

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 RESPONDENT SNOHOMISH HEALTH DISTRICT

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## I. INTRODUCTION

This challenge arises from neighboring landowners (“Appellants”) assertions that the Snohomish County’s (“County”) Department of Planning and Development Services (“PDS”) failed to apply its own County Code’s critical area and land disturbing activity (“LDA”) provisions as part of its review and approval of developer Begis Building Inc. (“Begis” or “developer”) single-family residential project. Regardless of that claim or the merit of that claim, the trial court appropriately dismissed the matter as a land use petition barred by the Land Use Petition Act’s (LUPA) 21-day statute of limitations.

The Begis new construction residential project (not to be served by public sewer) with a project common address of 11706 Marine View Drive, Edmonds, Washington, encompassed three (3) lots: one lot (lot 36) is the site of the residence plus a portion of the onsite sewage disposal system (“OSS”) servicing the residence, while a portion of the OSS was also located offsite on two vacant lots (lot 60 and 61) below and to the southwest of the residence.

The project site was located in unincorporated Snohomish County, Thus, the development permit process for this project was overseen by PDS and subject to the County’s planning and development regulations, including various land use and building code provisions. Additionally,

since the liquid waste to be generated by the project required an OSS, the Snohomish Health District (“SHD”) was responsible for the technical/functional review of the proposed OSS consistent with a separate set of state laws implemented through the State Board of Health adopted regulations and applied at the local level. Further, to the extent SHD approves a developer’s proposed OSS for a new residential project within unincorporated Snohomish County, its approval is integrated into the County’s permit process and the developer’s right to receive from SHD a permit to install the OSS is dependent upon the County’s actual issuance of a development permit to that developer.

The Appellants assert the County failed to apply certain necessary reviews to the Begis project, which led to construction of a completed project without full vetting of the same. In its First Amended Complaint after alleging serious landslide risks and hazards of the area, which is inclusive of the Begis project site, they specifically stated the basis of their complaint against the County and, to a lesser extent, against SHD (CP 769-788):

1. “This construction was performed without any review of the OSS by Snohomish County Planning and Development Services (PDS) for compliance with the County’s ‘Land Disturbing Activity’ (LDA) code, the County’s critical areas ordinance, or any other land use regulations that

could have provided substantive technical review of the proposed construction activity and the ongoing use of the bluff for drainfield purposes” (emphasis added). CP 770 at ¶ 1.1.

2. “The County issued approvals for the home associated with the OSS and various related approvals, but failed to take any action with respect to the OSS, including without limitation requiring appropriate SEPA, LDA and critical areas review of the OSS” (emphasis added). CP 771 ¶ 2.2.

3. “The District issued approvals for the OSS and various related approvals, but failed to ensure appropriate SEPA, LDA and critical areas review of the OSS” (emphasis added). CP 772 ¶ 2.3.

The heart of their complaint is to question the appropriateness of utilizing lots 60 and 61 for part of the OSS system serving the residence where the lots are located in an area susceptible to slides. That being said, all along, Appellants knew or could have known from public records that their issued building permit, which authorized construction, included a determination by the County that an approved means of waste disposal (the OSS) for the residence had been accepted by the County and that the building permit served to trigger the developer’s right to a permit to install the OSS to be issued by SHD.

As clearly evidenced in the public record, the County did apply critical areas and LDA analysis to a portion of the residential project to the extent of lot 36 (site for the house and a portion of the OSS) while not performing a critical area and LDA review of the two vacant lots 60 and 61 designated for placement of the soil absorption components (or more generally referred to as the drainfield) of the OSS servicing the residence. Thus, the Appellants' action arose out of the County's failure to conduct and apply critical area and LDA reviews of lots 60 and 61 and amounts to a challenge to the natural inference from the building permit being issued that there was an acceptable means of waste disposal to serve the residence through the utilization of lots 60 and 61.

The primary basis for the Appellants legal challenge was pursued under the Land Use Petition Act (LUPA). Appellants affirmatively asserted in their Complaint that the County was a "local jurisdiction" and due to the circumstances, SHD should be treated as if it was a "local jurisdiction" under LUPA as well. CP 783 ¶ 10.3.

With the County's February 24, 2015 issuance of the building permit to developer Begis, his proposal was no longer just a paper project but the developer could physically move dirt and construct the project. The public record was clear that unlike lot 36, the project would proceed

without any critical area or LDA assessments having been done for lots 60 and 61 or the OSS activity to occur on site.

Some nine months later (September 30, 2015), with the project complete, well past the 21-day limit of LUPA, the Appellants filed their action with the Snohomish County Superior Court. The trial court appropriately rejected Appellants' efforts to minimize the building permit itself to simply one stand alone piece of paper; to disregard the realities of the embedded approved application for an OSS to serve the residence into the development permit process; to disregard the reasonable notice from the public records of the integration and interdependence of the OSS approval into the development permit process; to disregard the failure of the Appellants to exercise their own due diligence; and to disregard the natural inferences which flowed from not only those records including the building permit but also the then natural inferences from the developer being allowed to commence construction.

The residential project required land disturbance activity as defined under County Code. At least as to lots 60 and 61, no critical area or LDA reviews or the OSS related activities contemplated for those lots were conducted by the County. However, as found by the trial court, Appellants' claim was nevertheless barred by LUPA's 21-day statute of limitation which commenced with the County's culminating issuance of a

building permit with its approved available means of waste disposal (OSS) determination embedded into the County's decision to allow actual construction activity – and the additional consequence of triggering the developer's right to a permit to install the OSS from SHD.

It is respectfully requested that the trial court decision be affirmed.

## **II. RESTATED ASSIGNMENTS OF ERRORS**

1. Did the trial court correctly determine that the County culminated its application review with the issuance of a building permit to the developer for this residential project and that not only constituted a final land use decision which memorialized the extent the County intended to conduct a critical area and LDA analysis but that also commenced the running of LUPA's 21-days statute of limitations?

2. Did the trial court correctly determine that Appellants' efforts to isolate and minimize the building permit and then challenge well after the fact certain subsequent OSS activities constitute impermissible collateral attack to this residential project in an effort to overcome the delinquency in bringing forth their LUPA challenge?

## **III. STATEMENT OF FACTS**

### **A. Preliminary General Background**

1. **SHD and the County are Distinct Entities.** SHD is an independent special purpose district or quasi/municipal

corporation as allowed under Chapter 70.46 RCW and Chapter 70.05 RCW. Its jurisdictional boundaries consist of all the cities and towns within Snohomish County and the County. However, it is neither a department nor a part of the other named municipal corporation in this proceeding, namely, Snohomish County. CP 537-538.

Where a new residential project is to be served by an OSS, SHD evaluates a proposed OSS from a technical/functional perspective mandated by state law. This role has its origin from RCW 43.20.050(3), which provides in part “the State Board (of Health) shall adopt rules for the design, construction, installation, operation and maintenance of those onsite sewage systems with design flows of less than 3,500 gallons per day.” In turn, the State Board of Health adopted Chapter 246-272A WAC entitled “Onsite Systems” which addresses the statutory mandate to provide rules for the design, construction, installation, operation and maintenance of an OSS. CR 399 ¶ 4. As the local health jurisdiction, SHD adopted by reference the state regulation in its Snohomish Health District Sanitary Code (SHDSC) as well as establishing procedures for implementation of the same under SHDSC 8.1, 8.5 and 8.6. CP 399 ¶ 4, 529-536.

**2. SHD’S OSS Approval is Integrated into the County’s Development Permit Process and Its Issuance of a Permit to Install is Dependent Upon the County’s Issuance of a Development Permit.** For the sake of a new residential project dependent upon an OSS, SHD advises the County of the availability of “an approved means of waste disposal” to serve a residence. This is memorialized in both municipal entities respective regulations. The Snohomish County Code (SCC) 30.50.104 provides in part, as follows:

Where a building permit application has been made for construction, other than maintenance, repairs, and minor alterations, on a parcel of land not served by a public sanitary sewer system, **a building permit shall not be issued without prior approval from the Snohomish Health District of an approved means of waste disposal.** Emphasis added. SCC 30.50.104(2).

In turn, SHDSC Chapter 8.5 provides:

- A. Upon receipt of a request for building permit clearance for the subject use from the city or county building department, a permit to install the approved on-site sewage disposal system will be approved for issuance providing the building department site plan and the SHD site plan are compatible.

- B. The on-site sewage disposal system is valid only when issued concurrently with the building/development permit. The permit will then remain valid for the term of the building/development permit. Expiration or termination of the building/development permit will cause the on-site sewage system permit to expire. Renewal of an expired on-site sewage disposal system will require submittal of a new application and payment of fees.
- C. “In no case will an on-site sewage disposal system permit be issued prior to issuance of the building permit for the proposed structure” (emphasis added). CP 529.

Accordingly, the issuance of a building permit is the trigger event for SHD to issue its permit to install an OSS to a developer and for that matter, the continuing lifeline for that permit to install remaining available to the developer.

SHD’s notice to the County of an approval is from the perspective of technical/functional standards as to the design, construction,

installation, operation and maintenance of a proposed OSS.<sup>1</sup> The focus is directed to effective treatment of sewage effluent from a public health perspective. As stated in WAC 246-272A-0001(2):

This chapter regulates the location, design, installation, operation, maintenance, and monitoring of on-site sewage systems to:

- (a) Achieve effective long-term sewage treatment and effluent dispersal; and
- (b) Limit the discharge of contaminants to waters of the state.

Within Chapter 246-272A WAC there are a variety of technical/functional requirements for a proposed OSS, among other things, the sizing of the system, flow capacity, soil characteristics and absorption qualities, the location in relation to wells. These criteria are directed to the effective management of sewage effluent from the residence.

Further, indicative of SHD's role to address technical/functional standards, Chapter 18.210 RCW entitled "On-Site Waste Water Treatment systems – Designer Licensing", reminds designers that in spite of their licensing by the Board of Professional Engineers and/or the State of Washington Department of Licensing certifying their competency to design OSS, the local health jurisdiction retains authority to make determinations on their design work. RCW 18.210.190(3).

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<sup>1</sup> WAC 246-272A-0010(2) defines "approved" as a written statement of acceptability issues by the local health officer or the department.

The County Code identified the input PDS seeks from SHD. SCC 30.50.104. The availability of a viable means of a waste disposal system from a technical/functional perspective is a prerequisite to the County's willingness to issue a building permit. In turn, although the Application for an Onsite Sewage Disposal System Permit (Application for OSS) is made to SHD and the Permit to Install an Onsite Sewage Disposal System (OSS installation permit) is issued by SHD, as provided by SHDSC, the right to receive an OSS installation permit and proceed with the installation is dependent upon the applicant holding a valid building permit. CP 399-400 ¶ 6. Accordingly, this relationship and integration of the approval to the County development permit is definitively written on SHD's application form (Application for an Onsite Sewage System Permit) which states:

A SHD sewage disposal installation permit:

- (a) will not be issued before the city/county building permit is issued;
- (b) will remain valid concurrent with the city/county building permit;
- (c) the applicable SHD installation permit is paid.

**If the building permit is withdrawn, revoked or expires, the installation permit will no longer be valid** (emphasis added). CP 404 ¶ 9, 408-409.

Recognizing that the County ultimately makes a decision on a project with due consideration to all of its land use and construction regulations, the application form also states, **"This approval shall not be considered assurance, either expressed or implied, that development permits for**

**this site will be issued**” (emphasis added). CP 408. Similar language is found on SHD’s “Request for a Health District Construction Clearance Supplemental Information Report” and the “Permit to Install an Onsite Disposal System.” CP 458, 463.

This embedding of the OSS approval within the development permit process with the subsequent issuance of the OSS installation permit itself dependent upon an issued development permit from the County is in recognition that there is more to be considered by the County to merit the installation of an OSS to serve a development project. In this manner, it is designed to avoid the “cart before the horse” scenario, such as an installed OSS that may not be acceptable for use due to the inability to meet County land use regulations. CP 399-400 ¶ 6.

The County’s issuance of the building permit not only allows the developer to construct his project but it is the triggering event that thereafter allows the developer to actually receive the permit to install the OSS from SHD which constitutes the developers authorization to install the system. This secondary status of the approval of an OSS being activated by the County’s issuance of a building permit also serves as a means for SHD to be compliant with WAC 246-272A-0015 which, among other things, requires local health jurisdictions to address the coordination of their OSS responsibilities with the governing entity overseeing the land

use regulation of property on which an OSS or components thereof are located. CP 404-405 ¶ 10. Since June 2007, SHD is one of the local health jurisdictions that has a written plan duly approved by the Department of Health entitled “Snohomish Health District Onsite Sewage Systems Management Plan” in which a section addresses the coordination and overriding role of the County development permit to the issuance of installation permit for the OSS. CP 404-405 ¶ 10, 472-527. In that regard, the plan states in part as follows:

Development of this OSS management plan included SHD request for comment from Snohomish County Planning and Development Services (PDS).

In terms of the current general level of coordination, the Snohomish Health District works closely with PDS on all land use proposals involving properties utilizing OSS. As the permitting agency in the County PDS can, and does, withhold the issuance of permits for a multitude of projects, including building permits, subdivisions, boundary line adjustments, variances, etc., until they are reviewed and approved by the Health District. Likewise, SHD does not undertake permitting of new OSS related projects without PDS development permit issuance.

The coordination between agencies is mutually beneficial. PDS is able to determine if the location of an existing or proposed OSS is consistent with the critical areas regulation and comprehensive plan, while the Health District is able to review proposed projects for compatibility with the OSS CP 497.

As noted in the Verbatim Transcript of Proceedings (VTP) of the November 20, 2015 hearing, counsel for Appellants and the County both stated the fact that SHD does not apply or enforce the County's land use regulations. (VTP (November 20, 2015) 37,12) It is for this reason that the approval of the OSS is integrated into the development permit process; and that is why the OSS installation permit from SHD is only issued after the County has had the opportunity to address its regulatory requirements.

**B. The Permitting of the Begis Permit**

The development project brought forth by Begis required a number of puzzle pieces to fit together to proceed. Not only did the project consist of three lots, it also entailed right of way permission over Marine View Drive from the County, an easement with a neighboring property and down to the two vacant lots 60 and 61 for the OSS.

In August of 2014, the developer submitted an Application for an Onsite Sewage System Permit for this project to SHD. CP 401. It would be subject to a series of additional requests for information and/or disapprovals until SHD deemed the application (with soil data, site plans, systems design and technical components with manuals) complete. SHD ultimately approved the application on February 23, 2015. CP 400-402 ¶ 7, 402, 408-445. The application as complete and approved including site

plans for all three lots; schematics depicting the location and nature of activity to occur on each respective lot including mechanisms being installed and all under the common project address of 11706 Marine View Drive, Edmonds, Washington. CP 408-445.

SHD's technical/functional approval of the Application for an OSS was relative to the development of a new residential project encompassing three lots with a common address of 11706 Marine View Drive, Edmonds, Snohomish County, Washington and directly tied back to the PDS development permit process. The County was notified of the availability of an acceptable means of waste disposal. CP 399 ¶ 2, 3. On February 23, 2015, SHD signed off on the Request for Health District Request for Clearance Supplemental Information Report, and that form as well reiterated that SHD's OSS installation permit would not be issued without the existence of the County's building permit. CP 402, 458. Further, SHD's approval of the Begis application was entered on the County's PDS project log on February 24, 2015. CP 469.

On February 25, 2015, SHD directed a narrative letter to the developer advising Begis of SHD's approval of the OSS application and design. CP 460.

Meanwhile, the developer Begis had submitted to the County not only an application for a building permit for a residence dependent upon

an OSS, but also an application for LDA permit. CP 222-228. The former, with its site plan, identified the presence of a portion of the OSS to serve the subject residence project being onsite and documented the departure of the OSS offsite. The developer's LDA application narratively spoke to the project consisting of a residence with an offsite OSS. CP 222. That application was reviewed and processed by the County which resulted in the recording of a critical area site plan of lot 36 and the issuance of the County's LDA permit #14115603-LDA relative to lot 36, referencing the recorded critical area site plan. CR 217-218, 223-234. In turn, the issued County building permit #14115603-RK referenced permit #14115603-LDA. CP 233-234, 593. The building permit imposed the responsibility of the developer to be compliant with the same. Those documents also made it clear that lots 60 and 61 of the residential project, which were the site for the soil absorption component of the OSS had not been nor were they being required to submit a critical area site plan or make application for an LDA permit.

With the developer's receipt of a LDA permit limited and specific to Lot 36 and SHD's notice of an acceptable means of sewage disposal available to service the project, on February 24, 2015, the County made its determination to issue its building permit to the developer. CP 593. The developer Begis proceeded with construction activity. CP 469. Further,

with the building permit in hand, developer Begis was now in a position to request SHD to issue the Permit to Install an Onsite Sewage Disposal System. Begis made the request and SHD issued the permit (assigning it permit # 37915) on June 11, 2015. CR 402, 463.

After being installed, the developer's OSS designer submitted to SHD the designer's "Onsite Sewage Disposal System Plan (As-Built)." CP 463, 465-467. Consistent with WAC 246-272A-0260(1)(b), on September 18, 2015, SHD reviewed the OSS to verify it was installed in conformity with the actual approved application and issued installation permit. CP 400, 402, 463.

On September 22, 2015, independent of and outside the specific knowledge of SHD, the County conducted its final inspection. CP 469-470. Shortly thereafter, the developer sold the house to Kim and Young. CP 773 ¶ 2.6.

## **V. RESTATEMENT OF THE CASE**

This dispute arises from the Appellants' challenge to the failure of the County to conduct/apply Snohomish County Code critical area and land disturbing activity review to the Begis project. More specifically, no critical area and land disturbing analysis per County Code took place of lots 60 and 61 (site for the drainfield) to serve the residence - and that is not in dispute.

With the issuance of the building permit, it was a matter of public record that the County had determined that there was an acceptable means of waste disposal for the residential project; had conducted and documented a critical area and land disturbing activity review of lot 36 portion of the proposal; had not conducted a critical area or land disturbing activity review of the remaining portion of the proposal; and beginning February 24, 2015, granted the right to the developer to commence construction of a residence to be served by an OSS. In turn, the issuance of the building permit triggered the right of the developer to request from SHD the permit to install the OSS.

SHD's approval of the Begis OSS application and design is indicative of the fact that the developer had presented an acceptable means of waste disposal and that approval was embedded into the County's development permit process subject to their land use regulations, construction code and other pertinent County Code provisions. Further, on February 24, 2015 with the County's issuance of the building permit, the same vested the developer Begis with the opportunity to pursue the issuance of the OSS installation permit from SHD subject to SHD protocols of presentment of a building permit, payment of the associated fee and preconstruction conference. CP 460. Also, the issuance of the building permit served as the benchmark of the degree of the County's

critical area and/or land disturbing activity review conducted of this residential project – including the OSS. This land use decision commenced the running of the LUPA timeline for a challenge.

Subsequent activities in the construction phase of the residential project did not change the timeline for the LUPA statute of limitations applicable to this matter. In July of 2015, the County received a complaint regarding the project. The County’s Complaint Investigation Report made reference to lots 60 and 61 and describes a posting by PDS of a stop work order against altering drainage adjacent to lots 60 and 61 by making a ditch across the road. CP 220. This led to the issuance of a Notice of Violation dated July 20, 2015 requesting compliance by August 25, 2015. CP 251-252. The Notice of Violation actually references lots 61 and 62, while the narrative section references a violation consistent with “...the land disturbing activity involved the alteration of an actual drainage course and draining in a critical area, its setback or buffer, as defined in SCC 30.91C.340(1-5).” CP 251. The Notice suggested that the developer take corrective action in the form of apply for a LDA permit for that activity. The County also directed a letter dated July 22, 2015 to the developer Begis identifying the issue of a code violation on lots 60 and 61 involving grading activity in a critical area. CP 254-255. However, the associated activity log with case number 15 110279 CT made it clear that the

violation was adjacent and offsite from lots 60 and 61. CP258-260.  
Developer Begis submitted an application for LDA permit dated August 5, 2015 to add drainage culverts for runoff on Possession Lane but not for OSS activities on lots 60 and 61. CP 265-272.

This complaint investigation by the County dealing with an offsite drainage control issue on Possession Lane did not change the fact that issuance of the building permit for a residence served by an acceptable OSS as the approved means of waste disposal was a final land use decision, allowed the commencement of construction and had placed all on notice of the extent the County had conducted critical area and LDA review of the Begis project.

In a similar manner, the Appellants' claim that procedural inspections of the installed OSS by SHD extended the timeline for their filing of a LUPA challenge. The SHD inspection was to confirm it had been installed in conformity with approved application and permit. CP 399-400 ¶ 6, 402-403 ¶ 7(a). This did not change the fact that the issuance of the building permit was a final land use decision allowing commencement of construction of the residence with its designated and accepted approved means of waste disposal without critical area and LDA reviews of lots 60 and 61.

## VI. ARGUMENT

### A. Appellants Challenge on the Basis that the County Failed to Conduct Critical Area and LDA Review of Lots 60 & 61 of the Begis Project is Barred by LUPA's Statute of Limitations.

1. LUPA is Designed to Promote Expedited, Efficient and Final Land Use Decisions. The underlying purpose of LUPA is to have an established uniform and timely appeals process applicable to final decisions of local land use authorities. The LUPA purpose clause proclaims that it is intended to "...reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable and timely judicial review." RCW 36.70C.010. Case law often cites the stated purpose as a fundamental principle in the overall analysis of a particular challenge. Habitat Watch v. Skagit Cy., 155 Wn.2d 397, 406, 120 P.3d 56 (2005).

2. A Development Permit for this Residential Project was a Final Land Use Decision. LUPA's procedural requirements apply to decisions that meet LUPA's definition for a land use decision. By its very nature, the building permit issued in

this matter to developer Begis for his residential project meets that definition. RCW 36.70C.020(2)(a). It is settled law that a local jurisdiction's building permit issuance constitutes a land use decision subject to judicial review under LUPA. Chelan Cy. v. Nykreim, 146 Wn.2d. 904, 929, 52 P.3d 1 (2002). The issuance of this permit was a final decision by the County's PDS that included an inferential determination that there was an approved means of waste disposal to serve the residence and also triggered the developer's right to have SHD issue its OSS installation permit for the approved means of managing waste disposal from the residence.

Under the LUPA analysis, the significance of a decision is not a question whether the decision is potentially debatable but rather, a representation that there is an end to a review and decision has been made. Samuel's Furniture Inc. v. Dep't of Ecology, 147 Wn.2d 440, 452-453, 54 P.3d 1194 (2002). The issuance of the County's building permit as a public record documented to all an end of the deliberation phase for this OSS dependent residential project and moved to actual construction phase of this project - including allowing the developer to secure his permit to install the OSS from SHD.

### **3. A Timely Review Requires a Challenge Filed**

**Within 21 Days.** To carry out LUPA's purpose of a "timely judicial review", LUPA identifies an obligation of a timely filed Petition within 21 days of the issuance of the land use decision. RCW 36.70C.040(3). The Courts have strictly applied the 21-day timeline. In Habitat Watch, 155 Wn.2d at 407, 120 P.3d 56 (2005), the court favorably cites pre-LUPA decisions and upheld that even illegal decisions must be challenged in a timely and appropriate manner.<sup>2</sup> The Habitat Watch court ruled that even though it was known that certain required public hearings were not held in the granting of extensions associated with a special use permit for construction of a golf course, it denied a LUPA challenge by a citizen's group because they failed to file the challenge within 21 days of learning of the procedurally improper granting of the special use permit extension. The citizen's group received notice by observing some activities occurring at the site and followed up with a public records request, which disclosed the extension being challenged. However, they did not file their Petition within 21 days thereafter. All that was required was to

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<sup>2</sup> See Pierce v. King Cy., 62 Wn.2d 324, 334, 382 P.2d 628 (1963), where it held that even though there was illegal spot zoning because of the lack of a timely challenge the matter was not heard.

find actual or constructive notice of the land use decision to commence the running of the LUPA timeline limitation. Habitat Watch, 155 Wn.2d at 406, 120 P.3d 56 (2005).

Similarly, even where the challenger is another governmental agency contending there was a failure to perform certain reviews, it must be raised in a timely appeal under LUPA. Twin Bridge Marine Park LLC v. State Dep't of Ecology, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008). After referencing the background of vested right entitlements for developers, the Court stated that “the crux of LUPA is that persons and agencies who oppose a final land use decision made by the local permitting authority must appeal that decision within 21 days. RCW 36.70C.040(3).”

LUPA's filing and service timeline are considered jurisdictional. RCW 36.70C.040(2). Where procedural requirements under LUPA are not met, the court lacks jurisdiction to hear a challenge. Lakeside Industries v. Thurston Cy., 119 Wn. App. 886, 900, 83 P.3d 433 (2004). Accordingly, if not appealed within the LUPA required timelines, the land use decision is no longer reviewable by a Court. Habitat Watch, 155 Wn.2d at 407, 120 P.3d 56 (2005).

The failure of the County to conduct/apply critical area and LDA reviews to lots 60 and 61 does not excuse the Appellant neighbors from their obligation to have commenced their challenge in a timely manner, and the consequence of that failure is the fact that the matter is no longer reviewable.

**4. The Triggering Event Was the Public Record Issuance of the Building Permit.** In this case, the commencement of the LUPA statute of limitations was the February 24, 2015 issuance of the building permit to the developer Begis.

As part of the procedural analysis, the statute itself provides substantive provisions on when the land use decision is considered “issued”. One of the statutory provisions defines the date of issuance as when the land use decision becomes a public record. RCW 36.70C.040(4). The Begis building permit became a public record on February 24, 2015 and thereby established the commencement of the LUPA timeline in this case.

A stated purpose of LUPA is to provide an opportunity for an expedited appeal of a land use decision which may be considered to be a final determination while leaving nothing open to further dispute and which “sets at rest cause of action between parties.” Durland v. San Juan Cy., 174 Wn.App 1, 13-14, 298 P.3d 257

(2002) (Durland I) quoting Samuel's Furniture Inc., 147 Wn.2d at 452, 54 P.3d 1194 (2002).

For this to be a viable residential project, it was dependent upon an OSS with components located on or dependent upon all three lots. Various interrelated applications and associated site plans submitted by the developer of public record provided notice of the same. These records put all on notice that the OSS servicing the residence would be sited upon three parcels.

The County Code required SHD to confirm the presence of an approved waste disposal system to service the residence before the County would issue a building permit to the developer; and in turn, SHD would not issue the developer a permit to install the OSS without it being tied to an existing building permit from the County. The applicable codes and regulations of the respective jurisdictions unequivocally embedded the approval by SHD with the County development permit process. If the developer did not hold a building permit or that building permit had been subject to revocation, the developer would not have a right to receive SHD's OSS installation permit. SHD's documents of approval of the OSS to the applicant, to the public and to the County all referenced this interrelationship.

In this case, it is beyond dispute that the right to receive the permit to install the OSS from SHD would be triggered by the County's decision as to if and when it would issue a development permit to the Begis project.

The public records identified the reality that critical area and LDA reviews did not occur for lots 60 and 61. The Appellants question the viability of citing the OSS on lots 60 and 61 due to hazards of the area. A challenge to the County's issuance of a building permit based on the basis of a failure to do reviews under the County Code provisions would put the building permit at risk without which the developer does not have a right to receive from SHD the OSS installation permit.

The applicant failed to timely challenge the building permit and thereby failed to timely utilize that mechanism to challenge the determination by inference there was a viable means of waste disposal available to the developer's project. The trial court correctly recognized the embedding of the OSS approval by SHD into the residential project building permit process; the issuance of a land use decision; the date it was issued; and that a challenge to OSS approval because of lack of critical area or LDA review naturally flows from a challenge to the building permit.

The issuance of the building permit brought closure to the developer's application and set to rest his right to proceed to construct a residence served by an OSS between the County and Begis. The very issues asserted by Appellants were ripe to challenge at that time.

Courts have consistently viewed LUPA from the perspective that once a party has had a chance to challenge a land use decision, it will become unreviewable if not appealed within the specified timeline. Habitat Watch, 155 Wn.2d at 406, 120 P.3d 56 (2005).

**5. The Issuance of the Building Permit Gave Notice of the County's Decision to Allow the Project Without Critical Area and LDA Reviews of Lots 60 & 61 and the OSS.** Did the County apply its Code provisions associated with the critical area and LDA reviews to lots 60 and 61 of the Begis residential project? The record is clear. It did not. However, the public record provided reasonable notice of that fact at the time the County issued the building permit.

The critical area analysis and LDA analysis provisions of the County Code are designed to provide substantive input before construction or disturbance to the land. A LDA permit is required

for land disturbing activity (unless its exempt) before the commencement of such activity (SCC 30.63B.030) and its specifically intended to afford the opportunity to address circumstances, which may merit mitigation. SCC 30.63B.060. The trial court recognized the reality of the failure but also recognized the reality that the underlying how and why those reviews did not occur were immaterial to its determination of Appellants' challenge.

In the case at hand, a critical area assessment and LDA assessment occurred relative to lot 36 and was so noted on the February 24, 2015 building permit. The referenced LDA permit number traces back to the LDA application, which specifically references that residential project consisting of a residence with an offsite OSS. The PDS project ledger and SHD's OSS approval cross-reference one another. On February 24, 2015, the County's issued building permit effortlessly leads to public records which gave notice that the residential project encompassing three lots and dependent upon an OSS, a portion of which was to be sited offsite on lots 60 and 61; and the project was approved to move forward with construction without a critical area and LDA assessment being performed on the vacant lots where the applicant was going

to locate the soil absorption components of the OSS. The issuance of the building permit left nothing open to further dispute from the perspective of the decision made – developer Begis could move forward with construction of his residential project being served by an offsite OSS for which two of the lots were never subject to certain land use reviews, and in addition, the developer now had the right to pursue issuance of the permit to install the OSS. However, it is also true if the Appellants had made a timely successful challenge to the building permit that would have also extinguished the right to the permit to install the OSS.

LUPA requires that the final land use decision provides reasonable notice of its determination. Twin Bridge Marine Park, 130 Wn. App. at 829, 125 P.3d 805 (2011). This does not mean that the development permit on its face value must spell out all that it did, and all that it did not do. It does not require individualized actual notice. Samuel's Furniture, 147 Wn.2d at 462, 54 P.3d 1194 (2002). In fact, in Habitat Watch, 155 Wn.2d at 397, 120 P.3d 56 (2005), the basis of the citizen's group challenge was directed at the lack of required notice of action. Nevertheless, it was not procedural notice but actual or constructive notice the court looked for purposes of the LUPA timeline. As a matter of fact, in that

case, it was what the citizen's group learned from their public records request that became the notice that triggered their LUPA timeline. The actual or constructive notice is viewed from a perspective of a reasonably diligent individual. Vogel v. City of Richland, 161 Wn. App. 770, 779-780, 255 p.3d 805 (2011).

If Appellants desired to challenge the County's reliance and acceptance of SHD's notice of an available means of waste disposal being deficient and/or want to challenge the County's failure to require reviews of the OSS activities to occur on lots 60 and 61, they should have done so when the County made a final land use decision of issuing a building permit to the developer to allow construction of the residential project. It is at this point and time, there is not only a natural inference of the availability of an acceptable means of waste disposal but, in addition, it also triggered the right to seek issuance of the installation permit. In Twin Bridge Marine Park, 162 Wn.2d 829, 125 P.3d 805 (2011), the court stated that:

Where Ecology has reasonable notice of a final land use decision by the local permitting authority, it must pursue collateral attack of that decision through the Land Use Petition Act (LUPA)... This is a well established principle of Washington law that gives closure and clarity....

That Court held that an inferential decision by the local government that an additional shoreline permit is not required must be appealed through LUPA. Likewise, issuance of the building permit by the County included an inferential decision that there was an approved means of waste disposal associated with the residence and it was okay for SHD to issue a permit to install the OSS. If that was potentially debatable due to the lack of certain land use reviews, the County had nevertheless rendered a final land use decision. By constructive and actual inference, the developer's receipt of a building permit commenced the timeline against which a LUPA statute of limitation applied.

The Appellants' were on notice and their challenge needed to be filed and served accordingly.

**B. Appellants Should Not be Allowed to Collaterally Challenge as a Means of Overcoming their Untimely Action.**

**1. LUPA's Stated Purpose is to be Protected.** Case law is very protective of the stated purpose of LUPA to limit challenges to those that are timely judicial reviews. Efforts to end run or pursue impermissible collateral attacks to the LUPA 21-day deadline has been regularly denied by the Courts. Once a party has a chance to challenge a land use decision, a land use decision

becomes unreviewable by the court if not appealed to the Superior Court within the LUPA timeline. Twin Bridge Marine Park, 162 Wn.2d 825, 175 P.3d 1050 (2008). Samuel's Furniture, 147 Wn.2d 440, 54 P.3d 1194 (2002). Chelan Cy. v. Nykreim, 146 Wn.2d at 904, 52 P.3d 1 (2002). Habitat Watch, 155 Wn.2d 397, 120 P.3d 56 (2005).

**2. The Final Inspection of the Installed System Did Not Expunge the February 24, 2015, Commencement of the LUPA Statute of Limitations.** Appellants have asserted that they were not on notice that the County was not going to perform critical area and/or LDA reviews of Lots 60 and 61 until SHD and/or the County conducted final inspections. Previous sections had addressed the reasonable notice available to Appellants.

The Snohomish Health District was not authorized, nor did it perform or intend to be responsible for the Snohomish County Code land use regulations. Its final inspection was pursuant to rules and regulations associated with OSS and directed by such applicable public health regulations. The final inspection process conducted by SHD served the purpose of verifying that the developer had installed the system in conformity with the approved application and permit issued for such purpose. It was an activity

by and between the applicant and SHD to assure installer work was consistent with the approval.

In short, SHD's final inspection had nothing to do with the County's critical area and LDA regulations nor constitute any form of a land use decision.

**3. The County's Investigation of Widening and Ditching of Possession Lane Did Not Expunge the February 24, 2015 Commencement of the LUPA Statute of Limitations.** In July of 2015, well into the construction activities of developer Begis' residential project, certain water issues become the subject matter of a complaint to the County. The initial report made reference to lots 60 and 61 and "stop work posted by Jared (PDS) for altering drainage. Seepage coming from the site and a ditch was dug across road and onto BNSF property" (emphasis added). CP 220. On July 20, 2015, a Notice of Violation under case number 15-110279-CT was issued to the developer and the document's tax account number references lots 61 and 62 with the subject matter of the violation being alteration of actual drainage course CP 251-253. On July 22, 2015, in an exchange of correspondence between the County and the developer, the County recognized the activity in question was addressing ditching and

water control on the private roadway known as Possession Lane. It also references the new onsite system installed on the lots but says nothing about the lack of or requiring critical area and/or LDA review of the same. The investigation concerned the certain widening activity on Possession Lane and efforts to address water control issue. The activity log entry identifies “unpermitted drainage” in the private road right of way and “diversion of water from the seep onto the driveway not authorized by the County and subject to enforcement.” The enforcement action “wasn’t for septic”. CP 258-260. This led to the submission by the developer of a LDA application (later withdrawn) to the County directed to adding drainage culvert for runoff control on Possession Lane to a catch basin. CP 266. In essence, the County was addressing activity, some of which had already occurred in part, to add 200 lineal feet of culvert along Possession Lane to a catch basin CP 265-272.

The events of July and August of 2015 did not address the drainfield sited at lots 60 and 61. It did not constitute notice of a final land use decision by the County as it relates to the OSS siting at lots 60 and 61 without the performance of a critical area and/or

LDA review. It was a code enforcement investigation relative to ditching and water control issues on or along Possession Lane.

**4. The Underlying Purpose of LUPA does not Support Subsequent Collateral Attacks.** As discussed at the outset, the primary cause of action is based on a LUPA challenge. As such, we are benefited by a rather substantive purpose provision for guidance. “The purpose of this Chapter is to reform the process of judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions in order to provide consistent, predictable and timely judicial review.” RCW 36.70C.010. The concept of time is important to the purpose clause with its reference to “expedited” and “timely”. Case law recognized the importance of a challenge to a project to be at the forefront of a project where it can be sufficiently and timely addressed in order that intelligent decisions can be made and a project can or cannot go forward. This fits comfortably with the underlying premise of the County’s land use regulations where critical area and LDA reviews are intended to bring information and special issues to the forefront for consideration before a project is authorized to break ground. It also fits comfortably with a

strong public policy to give credence to finality in the land use decisions. One who goes through the permitting process and is approved to move to an actual construction of a project should not face the risk or burdens of late challenges, which could have been brought forth at the outset. In Chelan Cy. v. Nykreim, 146 Wn.2d at 931-932, 52 P.3d 1 (2002), the Court speaks favorably of the public policy supporting finality and providing a sense of comfort in proceeding with the development of one's land without facing further challenges.

In Habitat Watch, 155 Wn.2d at 410, 120 P.3d 56 (2005), the Court favorably cites in Wenatchee Sportsman Ass'n v. Chelan Cy., 141 Wn.2d 169, 180-182, 4 P.3d 123 (2000) to emphasize the importance of a party to timely challenge at the first opportunity to do so. Thus, efforts to challenge a rezone through a LUPA petition to challenge the subsequently sought plat approval when the period for challenging the initial rezone decision had expired was rejected. Wenatchee Sportsman, 141 Wn.2d at 169, 4 P.3d 123 (2000).

A similar linkage occurred in Habitat Watch, 155 Wn.2d at 410-411, 120 P.3d 56 (2005), when time had expired to challenge the issuance of a special use permit but then the complaining

neighbors commenced a LUPA action based on meeting the timeline associated with subsequently issued grading permit. The court correctly noted that in essence, challenging the grading permit amounted to a challenge to the validity of the special use permit and dismissed the same as time barred. The court recognized that the grading permit was contingent on the underlying validity of the special use permit extensions. Courts have protected the purpose of LUPA from being undermined by such collateral attacks.

In the case at hand, the significance of the building permit to the permit to install an OSS is clear. Without the issuance of the building permit, there is no right to a permit to install. There is a direct relationship and dependency of the permit to install to the overriding building permit. The permit to install cannot be granted without an existing building permit. The trial court correctly ruled to protect the purpose of LUPA from being undermined by the Appellants' collateral attack.

## **VII. CONCLUSION**

In spite of the tendencies of the parties to proceedings to make matters more complicated and place greater emphasis on subplots that are

ultimately irrelevant to a determination, the trial court correctly simplified the issue and made a correct ruling.

It is not necessary to debate whether or not the County's critical area and land disturbing regulations were properly addressed relative to the subject residential project nor the ultimate cause of the same. The Appellants are correct, such reviews did not occur on lots 60 and 61 where a portion of the OSS was installed as part of the Begis project. However, the County's issuance of the building permit constructively and inferentially was a determination that there was an approved means of waste disposal for this project utilizing those lots. Additionally, the issued building permit was unequivocally a triggering event empowering the developer's right to request SHD to issue the permit to install the OSS to serve the residence. If Appellants felt that was questionable determination in fact or determination by inference, the time to challenge commenced with the building permit. As the County Code provides no building permit may be issued without an available means of waste disposal and likewise, SHD regulations provide no permit to install an OSS may issue without that building permit.

The Appellants failed to timely challenge the building permit, which would have also served as a means to challenge the OSS related

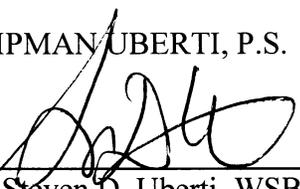
activities. This failure to timely challenge rendered the matter not reviewable.

It is respectfully requested that the trial court's decision be affirmed.

DATED this 28<sup>th</sup> day of April, 2016.

Respectfully submitted,

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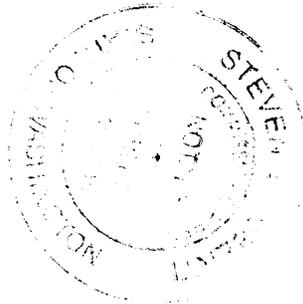
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SHANNON POLLOCK

SUBSCRIBED TO AND SWORN BEFORE ME this 28<sup>th</sup> day of April, 2016.



  
NOTARY PUBLIC SIGNATURE  
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Comm. Expires: 11/1/16