

No. 74528-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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JAMES CHUMBLEY, et al,

Appellants,

v.

SNOHOMISH COUNTY, et al,

Respondents.

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**BRIEF OF APPELLANTS**

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## INTRODUCTION

This case arises from the failure of the Snohomish County Department of Planning and Development Services (the “County” or “PDS”) to enforce compliance with the County’s Critical Areas and Land Disturbing Activity ordinances required for clearing and grading activities associated with the installation of an on-site sewage system (“OSS” or “Septic System”) in a designated “landslide hazard area,” directly above western Washington’s main north-south rail line (the “OSS Grading Activities”).

When adjacent landowners filed suit under the Land Use Petition Act (“LUPA”)<sup>1</sup> to challenge the County’s lack of enforcement of its own ordinances (“Appellants’ Petition”), the County convinced the trial court that Appellant landowners’ claims were barred by the 21-day statute of limitations, which the Court held had been triggered by the County’s issuance of a building permit on an entirely different lot. The trial court’s holding was in error.

The unique facts of this case make clear that no “land use decision” regarding the OSS Grading Activities was made at the time the building permit was issued. This case involves a residential lot (“Lot 36”), located

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<sup>1</sup> Appellants also filed several non-LUPA claims, which were also dismissed by the trial court’s order dismissing Appellants’ LUPA Petition.

along the western side of Marine View Drive, that was previously deemed unbuildable because of the property's unsuitability for a Septic System. Undeterred by this fact, the developer concocted a plan to install a Septic System that would transport septic effluent from a tank on Lot 36, down Marine View Drive, over an easement on a neighboring property, and down the steep slope to a drain field facility developed on two separate lots to the southwest also owned by the developer ("Lots 60 and 61"). Lots 60 and 61 lie within the steep landslide-prone bluff below Marine View Drive.

The trial court held that the building permit for construction of a single family residence on Lot 36 (the "Building Permit" or the "Lot 36 Permit") constituted a final "land use decision," which triggered LUPA's 21 day statute of limitations, with respect to the OSS Grading Activities on Lots 60 and 61. In reaching this conclusion, the trial court disregarded several key facts, including: (1) the Lot 36 Permit made no mention of Lots 60 and 61; (2) an explicit condition in the Lot 36 Permit required compliance with the County's Land Disturbing Activity ordinance for all activities authorized by the Permit; and (3) the County admitted that neither it, nor any other agency, conducted any analysis as to compliance with Land Disturbing Activity and Critical Areas ordinances for the OSS Grading Activities on Lots 60 and 61.

Simply put, nothing in the Building Permit, which focused entirely on Lot 36, could have alerted Appellants or other members of the public to the fact that the County did not intend to require a Land Disturbing Activity permit or enforce its Critical Areas ordinances for the OSS Grading Activities on Lots 60 or 61. Nevertheless, the trial court concluded that Appellants were required within 21 days after issuance of the Lot 36 Permit to challenge the mere possibility that the County might not require compliance with its own ordinances on Lots 60 and 61. But any such challenge surely would have been deemed premature and dismissed as unripe.

As the record makes clear, no final “land use decision” regarding the OSS Grading Activities was issued under LUPA until September 11, 2015, at the earliest, when the County closed its investigation of a pending violation as to grading activities on Lots 60 and 61. It is undisputed that Appellants’ Petition was filed within 21 days of the closure of the County’s investigation. The County also addressed the OSS Grading Activities when it “finaled” the Building Permit (the equivalent of issuing a Certificate of Occupancy) on September 22, 2015, and Appellants’ Petition was filed within 21 days of that date. In either case, Appellants’ Petition was timely.

Accordingly, Appellants respectfully request that the Court reverse the trial court's order dismissing Appellants' case and rule that Appellants' Petition is timely, as a matter of law.

### **ASSIGNMENTS OF ERROR**

(1) The trial court erred in determining that the Lot 36 Permit, issued on February 24, 2015, constituted a final "land use decision" about whether Critical Areas analysis and a Land Disturbing Activity permit would be required for OSS Grading Activities on Lots 60 and 61.

(2) The trial court erred in determining that Appellants' Petition was an impermissible collateral attack on the Lot 36 Permit.

(3) The trial court erred in granting Respondents' Motions to Dismiss Appellants' Petition because LUPA's 21-day statute of limitations period, which began to run on September 11, 2015 at the earliest, had not yet expired at the time the Appellants' Petition was filed.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

(1) Did the trial court err in determining that the County's consideration of a District-issued OSS Permit was the equivalent of a County determination regarding whether Critical Areas analysis and Land

Disturbing Activity permitting were required for the OSS Grading Activities? (Assignments of Error 1, 3).

(2) Did the trial court err in concluding that the Building Permit vested the right to construct a residence and “the corresponding right of use and occupancy,” which right can only be vested through the issuance of a Certificate of Occupancy at the time the County “finals” the building permit? (Assignments of Error 1, 3).

(3) Did the trial court err in concluding that the Building Permit included a determination about whether Critical Areas analysis and Land Disturbing Activity permitting were required for the OSS Grading Activities, notwithstanding the Building Permit’s express condition that all activity authorized by the permit “shall comply with” the County’s Land Disturbing Activity code? (Assignments of Error 1, 3).

(4) Did the trial court err in concluding that the Building Permit authorized or otherwise addressed the OSS Grading Activities where terms regarding the OSS Grading Activities are not memorialized in any tangible or accessible way? (Assignments of Error 1, 3).

(5) Did the trial court err in concluding that a challenge to the OSS Grading activities “should have been raised in the context of a challenge to the County’s decision to issue the building permit” even

though the Building Permit did not authorize the OSS Grading Activities?  
(Assignments of Error 2, 3).

(6) Did the trial court err in extending principles from *Samuel's Furniture*<sup>2</sup> and other LUPA “collateral attack” cases, which held that activities specifically authorized in one permit may not be collaterally attacked in a challenge on a subsequently-issued permit, to Appellants’ challenge to the OSS Grading Activities when those activities were not previously authorized by the Building Permit or any other permit?  
(Assignments of Error 2, 3).

#### STATEMENT OF THE CASE

This dispute concerns grading, clearing, and other activities associated with the installation of an OSS on parcels in a designated “landslide hazard area” that were undertaken without required Critical Areas analysis and without required Land Disturbing Activity permits. CP 770-777. Respondent Begis Building Inc., and Jake Begis (the “Developer”) sought to construct and install an OSS that would transport septic effluent from a tank on one lot owned by the Developer (Lot 36), down the street, across an easement over a neighbor’s property, and down

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<sup>2</sup> *Samuel's Furniture, Inc. v. State Dep't of Ecology*, 147 Wn.2d 440, 456, 54 P.3d 1194 (2002). See also Argument Section II(D), *infra*.

the steep slope to a drain field facility located on two separate steep hillside lots owned by the Developer (Lots 60 and 61). CP 683.

Lots 60 and 61 are extremely steep bluffs, located wholly within a designated landslide hazard area. CP 296. Lot 36 is located at the crest of the steep bluffs overlooking the Puget Sound, just above and to the north of Lots 60 and 61, and is partially included within the same designated landslide hazard area. CP 217-218.

The County and the Snohomish County Health District (the “District”) admit the area has a long history of landslides; that BNSF Railways Company’s (“BNSF”) railroad right of way, located immediately down gradient from Lots 60 and 61, carries a substantial volume of daily train traffic, including the Amtrak Cascade Line and the Sounder commuter train; and that a landslide triggered by the OSS could disrupt rail service and cause bodily injury or death. CP 639-640, 668-669. In spite of this, the County admits that it failed to undertake Critical Areas analysis, or to require Land Disturbing Activity permits for the OSS Grading Activity, both of which are mandated by the Snohomish County Code (“SCC”). CP 154-155 at ¶¶ 4-9, CP 620 at ¶ 14, CP 270:11-13.

**I. THE BUILDING PERMIT DECISION FOR LOT 36 DOES NOT AUTHORIZE OSS GRADING ACTIVITIES ON LOTS 60 OR 61.**

**A. The Building Permit's Scope Of Authorization Was Limited To Activities Involving The Construction Of A Structure On Lot 36, Not Land Disturbing Activities Associated With The OSS Installation On Lots 60 And 61.**

On December 2, 2014, the Developer applied for a building permit to construct a single-family residence on Lot 36. CP 617, CP 691-692. The application seeks authorization for, and the Lot 36 Permit authorizes, *only* work on Lot 36, not Lots 60 and 61, as evidenced by numerous references in the application materials and permit documents. CP 690-692.

**B. The Building Permit Was Expressly Conditioned On Future Compliance With The LDA Code.**

On February 24, 2015, the County issued the Lot 36 Permit to the Developer. CP 690. The Lot 36 Permit authorized the Developer to build a single-family residential structure, subject to certain "special conditions." CP 690. Notably, one special condition of the Lot 36 Permit required that "[a]ll activity authorized by this permit shall comply with Chapters 30.63A and 30.63B SCC," *e.g.*, the Land Disturbing Activity ordinance. CP 690. In a separate provision, the Lot 36 Permit was explicitly subject to an open application for a Land Disturbing Activity permit ("LDA permit") on Lot 36 which had yet to be finally approved. CP 690, CP 234. Accordingly,

the County's Building Permit decision did not authorize or otherwise address any grading or other land disturbing activities on Lots 60 and 61, and the decision expressly deferred any issues relating to land disturbing activities to a separate, future process: the County's LDA process.

**II. THE HEALTH DISTRICT WASTE DISPOSAL PERMIT DOES NOT AUTHORIZE OSS GRADING ACTIVITIES ON LOTS 60 OR 61.**

Before the County could issue the Building Permit, the Developer was required to first provide confirmation from the Snohomish Health District of an "approved means of waste disposal" for Lot 36 in accordance with SCC 30.50.104. CP 617. On August 11, 2014, the Developer submitted its initial application for an OSS permit to the District, which stated that the permit was "for installation at lot 36 Marine View Dr. and Lot 61 Possession Lane." CP 236-237. After this application was denied twice for various reasons, the Developer submitted supplemental information to address the underlying basis for denials, with the final application submitted on January 8, 2015, stating that the OSS was to be installed solely on "11706 Marine View Drive." CP 239-240.

As required by WAC 246-272A-0210(5)(d) and (e), the Health District's review of the OSS permit application required the Developer to provide a report from a licensed engineer addressing the slope stability of the subject property and demonstrating how compliance with the applicable

State Board of Health construction and design standards would be achieved. CP 242-243. The County and the District admit these standards relate solely to “characteristics impacting design” of the OSS “from a functional standards perspective,” and that they “are not land use regulations nor specific determinations under the Snohomish County Code.” CP 661, CP 543, CP 545, CP 637, RP 15:15-21, RP 18:1-5.

As part of his application dated January 8, 2015, the Developer submitted a Geotechnical Report to the Health District that flatly stated: “This portion of the coastal bluffs are not as susceptible to landslides. . . .” CP 660-664 at ¶ 1.2, CP 697-698. Recognizing the conclusory nature of that report, the District then requested additional geotechnical analysis specific to Lots 60 and 61. CP 660-664 at ¶ 1.2, CP 700. Based on the subsequent “Revised Geotechnical Report” submitted on February 3, 2015, the Health District approved the Developer’s OSS application on February 23, 2015. CP 660-664 at ¶ 1.1, CP 682-688. The approved application states: “This approval shall NOT be considered an assurance, either expressed or implied, that *development permits* for this site will be issued,” and “as a precaution, *the soil in the designated drainfield and reserve areas should remain undisturbed.*” CP 660-664 at ¶ 1.1 (emphasis added). *See also* CP 682.

As the County and District concede, the District's OSS Permit (like the Building Permit) did not address Critical Areas review, did not address Land Disturbing Activity review, and did not issue a Land Disturbing Activity permit for related grading activities. CP 637, CP 403-404 at ¶ 9, CP 254-255, CP 274 at ¶ 1, CP 154-155 at ¶¶ 4-9, RP 21:15-22:3. As set forth below, these independent requirements address policy concerns different from the District's OSS Permit process, and must independently be analyzed and approved by the County under applicable County ordinances.

**III. THE COUNTY'S ENFORCEMENT ACTION SPECIFICALLY CONSIDERED, FOR THE FIRST TIME, WHETHER A SEPARATE LDA APPROVAL WAS NEEDED TO AUTHORIZE THE OSS GRADING ACTIVITIES.**

Appellants first became aware of the OSS Grading Activities on Lots 60 and 61 in June and July of 2015 and immediately began submitting formal complaints to the County and the District. CP 257-260. In response to complaints submitted by Appellants and other neighboring landowners, the County initiated a code enforcement action in the form of a "Complaint" that was assigned to Project File Number 15-110279-CT (the "Lots 60 and 61 Enforcement Action").<sup>3</sup> CP 220, CP 257-260. On July

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<sup>3</sup> The Developer had also been the subject of prior enforcement actions related to his failure to comply with permit conditions and County regulations, but those solely addressed issues on Lot 36. Specifically, on March 17, 2015, Randy Sleight, the County's

14, 2015, the County issued a “Complaint Investigation Report” stating as follows: “Stop work posted by Jared (PDS) for altering drainage. Seepage coming from site and a ditch was dug across road and onto BNSF property.” CP 220.

On July 20, 2015, the County issued a Notice of Violation for grading in a Critical Area and diverting a natural drainage course (15-110279-CT) stating as follows:

*Land disturbing activity (clearing, grading, or the creation of new, replaced, or new plus replaced impervious surface) has occurred on the above described property without the necessary permits and/or approvals as required by Snohomish County Code (SCC) 30.63B.030 and 30.63B.070. The land disturbing activity involved the alteration of a natural drainage course and grading within a critical area, its setback or buffer as defined in SCC 30.91C.340(1-5). The suggested corrective action is to obtain a land disturbing activity permit, comply with the drainage requirements in Chapter 30.63A SCC and/or obtain any additional permits that are deemed necessary through review of the application(s).*

CP 251-252 (emphasis added). On July 22, 2015, Mr. Sleight sent a letter to the Developer stating “you have authorized [sic] grading in a critical area without County permits”; that “[a] LDA permit is required for all work

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Chief Engineering Officer, sent the Developer a letter regarding “ongoing issues,” stating that the Developer had not followed required procedure nor complied with the approved plans or permit conditions. CP 245-246. The letter detailed several unapproved actions that created the “potential for hillside failure from the upstream property” and expressed concerns regarding water quality impacts, erosion, and the “stability of slopes on the upstream and downstream property lines.” CP 245-246. On August 7, 2015, the County sent the Developer a further letter stating he had “neglected to follow correct procedure in the permitting and construction process” and listing several additional violations resulting from the Developer’s activities on Lot 36. CP 248-249.

*associated with this violation due to its location within a critical area*"; and that "this work relates directly to the new on-site [septic] system installed" on Lots 60 and 61. CP 254-255.

The activity log for the Lots 60 and 61 Enforcement Action shows that, on July 23, 2015, Mr. Sleight, the County's chief engineering officer, sent an email to the County's enforcement staff changing course and directing them to omit the OSS Grading Activities from the scope of the County's enforcement action, stating that "our letter to Health District and our meeting with the Health Dept. . . . *put this issue squarely in their jurisdiction*" and that "the issue of the unpermitted drainage in the private road right of way and the diversion of water from the seep onto the driveway . . . is the subject of the enforcement letter sent out yesterday to Mr. Begis." CP 257-260 (emphasis added).

On August 6, 2015, Mr. Sleight sent an e-mail to Ms. Hacker, another County engineer, relaying the contents of a telephone conversation between Mr. Sleight and the Developer's drilling contractor in which Mr. Sleight discussed issues encountered during the installation of the drainfield and pumps and Mr. Sleight reiterated that even the remedial work "would require a permit or LDA since all the work that he was describing was in a Critical Area." CP 262-263.

On August 5, 2015, in an effort to resolve the Lots 60 and 61

Enforcement Action, the Developer applied for an after-the-fact LDA permit authorizing the land disturbing activities on Lots 60 and 61. CP 265-272. The application specifically sought authorization for “grading” activities. CP 267.

On August 12, 2015, Mr. Sleight sent a letter to the Developer stating as follows:

The applicant has neglected to follow the correct procedure in the permitting and construction process:

1. *Construction of on-site sewage system (OSS) in a critical area.*

A geotechnical review submitted by Shannon & Wilson, Inc., as requested by the BNSF Railroad [sic] Company, has raised concerns regarding the location of the proposed drainfield on Lots 60 and 61. *Snohomish County did not issue or approve permits for this work* and has deferred to the Snohomish Health District for review and next steps in addressing this concern. Approved as-builts are required of the drainfield and pumpline within the road easement prior to the issuance of a certificate of occupancy for the house located on Lot 36.

[...]

*All four violations listed in this letter need to be resolved prior to issuance of a certificate of occupancy for the residence on Lot 36 (11706 Marine View Drive, Edmonds, WA). If the applicant does not comply in appropriately responding to the issues stated above, the County may initiate suspension or revocation of your permits per SCC 30.85.310.*

CP 274-275 (emphasis added). The following week, on August 18, 2015, the Developer’s engineer, Mr. Chopelas, submitted a Targeted Stormwater

Drainage Plan Report discussing erosion control and drainage issues resulting from seepage from the sewer bore hole within the coastal bluff. CP 277-281.

The report includes a section for Critical Areas, but it only mentions the nearby Puget Sound shoreline, not the designated landslide hazard area that encompasses Lots 60 and 61. CP 280.

On September 8, 2015, the Developer emailed the County and stated: “The seepage is perminately [sic] stopped. So, we will not be needing this permit . . . and, I am withdrawing the application.” CP 283-284. On or around September 11, 2015, the case file related to 15-110279-CT was “closed.” CP 795-808. The closure of the Lots 60 and 61 Enforcement Action was the first time the County made an official land use decision indicating that it did not intend to enforce its Critical Areas and Land Disturbing Activity ordinances with respect to the OSS Grading Activities on Lots 60 and 61.

**IV. THE COUNTY’S AND DISTRICT’S FINAL INSPECTIONS DOCUMENTED, FOR THE FIRST TIME, THE COUNTY’S AND DISTRICT’S FINAL DECISIONS THAT NEITHER ENTITY WOULD ENFORCE THE COUNTY’S LDA CODE OR CRITICAL AREA ORDINANCE.**

On September 17, 2015, Kevin Plemel, one of the District’s Managers, contacted Mr. Sleight at the County requesting that he “confirm that the referenced grading code violation and stop work order have been

adequately addressed and that no outstanding issues relative to any offsite grading/trenching/clearing relative to violation of Land Disturbing Activities, Critical Areas, Grading, and/or any other Snohomish County development codes are **currently** under any outstanding action by PDS.” CP 287 (emphasis in original). On September 18, 2015, Tom Rowe, the PDS Division Manager, responded to Mr. Plemel’s request by stating, in part, that “[t]he grading code violation and stop work order previously issued by the County *related to off-site grading activity associated with the property where the OSS system permitted by the Health District is located.*” CP 287 (emphasis added). Mr. Rowe and Mr. Plemel then exchanged several emails in which Mr. Plemel sought further confirmation “that there is currently not an ongoing violation action underway by the County”; Mr. Rowe responded by stating that “it doesn’t matter, the drainfield is a separate issue” and that “it’s my understanding that the stop work has been resolved through restoration”; and Mr. Plemel replied by stating that “*the outcome of that issue may have had an effect on the drainfield* and possibly our final review of the as-built.” CP 286 (emphasis added).

The County and the District admit that, despite their awareness of the absence of any SEPA, LDA, or Critical Areas review of the OSS Grading Activities, the District approved its final inspection for the OSS later that same day, September 18, 2015; and the County approved its final

inspection for the Building Permit on September 22, 2015. CP 274, CP 642 at ¶¶ 20-21, CP 670 at ¶ 3.15. The County further admits that its final inspection approval constituted the “Certificate of Occupancy” for the residential structure on the Development Site. CP 670 at ¶ 3.15, CP 288, CP 156 at ¶ 10.

Appellants filed suit eight days later, on September 30, 2015. CP 813-871.

## **ARGUMENT**

### **I. THE COURT’S RULING ON A MOTION TO DISMISS IS SUBJECT TO DE NOVO REVIEW.**

This case was decided upon a motion to dismiss. Accordingly, the Court’s review is de novo. *Durland v. San Juan County*, 175 Wn. App. 316, 320, 305 P.3d 246, 248 (2013) (“*Durland I*”) aff’d, 182 Wn.2d 55, 340 P.3d 191 (2014) (“*Durland III*”). Even if the motion had been converted to a motion for summary judgment, the review standard is the same. *Durland III*, 182 Wn.2d at 69.<sup>4</sup>

### **II. THE COURT ERRED IN FINDING APPELLANTS’ CLAIMS BARRED BY THE STATUTE OF LIMITATIONS.**

#### **A. Legal Framework: Determining When LUPA Requirements Are Implicated.**

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<sup>4</sup> Appellants filed a motion for discovery, to the extent that factual analysis would be required in resolving Respondents’ motions to dismiss. CP 108-123. In resolving the issue, the Court denied the motion for discovery as moot, following its decision on the Motion to Dismiss. CP 15 at ¶ 2.

1. LUPA's Requirements Are Triggered Only When A Final "Land Used Decision" Is "Issued."

LUPA's procedural requirements apply only to decisions that meet LUPA's definition for a "land use decision," and only to decisions that have been "issued" as that term is defined in LUPA. LUPA defines the term "land use decision" as follows:

"Land use decision" means a *final* determination by a *local jurisdiction's body or officer with the highest level of authority to make the determination*, including those with authority to hear appeals, 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*, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(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; and

(c) *The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property*. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020(2) (emphasis added). The term "local jurisdiction," in turn, is defined as "a county, city, or incorporated town." RCW 36.70C.020(3).

As further discussed below, LUPA requires parties seeking to challenge a “land use decision” to file and serve a LUPA petition within 21 days after the decision is “*issued*.” RCW 36.70C.040(3) (emphasis added).

“The statute designates the exact date a land use decision is ‘issued,’ based on whether the decision is written, made by ordinance or resolution, or in some other fashion.” *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 408, 120 P.3d 56, 61 (2005) (citing RCW 36.70C.040(4)(a)). Local jurisdictions may “issue” “land use decisions,” subjecting them to LUPA’s procedural requirements, in one of three ways: (1) by preparing a “written decision” that is mailed, or for which notice of public availability is given; (2) by passing an ordinance or resolution; or, if neither of those applies, (3) by entering the decision into the public record. The date on which a “land use decision” is “issued” is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

RCW 36.70C.040(4). Thus, a “land use decision” is not subject to

LUPA's procedural requirements unless it is a "final" decision that has been "issued" in one of the three ways designated in RCW 36.70C.040(4). A "land use decision" is "final" for purposes of LUPA when it "leaves nothing open to further dispute" and "sets at rest [the] cause of action between the parties." *Durland v. San Juan County*, 174 Wn. App. 1, 13-14, 298 P.3d 757 (2012) ("*Durland I*") (quoting *Samuel's Furniture, Inc.*, 147 Wn.2d at 452).

2. A Final Land Use Decision Must Memorialize The Terms Of The Decision, Not Merely Reference Them.

Furthermore, a final "land use decision" "should memorialize the terms of the decision, not simply reference them, in a tangible and accessible way so that a diligent citizen may 'know whether the decision is objectionable or, if it is, whether there is a viable basis for a challenge.'" *Durland I*, 174 Wn. App. at 13-14 (quoting *Vogel v. City of Richland*, 161 Wn. App. 770, 779-80, 255, 255 P.3d, 805).

The courts have emphasized that "[i]t must be clear to a reviewing court what decision is presented for review." *Id.* (citing *Vogel*, 161 Wn. App. at 779-780). Where a local jurisdiction sets forth a process for making a "land use decision," the "land use decision" is not "final" unless the jurisdiction has complied with the process and the entire process is complete. *Id.* (citing *Heller Bldg., LLC (HBC) v. City of Bellevue*, 147

Wn. App. 46, 55–56, 194 P.3d 264 (2008)) (stop work order not final land use decision where it did not contain information required by city code, which would have informed landowner HBL of substance of violations in a way that would allow HBL to correct violation or make informed decision whether to challenge city’s decision); *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 679–80, 86 P.3d 1169 (2004) (letters from city to landowner not final land use decisions because, among other reasons, they did not comply with city’s own code requirements for distributing notice of decisions).

3. The Question Of Whether And When A Final Land Use Decisions Is Issued Under LUPA Is A Mixed Question Of Law And Fact.

Thus, the question of whether and when a “final” land use decision was “issued” under LUPA is a mixed question of law and fact, requiring the court to examine the land use process requirements in the local jurisdiction’s adopted code provisions as well as evidence showing whether and how the jurisdiction followed those process requirements. *See Habitat Watch*, 155 Wn.2d at 408; *Durland I*, 174 Wn. App. at 13-14; *Samuel’s Furniture*, 147 Wn.2d at 452; *Vogel*, 161 Wn. App. at 779–80; *Heller Bldg. LLC*, 147 Wn. App. at 55–56; *WCHS, Inc.*, 120 Wn. App. at 679–80. *See also Northshore Investors, LLC v. City of Tacoma*, 174 Wn. App. 678, 695, 301 P.3d 1049, 1057, review denied, 178 Wn.2d 1015, 311 P.3d 26 (2013);

*Hale v. Island County*, 88 Wn. App. 764, 946 P.2d 1192 (1997).

Therefore, in determining whether and how to apply the procedural requirements of LUPA in a particular case, the Court must follow a three-step analysis:

- First, was a “final” land use decision authorizing a particular activity ever *made by a local jurisdiction* under LUPA?
- Second, if a decision was made, was that decision ever formally “*issued*” under LUPA, and if so, when was the decision issued?
- Third, what are the *scope and terms* of the land use decision that was issued?

Once a land use decision is “issued” under LUPA, a petition to review that decision under LUPA is barred unless it is filed within 21 days of the issuance of the land use decision. *Durland I*, 174 Wn. App. at 13.

4. Collateral Attacks On The Same Activity Via A Subsequent Land Use Decisions Are Not Permitted.

In addition, a party may not collaterally challenge the activities authorized by a land use decision via a challenge to a subsequent land use decision addressing *those same* activities. *Twin Bridge Marine Park, L.L.C. v. State Dep’t of Ecology*, 130 Wn. App. 730, 738, 125 P.3d 155 (2005), *aff’d*, 162 Wn.2d 825, 175 P.3d 1050 (2008) (agreeing with trial court’s ruling that Department of Ecology’s failure to file a timely LUPA challenge to building permits vested the developer’s rights in those permits and precluded Ecology from making a “collateral attack on *activities authorized by the building permits*”) (emphasis added); *Habitat Watch*, 155

Wn.2d at 410 (challenge to grading permit “on the sole ground that it was issued for an impermissible use” amounted to untimely collateral attack of earlier special use permit that specifically authorized the golf course use in question); *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 180–82, 4 P.3d 123 (2000) (challenge to county’s approval of plat application based on challenge to density of plat was untimely collateral attack on rezone decision establishing allowed density for project two years earlier). This “collateral attack” line of cases is based on the principle that, when a permit authorizes a landowner to engage in a specific development activity, the landowner has a type of “vested right” to conduct that specific activity.

Importantly, however, this “collateral attack” rule applies only to challenges that attack *the same* activities that were previously authorized and memorialized in a prior land use decision. *Twin Bridge Marine Park, L.L.C. v. State Dep’t of Ecology*, 130 Wn. App. 730 (2005); *Habitat Watch*, 155 Wn.2d 397 (2005); *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169 (2000). Rights to conduct specific activities “vest” under this rule when they are authorized in a fully-memorialized land use decision, but rights to conduct other activities that were not specifically authorized *do not* “vest” merely because they have some logical connection to the authorized activities.

Moreover, the “collateral attack” rule does not apply to appeals challenging *compliance* with permit conditions. In circumstances where a permittee “obtains a permit and then proceeds to violate the conditions of the permit,” LUPA does not preclude a third party who did not bring a LUPA action challenging the initial permit decision from later bringing a challenge based on the permittee’s subsequent noncompliance with the permit’s conditions. *Samuel’s Furniture, Inc.*, 147 Wn.2d at 456 (2002). For obvious reasons, LUPA does not require challengers to predict such future noncompliance.

**B. Critical Areas Analysis And Land Disturbing Activity Permitting Were Required For OSS Grading Activities On Lots 60 and 61.**

1. Lots 60 And 61 Are Geologically Hazardous Areas.

The Growth Management Act (GMA) requires the County to designate and adopt development regulations to protect Critical Areas, which include “geologically hazardous areas.” RCW 36.70A.060, 36.70A.030(5).

The GMA’s definition for “geologically hazardous areas” creates a presumption that most development activities are not appropriate in such areas due to public health and safety concerns. RCW 36.70A.030(9). Among the types of “geologically hazardous areas” are “landslide hazard

areas.” SCC 30.91G.020, SCC 30.91L.040.

Lots 60 and 61 are designated entirely as landslide hazard areas with slopes greater than 33% and more than a 10-foot elevation change. CP 293 at ¶¶ 2-4, CP 296. Accordingly, Lots 60 and 61 meet the criteria for “landslide hazard areas” under the Snohomish County Code. SCC 30.62B and SCC 30.91L.040; *see also* CP 293 at ¶¶ 2-4, CP 296, CP 251-252, CP 254.

2. Grading Activities Within A Critical Area Require Critical Areas Analysis And A Land Disturbing Activity Permit.

It is undisputed that grading, clearing, and other land disturbing activities associated with the installation of the OSS at issue in this action occurred on Lots 60 and 61 in the Landslide Hazard Areas. CP 293 at ¶¶ 2-4, CP 296, CP 465-467.

The County’s Unified Development Code (UDC) regulates proposed grading activities associated with OSS installation in a designated landslide hazard area primarily through the application of two chapters of the UDC: SCC Chapter 30.63B (the “LDA Code”) and SCC Chapter 30.62B (the “GHA Code”).<sup>5</sup>

The express purpose of the County’s LDA Code, SCC Chapter

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<sup>5</sup> The LDA Code and the GHA Code were both adopted as part of the County’s GMA development regulations. *See* SCC 30.10.080 (“The UDC is adopted as a development regulation under RCW 36.70A.040, except for the following: subtitle 30.5 SCC (construction codes); chapter 30.61 SCC (SEPA); chapter 30.86 SCC (fees); chapter 30.44 SCC (shoreline permits); and chapter 30.67 (shoreline management program).”).

30.63B, is “to regulate land disturbing activities, which means “any activity that will result in movement of earth or a change in the existing soil cover or the existing soil topography (both vegetative and non-vegetative), including the creation and/or replacement of impervious surfaces” and which specifically includes “clearing and grading,” among other activities. SCC 30.63B.010(1); SCC 30.91L.025. Among the “specific objectives” of the LDA Code are “[t]o control soil movement on land that is subject to new development or redevelopment” and “[t]o protect public safety by reducing slope instability and the potential for landslides or erosion.” SCC 30.63B.010(2).

The LDA Code addresses these types of impacts by requiring LDA permit submittals such as a “land disturbing activity site plan,” “engineered construction plans,” a “geotechnical engineering report,” a “soils engineering report,” an “engineering geology report,” and a “liquefaction report,” as well as “stormwater site plan approvals.” SCC 30.63B.180(1)-(6); SCC 30.63B.050(1)(b). The “land disturbing activity site plan” must depict “[c]ritical areas and their buffers” as well as “[t]he amount of proposed fill, measured in acres, in critical areas.” SCC 30.63B.190(1)(b)-(c).<sup>6</sup> In addition, cuts, excavations, and fills are not

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<sup>6</sup> The LDA code provides a number of exemptions for activities that are exempt from the requirement to obtain a LDA permit, but none of the exemptions apply to activities within designated landslide hazard areas. SCC 30.63B.070.

allowed within designated landslide hazard areas or their buffers or setbacks “unless a critical area study is prepared and mitigation is provided consistent with the applicable requirements of chapters 30.62A and 30.62B.” SCC 30.63B.110(3); SCC 30.63B.120(4).

The County’s GHA Code provides “regulations for the protection of public safety, health and welfare pursuant to the Growth Management Act (chapter 36.70A RCW), in geologically hazardous areas, including . . . landslide hazard [areas].” SCC 30.62B.010(1). The GHA Code applies to “[d]evelopment activities, actions requiring project permits, and clearing [activities],” with exceptions that do not apply here. SCC 30.62B.010(2).

The GHA Code imposes procedural requirements such as the submittal of a geotechnical report, independent consultant review, and security devices and insurance requirements as well as substantive standards such as design requirements and a prohibition on all development activities in landslide hazard areas unless a “deviation” is granted by the PDS Director and the applicant establishes that a certain “factor of safety for landslide occurrences” has been established. SCC 30.62B.320, SCC 30.62B.340.

It is undisputed that the Developer did not comply with the requirements of the LDA Code for the OSS Grading Activities on Lots 60 and 61, did not obtain an LDA permit for Lots 60 and 61, and did not

conduct any Critical Areas review, including the enhanced review required by the GHA. CP 637, CP 403-404 at ¶ 9, CP 254, CP 274 at ¶ 1, CP 154-155 at ¶¶ 4-9.

3. The County Is Not Relieved From Performing Critical Areas Analysis Or Requiring A LDA Permit By The District's Permitting Of An "Approved Means Of Waste Disposal."

The County argued below, after the fact, that it did not need to perform LDA and Critical Areas review because the District, in permitting an "approved means of waste disposal," also conducted a limited analysis of drainage and slope stability. CP 154-155 at ¶¶ 4-9, CP 618-620. This assertion has no basis in law.

As an initial matter, the OSS Management Plan followed by the District is separate and distinct from the County's LDA Code and its GHA Code, and is intended to regulate different types of activities. *Compare* WAC 246-272A-001 et seq. with RCW 36.70A.010 et seq., SCC 30.62B, 30.63B; *see also* CP 333-348 (and citations therein).

The District's prior pleadings make plain that "there is no controversy that Snohomish County is charged with the responsibility to address LDA and Critical Areas reviews as provided by its Snohomish County Code and its land use regulations apply to all property within Snohomish County including land parcels with OSS or proposed to be the site of an OSS." CP 645 at ¶ 32. Further, the District agrees that "the

District’s OSS permitting process “*does not preclude Snohomish County from applying its land use regulations* to parcels where the District approves an application to it for an OSS permit.” CP 637 at ¶ 1 (emphasis added).

More fundamentally, there is nothing indicating that the mere existence of some analysis by a different agency relieves the County of enforcing its own ordinances. Indeed, the GMA is explicit on this point: “Absent a clear statement of legislative intent or judicial interpretation to the contrary, it should be presumed that neither the act nor other statutes are intended to be preemptive. Rather they should be read together and, wherever possible, construed as mutually consistent.” WAC 365-196-705(2).

**C. The County’s Issuance Of A Building Permit On Lot 36 Was Not An Appealable Final “Land Use Decision” Approving The OSS Grading Activities On Lots 60 And 61.**

The trial court erred in determining that the County’s February 24, 2015, Building Permit for Lot 36 authorized, or even considered, the Developer’s OSS Grading Activities on Lots 60 and 61.

1. The Fact That The County Considered The District’s Permit (With Separate Requirements) Is Irrelevant To Whether The County Made A Land Use Decision Regarding The OSS Grading Activities On Lots 60 And 61.

The trial court incorrectly opined that the *County* made a “land use

decision” regarding the OSS Grading Activities when it issued its Building Permit on February 24, 2015 because “the County’s issuance of the building permit in this matter necessarily required a determination that there was an approved means of waste disposal to serve the proposed structure.” CP 81 at ¶ 1. The trial court reached this conclusion by conflating various statutory requirements for two different government entities, without distinguishing between their respective duties and obligations.

The trial court’s statement is derived from SCC 30.50.104(2), which requires the **County** to confirm that the **District** has issued an OSS Permit. As set forth above, however, the **District’s** process for permitting of an “approved means of waste disposal” is separate from the **County’s** Land Disturbing Activity and Critical Areas processes. While SCC 30.50.104(2) requires the County to confirm that the District has issued an OSS Permit, it does not speak to the need for such other approvals or review processes that may be triggered by clearing, grading, or other development activities associated with the installation of an “approved means of waste disposal.” See Section II(B)(3), *supra*.

Accordingly, whether or not the District issued a permit for an “approved means of waste disposal” (and whether or not the County considered that fact in issuing the Building Permit) has no bearing on the relevant question of whether the County would require Land Disturbing

Activity and Critical Areas analysis for the OSS Grading Activities on Lots 60 and 61. *Id.*

When the proper inquiry is examined, the evidence in the record is uncontested that no such decision, either express or implied, had been made at the time the County issued its Building Permit. CP 637, CP 403-404 at ¶ 9, CP 254, CP 274 at ¶ 1, CP 154-155 at ¶¶ 4-9.

2. The Face Of The Building Permit Does Not Reference Lots 60 And 61, And Evidence Makes Clear That The Building Permit Did Not Authorize The OSS Grading Activities.

It is undisputed that nothing on the face of the Building Permit for Lot 36 mentions Lots 60 or 61, let alone addresses the OSS Grading Activities on those lots. The evidence in the record memorializing the County's decisions confirms that the Building Permit decision did not authorize the OSS Grading Activities. In its letter to the Developer dated August 12, 2015, regarding code violations that included "construction of an on-site sewage system (OSS) in a critical area," the County unambiguously stated that "Snohomish County *did not issue or approve permits for this work.*" CP 274 at ¶ 1. Similarly, the District has consistently stated that its role is limited to determining "whether the Applicant's proposal presents, from a *functional standards perspective*, a viable OSS or 'means of waste disposal.'" CP 543-544 (emphasis added), *see also* RP 15:15-21, RP 18:1-5. Thus, the record clearly shows that the

OSS Grading Activities were not authorized by the County's Building Permit decision or the District's OSS Permit decision. CP 637, CP 403-404 at ¶ 9, CP 254-255, CP 274 at ¶ 1, CP 154-155 at ¶¶ 4-9.

3. The Face Of The Building Permit Makes Explicit That A LDA Permit Will Be Required.

Even assuming work performed on Lots 60 and 61 could somehow be authorized by the Lot 36 Building Permit, the conditions on the face of the Building Permit require that "all activity authorized by this permit" must comply with SCC Chapter 30.63A (the County's Drainage Code) and Chapter 30.63B (the LDA Code). CP 690.

Accordingly, the face of the permit makes explicit that, to the extent any work on Lots 60 and 61 was authorized, such work would, at minimum, be subject to additional LDA, Drainage analysis, and permitting. Neither Petitioners, nor any member of the public, could have known at the time the County issued the Building Permit that it did not intend to enforce compliance with that condition.

4. Appellants Could Not Have Known From Information Available On the Date Of Building Permit Issuance That The County Would Not Require Compliance With Critical Areas And Land Disturbing Activities Ordinances.

Here, the trial court suggests that Appellants should have reviewed the Building Permit decision and – based solely on an implied,

undocumented reference in SCC 30.50.104 to an “approved means of waste disposal” – should have concluded that the Building Permit decision authorized the OSS Grading Activities in a landslide hazard area on two other lots. CP 81 at ¶¶ 1-2. Based upon such a prescient conclusion, the trial court asserts that Appellants, or any member of the public, should have appealed the Building Permit under LUPA within 21 days. *Id.*

The trial court’s suggestion is manifestly at odds with black letter law that a land use decision “should memorialize the terms of the decision, not simply reference them.” *Durland I*, 174 Wn. App. at 14. As noted above, the courts have emphasized that “[i]t must be clear to a reviewing court what decision is presented for review.” *Id.* Here, the issue of County authorization for the OSS Grading Activities was never clearly presented in the documents reflecting the County’s review process until the County closed its enforcement action on Lots 60 and 61 and “finalized” the Building Permit.

Moreover, the issue of County authorization for the OSS Grading Activities could not have been part of the Building Permit decision because the County code provisions that define the building permit process do not authorize the County to address such grading issues as part of that process.<sup>7</sup>

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<sup>7</sup> The code provisions that govern the County’s issuance of residential building permits apply to the following activities: “the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, removal and demolition of

Instead, as explained above, the County addresses such grading issues through the GHA Code and the LDA Code.<sup>8</sup> Thus, the OSS Grading Activities could not have been part of a final LUPA decision until, at the earliest, when the County closed its enforcement action addressing Critical Areas and LDA issues on Lots 60 and 61. *See Durland I*, 174 Wn. App. at 14 (“[W]here a local jurisdiction sets forth a process for making a land use decision, the land use decision is not final unless the jurisdiction has complied with the process and the entire process is complete”) (internal citation omitted).

5. Appeal Of Non-Compliance With Condition Would Have Been Premature.

As the Building Permit was explicit that compliance with the LDA would be required (CP 690), a challenge to non-compliance with that condition would have been premature, if brought within 21-days of the Lot 36 Permit issuing.

The law under LUPA is clear that an action may be brought more than 21 days following the issuance of a permit against one who obtains a permit and then proceeds to violate the conditions of the permit. *Samuel’s Furniture, Inc.*, 147 Wn.2d at 456 (2002) (“Ecology, for example, would

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*detached one- and two-family dwellings and townhouses not more than three stories above-grade plane in height with a separate means of egress and their accessory structures.”* Snohomish County Code (SCC) 30.50.402 (emphasis added).

<sup>8</sup> *See* Section II.B.2, *supra*.

not be prevented from taking action against a party who completely ignores the shoreline permitting process or one who obtains a permit and then proceeds to violate the conditions of the permit”).

Rather, the appropriate time to bring such an action, as here, is when the County makes a land use decision confirming that it is not going to enforce the conditions of its permit, which the County did when it closed its enforcement action on Lots 60 and 61 and when it issued a Certificate of Occupancy for the residence by “finaling” the Building Permit. See Section III, *infra*.

**D. The Court Erred By Applying LUPA’s “Collateral Attack” Cases To A Discrete Set Of Activities That Were Never Authorized By The County Or The District.**

1. The Building Permit Did Not Authorize Or “Vest” Any Right To Conduct Grading Or Other Land Disturbing Activities.

As set forth above, the Building Permit did not authorize the OSS Grading Activities and did not consider the applicability of LDA and Critical Areas review requirements. In spite of this, the trial court found that Appellants’ petition was a “collateral attack” on activities *authorized* by the Building Permit. CP 81 at ¶ 2. This was in error.

As explained above, *Samuel’s Furniture* and the other LUPA “collateral attack” cases are limited to challenges that attack *the same activities* that were previously authorized and memorialized in a prior land

use decision issued under LUPA. *Twin Bridge Marine Park, L.L.C.*, 130 Wn. App. at 738; *Samuel's Furniture, Inc.*, 147 Wn.2d at 443; *Habitat Watch*, 155 Wn.2d at 410; *Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 180–82. The “collateral attack” cases do not apply to activities that were not specifically authorized and therefore were not part of any “vested right” held by a permittee.

Here, the Building Permit did not authorize the OSS Grading Activities and did not consider the applicability of LDA and Critical Areas review requirements to that discrete set of activities. CP 637, CP 403-404 at ¶ 9, CP 254-255, CP 274 at ¶ 1, CP 154-155 at ¶¶ 4-9. Accordingly, the developer did not have a vested right to conduct the OSS Grading Activities (much less a vested right to *occupy* the residential structure, as suggested by the trial court), and Appellants’ LUPA Petition challenging the lack of authorization for the OSS Grading Activities could therefore not have been a collateral attack on the Building Permit.

2. The Collateral Attack Rule Does Not Bar Bringing A Claim To Challenge Violation Of Conditions Of A Permit.

The Building Permit was explicitly conditioned on compliance with, among other things, the LDA Code. CP 690. Even if the Building Permit could be construed as a “land use decision” authorizing the OSS Grading Activities, the law regarding “collateral attack” is clear that, in

circumstances where a permittee “obtains a permit and then proceeds to violate the conditions of the permit,” the “collateral attack” rule does not preclude a third party who did not bring a LUPA action challenging the initial permit decision from bringing a challenge based on the permittee’s subsequent noncompliance with the permit’s conditions. *Samuel’s Furniture, Inc.*, 147 Wn.2d at 456.

Accordingly, even if the Building Permit were construed as a “land use decision” authorizing the OSS Grading Activities, Appellants’ Petition would still not be barred, as it directly addresses the County’s failure to enforce the conditions of the Building Permit, which require compliance with the LDA Code.

3. Extending The Collateral Attack Rule To Activities That Were Not Previously Authorized Results In Bad Policy Outcomes And Absurd Results.

Allowing the collateral attack rule to apply in a case where a building permit did not mention, analyze, or consider the discrete development activity at issue would result in bad policy outcomes and absurd results.

Under the holding of the trial court, it would be impossible for the public to know whether and when additional activities may have been authorized when the County issues a building permit. Accordingly, essentially any challenge to any development activity on a particular site

would be triggered by the issuance of a building permit. This would require members of the public to file suit as soon as a building permit is issued, regardless of whether the objectionable activity was authorized by the building permit or whether the challenger's claim was ripe, leading to substantial volumes of unnecessary, prophylactic litigation under LUPA.

The trial court's expansive interpretation of the "collateral attack" cases could also shield unscrupulous developers from accountability to government agencies and neighborhood interests, as developers could merely point to a building permit as authorizing all sorts of activities that were never considered, reviewed, or authorized. Under the County's interpretation of those cases, for example, a building permit could include an "inferential" determination that no County authorization is needed for a developer to fill a wetland, divert a stream, or dewater an aquifer. If Snohomish County – the same County where the Oso Landslide occurred in 2014, and where numerous landslides near the subject property closed down commuter service just this week – can conclude that a building permit included such a determination regarding grading and other land disturbing activities in a designated landslide hazard area, it is hard to imagine what kind of activity would not be subject to potential "inferential" authorization.

Allowing such a result runs contrary to sound public policy and to rules of statutory construction requiring the Court to avoid constructions

“that yield unlikely, strange or absurd consequences.” *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). It would also be contrary to LUPA’s purpose “to provide consistent, predictable, and timely judicial review.” RCW 36.70C.010.

### **III. APPELLANTS’ LUPA PETITION WAS TIMELY.**

As set forth above, the County did not issue a final land use decision under LUPA approving the OSS Grading Activities on Lots 60 and 61 when it issued the Building Permit for Lot 36. As explained below, the series of events that transpired following the County’s issuance of the Building Permit make clear that such a final land use decision was issued only when the County closed its enforcement action on September 11, 2015 or when it “finalized” its permit on September 22, 2015. Because Appellants filed their Petition on September 30, 2015, the Petition was filed well within the 21-day limitations period and was therefore timely.

#### **A. The LUPA Petition Is Timely Because It Was Filed Within 21 Days After The County Closed Its Enforcement Action Regarding Grading Violations.**

As explained above, after Appellants first became aware of the OSS Grading Activities on Lots 60 and 61 and raised the issue with the County, the County issued a Notice of Violation on July 20, 2015 for, among other activities, grading in a Critical Area. CP 220, CP 257-260. The Notice of Violation was explicit that grading activities had occurred on Lots 60 and

61 “without the necessary permits and/or approvals as required by Snohomish County Code (SCC) 30.63B.030 and 30.63B.070.” The Notice of Violation explicitly made clear – ***consistent with the Building Permit*** – that “[t]he suggested corrective action is to obtain a land disturbing activity permit, comply with the drainage requirements in Chapter 30.63A SCC and/or obtain any additional permits that are deemed necessary through review of the application(s).” CP 251-252.

On July 22, 2015, Mr. Sleight confirmed that “[a] LDA permit is required for all work associated with this violation due to its location within a critical area,” making clear that the work performed in this critical area “relates directly to the new on-site [septic] system installed” on Lots 60 and 61. CP 254-255 (emphasis added).

The scope of the enforcement decision challenged by Appellants’ LUPA Petition was not narrowed by Mr. Sleight’s subsequent decision on July 23, 2015 to reverse course by directing County staff to *omit* the OSS Grading Activities from the scope of the County’s enforcement action. CP 154-155 at ¶¶ 4-9, CP 257-260. Indeed, the County’s decision to omit the OSS Grading Activities from enforcement is at the heart of the decision Appellants sought to challenge.

Moreover, subsequent statements by the County make clear that LDA and Critical Areas requirements should have been required. On

August 6, 2015, for instance, Mr. Sleight reiterated that even remedial work “would require a permit or LDA since all the work that he was describing was in a critical area.” CP 262-263. Thereafter, in an effort to resolve the Lots 60 and 61 Enforcement Action, the Developer applied for an after-the-fact LDA permit authorizing the land disturbing activities on Lots 60 and 61. CP 265-272. The application specifically sought authorization for “grading” activities. CP 267.

Following the application, the County stated in a letter to the Developer that the “geotechnical review submitted by Shannon & Wilson, Inc., as requested by the BNSF Railroad [sic] Company, has raised concerns regarding the location of the proposed drainfield on Lots 60 and 61” and conceded that “*Snohomish County did not issue or approve permits for this work, and has deferred to the Snohomish Health District for review and next steps in addressing this concern.*” CP 274-275. The County advised that the violation “*need[ed] to be resolved prior to the issuance of a certificate of occupancy on Lot 36.*” *Id.*

The following week, on August 18, 2015, the Developer’s engineer, Mr. Chopelas, submitted a Targeted Stormwater Drainage Plan Report discussing erosion control and drainage issues resulting from seepage from the sewer bore hole within the coastal bluff, which included a section for Critical Areas, only mentioning the nearby Puget Sound shoreline, and not

the designated landslide hazard area that encompasses Lots 60 and 61. CP 277-281.

On September 8, 2015, the Developer emailed the County and stated: “The seepage is perminately [sic] stopped. So, we will not be needing this permit . . . and, I am withdrawing the application.” CP 283-284. On or around September 11, 2015, the case file related to 15-110279-CT was “closed.” CP 795-808.

The County’s closing of the enforcement action against Developers’ grading violation constitutes a “final” “land use decision” under LUPA. RCW 36.70C.020(2), RCW 36.70C.040(4). Appellants’ Petition challenging this decision was filed on September 30, 2015, well within the 21-day statute of limitations, and was therefore timely. *Id.*

**B. The LUPA Petition Is Timely Because It Was Filed Within 21 Days Of The County’s Decision To “Final” The Building Permit.**

The County argued, in spite of the record, that the enforcement action was not intended to address violations associated with the OSS Grading Activities. CP 257-258. Even accepting this argument, in spite of the evidence in the record to the contrary, Appellants’ Petition would still be timely, having been filed within 21-days of the County’s “finaling” of the Building Permit (the equivalent of issuing a Certificate of Occupancy).

As noted above, the County admits that its final inspection approval constituted the “Certificate of Occupancy” for the residential structure on the Development Site. CP 670 at ¶ 3.15, CP 288-289, CP 156 at ¶ 10. The County’s letter dated August 12, 2015, made resolution of the OSS Grading Activities an express condition of the issuance of a Certificate of Occupancy. CP 274-275. The County’s letter stated that “[a]ll four violations listed in this letter need to be resolved prior to the issuance of a certificate of occupancy on Lot 36”; those issues included the issue of “[c]onstruction of on-site sewage system (OSS) in a critical area” (activities for which, the letter noted, “Snohomish County did not issue or approve permits”). CP 274-275. Thus, if the Court accepts the County’s position that the OSS Grading Activities were not a subject of the County’s enforcement action, there can be no question that those activities were a subject of the County’s decision to issue a Certificate of Occupancy by proceeding to “final” the building permit.

Accordingly, because Appellants’ Petition was filed 8 days after the County’s “finaling,” it was filed well within the 21-day statute of limitations, and was therefore timely.

## CONCLUSION

The County and District have repeatedly butted heads over who is responsible for ensuring compliance with the County's LDA and Critical Areas review obligations. What is clear is that substantial grading activities took place on the steep bluff, in a historic landslide zone, directly above the state's primary north-south commuter railroad tracks, and no one performed these critical analyses.

The County is laboring mightily to make this issue disappear and has convinced the trial court to dismiss Appellants' LUPA Petition based upon a flawed analysis of the County's legal obligations and decision making processes. The record is clear that neither the County nor the District authorized the OSS Grading Activities on Lots 60 and 61. This is most readily apparent in the fact that the Building Permit was explicitly conditioned on future compliance with the LDA Code. Accordingly, the trial court erred in ruling that the statute of limitations began to run when the Building Permit was issued.

Rather, the statute of limitations did not begin to run until the County issued a final land use decision on the matter when it closed its enforcement action against the Developer, or when the County "finaled" the Building Permit. It is undisputed that, regardless of which of these events

constituted the final “land use decision” in this matter, Appellants’ Petition was filed within the 21-day statute of limitations.

For all the reasons herein, Appellants respectfully request that the Court reverse the trial court’s dismissal, and find Appellants’ Petition timely, as a matter of law.

Dated March 17, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Chait", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp , PLLC, whose address is 1218 Third Avenue, Suite 2500, Seattle, Washington, 98101.

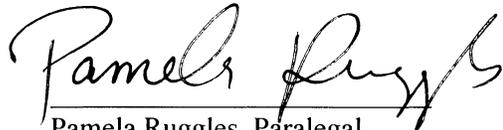
I hereby certify that the original and one true and correct copy of the *BRIEF OF APPELLANTS* have been filed with the Court of Appeals of the State of Washington Division One and copies have been served electronically upon the following:

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I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 17th day of March, 2016, at Seattle, Washington.

  
Pamela Ruggles, Paralegal