now appear on the Final Short Plat 1227-00 approved by Spokane County in 2000 and 2002. (CP 364-372)

The preliminary Short Plat application map included the pre-existing recorded easements but by the time the Final Short Plat was approved, Spokane County removed the pre-existing easements and the Final Short Plat contained only a single 40 foot wide utility, ingress and egress easement in its final form. (CP 374) The pre-existing easements appear nowhere on the Final Short Plat that was recorded in March of 2002. (CP 364-372) Nor do the easements recorded after the Final Short

Plat was created appear anywhere on the Final Short Plat. The Short Plat was never amended after it was finally approved in 2002. (CP 258-263)

The Hannas' position is that the final Short Plat map represents a "land use decision" (and included in the Decision) under the Land Use Petition Act ("LUPA") and because no one appealed the "land use decision" to Superior Court within 21 days of March 12, 2000 or April of 2002, the easements recorded before the Final Short Plat was approved, not being on the Short Plat and not apart of the land use decision, were extinguished and may only be added legally through a Short Plat amendment process per Spokane County regulations. Any attempt to add the pre-existing easements to the Final Short Plat, as the trial court allowed in this case, is either a direct or collateral attack on an un-appealed "land use decision" under LUPA and any court is without any jurisdiction to hear the arguments of the Rykens et al.

The Superior Court attempted an end run around LUPA by declaring that LUPA has no legal effect on "private easements" recorded before the creation of the Final Short Plat. "Private Easements" are ostensibly those easements that are not accessible by the public at large. But LUPA stands as the "exclusive" means of appealing any "land use decision" approving or disapproving a short plat. RCW 58.17.180. And all land use decisions are subject to LUPA unless specifically excluded under

RCW 36.70C.030. None of the statutory LUPA exemptions includes “private easements”. Where a statute is plain and unambiguous, it must be construed in conformity with its obvious meaning without *regard to the previous state of the common law*. The plain meaning of LUPA is that unless an exemption from coverage is clearly and unambiguously stated in the statute, there are no exemptions from coverage. Because LUPA applies to the Short Plat and the Short Plat excludes Rykens et al easements a court is without jurisdiction to alter the Short Plat to include any of the Rykens et al easements without a timely LUPA appeal. A LUPA appeal is too late 15 years after the decision approving the Final Short Plat in this case.

There does not seem to be any challenge from the Rykens et al that the Short Plat cannot be altered since there was no appeal under LUPA by anyone. (CP 568-578, CP 619-635, CP 583-586, CP 649-656, CP 716-719) Their position is that “private easements” get a free pass, are not within the purview of LUPA and are exempt from LUPA, and hence the procedural limitations of LUPA do not and cannot apply. *Id.* This position clearly argues that either there is an exemption from LUPA or that there is no collateral attack on the land use decision approving the Short Plat. Here there is no stated statutory exemption and, by definition, there is a

collateral attack on the current status of the Short Plat that does not contain the Respondents' easements.

The Superior Court also ignored the existing Summary Judgment Order of Judge Tompkins that stated Short Plat 1227-00 is subject to LUPA. (CP 258-263) The court assumed it could ignore the previous order by sidestepping the LUPA issue by finding "private easements" recorded prior to the creation of the Short Plat were exempt from the coverage of LUPA.

Easements are the centerpiece of this particular litigation but LUPA's scope is not directed at easements per se. LUPA addresses the finality of "land use decisions", any "land use decision", even those that include or exclude easements. So long as there is a "land use decision", which could include a decision about easements, which is un-appealed, the Superior Court is without jurisdiction to allow either a direct or collateral attack on the decision, regardless of whether the "land use decision" is legal or not or involves easements or not. LUPA was enacted to precisely prevent the "evil" that land owners and developers are unable to rely on local government decisions. The Short Plat "land use decision" here includes only a single easement. A court order allowing more than a single legal easement to exist on the Short Plat directly attacks the "land use decision" made by Spokane County.

The Respondents Margitans and Inland Power claim to have easements in the Short Plat, recorded after the Short Plat was created, without amending the Short Plat to add those easements. Case law clearly states that easements may not be removed or added to a short plat without amending the plat pursuant to local land use regulations.

Finally, the Margitans claim to have the right to construct, use and maintain structures outside of the building site corridor on the Final Short Plat without an exemption. Without an exemption or an amendment to the Final Short Plat the Margitans may not construct, use or maintain structures outside of the building site corridor on Short Plat 1227-00. And the Hannas may enforce this restriction in court.

#### **A. ASSIGNMENT OF ERRORS**

1. The trial court erred by concluding “private easements” were beyond the purview of the Land Use Petition Act, RCW 36.70C.
2. The trial court erred by ignoring a pre-existing Summary Judgment Order beyond the period for Motions for Reconsideration.

3. The trial court erred by entertaining any of the Rykens et al Motions for Summary Judgment beyond LUPA's 21 day Statute of Limitations. The Trial Court is without jurisdiction.
4. The trial court erred by not ordering dismissal of all of the Rykens et al "private easement" claims as a collateral attack on Spokane County's "land use decision" from May of 2000 creating a short plat without their recorded easements.
5. The trial court erred by concluding that easements may be added to a final Short Plat without amending the Short Plat.
6. The trial court erred by concluding that "private easements" may be added to final short plats at any time without formally amending the short plat.
7. The trial court erred by concluding that pre-existing recorded "private easements" are not a collateral attack on a "land use decision" creating a short plat.
8. The trial court erred by concluding that Short Plat 1227-00 includes not only the single 40 foot wide easement depicted on the face of the plat but also includes all recorded pre-existing easements and also all recorded post-existing easements, without amending the Short Plat.

9. The trial court erred by concluding it had jurisdiction to entertain Rykens et al arguments about pre-existing easements not appearing on the face of the Short Plat beyond the LUPA Statute of Limitations
10. The trial court erred by concluding that there was no legal effect when roads not dedicated to the public were not placed on the face of the Short Plat pursuant to RCW 58.17.165.
11. The trial court erred by concluding the Margitans were allowed to construct and/or maintain residential structures outside of the Short Plat building site corridor.

**B. ISSUES PERTAINING TO ASSIGNMENT OF  
ERRORS**

1. Are “private” as opposed to “public” easements exempt from the coverage of the Land Use Petition Act?
2. Are pre-existing “private” easements unaffected by the platting process pursuant to RCW 58.17?
3. Are there exemptions from LUPA not contained in RCW 36.70C.030?

4. Can LUPA extinguished pre-existing easements on un-platted property if the easements are not included on the final short plat pursuant to the local authority's "land use decision"?
5. Does a trial court have jurisdiction to hear arguments about what is or is not included on a short plat beyond LUPA's 21 Statute of Limitations?
6. Does RCW 58.17 determine to what use land may be put?
7. Can a party possessing a legal easement on un-platted land lose their easement if the easement is not included in an approved final short plat?
8. Is final Short Plat 1227-00 a "land use decision"?
9. If RCW 58.17.165 requires that all roads not dedicated to the public must be shown on the face of a short plat and only a single road or easement is shown on the face of a final short plat where previously there were recorded easements, are the recorded easements extinguish?
10. If a "preliminary short plat" application shows several recorded easements but when the final short plat is approved, only a single easement is shown and no person appeals the final short

plat land use decision under LUPA, are the recorded easements extinguished?

11. When a final short plat is approved and there is no appeal under LUPA is the short plat land configuration now only represented by what appears on the short plat and there are no features on the land that legally exist outside the short plat?
12. Does the failure to appeal a land use decision under LUPA creating a short plat, even though the land use decision eliminated recorded easements, legally extinguish pre-existing easements if the recorded easements are not shown on the final short plat?
13. Does LUPA apply even if the land use decision creating a short plat is unlawful?
14. What legally is the effect of land that is subdivided through a land use decision pursuant to RCW 58.17?
15. Can legal easements be removed from a short plat without amending the short plat?
16. Can legal easements be added to a short plat without amending the short plat?

17. Can a land owner in a short plat enforce short plat restrictions against other owners in the short plat?
18. Does Spokane County have exclusive jurisdiction to hear issues related to short plat restrictions?
19. Can the Margitans build or maintain residential structures outside of the building site corridor on the Short Plat?

### **C. STATEMENT OF THE CASE**

Final Short Plat 1227-00 was approved by Spokane County in March of 2002 containing three parcels of land (Parcels 1, 2 and 3). (CP 362-372) Pursuant to the Decision in 2000 the final Short Plat was recorded in April of 2002. *Id.* The Margitans own Parcel 1 and Parcel 3 in the Short Plat. (CP 3-4) The Hannas own Parcel 2 of the Short Plat. (CP 3-4) There is only a single 40 foot wide ingress, egress and utilities easement shown on the face of the Short Plat allowing access to the three Parcels in the Short Plat. (CP 372) The easement on the face of the Short Plat states that it is for the exclusive use of the owners of Parcels 1, 2 and 3. *Id.* Notwithstanding the single easement on the face of the Final Short Plat, the physical features of the land the Short Plat sits on indicate pathways and roads crisscrossing the Short Plat, all of which existed at the

creation of the Short Plat. (CP 374) Rykens et al claim recorded easements pre-dating the final approval of the Short Plat in 2002.

The preliminary plat application filed with Spokane County by the landowners in the year 2000 also prominently displayed other pathways and roads other than the current 40 foot wide easement. *Id.* Presumably, these pathways and roads are the claimed easements of the Rykens et al other than the Margitans and Inland Power. None of the pathways and roads crisscrossing the land prior to the creation of the Short Plat were incorporated into the final Short Plat or approved by Spokane County when approving the final Short Plat in 2002. *Id.*

The Margitans and Inland Power, in particular, were never possessed of any pre-existing easements in the Short Plat. (CP 382-385) The only easements Margitans and Inland Power received were provided to them after the creation of the final Short Plat. *Id.* In April of 2002, at the time of purchase of Parcel 1 in the Short Plat and after the creation of the Short Plat, the Margitans and Inland Power received easements across Parcel 1 and 2 of Short Plat 1227-00. *Id.* The Margitans and Inland Power did not amend the Short Plat to include these easements in the final Short Plat. (CP 258-263)

No one appealed the “land use decision” made by Spokane County creating the Short plat in May of 2000 or 2002 (CP 258-263).

Additionally, Short Plat 1227-00 has never been amended or modified following Spokane County ordinances since its creation. *Id.*

Further, the Margitans maintain a residence outside of the stipulated building site corridor on the Short Plat. (CP 32-33)

The Hannas sued for declaratory relief asking the court to declare there is only single easement in the Final Short Plat and all other easements are extinguished until the Short Plat is properly amended and that the Margitans are not allowed to construct and/or maintain residential structures outside of the Short Plat building site corridor.

#### **D. ARGUMENT**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). This court engages in the same inquiry as the trial court on the record that was before it. The motion will be granted, considering the evidence in the light to the nonmoving party, only if reasonable persons could reach but one conclusion. Reynolds v. Hicks, 134 Wash.2d 491, 495, 951 P.2d 761 (1998).

THERE ARE NO EXEMPTIONS FROM LUPA NOT FOUND IN RCW

36.70C.030

The triggering mechanism for the application of LUPA is the making of a “land use decision”. RCW 36.70C.040. The final approval of Short Plat 1227-00 is per se a “land use decision” under LUPA per RCW 58.17.180. “Construing the express language of RCW 36.70C.030(1) (“[t]his chapter replaces the writ of certiorari for appeal of land use decisions and shall be the *exclusive* means of judicial review of land use decisions”) (emphasis added) according to its obvious meaning *without regard to previous common law* or, in this case, chapter 7.16. RCW, all land use decisions are subject to LUPA unless specifically excluded under RCW 36.70C.030.” *Chelan County v. Nykriem*, 146 Wash. 2d 904, 931, 52 P. 3d 1 (2002). The trial court determined that “private easements” (previous common law) were not subject to the “land use decision” creating Short Plat 1227-00 even though there is no exclusion found in RCW 36.70C.030 for “private easements”. Further, as we have noted, the trial Judge was also constrained by a pre-existing, and now unappealed, Order on Summary Judgment concluding that Short Plat 1227-00 was governed by LUPA. There being no exclusion for “private easements” we are left with a direct or collateral attack on the “land use decision” creating

Short Plat 1227-00 adding easements on the final Short Plat land use decision beyond LUPA's 21 day Statute of Limitations.

Challenges brought after the deadlines for filing local administrative appeals or after LUPA's 21-day time period for filing an appeal constitute impermissible collateral attacks. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 181, 4 P.3d 123 (2000). Because the Rykens et al Respondents sought a court order including their easements in the Short Plat their attack is more direct rather than collateral to the Short Plat itself. A excellent example of a collateral attack is found in Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology, 162 Wash.2d 825, 175 P.3d 1050 (2008). Instead of appealing a building permit issued by Skagit County the Department of Ecology imposed penalties on a project because it disagreed with the issuance of the building permit. The Supreme Court said: "Ecology's disagreement with the local permitting authority should have been resolved through LUPA and not through a series of penalties assessed against a private party." *Id.*

In Samuel's Furniture, Inc. v. State, Department of Ecology, 147 Wash. 2d 440, 462, 54 P. 3d 1194 (2002) the court said: "The single issue before this court is whether Ecology is prevented from collaterally attacking the City's determination that the Samuel's project is outside the shoreline jurisdiction because it failed to file a timely LUPA petition

challenging the City's decision to issue either the fill and grade or building permits or to withdraw the stop work order.” By the same token, the single issue here is whether the Rykens et al are prevented from collaterally attacking Spokane County’s decision to exclude pre-existing easements from the final Short Plat because Rykens et al failed to file a timely LUPA petition challenging the County’s decision to remove the pre-existing easements from the final approved Short Plat. *“Further, it would undermine the intent of LUPA to allow what is in essence an untimely collateral challenge to a land use decision by framing it as non-LUPA challenge.” Cedar River Water and Sewer Dist. v. King County, 178 Wash.2d 763, 315 P.3d 1065 (2013).*

The final land use decision of Spokane County excludes the Respondents’ pre-existing easements. The trial court restored those easements to the Short Plat and allowed Rykens et al to use the easements across the Short Plat and hence changed the land use decision, without the easements, from 2002 to a Short Plat with the pre-existing easements. (CP 811-818, CP 846-851, CP 827-836, CP 819-826, CP 837-845) This is in spite of the law that requires all roads not dedicated to the public (private roads) be clearly depicted on the face of the plat. RCW 58.17.165.

Our case law is clear that a land use decision that is not timely appealed under LUPA may not be collaterally attacked in a later

proceeding. Habitat Watch v. Skagit County, 155 Wash. 2d 397, 407, 120 P. 3d 56 (2005) (holding that a challenge to a grading permit was an improper collateral attack on the issuance of a SUP); James v. County of Kitsap, 154 Wash.2d at 574, 586, 115 P.3d 286 (2005) (holding that the imposition of impact fees as a condition on a building permit was unreviewable absent a timely challenge to the permit); Nykreim, 146 Wn.2d 940 (holding that LUPA's statutory time limits prevent the county from revoking an improperly granted boundary line adjustment); Wenatchee Sportsmen, 141 Wash.2d at 173, 4 P.3d 123 (holding that a challenge to a development permit was an improper collateral attack on the underlying land use decision to rezone the property); Grundy v. Brack Family Trust, 116 Wash.App. 625, 633, 67 P.3d 500 (2003) (holding that a public nuisance claim cannot be predicated on an allegedly invalid Shoreline Development Permit where the plaintiff failed to timely challenge the permit under LUPA), rev'd sub nom., Grundy v. Thurston County, 155 Wash.2d 1, 117 P.3d 1089 (2005)

‘A collateral attack is an attempt to impeach the judgment by matters dehors the record, in an action other than that in which it was rendered; an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it; any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree; an objection, incidentally raised in the course of the proceeding, which presents an issue collateral to the issues

made by the pleadings. In other words, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral.’  
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In re Peterson's Estate, 12 Wash.2d 686, 123 P.2d 733 (1942)

The 21 day Statute of Limitations under LUPA is jurisdictional. (“If LUPA applies—and the County failed to file a LUPA petition—this court has no jurisdiction to proceed...”. Chelan County v. Nykriem, 105 Wash. App. 339, 360, 20 P. 3d 416 (2001). The Supreme Court “...also recognized a strong policy supporting administrative finality in land use decisions. In fact, the Supreme Court has stated that ***“[i]f there were not finality [in land use decisions] no owner of land would ever be safe in proceeding with development of his property...to make an exception would completely defeat the purpose and policy of the law...”*** Chelan County v. Nykriem, 146 Wash. 2d 904, 931, 52 P. 3d 1 (2002). The Supreme Court in December of 2014 also noted:

In this consolidated case, petitioners brought an untimely challenge to San Juan County's issuance of a garage-addition building permit. Petitioners did not receive notice of the permit application and grant until the administrative appeals period had expired. Thus, petitioners claim that our court's interpretation of the Land Use Petition Act (LUPA), chapter 36.70C RCW, required them to do the impossible: to appeal a decision without actual or constructive notice of it. While this result may seem harsh and unfair, to grant relief on these facts would be contrary to the statutory

scheme enacted by the legislature as well as our prior holdings. Indeed, we have acknowledged a strong public policy supporting administrative deadlines and have further explained that "[l]eaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner." *Chelan County v. Nykreim*, 146 Wn.2d 904, 933, 52 P.3d 1 (2002). This court has faced numerous challenges to statutory time limits for appealing land use decisions and has repeatedly concluded that the rules must provide certainty, predictability, and finality for land owners and the government. Petitioners offer us no mechanism that would permit them to assert their claim under LUPA's statutory framework. *Durland et al. v. San Juan County et al.* 82 Wash.2d 55, 340 P.3d 191 (2014)

The court further stated:

For example, we require strict compliance with LUPA's bar against untimely or improperly served petitions. In *Habitat Watch v. Skagit County*, we held that LUPA's 21-day appeals window barred a citizens' group's challenge to a construction project, despite the fact that the county mistakenly failed to provide public notice for two public hearings on permit extensions for the project. 155 Wn.2d 397, 406-10, 120 P.3d 56 (2005). ***We explained that "even illegal decisions must be challenged in a timely, appropriate manner."*** *Id.* at 407.7

“The LUPA time-of-filing requirements control access to the superior court’s substantive review of any LUPA land use decision and the failure to timely file an appeal prevents court access for such review;...”.

*Nickum v. City of Bainbridge Island*, 153 Wash. App. 366, 382, 223 P. 3d 1172 (2009). Because LUPA prevents a court from reviewing an untimely

petition, a land use decision becomes valid once the opportunity to challenge has passed. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash.2d 169, 181, 175, 4 P.3d 123 (2000).

***“LUPA applies even when the litigant complains of lack of notice under the due process clause”*** Asche v. Bloomquist, 132 Wash.App. 784, 799, 133 P.3d 475 (2006). In Habitat Watch v. Skagit County, 155 Wash. 2d 397, 407, 120 P. 3d 56 (2005), Justice Chambers said in a concurring opinion addressing LUPA’s notice provisions: “In Samuel’s Furniture we effectively approved of the practice of giving no notice even to those entitled to it by law”. (“LUPA does not require that a party receive individualized notice of a land use decision in order to be subject to the time limits for filing a LUPA petition.” Samuel’s Furniture, Inc. v. State, Department of Ecology, 147 Wash. 2d 440, 462, 54 P. 3d 1194 (2002)).

The triggering event for a LUPA analysis is whether a “land use decision” has been made. Horan v. City of Federal Way, 110 Wash.App. 204, 209, 39 P.3d 366 (2002). “Judicial review under LUPA is contemplated for decisions approving or disapproving a plat”. Chelan County v. Nykriem, 146 Wash. 2d 904, 925, 52 P. 3d 1 (2002). Further, “Any decision approving or disapproving any plat shall be reviewable under chapter 36.70C RCW [LUPA].” RCW 58.17.180. “Numerous opinions confirm that the 21 day LUPA deadline is absolute.” Nickum v.

City of Bainbridge Island, 153 Wash. App. 366, 382, 223 P. 3d 1172

(2009).

And, of course, LUPA is the “...exclusive means of judicial review of land use decisions...”. RCW 36C.70C.030(1). “***Thus, the law is clear that the Legislature has granted the authority to amend plats to the legislative bodies and not the courts.***” Halverson v. City of Bellevue, 41 Wash.App. 457, 704 P.2d 1232 (1985). The court below performed a legislative function by amending the Short Plat.

THERE ARE NO VESTED RIGHTS IN EXISTING LAW

With respect to the Respondents Rykens et al, to which LUPA applies, their basic contention is that LUPA cannot take away common law property rights in the form of “private easements”. “There is no vested right in an existing law—common law or statutory—which precludes its change or repeal... A statute which is clearly designed as a substitute for the prior common law must be given effect. State ex rel. Madden v. Public Utility Dist. No. 1 of Douglas County, 83 Wash.2d 219, 221-223, 517 P.2d 585 (1974) Where the provisions of a later statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force, the statute will be deemed to abrogate the common law. *Id.* It is a general rule of interpretation to assume that the legislature was aware of the established common law rules applicable to

the subject matter of the statute when it was enacted. *Id.* In ascertaining the legislative intent in the enactment of a statute, the state of the law prior to its adoption must be given consideration. *Peet v. Mills*, 76 Wash. 437, 136 P. 685 (1913). But where, as here under LUPA, the statute is plain and unambiguous, it must be construed in conformity to its obvious meaning without regard to the previous state of the common law. *State ex rel. Madden, supra*. Our Supreme Court has said on the question of the pervasiveness of LUPA: “*In ascertaining the legislative intent in the enactment of a statute, the state of the law prior to its adoption must be given consideration. But where ... a statute is plain and unambiguous, it must be construed in conformity to its obvious meaning without regard to the previous state of the common law. Construing the express language of RCW 36.70C.030(1) (“[t]his chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions”) (emphasis added) according to its obvious meaning without regard to previous common law or, in this case, chapter 7.16. RCW, all land use decisions are subject to LUPA unless specifically excluded under RCW 36.70C.030. The purpose of this chapter 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. To allow Respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.” Chelan County v. Nykreim, 146 Wash.2d 904, 52 P.3d 1 (2002).*

The basic argument of the Rykens et al is that LUPA conflicts with the prevailing common law that preserves their easement rights. But as noted above LUPA is plain and unambiguous and is the exclusive means for the Rykens et al to address their claims that their easements remained apart of the Short Plat in spite of the easements exclusion from the final recorded Short Plat. The Rykens et al have not demonstrated, nor can they, that they are entitled to an exclusion from LUPA that is not within the purview of RCW 36.70C.030.

FAILURE TO APPEAL A LAND USE DECISION UNDER LUPA IS  
FATAL

Wenatchee Sportsmen Ass'n v. Chelan County addressed the issue whether “a party's failure to timely appeal a county's approval of a site-specific rezone bar[s] it from challenging the validity of the rezone in a

later ... [action].” *supra*. In 1996, Chelan County *illegally* rezoned property to allow residential subdivisions inconsistent with the County's interim urban growth area regulation (IUGA). In 1998, the County later approved a plat application for residential development. Wenatchee Sportsmen Association filed a LUPA petition challenging approval of the 1998 plat application, arguing that the residential development outside of the IUGA violated the Growth Management Act, chapter 36.70A RCW. The Supreme Court concluded that, although the residential project constituted impermissible urban growth outside of the IUGA, a challenge of the rezone should have been raised in a timely LUPA action within 21 days of the 1996 action and not in the later challenge of the 1998 plat approval. ‘Thus, defects in land use determinations that could have resulted in decisions that were void ab initio under pre-LUPA cases fall within LUPA, with its express 21–day limitation period.’ *Habitat Watch*, 155 Wash.2d at 407, 120 P.3d 5. The developer was therefore able to place a plat in a location prohibited by local land use regulations because no one appealed the rezone.

The Supreme court stated:

Under LUPA “[a] land use petition is barred, and the court may not grant review unless the petition is timely filed....” The petition is timely filed if it is filed within 21 days of the issuance of the land use decision.... Because RCW 36.70C.040(2) prevents a court from reviewing a petition

that is untimely, approval of the rezone *became valid* once the opportunity to challenge it passed. It was too late for [Wenatchee Sportsmen Association] to challenge approval of the rezone in a LUPA petition filed in 1998.... If there is no challenge to the decision, the *decision is valid*, the statutory bar against untimely petitions must be given effect, and the issue of whether the zoning ordinance is compatible with IUGA is no longer reviewable. *Id.*

Ultimately, LUPA prevents any change to the Short Plat or the land use decision made to create the Short Plat if there was no appeal. If Rykens et al were dissatisfied with the land use decision creating the Short Plat in 2000, whether they claimed the Short Plat was unfair, unauthorized, did not include certain easements, illegal or even unconstitutional, they were required to file a LUPA appeal. “Because [LUPA] prevents a court from reviewing a petition that is untimely, approval of the rezone became valid once the opportunity to challenge it passed.” *Chelan County v. Nykriem*, 146 Wash. 2d 904, 925, 52 P. 3d 1 (2002). So too did Short Plat 1227-00, without the claimed easements, become valid once the appeal time ran.

In *Habitat Watch*, a Skagit County hearings examiner twice granted extensions of a special use permit to construct a golf court without notice to Habitat Watch or any other person and without a hearing, as was required by Skagit County ordinance. *Id* at 403-405. “Habitat Watch argu[ed] that the last two permit extensions [were] void because the

hearings examiner did not provide notice or a public hearing and that LUPA cannot ever bar judicial review of such decisions.” *Id* at 406. The Supreme Court rejected Habitat Watch’s argument in its entirety stating that “Thus, defects in land use determinations that could have resulted in decisions that were void ab initio under pre-LUPA cases fall within LUPA, with its express 21–day limitation period.” *Id* at 408. In other words, even if the land use decision was so corrupted that it was void ab initio, parties claiming a defect in the decision were still required to file a petition for review within twenty one days of the land use decision, otherwise the land use decision becomes valid and final.

The result of the failure the Respondents to appeal the land use decision resulting in the final Short Plat in 2002 is that they now cannot argue that certain of their claimed easements are missing from the Short Plat. The Short Plat is fixed, valid and unalterable by any court.

Division Three recently analyzed the LUPA Statute of Limitations issue in 2012 in *Applewood Estates Homeowners Ass’n v. City of Richland*, 166 Wash. App. 161, 269 P. 3d 388 (2012). In *Applewood Estates* neighbors of a planned unit development only learned, for the first time, of the City of Richland’s unlawful land use decision four months after the decision was made and petitioned the Superior Court to overturn the decision. The Superior Court agreed with Plaintiffs. The Court of

Appeals found that LUPA's 21 day statute of limitations absolutely applied and reversed the trial court. *Id.* Division Three said: "Applying the legal principles derived from *Samuel's Furniture*, *Habitat Watch*, and *Asche*, we conclude the Neighbors were not entitled to personal notice, distinct from the notice contemplated by the filing of a public record as discussed in *RCW 36.70C.040(4)(c)*. Accordingly, we hold the Neighbors' LUPA petition filed nearly 4 months after the City made its determination was time barred." *Id* at 170.

AN UNAPPEALED LAND USE DECISION UNDER LUPA  
CREATING A SHORT PLAT CAN ELIMINATE PRE-EXISTING  
EASEMENTS

Rykens et al argue that there is no law that can eliminate deeded private easements without their permission. On the contrary, the effect of the failure to appeal the land use decision to Superior Court in 2000 created a Short Plat with only a single easement. The effect of the failure to appeal was also to eliminate any claimed easements existing at that time, the court having no jurisdiction to alter the Short Plat "land use decision" and add easements not shown on the face of the Short Plat. In each of the below cited LUPA decisions the legislative authority

committed a patently illegal and unlawful act but so long as the land use decision was un-appealed the unlawful decision became valid and lawful.

In *Asche* Kitsap County unlawfully permitted a building to be built nine feet higher than allowed by county ordinance. The court held the illegal land use decision valid since no appeal was taken under LUPA. In *Applewood Estates* the City of Richland allowed major changes to a PUD application without requiring a new PUD application, contrary to municipal codes. The court held the changes valid because Applewood Estates had not timely appealed the land use decision under LUPA. In *Habitat Watch*, a King County hearings examiner did not give notice of extensions of special use permits as required by county ordinance. The court held the extensions valid since no timely appeal was taken under LUPA. In *Chelan County v. Nykriem*, 146 Wash. 2d 904, 52 P. 3d 1 (2002), Chelan County granted a boundary line adjustment which unequivocally violated county ordinances. The court held the boundary line adjustment valid since there was no appeal under LUPA. In *Wenatchee Sportman Ass'n v. Chelan County*, 141 Wash. 2d. 169, 4 P. 3d 123 (2000), Chelan County unlawfully granted a site specific rezone in 1996. In 1998, based on the unlawful rezone, the county granted a Short Plat application. The court held the approval of the Short Plat application

valid since no appeal was had under LUPA in the 1996 site specific rezone.

For example, in *Holder v. City of Vancouver*, 136 Wash.App. 104, 105–06, 147 P.3d 641 (2006), a property owner appealed a local hearing examiner's determination that he had violated the city municipal code by parking and storing vehicles on unimproved surfaces. The property owner filed a timely LUPA appeal and then expressly abandoned his LUPA claim in superior court and on appeal. *Holder*, 136 Wash.App. at 105–06, 147 P.3d 641. “Because all of the property owner's arguments arose directly from the hearing examiner's land use decision, and LUPA is the exclusive means for reviewing such decisions, we declined to review his arguments.” *Holder*, 136 Wash.App. at 107–08, 147 P.3d 641. The Superior Court below should have declined to hear the Respondents arguments regarding a LUPA exemption.

THE PRIOR SUMMARY JUDGMENT ORDER CANNOT BE  
ALTERED EXCEPT ON APPEAL

The Summary Judgment order of May 24, 2013 cannot be altered since the order has not been appealed. The Supreme Court stated very clearly that a trial court does not have the authority or discretion to extend the time for filing a motion for reconsideration. CR 6(b); *King County v.*

Williamson, 66 Wash.App. 10, 13–14, 830 P.2d 392 (1992); *See also* Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wash.2d 366, 367-68, 849 P.2d 1225 (1993). It is, per se, reversible error for the court to entertain a Motion for Reconsideration after the 10 day time limit. Metz v. Savanatos, 91 Wash. App. 357, 359, 957 P. 2d 795 (1998). Further, the trial court cannot even sua sponte reconsider a ruling after the ten day time limit. In re Marriage of Knutson, 114 Wash.App. 866, 874, 60 P.3d 681 (2003) (Division Three). The *Metz* decision from Division Three is instructive. In *Metz*, a personal injury suit, a trial judge granted the defendant a summary judgment on liability and dismissed the case. Plaintiff then moved for reconsideration pursuant to CR 59 thirteen (13) days later and the court entertained the motion and granted the Motion to reconsider. The Court of Appeals, Division Three, reversed and reinstated the summary judgment. *Id.*

Therefore, what cannot be challenged by the Respondents are: (1) that Short Plat 1227-00 depicts only a single 40 foot wide easement on its face, (2) that the Land Use Petition Act (“LUPA”) applies to Short Plat 1227-00, (3) that approval of Short Plat 1227-00 was a land use decision under LUPA, (4) that Short Plat 1227-00 is a valid short plat, (5) that no one appealed the land use decision and (6) that there have been no amendments to Short Plat 1227-00 since it was created.

THERE ARE TWO REASONS THE MARGITANS' EASEMENTS ARE  
INVALID

The claimed easements of the Margitans are invalid for two reasons. (1) The recorded documents are not legal easements and (2) The recorded documents did not amend Short Plat 1227-00. (CP 258-263) The second reason equally applies to Inland Power.

Completely supporting our argument that the Margitans' easements are not easements at all is Division Three's Zunino v. Rajewski, 140 Wash.App. 215, 165 P.3d 57 (2007). In Zunino, Anderberg separately sold five parcels of land to two sets of individuals (Zunino and Zabinski). The deeds did not convey or reserve easements. Instead, as a part of her quest to create a county subdivision, Anderberg recorded two "Private Road and Utility Easements" affecting the Zunino and Zabinski property. Later Anderberg sold her remaining land to Rajewski who contemplated a larger subdivision. Fearing greater growth by Rajewski, Zunino and Zabinski sued to eliminate the easements recorded by Anderberg claiming they were not easements at all. Judge Austin agreed and Division Three affirmed. Division Three said "These documents [Private Road and Utility Easements] failed to convey an easement because the words do not demonstrate a present intent to grant or reserve an easement". Zunino at P.

222. The documents in Zunino and the documents claimed as easements by the Margitans are **identical**. See Below. (CP 463-468)

<u>Zunino Recorded Easements</u>	<u>Margitan Recorded Easements</u>
<p>“This agreement made and entered into the ___ day of..., 1997, by the undersigned property owner <u>who is granting the easement across property...</u>”</p>	<p>“THIS AGREEMENT made and entered into this 16<sup>th</sup> day of April, 2002, by the undersigned property owners, <u>who are granting the easement across their property...</u>”</p>
<p>“<u>Whereas this easement <i>was created</i> as a medium of ingress and egress for the benefit of...</u>”</p>	<p>“<u>Whereas this easement <i>was created</i> as a medium of ingress and egress for the benefit of...</u>”</p>
<p>“<u>I am the owner of record of the property involved with this easement.</u>”</p>	<p>“<u>We are the owners of record of the property granting this easement</u>”</p>

Because the language in Zunino is identical to the language in the Margitans claimed easements and the fact that Division Three specifically relied on this language in determining that the claimed easements did not convey an easement, this court is required to follow suit and declare the Margitans’ easements invalid. The Margitans’ documents do not likewise demonstrate a present intent to convey an easement. It is though the

Margitans found the form easement used in the Zunino case and used it without verifying the legal validity of the document.

Secondly, easements may only be added to a Short Plat per RCW 58.17.215 (“When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located.”) and Spokane County Code 12.100.122 (“An application shall be submitted for any proposed alteration to a final plat or final short plat.”). The Margitans did not submit an application to alter Short Plat 1227-00 to include additional easements to the short plat. (CP 258-263) Hence, the Margitans’ easements are not apart of Short Plat 1227-00.

Lastly case law also supports the rule that easements may not be added to a short plat or removed from a short plat without compliance with RCW 58.17. The M.K.K.I., Inc. v. Krueger, 135 Wash.App. 647, 658, 653, 145 P.3d 411 (2006) Division Three decision provides that an easement may not be removed from a short plat without asking Spokane County for permission to do so. And, to support its point that an easement may not be removed from a short plat without compliance with county codes, the M.K.K.I. court cited McPhaden v. Scott, 95 Wash.App. 431,

975 P.2d 1033 (1999) for the proposition that neither can an easement be *added* to a short plat without the county's permission. The M.K.K.I. court said:

“In McPhaden, the original plat map did not show an easement. One year later, a surveyor recorded a separate document in an attempt to amend the plat map. The court determined that the filing of this document did not comply with statutory requirements and did not create an easement or amend the original plat map.” M.K.K.I at P. 658.

RCW 58.17.170 also states emphatically that a subdivision “*shall* be governed by the terms of approval of the final plat.” “Every subdivision shall comply with the provisions of this chapter. Every short subdivision as defined in this chapter shall comply with the provisions of any local regulation adopted pursuant to RCW 58.17.060.” RCW 58.17.030.

The issue of whether RCW 58.17 encompasses “private” easements was also raised in M.K.K.I. The M.K.K.I court said:

Finally, Pacific Alliance argues that Bunnell v. Blair, 132 Wash.App. 149, 130 P.3d 423 (2006), supports the proposition that the easements here are private and that the County has no interest in requiring the amendment of the short plat to extinguish the easements. In Bunnell, the Blairs contended that several access roads within various short plats were not private because the plat maps were not labeled “ ‘Private Road Easement,’ ” as required by the Benton County Code, adopted pursuant to RCW 58.17.060. Bunnell, 132 Wash.App. at 152, 130 P.3d 423. The court examined the labeling and determined that reasonable minds could conclude that the county regulation had been satisfied. Id. at 153. Bunnell supports the argument that this court should apply the county code as

was done in *Bunnell*. *Bunnell* does not stand for the proposition that the County has no right or interest in requiring compliance with the Y.C.C. to extinguish easements.

***Pacific Alliance's assertions that the statute should not apply to the extinguishment of private easements is contrary to the plain terms of the subdivision statute. M.K.K.I at Page 660-662.***

Private easements are not exempt from RCW 58.17.

THE MARGITANS MAY NOT CONSTRUCT OR MAINTAIN  
STRUCTURES OUTSIDE OF THE BUILDING SITE AREA ON  
SHORT PLAT 1227-00

There is no question that the Margitans have a house on Parcel 3 outside of the Short Plat building site area. (CP 394-396) They will claim that they have this right because it was “grandfathered” into the Short Plat but without any statement to that effect on the Short Plat or anywhere else. “Grandfather” means “[t]o cover (a person) with the benefits of a grandfather clause.” A “grandfather clause” is “[a] statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect.” BLACK'S LAW DICTIONARY, 706 (7th ed.1999). *Bellevue Farm Owners Ass'n v. State of Washington Shorelines Hearings Bd.*, 100 Wash.App. 341, 345, 997 P.2d 380 (2000). There is no “grandfather

clause” in the Short Plat exempting the Margitans from the Short Plat requirement that there can be no structures outside of the building site area of the Short Plat. And, of course, because the short plat is a “land use decision” and no one appealed, the building site area cannot be changed except pursuant to RCW 58.17 and the Spokane County Code.

Further, the Hannas have the right to enforce the Short Plat restrictions in court. Hollis v. Garwall, Inc., 88 Wash.App. 10, 945 P.2d 717 (1997).

THE TRIAL COURT ERRED IN ORDERING ATTORNEY FEES  
PURSUANT TO RCW 4.84.185

The Superior Court erred in ordering attorney fees under RCW 4.84.185 in six separate orders. Appendix A. This court reviews orders arising out of RCW 4.84.185 (Frivolous Lawsuits) for abuse of discretion. Alexander v. Sanford, 181 Wash. App. 135, 184, 325 P.3d 341 (2014). Frivolous lawsuits are those that cannot be supported by a rational argument on the law or facts. Id. In this instance there are several substantive and procedural defects in the Superior Court’s rulings. RCW 4.84.185 provides in pertinent part: “In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay

the prevailing party the reasonable expenses, including fees of attorneys...”. In order to avoid remand the trial court was required to enter “written findings” to sustain an order under RCW 4.84.185. Our Supreme Court said: “Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record”. Mahler v Szucs, 135 Wash. 2d 398, 435, 957 P. 2d 632 (1998). The Supreme Court echoed the same sentiments in SentinelC3, Inc. v. Hunt, 181 Wash. W.2d 127, 144, 331 P.3d 40 (2014) when it noted: “Rather, it [trial court] must supply findings of fact and conclusions of law sufficient to permit a review court to determine why the trial court awarded the amount in question.” The trial court only recited the conclusion that the claim under LUPA against the defendants was frivolous and simply recited the language in RCW 4.84.185. In awarding reasonable attorney fees under RCW 4.84.185, a trial court must “sufficiently explain” the objective basis for its fee award to permit appellate review. Highland Sch. Dist. No. 203 v. Racy, 149 Wn.App. 307, 316, 202 P.3d 1024 (2009). Absence of an adequate record upon which to review a fee award “will result in a remand of the award to the trial court to develop such a record.” 224 Westlake, LLC v. Engstrom Props., LLC, 169 Wn.App. 700, 741, 281 P.3d 693 (2012). Remand is required in this case.

With respect to the attorney fees court order in favor of Allan and Gina Margitan, the lawsuit in its entirety against these defendants was not frivolous and any award of attorney fees to the Margitans under RCW 4.84.185 was plain error. The Supreme Court held as follows in 1998: “In *Biggs I*, we reversed the trial court’s award of fees under RCW 4.84.185 because the trial court found only three of the four claims asserted by Biggs to be frivolous. Because the fourth claim advanced to trial, the suit could not be considered frivolous in its entirety. Thus fees under RCW 4.84.185 were not appropriate. . . . Under *Biggs I*, if any claims advance to trial, a trial court’s award of fees under RCW 4.84.185 cannot be sustained.” *State ex rel Tuick-Ruben v. Verhaven*, 136 Wash. 2d 888, 904, 969 P.2d 64 (1998). This rule applies as between a single plaintiff against a single defendant. *Eller v. East Sprague Motors*, 159 Wash. App. 180, 193, 244 P.3d 447 (2010). (“Both *Biggs I* and *Quick-Ruben* applied a requirement to consider the action “as a whole” to cases where a plaintiff had asserted both colorable and noncolorable claims against a single party, . . .”) Several claims proceeded to trial held on April 22, 2015. *Appendix B*. In fact, the trial court ordered that the claims that did proceed to trial were not frivolous under RCW 4.84.185. *Appendix C*. Hence, there were both colorable and noncolorable claims against a single

Defendant, the Margitans. Clearly case law provides that the court order regarding attorney fees in favor of the Margitans must be reversed.

Further, there are several rational and persuasive arguments to be made that the Land Use Petition Act applies to and effects easements pre-existing a land use decision that excludes them from a final short plat. And, as result, the Hannas argument that LUPA applies in this case is not frivolous. First, there is a pre-existing unappealed summary judgment order that states Short Plat 1227-00 is a “land use decision” and that LUPA applies to the Short Plat. CP 258-263. The Defendants agree the Short Plat is a “land use decision”. *See P. 6, Rykens Brief*. The final Short Plat “land use decision” does not depict the easements of the Defendants on its face and regardless of how the Defendants may view it, in order to have their easements apart of the final Short Plat “land use decision”, the Short Plat must be altered. We understand, of course, that the position of the Defendants is that the LUPA “land use decision” cannot have any effect on private easements. But, as we argued before the trial court, RCW 36.70C.030 provides the only exceptions to LUPA. CP 412. The Hannas also quoted exhaustively at the trial court from *Chelan County v. Nykreim*, 146 Wash.2d 904, 52 P.3d 1 (2002) where the court quoted from *State ex rel. Madden v. Public Utility Dist. No. 1 of Douglas County*, 83 Wash.2d 219, 221-223, 517 P.2d 585 (1974) and *Peet v. Mills*, 76 Wash. 4as37, 136

P. 685 (1913). CP 412. LUPA was designed to abrogate any common law that effected a land use decision. *Supra*, Section *THERE ARE NO VESTED RIGHTS IN EXISTING LAW.*

Attorney fees for a frivolous action are also not warranted based on the entirety of this brief. The approach taken by the Appellants Hannas was rational inasmuch as the final short plat land use decision excluded from the face of the short plat the LUPA Respondents pre-existing easements. Spokane County, on the preliminary short plat, depicted the pre-existing easements but in the final short plat removed them. Whether the removal of the pre-existing easements from the final short was legal or not is irrelevant, per LUPA case law. The fact that the final short plat land use decision does not depict the LUPA Respondents easements is the only relevant and rational question.

The trial court also determined that the claim by the Apellants Hannas against Inland Power and the Margitans was frivolous because there was no requirement a final short plat be amended to add easements. The trial court ruled in this fashion in spite of the holding in *McPhaden v. Scott*, 95 Wash.App. 431, 975 P.2d 1033 (1999) that requires an amendment to a plat pursuant to RCW 58.17 to add an easement.

With respect to the LUPA Respondents (excluding Inland Power and the Margitans who created easements after the final Short Plat was

approved), the court ruled that in spite of LUPA the court could not ignore the common law and, in effect, ordered that the common law prevails over the unambiguous LUPA statute. Our State is governed by common law only to the extent that the common law is not inconsistent with state law. Potter v Wash. State Patrol, 165 Wash. App. 67, 76, 196 P. 3d 69 (2008). And “The legislature has the power to supersede, abrogate, or modify the common law” Id at P. 76. Common law prevails in this state except as modified by statute. State v. Mays, 57 Wash. 540, 542-543, 107 P. 363 (1920). “... and courts cannot simply ignore statutes that conflict with case law”. Wynn v. Earin, 131 Wash. App. 23, 39, 125 P.3d 236 (2005). As we noted in Chelan County v. Nykriem, 146 Wash. 2d 904, 926, 52 P. 3d 1 (2002) in a discussion regarding the “Applicability of LUPA” : “But where ... a statute is plain and unambiguous, it must be construed in conformity to its obvious meaning *without regard to the previous state of the common law.*” This court is “obliged to give the plain language of a statute its *full effect*, even when its results may seem unduly harsh.”

In ruling that the LUPA claim of the Hannas was frivolous the trial court abused its discretion by failing to engage in any sort of statutory interpretation and construction or common law versus statute conflict resolution. If the court had done any statutory construction it would have, as pointed out by the Respondents, determined that there is a conflict

between LUPA and common law private easements. And, as a result, the court would have followed case law precedent in concluding that LUPA was an unambiguously plain and clear statute creating a harsh result for Respondents. The land use decision creating Final Short Plat 1227-00 did not depict the private easements of the LUPA Respondents. Common law would have provided that the LUPA Respondents got to keep their easement unless they consented to terminations. LUPA, on the other hand, required that any desired change to a land use decision (adding the easements to the final Short Plat) must be prosecuted within 21 days of the land use decision. Herein lies the conflict and in such a case the statute prevails. The position taken by the Hannas, based on these arguments, is not frivolous.

Lastly, RCW 58.17.170 provides that “A subdivision shall be governed by the terms of approval of the final plat...”. The approved final plat only contains a single 40 foot wide easements and not the easement of any Respondent. Again, another reason that the Hannas’ position is not frivolous.

### **CONCLUSION**

Ultimately, the Respondents with pre-existing easements were required to file a LUPA petition in the year 2000 in order to bestow appellate jurisdiction on the Superior Court in order for the Superior Court

to entertain arguments that their easements still existed in the Short Plat. An unsupported ruling by the trial court that LUPA did not apply to “private easements” was in error and supplanted all land use regulations. The additional proclamation of the trial court that any number of private easements may be added to a short plat without amending the Short Plat is contrary to land use planning. Such a theory turns planning over to individuals with no planning experience or any reverence for land use regulations.

The only person having an interest in enforcing the short plat is another short plat owner. The Margitans claim that it is permissible to violate the short plat building site corridor without any exemption allowing the violation. The court should have declared that any building outside of the building site corridor is unlawful and cannot be used.

Lastly, the claims against the Respondents were not frivolous or irrational and therefore attorney fees should not have been imposed.

Dated this 25<sup>th</sup> day of June 2015.

Respectfully submitted,

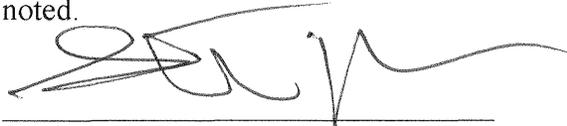


Stanley E. Perdue, WSBA  
#10922

Attorney for Appellants

CERTIFICATE OF SERVICE

I, Stanley Perdue, under penalty of perjury under the laws of the State of Washington certify that on this 25<sup>th</sup> day of June, 2015 I served the foregoing Appellants' Brief on the following attorneys via the method noted.



Stanley Perdue

<p>Gregory Lockwood Attorney at Law 421 W. Riverside, Ste. 960 Spokane WA 99201</p> <p>Via email: jgregorylockwood@hotmail.com</p>	<p>David Kulisch, Attorney at Law 601 West Riverside, Suite 1500 Spokane, WA 99201</p> <p>Via email: dak@randalldanskin.com</p>
<p>David Eash Attorney at Law 522 West Riverside, Suite 800 Spokane, WA 99201</p> <p>Via email: deash@ewinganderson.com</p>	<p>Peter Witherspoon Attorney at Law 601 West Main, Suite 714 Spokane, WA 9920</p> <p>Via email: pwitherspoon@workwith.com</p>
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Appendix A

**SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE**

<b>JENNIFER HANNA AND MARK HANNA,</b>	)	
	)	
Plaintiffs,	)	
	)	<b>CASE NO. <u>2012-02-04045-6</u></b>
vs.	)	
	)	
<b>ALLAN MARGITAN, ANNETTE BOND,</b>	)	<b>ORDER ON ATTORNEY FEES</b>
<b>AVISTA CORPORATION, CARL RYKEN,</b>	)	
<b>CAROLE RYKEN, DAN R. BOND, GINA</b>	)	
<b>MARGITAN, HAROLD L. CROWSTON,</b>	)	
<b>PATRICIA CROWSTON, RYKEN LIVING</b>	)	
<b>TRUST, SHANNON MOSER and STEVE</b>	)	
<b>MOSER,</b>	)	
Defendants.	)	

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This matter came before the Court on Tuesday, June 9, 2015 upon the motion of the defendant, Margitan for:

- 1) Presentment of orders;
- 2) Attorney fees;
- 3) Injunctive relief.

The Plaintiffs also made a Motion for Attorney Fees.

On June 10, 2015 the Motion for Injunctive Relief was withdrawn. Given that, the Court has signed the Order Dismissing Hannas' Remaining Claims and Terminating Certain Other Orders.

The parties have each requested fees. The Plaintiffs' request is under the Adverse Possession Statute and the Defendants' request is under RCW 4.84.185.

The Court denies the Plaintiffs' claims they have made under 7.28.083(3) which provides for attorney fees to the prevailing party in an adverse possession case. Although the case had adverse possession claims, they were settled by the parties during trial. While each party can argue they prevailed in the settlement, this Court will not go behind that process and declare one party to be prevailing.

The Defendants' request for fees centers around the Plaintiffs CR 41 dismissal of various claims (the Court recalls there were four in the motion) at the start of trial. The defendant, Margitan, asserts that the dismissal is an indicator of the claims being frivolous.

It is correct that a dismissal under CR 41 does not preclude the Court from assessing fees in the appropriate case. Accordingly, the Court has jurisdiction to determine the question of fees.

The Court finds that although the merits of the four dismissed claims are, in part, questionable, they are not so frivolous as to warrant an award of fees. The motion is denied.

DATED this 16th day of June, 2015.



HAROLD D. CLARKE, III  
SUPERIOR COURT JUDGE

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

MARK AND JENNIFER HANNA, husband  
and wife,  
Plaintiffs

v.

ALLAN AND GINA MARGITAN, husband  
and wife, and HAROLD L. AND PATRICIA  
CROWSTON, husband and wife, DAN R.  
BOND and JANE DOE BOND, Husband and  
wife, DAN M. BOND and JANE DOE BOND,  
husband and wife, RYKEN LIVING TRUST  
and Trustees Carl and Carole Ryken, STEVE  
and SHANNON MOSER, husband and wife,  
and AVISTA CORPORATION.

Defendants

INLAND POWER AND LIGHT CO.,  
Intervenor.

No. 12-2-04045-6

ORDER RE DISMISSAL OF  
HANNAS' REMAINING CLAIMS  
AND TERMINATING CERTAIN  
OTHER ORDERS

ORDER OF DISMISSAL OF CLAIMS AND  
TERMINATING OTHER ORDERS

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MOTION AND STIPULATION

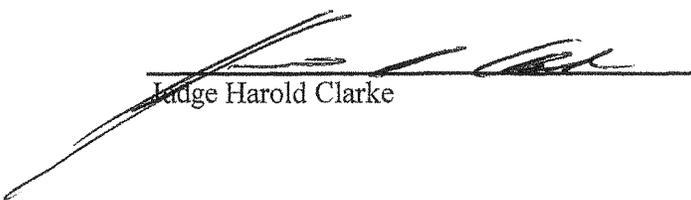
The Plaintiffs, Mark and Jennifer Hanna, by their attorney Stanley Perdue moved in court April 22, 2015 to dismiss their remaining claims, not otherwise disposed of by court order, pursuant to CR 41. Further, the parties stipulate to the termination of the following orders: August 6, 2013 order of Judge Tompkins as it relates to maintaining the status quo pending further order of court and the June 9, 2014 order of Judge Price as it relates to granting the Hannas temporary access to Long Lake across Parcel 3 of Short Plat 1227-00.

ORDER

The Hannas having moved to dismiss their remaining claims, not otherwise disposed by court order, pursuant to CR 41, it is hereby ORDERED:

1. The remaining claims of the Hannas, not otherwise disposed by court order, are DISMISSED with prejudice.
2. Per the stipulation of the parties the parties the following orders are terminated: August 6, 2013 order of Judge Tompkins as it relates to maintaining the status quo pending further order of court and the June 9, 2014 order of Judge Price as it relates to granting the Hannas temporary access to Long Lake across Parcel 3 of Short Plat 1227-00

Dated this 16<sup>th</sup> of ~~April~~, 2015.  
June

  
\_\_\_\_\_  
Judge Harold Clarke

ORDER OF DISMISSAL OF CLAIMS AND  
TERMINATING OTHER ORDERS

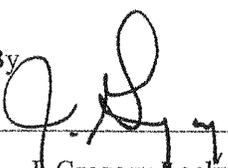
Page 2 of 3

**PERDUE LAW FIRM**  
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Approved as to form and Notice of  
Presentment waived:  
LAW OFFICE OF J. GREGORY  
LOCKWOOD

Presented by:  
  
PERDUE LAW FIRM.

By  

By attached

J. Gregory Lockwood, WSBA #20629  
Attorney for Margitan Defendants

Stanley Perdue, WSBA #10922  
Attorney for Plaintiffs

ORDER OF DISMISSAL OF CLAIMS AND  
TERMINATING OTHER ORDERS

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Approved as to form and Notice of  
Presentment waived:  
LAW OFFICE OF J. GREGORY  
LOCKWOOD

By: \_\_\_\_\_  
J. Gregory Lockwood, WSBA #20629  
Attorney for Margitan Defendants

Presented by:

PERDUE LAW FIRM.

By:   
Stanley Perdue, WSBA #10922  
Attorney for Plaintiffs

ORDER OF DISMISSAL OF CLAIMS AND  
TERMINATING OTHER ORDERS