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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

JONATHAN DREZNER, MD, and)
HEIDI GRAY, MD, husband and)
wife,)

No. 68538-4-I

Appellants,)

v.)

CITY OF SEATTLE,)

Respondent,)

APPELLANTS' REPLY
BRIEF

And)

DAN DUFFUS; SOLEIL LLC;)
SOLEIL HOMES, LLC; and DL)
DALTON, LLC,)

Additional Respondents.)

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Table of Contents

I. LEGAL AUTHORITY AND ARGUMENT.....1

A. The Challenged Land Use Decision—the LBA Permit—
Was Issued on December 2, 2011.....1

B. If Deference is Required, the Court Should Defer to DPD’s
Ex Ante Interpretation of City Code, not the Contradictory
Interpretation it Advanced for the Purposes of Litigation8

C. The Land Use Decision Did not Issue Until Petitioners
Obtained Actual Notice After Diligent Efforts.....11

1. Petitioners Made Diligent Efforts to Obtain Copies of
the LBA.....11

2. The Disclaimer, Buried Deep Within the City’s
Website, has no Effect14

3. Case Law Allows the Court to Rule that a Land Use
Decision is Issued the Date Diligent Appellants
Receive Actual Notice of a Land Use Decision16

D. Estoppel Binds the City—the Permitting Authority—and
Additional Respondents Suffer no Prejudice.....19

E. An Award of Attorneys Fees is Improper Even if
Additional Respondents Prevail19

II. CONCLUSION.....22

Table Of Authorities

Statutes

RCW 36.70C.020.....	2, 3
RCW 36.70C.040.....	2, 6, 7, 16
RCW 36.70C.130.....	9
RCW 58.17.180	6
RCW 4.84.370	20, 21

Ordinances

SMC 23.88.020	3
SMC 23.76.024	6
SMC 23.76.028	7, 8, 9
SMC 23.76.032	10

Cases

<i>Applewood Estates v. City of Richland</i> , 166 Wn. App. 161, 269 P.3d 388 (2012).....	18
<i>Asche v. Bloomquist</i> , 132 Wn. App. 784, 133 P.3d 475 (2006)	3, 4, 7, 20, 21
<i>Baker v. City of Seattle</i> , 79 Wn.2d 198, 484 P.2d 405 (1971).....	15
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	9
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005).....	16, 17
<i>HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services</i> , 148 Wn.2d 451, 61 P.3d 1141 (2003).....	5

<i>Prekeges v. King County</i> , 98 Wn. App. 275, 990 P.2d 405 (1999)	21
<i>Richards v. City of Pullman</i> , 134 Wn. App. 876, 142 P.3d 1121 (2006).....	20, 21
<i>Samuel’s Furniture, Inc. v. Department of Ecology</i> , 147 Wn.2d 440, 54 P.3d 1194 (2002).....	18
<i>Sleasman v. City of Lacey</i> , 159 Wn.2d 639, 151 P.3d 990 (2007).....	8, 9
<i>Witt v. Port of Olympia</i> , 126 Wn. App. 752, 109 P.3d 489 (2005).....	21

I. LEGAL AUTHORITY AND ARGUMENT

Additional Respondents did not apply for a determination that their proposed LBA was consistent with the zoning code. They applied for an LBA Permit. They sought the right to improve their land in accordance with the LBA, which the parties agree did not happen until the City issued the LBA Permit on December 2, 2011. The issuance of the LBA Permit, not any earlier determination of consistency with the code, fixed the parties' rights.

This is a simple case. There is no need to make new law to resolve it, and the Court need not fear the parade of horrors listed by Respondents. The Court need only give effect to the face of the challenged permit to reverse the trial court and remand for a hearing on the merits. Regardless of the date the City determined that the proposed LBA complied with the Seattle Municipal Code, it issued the challenged permit—the document that gave Additional Respondents the right to improve their land—on December 2, 2011. This appeal, filed four days later, was timely.

A. **The Challenged Land Use Decision—the LBA Permit—Was Issued on December 2, 2011**

It does not matter when a City staffer concluded that the LBA application complied with zoning codes. What matters here is when the Additional Respondents obtained a right to use their property in

accordance with the LBA. The parties agree that this did not occur until the City issued the LBA Permit on December 2, 2011.

By arguing that the interim determination of consistency with the land use code constitutes the challenged land use decision in this case, Respondents misapprehend LUPA's definition of "land use decision." Under LUPA, a "land use decision" is the local government's "final determination" on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used . . . ;

[or]

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property

RCW 36.70C.020(2). LUPA's 21-day appeal clock commences running on "the issuance of the land use decision." RCW 36.70C.040(3) (emphasis added). Reading these sections of LUPA together, where an applicant seeks a project permit to improve land, as here, the 21-day clock begins running on the day that project permit is issued.

Respondents' argument—that the November 2, 2011 letter is the appealable event because it contained a list purporting to demonstrate

compliance with the code¹—could be valid only if the applicant had requested an “interpretive or declaratory decision” regarding whether the proposed LBA conformed to the zoning code, which the Seattle Municipal Code provides for in SMC 23.88.020. But that is not what the Additional Respondents sought. Rather, they sought “a project permit . . . required by law before real property may be improved.”² That project permit was the LBA Permit, which all parties agree was issued on December 2, 2011. The “final determination” was the issuance of the permit under RCW 36.70C.020(2)(a), not an interpretive or declaratory decision of consistency with the zoning code under RCW 36.70C.020(2)(b) and SMC 23.88.020. *Asche v. Bloomquist* confirms that an interim determination of consistency with zoning, such as that contained in the November 2, 2011 letter, is subsumed in a later-issued permit and appealable with it. 132 Wn. App. 784, 791, 133 P.3d 475 (2006) (holding that challenge should have been filed within 21 days of building permit issuance and writing: “Given that LUPA applies to interpretive decisions regarding application of zoning ordinances to specific property, RCW 36.70C.020(b), it does not

¹ See Add'l Respondents' Brief at 16, Respondent's Brief at 13.

² Additional Respondents' argument that the LBA at issue is an “other governmental approval,” Add'l Respondents' Response at 12, finds no support in the record. Additional Respondents applied for an LBA permit, not some other government “LBA approval.”

matter whether the Asches are challenging the validity of the permit or the interpretation of the County zoning ordinance as applied to this piece of property.”).

DPD and every other permitting agency must necessarily determine that any application is consistent with code requirements before issuing a land use permit, yet LUPA’s definition of “land use decision” excludes all such preliminary determinations from the definition. Nothing in City or State law says that a letter confirming an application’s consistency with code requirements is appealable before the permit that occasioned the letter is issued, and, for all the reasons described in Petitioners’ Opening Brief, the City’s letter manifestly does not meet the requirements in the case law for letters to constitute final land use decisions.³

Additional Respondents’ argument that the LBA is like the two-step process of subdivisions is unavailing. A preliminary plat approval—either a long plat (more than nine lots) or a short plat—is a project permit that authorizes the permittee to improve real property. With nothing more than preliminary plat approval in hand, the permittee may begin

³ Additional Respondents’ attempt to distinguish those cases, on the grounds that Petitioners are not permit applicants, does not explain how the letter to Additional Respondents meets the requirements in the case law for a letter to be a final land use decision.

constructing internal roads, sidewalks, and driveways, and may install utilities. *See, e.g., HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wn.2d 451, 475, 61 P.3d 1141 (2003) (“Once receiving preliminary plat approval, an owner or developer may proceed to prepare detailed engineering drawings, **construct improvements**, and prepare the final plat in compliance with the terms and conditions of the approved preliminary plat.” (emphasis added)); *accord* Robert Johns and Duana Kolouskova, *Subdivision of Land*, 6 Wash. Real Prop. Deskbook at 2-27 (4th ed. 2012) (after receiving preliminary plat approval but before receiving final plat approval, subdivider must either construct plat infrastructure or post a completion bond. “If the applicant elects to construct the improvements, they must be completed, inspected, and approved **before final plat approval can be granted.**” (emphasis added)). Preliminary plat “approval creates a change in the legal relationship of the owner or developer to the land which materially affects development.” *HJS*, 148 Wn.2d at 475. By contrast, the November 2, 2011 letter gave Additional Respondents no right to improve their land prior to receiving their LBA Permit.

Obviously, an aggrieved party must appeal such “preliminary plat” immediately, before the bulldozers start moving earth. Both the state subdivision statute and the City’s code confirm this, stating that approval

of a preliminary plat (or proposed plat, in the City's parlance) is not a "preliminary" determination but a *final land use decision* appealable under LUPA. See RCW 58.17.180; SMC 23.76.024.J ("Any judicial review of [preliminary plat] decisions . . . shall be commenced within 21 days of issuance of the decision, as provided by RCW 36.70C.040."). The process is the same for short plats, except DPD, rather than the Hearing Examiner, makes the preliminary and final decisions.

In other words, for subdivisions, only preliminary plat approval is required before the subdivider may change the status quo and begin construction in accordance with the plat. Unlike the preliminary plat, however, in the lot boundary adjustment context a determination of consistency with code (such as that contained in the November 2, 2011 letter) does not give the applicant any right to make changes to property. And unlike the preliminary plat language quoted above that provides an immediate right to appeal upon issuance of the preliminary plat, the Seattle Municipal Code and state law are devoid of language authorizing appeal immediately upon determination that an LBA application is consistent with code. In short, with nothing more than the November 2, 2011 letter in hand, Additional Respondents could do nothing to their property but wait for the issuance of the permit.

The November 2, 2011 letter is not analogous to a preliminary plat approval. If one wants to analogize review of an LBA application to review of other permits, it would be to other Type I permits under the City's code, such as building permits (which also require review for consistency with code), and the case law is clear that an appeal of a building permit for any reason must be filed within 21 days of the issuance of the building permit. *See, e.g., Asche* 132 Wn. App. at 788 (“We hold that their failure to file a land use petition within 21 days of *the issuance of the building permit* as required by RCW 36.70C.040 is determinative.” (emphasis added)).

The City mischaracterizes its own Code when it attempts to distinguish between the zoning compliance review letter, which it calls the “land use decision” in this case, and the later-issued LBA permit, which it calls a “master use permit.” City Response at 3-4, 5, 7. The City then conflates the two terms when it argues from SMC 23.76.028. The City misleadingly writes “[t]he code also provides that *LBA applications shall be approved* when the Department determines the applications ‘conform to all applicable codes.’” City Response at 2-3 (bold emphasis added).

The actual code language reads:

A Type I Master Use Permit is approved for issuance at the time of the Director's decision that the application conforms to all applicable laws

SMC 23.76.028.B (emphasis added). So, if the City's argument is correct, the Type I Master Use Permit (which is the same thing as the LBA Permit under the City Code) was "approved for issuance" the day that Ms. Anderson issued her November 2, 2011 letter. However, the City acknowledges that the MUP actually *issued* on December 2, 2011, after the payment of fees and recording of the LBA survey. Under LUPA, as discussed above, actual issuance of an applied-for permit is required to commence the running of the 21-day appeals clock. This appeal, filed four days after permit issuance, was timely.

B. If Deference is Required, the Court Should Defer to DPD's Ex Ante Interpretation of City Code, not the Contradictory Interpretation it Advanced for the Purposes of Litigation

DPD's pattern of interpreting the date an LBA is "approved for issuance" is reflected in its assignment of an expiration date three years to the day after the date the DPD website listed as the "decision date." Respondents request that the Court defer to the legal theories advanced in the declarations of DPD staff submitted in support of the motion to dismiss, but these declarations are owed no deference, because the interpretations contained therein are nothing more than a response to this litigation and are inconsistent with DPD's own records and practices. *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007)

(rejecting proffered interpretation, writing “Lacey’s claimed definition was not part of a pattern of past enforcement, but a by-product of current litigation.”); accord *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 814, 828 P.2d 549 (1992) (rejecting proffered interpretation as generated for the purposes of litigation and writing: “The record tends to show that, to the contrary of the Department’s now asserted position, the agency had no agency interpretation of the statute.”). In addition, the City bears the burden of establishing that its interpretation reflected a preexisting policy, which it has not done here. *Sleasman*, 159 Wn.2d at 647.

LUPA provides relief from “an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction.” RCW 36.70C.130(1)(b). Insofar as any deference is owed,⁴ the Court should defer to DPD’s interpretation before this litigation commenced, not a new interpretation offered in support of Respondents’ motion to dismiss. Respondents argue that the LUPA appeal period began running on the day that the LBA Permit was “approved for issuance” under SMC 23.76.028,⁵ which Ms. Anderson asserts in her declaration

⁴ Petitioners do not, as Additional Respondents allege, argue that City Code is ambiguous on the point.

⁵ This is contrary to LUPA’s plain language providing that the 21-day appeal period begins to run with the issuance of the permit.

was November 2, 2011. However, even if the appeals clock begins running the day a land use decision is “approved for issuance” (rather than “issued” as LUPA provides), the evidence demonstrates that, prior to this lawsuit, DPD interpreted that date in this case as November 15, 2011.

Before it knew that Petitioners would challenge the LBA, the City issued the LBA Permit with an expiration date of November 15, 2014—three years to the day after the LBA Permit was “approved for issuance.” *Cf.* SMC 23.76.032.A.1 (“An issued Type I or II Master Use Permit expires three years from the date a permit is *approved for issuance* as described in Section 23.76.028” (emphasis added)). This is how DPD, as a matter of course, interpreted the date the permit was “approved for issuance” before its lawyer realized that another date might prove more convenient for litigation purposes. If deference is owed, it is owed to this interpretation, not to the post-hoc and self-serving explanation offered later. Under DPD’s *ex ante* interpretation, the City issued the challenged land use decision no earlier than November 15, 2011 and this appeal, filed 21 days later, is timely.

The City attempts to minimize the importance of the expiration date by arguing that the expiration date does not change the effect of the November 2, 2011 letter, but the City misses the point of the argument. Insofar as the relevant date is the day the Type I MUP is “approved for

issuance,” DPD’s ex ante assignment of an expiration date of November 15, 2014 demonstrates that DPD did not, as a matter of fact and practice, interpret the phrase the way the City now argues.

C. The Land Use Decision Did not Issue Until Petitioners Obtained Actual Notice After Diligent Efforts

Assuming, *arguendo*, that Respondents correctly conclude that the City made the LBA decision on November 2, 2011, under the facts of this case, the Court should conclude that the decision *issuance date*, the date on which LUPA’s 21-day timeline begins to run, was November 15, 2011—the day the City represented for all the world that it made the land use decision. This will not create the havoc Respondents allege, because local governments do not typically make affirmative misstatements that mislead the public regarding the dates they make land use decisions. But when they do, a strict application of LUPA’s 21-day appeal period does violence to the structure of land use appeals—it allows local governments, through negligence or misrepresentation, to shield their land use decisions from meritorious appeal.

1. Petitioners Made Diligent Efforts to Obtain Copies of the LBA

Petitioners reviewed the City’s website, and their attorney spoke with multiple staff members at DPD—one of whom had recently issued the decision to recognize two building sites on the subject property that

forms the basis of the LBA,⁶ Andy McKim, *see* LUPA Petition ¶ 44. In so doing, they learned that (a) the LBA decision was made on November 15, and (b) the City had sent the LBA to the County for recording and thus the relevant records were not on site at the time Petitioners sought to review them.

Under Respondents' formulation, members of the public must (a) correctly identify the City individual responsible for making a decision—separate from the permit itself—rather than discussing the matter with the staff member that has worked closely with the subject property for months; (b) disregard clear statements on the City's website; (c) ignore statements of DPD staff that confirm the accuracy of the information on the City's website, notably the decision date; and (d) ignore statements of DPD staff that the City does not possess the relevant LBA materials because they are at the County recorder's office.

While the City's website said that land use review was completed on November 2, it also listed a "decision date" of November 15. A trusted DPD staffer, who had previously issued the opinion that originally

⁶ Mr. McKim was not the stranger to this property or this LBA that Respondents allege. An LBA cannot be used to *create* new lots where there were none before. *See* SMC 23.28.010 (purpose of LBA chapter is to provide boundary adjustments "which do not create any additional lot"). Thus, a necessary prerequisite to granting an LBA is the existence of two or more lots under common ownership. Mr. McKim made the original determination, the merits of which this action challenges, that Additional Respondents' property contained two lots.

recognized the existence of two lots, *see* LUPA Petition ¶ 44, confirmed that DPD’s internal system also indicated a decision date of November 15. Another trusted DPD staffer said that the files Petitioners requested were not on site, because they were at the County recorder’s office. Additional Respondents do not explain why, given this set of facts, Petitioners’ attorneys would go to DPD to view files they had been told were offsite.

From all the information they had available, Petitioners reasonably concluded that (a) the LBA “decision” was made on November 15 and (b) the City did not presently have the LBA documents in its files because they were being recorded with King County. Nothing in that series of events would have given Petitioners any indication that the “decision date” was any earlier than November 15. The City did not disclose even the existence of the November 2 letter until the City’s attorney offered it in support of the motion to dismiss—the City did not include the letter in the package of documents it delivered on December 2 (after the expiration of what the City now alleges is the appeal deadline) in response to Petitioners’ request for the LBA. CP 112, ¶ 17. In light of the full record, Petitioners’ efforts to obtain actual notice of the LBA were diligent.

2. The Disclaimer, Buried Deep Within the City’s Website, has no Effect

Petitioners’ reliance on the City’s online representation was reasonable, and the City’s attempt to disclaim the accuracy of that information is legally ineffective. Even if it were enforceable, the disclaimer relied upon by Respondents is irrelevant because Mr. McKim confirmed the accuracy of the public statement by reference to DPD’s internal system, which contained the same information. But the disclaimer is not enforceable; the word “disclaimer” does not appear on the page relied upon by Petitioners. This “fine print” is so buried in the City’s website that no reasonable citizen would ever stumble across it—indeed, Respondents’ attorneys did not offer it until they responded to Petitioners’ motion for reconsideration of the trial court’s order of dismissal. *See* CP 186 (quoting disclaimer for the first time). The undersigned counsel was able to locate this disclaimer by opening www.seattle.gov, then clicking “City Services,” “Seattle.gov Information,” “Policies and Planning,” “Legislation, Policies, and Standards,” and finally, “Online Privacy and Security Policy.” Only on this sixth page does the word “disclaimer” even appear. That page contains the disclaimer quoted in the response briefs.

A disclaimer hidden from view has no effect. In the analogous context of contracts, Washington courts give no effect to a liability disclaimer, even if it is contained in a one-page, one-paragraph contract, if

it appears in the middle of the paragraph in the same type as the text around it. *Baker v. City of Seattle*, 79 Wn.2d 198, 202, 484 P.2d 405 (1971) (“In the instant case, the disclaimer was contained in the middle of the agreement and was not conspicuous. To allow the respondent to completely exclude himself from liability by such an inconspicuous disclaimer, would truly be unconscionable.”). Here, the purported disclaimer is far more hidden than the disclaimer the *Baker* court determined was “unconscionable.” Not only is it not out on the same page as the purportedly disclaimed assertion, it is buried deep in the City’s website, six pages removed.

If the City does not want people to rely upon the accuracy of the representations contained on the City’s website, it is a simple matter to include its disclaimer language on every page that contains a disclaimed assertion. Alternatively, the City could include the word “DISCLAIMER,” with a hyperlink to the disclaimer page. Instead, the City buried the disclaimer language so deeply only a motivated lawyer could find it. The disclaimer is without legal effect.

And if an appellant cannot rely on the information on a web site, corroborated by multiple representations by city staff, how can a motivated party with standing, who wants to bring a timely petition for review, determine when a land use decision is issued? The necessary

effect of Respondents arguments is that a local government can avoid challenges to its land use decisions by “hiding the ball,” while LUPA’s purpose is very much to the contrary: “to provide consistent, predictable, and timely judicial review.”

3. Case Law Allows the Court to Rule that a Land Use Decision is Issued the Date Diligent Appellants Receive Actual Notice of a Land Use Decision

As Petitioners argued in their opening brief, this case presents a matter of first impression, anticipated by *dicta* in *Habitat Watch* but never squarely addressed in case law. Petitioners do not argue, as Additional Respondents allege, that these cases *require* the Court to rule for Petitioners. Rather, they do not *preclude* a ruling for Petitioners, as Additional Respondents argue. As Petitioners pointed out in their opening brief, the Supreme Court wrote:

At the very latest, the written decisions were issued when the county made them available on June 24, 2002, in response to Habitat Watch’s public disclosure request. By the date of the county’s response to Habitat Watch’s public disclosure request, the county had provided “notice that a written decision is publicly available” pursuant to RCW 36.70C.040(4)(a).

Habitat Watch v. Skagit County, 155 Wn.2d 397, 409, 120 P.3d 56 (2005) (emphasis added). The Court ruled against Habitat Watch because it did not file within 21 days of the last possible date. *Id.* n.6. The Court clarified:

Had Habitat Watch filed a LUPA petition before or in consort with filing the petition for revocation with the county, things might have been different. . . . Because the opportunity for direct administrative appeal of the extensions had passed with Habitat Watch having no notice of the decisions, its next step would be an appeal to the superior court via LUPA.

Id. at 409 n.7. Thus, the Supreme Court acknowledged that there may be situations in which a good-faith appellant who receives no notice of a land use decision may appeal within 21 days of receiving actual notice. *Nickum*'s analysis of equitable tolling does not apply here, where the relevant question is what date the Court should establish as the date of issuance.⁷

The parties agree on the scope of existing case law. Interested parties are not generally entitled to receive actual notice of land use decisions, or no jurisdiction would have the Type I process that the City does. However, local governments enjoy no privilege to affirmatively mislead persons with standing who are aware of the imminence of a land use decision and are diligently seeking to determine the date of issuance so that they can timely pursue their rights under LUPA. This separates this

⁷ Petitioners' brief was imprecise on this point. The question is not whether the Court should toll the limitations period, it is whether the Court should conclude as a matter of law that the land use decision was issued later than November 2, 2011. The same 21-day appeal period applies.

case from the cases cited by Respondents such as *Samuel's Furniture*⁸ and *Applewood Estates*⁹—here, Petitioners asked the City questions about the LBA, and the City responded with what it now, after the fact, asserts were falsehoods and misrepresentations. In fact, DPD's contemporaneous representations and the information on its web site were accurate and reflected DPD's actual practices, but even if one assumes *arguendo* that the information that DPD provided both on the web and in person was false, as the City now asserts for purposes of litigation, Petitioners nonetheless acted in a timely manner in light of the information that DPD actually provided, and no case has addressed such facts and held that timely action, in light of the information contemporaneously provided by the government, nevertheless precludes review under LUPA.

LUPA operates on a fantastically short timeline—permits become final and legally unassailable only 21 days after issuance. Yet, the cases acknowledge that neighbors and other potentially aggrieved parties have standing to challenge adverse land use decisions. The only way this balance can work is if local governments promptly convey accurate information about permits, or are held to the information they do convey

⁸ *Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002).

⁹ *Applewood Estates v. City of Richland*, 166 Wn. App. 161, 269 P.3d 388 (2012).

in response to specific inquiry. The City should not now be heard to disclaim its contemporaneous statements and succeed in dismissing an appeal that was indisputably timely in light of those statements.

D. Estoppel Binds the City—the Permitting Authority—and Additional Respondents Suffer no Prejudice

For all the reasons Petitioners argued in their opening brief, the Court should estop the City to deny an issuance date earlier than November 15, 2011. Additional Respondents' argument that estoppel would prejudice them makes no sense in light of the undisputed fact that Additional Respondents could not actually act in accordance with the LBA until the City issued the LBA Permit on December 2, 2011. The cases cited by Additional Respondents stand for the proposition that permittees are harmed when the appeal deadlines of their issued land use permits are held open. By contrast, Additional Respondents had no right to act upon any determination made in the November 2, 2011 letter until it received the LBA Permit on December 2, 2011. The concerns expressed in the case law have no bearing here.

E. An Award of Attorneys Fees is Improper Even if Additional Respondents Prevail

Additional Respondents should not prevail here, so their request for attorneys' fees should become moot. But even assuming for the sake of argument that this Court affirms the trial court, Additional Respondents

are not entitled to fees under RCW 4.84.370 (providing that “reasonable attorneys’ fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of *a decision by a . . . city*”).¹⁰ The statute does not apply to appeals to this Court of ministerial land use entitlements. *Asche v. Bloomquist*, 132 Wn. App. at 802.

RCW 4.84.370 is essentially a “three strikes” statute—if an appellant fails to prevail in three successive fora, he or she must pay the opponent’s attorney fees. Here, because there was no administrative hearing before the City, this appeal is only the second opportunity for Petitioners to challenge the LBA. The *Asche* court captured this concept by stating that the county in that case made no “decision.” In *Asche*, Division 2 of the Court of Appeals declined to grant an award of attorneys fees to Bloomquist, who obtained a building permit and then successfully defended it before the trial court and the Court of Appeals. 132 Wn. App. at 802. The Court wrote: “Here, the Bloomquists did not receive a county decision in their favor because issuing a building permit is ministerial. The Asches’ first challenge was at the superior court level.” *Id.*

¹⁰ The City’s failure to timely request attorneys’ fees bars any fee award to the City. *Richards v. City of Pullman*, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006) (declining to award attorney fees for failure to properly request them, writing “appellate parties are required to include a separate section in their briefs devoted to the fees issue, as required by RAP 18.1(b).”)

In Seattle, a ministerial building permit requires a Type I process, handled entirely by administrative staff. An LBA similarly requires a Type I process and is therefore also “ministerial,” just as the building permit in *Asche* was. Under *Asche*, no “decision” was required by the City before issuing the LBA.¹¹ The statute requires the “prevailing party” on appeal to also have prevailed before the City, RCW 4.84.370(1)(a) (“The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town . . .”). Here, Additional Respondents could not have been a “prevailing party” before the City for the simple reason that there was no “opponent” before the City—the City issued the LBA Permit without considering the input of Petitioners or anyone else. Because Additional Respondents received no City decision in their favor, RCW 4.84.370 does not apply and the Court need not award attorneys’ fees, even if Additional Respondents prevail on the merits.

¹¹ Even if, contrary to the reasoning of *Asche*, the City of Seattle did make a “decision,” Divisions 2 and 3 of this Court have ruled that a party that obtains a dismissal at the superior court on jurisdictional grounds is not a “prevailing party” for the purposes of RCW 4.84.370. *Richards*, 134 Wn. App. at 884 (“Dismissal for want of jurisdiction is not the same as a final decision on the merits.”); accord *Witt v. Port of Olympia*, 126 Wn. App. 752, 758-59, 109 P.3d 489 (2005). While Division 1 issued a contrary ruling in 1999, see *Prekeges v. King County*, 98 Wn. App. 275, 284-86, 990 P.2d 405 (1999), the *Witt* court explained that under the plain language of the statute, attorney fees are available only if the “decision” of the local government is upheld, and a ruling on procedural grounds does not address the decision, *Witt*, 126 Wn. App. at 759. This Court should adopt the reasoning of *Witt* and *Richards* and decline to award attorneys’ fees.

II. CONCLUSION

Additional Respondents applied for an LBA Permit, which they received on December 2, 2011. Petitioners filed a LUPA challenge to the LBA Permit on December 6, 2011, only four days after issuance. No case supports the proposition that the completion of a zoning review incidental to the later issuance of a permit—such as the one memorialized in the November 2, 2011 letter—constitutes a “final land use decision.” Had Petitioners appealed the determination in the letter prior to the issuance of the LBA Permit, the City would have properly moved to dismiss the challenge as unripe. By taking the opposite position, the City attempts to return land use litigation to a time when appeals were marked by uncertainty. The Court should not allow this. The issuance of a permit that authorizes the alteration of land constitutes the “final land use decision” in this case. Establishing the date of permit issuance as the date of the “final land use decision” gives effect to LUPA’s plain language and provides the certainty to all parties that the Washington cases value.

If, and only if, the Court decides that some pre-permit date should serve as the date of the final land use decision, then it should adopt the reasoning of subsections B, C, or D above. First, only DPD’s ex ante interpretation, expressed in its ex ante assignment of an expiration date of November 15, 2014, should be granted deference. Second, assuming the

November 2, 2011 letter contained a “final land use decision,” based on this record, Petitioners’ timely, diligent, but ultimately unsuccessful attempts to obtain the decision compel a decision that the letter did not issue until Petitioners should reasonably have discovered it—on November 15, 2011. Finally, the City’s multiple representations should estop it from denying a issuance date after November 15, 2011.

But there is no need to reach these secondary issues. The LBA Permit was issued on December 2, 2011, and this appeal, filed four days later, was timely under LUPA. For all these reasons, Petitioners respectfully request that the Court reverse and remand for a hearing on the merits.

Dated this 5th day of October, 2012

FOSTER PEPPER PLLC



Patrick J. Schneider, WSBA No. 11957

Steven J. Gillespie, WSBA No. 39538

Attorneys for Appellants

DECLARATION OF SERVICE

I am a legal assistant at Foster Pepper PLLC. I have personal knowledge of the facts in this declaration and am competent to be a witness in the above-entitled proceeding. On October 5, 2012, I caused to be delivered in the manner indicated below a true and correct copy of the foregoing Appellants' Opening Brief to each of the following:

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Helen M. Stubbert

2012 OCT -5 PM 4:45
COURT OF APPEALS
STATE OF WASHINGTON

CHAPTER 2

SUBDIVISION OF LAND

Robert Johns

Duana Koloušková

Summary

§2.1 Introduction

§2.2 Subdivisions in General

(1) Governing Law and Definitions

Robert Johns is a founding partner at Johns Monroe Mitsunaga Koloušková PLLC, which represents a variety of private and public clients on land use, real estate, and construction issues. Prior to founding Johns Monroe Mitsunaga Koloušková, Mr. Johns was the manager of the Land Use, Construction and Environmental law section of the Seattle law firm of Reed McClure. Before joining Reed McClure in 1984, Mr. Johns was a senior King County deputy prosecuting attorney, where he represented the Building and Land Development, Planning, and Public Works Divisions. Mr. Johns is member of the Environmental and Land Use Section of the Washington State Bar Association. He has been a frequent speaker at seminars on a variety of land use and environmental law topics, including subdivision law. Mr. Johns is a member of the board of directors of the Master Builders Association of King and Snohomish County. He has served on several technical advisory committees working on the development of land use policies, transportation plans, and storm water control manuals for various government agencies.

Duana Koloušková is a partner at Johns Monroe Mitsunaga Koloušková PLLC, which represents a variety of private clients on land use, real estate, and construction issues. Ms. Koloušková represents developers, property owners, and developer/builder organizations in all phases of property development. Her work includes consultation in the preparation of permit applications, negotiation with agencies, and representation at public hearings before hearing examiners, city and county councils, and other public agencies. She has also litigated numerous judicial challenges related to land use decisions in the trial and appellate courts of the state of Washington. Ms. Koloušková is a member of the Environmental and Land Use Section of the Washington State Bar Association. She is a frequent speaker at and chair of continuing legal education seminars on a variety of land use and environmental law topics. Ms. Koloušková sits on the board of directors of the Master Builders Association of King and Snohomish County.

Subdivision of Land / §2.5(2)

sure to check with local authorities to determine the application of the seven-year rule to phased projects. Some jurisdictions require all phases to be completed within a single five-year time period. Others require only that at least one phase be completed every five years. Still other jurisdictions allow a longer time period for phased projects, but only if a development agreement is adopted pursuant to RCW 36.70B.170-.210 at the time of original preliminary plat approval.

Practice Tip:	With large developments that expect a build-out period longer than seven years, applicants should discuss phasing with planning staff when the preliminary plat application is first submitted. Also, for extended developments applicants should seriously consider development agreements (see Volume 6, Chapter 8 (Development Agreements), of this deskbook), which can address phasing and vesting of utilities and other conditions to assure continuity of development over time and avoid the need to retrofit or change facilities due to changing regulations.
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(2) Final plat approval process

Upon receipt of preliminary plat approval, the developer must prepare and obtain approval of detailed plans for the plat infrastructure (generally referred to as “final engineering plans”). Once the final engineering plans have been reviewed and approved by the local planning department, the applicant has the option of either constructing the improvements or posting a bond covering the cost of constructing the improvements. If the applicant elects to construct the improvements, they must be completed, inspected, and approved before final plat approval can be granted. If the applicant elects to post a bond, the applicant can obtain final plat approval contingent upon an agreement to complete the improvements within a specified time (usually one or two years) after final plat approval or risks forfeiture of the bond.

Practice Tip:	RCW 58.17.130 <i>requires</i> local agencies to give developers the options of constructing improvements or posting a bond “or other secure method” to cover the cost of the improvements. Many local jurisdictions simply ignore this statute and require that some/all infrastructure improvements be constructed before final plat approval. In addition, local utility districts often take the position that they are not bound by RCW 58.17.130 and can refuse to accept a bond or other security in lieu of actual construction. No case law exists at the present time clarifying either issue. Be sure to check local regulations and practice on this point.
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