

68538-4

68538-4

RECEIVED
COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I
JAN 11 2011
10:12 AM

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

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

No. 68538-4-I

Appellants,)

v.)

CITY OF SEATTLE,)

**APPELLANTS' OPENING
BRIEF**

Respondent,)

And)

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

Additional Respondents.)

Table of Contents

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	2
III.	STATEMENT OF THE CASE	4
	A. Although Appellants Diligently Sought a Copy of the LBA Decision, the City did not Respond to Public Records Request	5
	B. The City Delivered Neither a Copy of the November 2, 2011 Letter Nor the December 2, 2011 LBA Permit in Response to Appellants' Records Request	8
	C. The City Issued the LBA Permit on December 2, 2011	8
	D. Respondents Filed Their Motion, With a Supporting Declaration and Evidence, Only Nine Days Before Hearing	9
	E. Relying on the November 2, 2011 Letter as the Final Land Use Decision, the Trial Court Dismissed the Appeal	9
IV.	ARGUMENT	10
	A. The City Issued the Challenged Permit on December 2, 2011	12
	B. The Expiration Date on the Face of the LBA Permit Demonstrates that the Decision Date was November 15, 2011	13
	C. The November 2, 2011 Letter was an Interim Determination of Consistency, not an Appealable Final Decision	15
	1. The November 2, 2011 Letter Stated it was not the Final Land Use Decision.....	16
	2. Case Law Confirms that Letters do Not Constitute Final Land Use Decisions	19
	3. Any Doubts as to Finality are Resolved Against the Agency and in Favor of Judicial Review.....	21
	D. The LUPA Appeal Period Did Not Commence Until Appellants Received Actual Notice Of The Decision	24
	E. The City's Affirmative Acts Misleading Appellants Estop the City from Denying a Later Issuance Date	30
	F. The Trial Court's Order Does Not Effect the Purpose of LUPA.....	34
	G. The Motion was Untimely and Should be Dismissed	34
V.	CONCLUSION.....	36

Table of Authorities

Statutes

RCW 36.70C.020.....	17
RCW 36.70C.040.....	12, 16, 22, 28

Cases

<i>Felida Neighborhood v. Clark County</i> , 81 Wn. App. 155, 162, 913 P.2d 823 (1996).....	24
<i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 402-03, 120 P.3d 56 (2005).....	27, 28, 29
<i>Harrington v. Spokane County</i> , 128 Wn. App. 202, 212-13, 114 P.3d 1233 (2005).....	19, 20, 21, 23
<i>Heg v. Alldredge</i> , 157 Wn.2d 154, 165, 137 P.3d 9 (2006).....	32
<i>Lee v. Jacobs</i> , 81 Wn.2d 937, 940-41, 506 P.2d 308 (1973).....	23
<i>Nickum v. Bainbridge Island</i> , 153 Wn. App. 366, 223 P.3d 1172 (2009).....	28, 29
<i>Pacific Rock Environmental Enhancement Group v. Clark County</i> , 92 Wn. App. 777, 964 P.2d 1211 (1998).....	18
<i>State, Dept. of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 599, 957 P.2d 1241 (1998)	32
<i>Valley View Indus. Park v. City of Redmond</i> , 107 Wn.2d 621, 634, 733 P.2d 182 (1987)	19, 21, 23
<i>WCHS, Inc. v. City of Lynnwood</i> , 120 Wn. App. 668, 679, 86 P.3d 1169, <i>rev. denied</i> , 152 Wn.2d 1034, 103 P.3d 202 (2004)	20, 22

I. INTRODUCTION

LUPA provides an aggrieved party 21 days to challenge a land use decision, defined as the local government's final determination on an application for a permit. Here, the City's records state that the challenged land use decision – a permit authorizing a Lot Boundary Adjustment (“LBA”) – was issued on December 2, 2011. Appellants filed their land use petition on December 6, 2011, four days later, and within 21 days of November 15, 2011, the date the City's records state was the “decision date” – a representation that the City also made orally to Appellants' attorney.

The City then moved to dismiss the LUPA petition on the grounds that it had not been filed within 21 days of a letter dated November 2, 2011 – a letter, containing directions for securing future LBA permit issuance, that the City sent to the applicant but never provided to Petitioners despite their timely request for the City's permitting records. The City's web site, which states that the date of issuance was December 2, 2011, does not even mention this letter, which the City first produced as an attachment to its motion to dismiss. The Court granted the City's motion, apparently reasoning that because the City was not required to provide notice of its land use decision, the City could repudiate its own records and its affirmative representations about when it issued the land

use decision. The Court accepted the City's assertions that this letter was the "real" land use decision, despite the City's records and representations to the contrary, and even though the letter does not satisfy the requirements in either the statute or the case law for a land use decision. The trial court's decision is wrong as a matter of fact, law, equity, and policy for all the reasons discussed below.

II. ASSIGNMENTS OF ERROR

The trial court erroneously granted Respondents' motion to dismiss and erroneously denied Appellants' motion for reconsideration for the following reasons:

- A. The land use decision in this case was the LBA Permit, which states that it was issued on December 2, 2011, not the November 2, 2011 letter. Appellants filed their land use petition on December 6, 2011, four days after LBA Permit issuance. The trial court erred in not giving effect to the date on the face of the LBA Permit.
- B. The LBA Permit carries an expiration date of November 15, 2014, which is confirmed by the DPD Website. Under Seattle Code, an LBA Permit expires three years after it is approved for issuance, indicating this LBA Permit was approved for issuance on November 15, 2011. The trial court's conclusion that the LBA Permit was approved for issuance on November 2, 2011 was error.
- C. The November 2, 2011 letter contained none of the indicia of a "final land use decision." It included directions for securing future permit issuance. It did not "clearly assert[] a legal relationship and make[] clear that it [was] the final point of the administrative process." It was not "clearly cognizable as a final determination of rights." Finally, even if the letter were ambiguous as to its finality, any doubts must be resolved against the government and in favor of judicial review. The trial court erroneously concluded

that the November 2, 2011 letter constituted the final land use decision.

- D. Assuming, *arguendo*, the November 2, 2011 letter did constitute the appealable LBA decision, after diligent attempts to obtain notice of the land use decision, Appellants received actual notice of the LBA decision on November 15, the date which the DPD web site said (and still says) was the “decision date,” and filed their LUPA petition on December 6, 2011, 21 days later. The trial court erred in concluding that a LUPA appeal period can commence and end before neighboring property owners can obtain actual notice of an alleged decision despite a diligent attempt to obtain such notice.
- E. The City, in multiple ways, stated that the LBA issued either on November 15 or December 2. In reasonable reliance on the City’s representations, Appellants filed their land use petition on December 6. The trial court erroneously concluded that the City should not be estopped to assert any issue date prior to November 15, 2011.
- F. LUPA was enacted to reform the process for judicial review. It replaced an arcane writ system, easily exploitable by clever attorneys who often obtained procedural dismissals of meritorious claims. The trial court’s decision allows local governments to affirmatively mislead the public and thereby obtain dismissal of meritorious claims despite LUPA’s stated purpose to provide for consistent, predictable, and timely judicial review. The trial court erred in failing to give effect to the terms and purpose of LUPA.
- G. Respondents supported their dispositive motion with evidence outside of the pleadings, yet, without requesting that the trial court shorten time for hearing their motion, they filed and served only nine days before the hearing rather than the 28 days required by the Civil Rules for motions for summary judgment. The trial court erroneously allowed Respondents to bring a CR 56 on nine days notice.

III. STATEMENT OF THE CASE

Appellants own a single-family house at 2506 8th Avenue West (“Appellants’ Property”), just to the north of the property owned by the Additional Respondents, at 2502 8th Avenue West (“Duffus Property”).¹ Declaration of Jonathan Drezner, MD, in Opposition to Motion to Dismiss (“Drezner Dec.”) ¶ 2 (CP 101). Appellants have adversely possessed a swath of the Duffus Property to which they are seeking to quiet title in a separate lawsuit, King County Cause Number 11-2-31648-3 SEA. *Id.* ¶ 3 (CP 101). Additional Respondents filed, and the City approved, an application for a building permit to construct a second single-family home on the Duffus Property, all acting in disregard of Appellants’ property interest in the Duffus Property. *Id.* ¶ 4 (CP 101-02). Appellants challenged the building permit in a separate LUPA action, King County Cause Number 11-2-34632-3 SEA. *Id.* (CP 102). One of the issues in that case, as in this case, is whether the property owned by Respondents even contains multiple lots. *See* LUPA Petition at 17 (CP 5). After a hearing on the merits in that case, Judge Lum stayed the matter pending the final

¹ While the RAP discourages the use of the labels “Appellant” and “Respondent,” RAP 10.4(e), in the circumstances of this case, these are the most convenient labels. “Appellants” are a married couple with different last names, referred to in the trial court as either “Petitioners” or “Appellants.” “Respondents” include Respondent City of Seattle as well as those the statute designates Additional Respondents – the applicant for the LBA and the property owners, three entities and one individual in total. With apologies to the Court and its clerks, this brief will refer to Drs. Drezner and Gray as “Appellants”, the City of Seattle and all Additional Respondents as “Respondents.”

resolution of the adverse possession case. *See* Partial Order on LUPA Appeal (April 13, 2012) (attachment A to this brief).²

On October 11, 2011, after Appellants filed the two court actions mentioned above, Additional Respondents filed an application for the Lot Boundary Adjustment that is the subject of this appeal. Drezner Dec. ¶ 5 (CP 102). The LBA removes the adversely possessed property from the alleged “lot” that is challenged in the proceeding before Judge Lum and attaches it to the rest of the Duffus Property. Petition ¶ 46 (CP 11).

A. Although Appellants Diligently Sought a Copy of the LBA Decision, the City did not Respond to Public Records Request

Appellants learned of the LBA application on Sunday, November 13, 2011, when Appellants noticed that the DPD website indicated that an LBA application had been filed for the Duffus Property. Drezner Dec. ¶ 5 (CP 102). After trying to reach the City on Monday, November 14, Appellants’ attorney, Pat Schneider, spoke with Andy McKim of DPD on the morning of Tuesday, November 15. Declaration of Patrick J. Schneider in Opposition to Motion to Dismiss (“Schneider Dec.”) ¶ 9 (CP 111). Mr. Schneider requested a copy of the City’s LBA file, including

² The Court may take judicial notice of orders in other cases. ER 201 (allowing judicial notice of facts “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”); *see also Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005) (setting out rule that court can take notice of record in another case where the two proceedings are “engrafted, ancillary, or supplementary” to one another).

the approved plans. *Id.* ¶ 10 (CP 111). Mr. McKim forwarded Mr. Schneider's request to two other DPD employees—Sue Putnam and Alan Oiye. *Id.* ¶ 11 (CP 111) & Exhibit B (CP 118-119). In his e-mail, Mr. McKim explained (1) that DPD's internal system (HWT) indicated that the LBA had issued on November 15, (2) that Appellants intended to challenge the LBA, and (3) that time was of the essence. *Id.* ¶ 12 (CP 111) & Ex. B (CP 118-119). Mr. Schneider responded to Mr. McKim's e-mail, stressing the urgency of the situation. *Id.* ¶ 13 (CP 111). The next morning, November 16, Ms. Putnam replied to Mr. Schneider. *Id.* ¶ 14 (CP 111) & Ex. B (CP 118-119). She quoted a cost "to copy the file including the recorded LBA." *Id.* She further explained that the City was "taking the LBA over to the county today for recording and *will issue the permit once it has been recorded.*" *Id.* (emphasis added). She also gave Mr. Schneider directions for making payment to get copies of the file. *Id.*

Beginning on November 16, Helen Stubbert (Mr. Schneider's assistant) and Jennifer Noble (then a Foster Pepper employee) attempted numerous times over the course of a week to remit payment. Ms. Noble called the City in an effort to pay for the copies by credit card, but reached an answering machine and left a voice message. Declaration of Jennifer Noble in Opposition to Motion to Dismiss ("Noble Dec.") ¶ 4 (CP 100). However, on November 17, the City's cashier left a voice message with

Ms. Noble stating that because nothing was owing on the permit, she could not process the payment. *Id.* Ms. Noble was able to reach the cashier that afternoon, but again, the cashier told Ms. Noble that she could not process the payment and that she should call back the next day. *Id.* Ms. Stubbert sent an e-mail to Ms. Putnam seeking assistance but received no response. Declaration of Helen Stubbert in Opposition to Motion to Dismiss (“Stubbert Dec.”) ¶ 4 (CP 104). On November 18, Ms. Noble again called DPD and reached a cashier, but this time, while the DPD system showed charges owing, the amount did not match that quoted by Ms. Putnam. Noble Dec. ¶ 6 (CP 100). On Monday, November 21, someone named Valerie from DPD left a voice message with Mr. Schneider stating that anyone who answered the phone at DPD could take the credit card information. Stubbert Dec. ¶ 5 (CP 104). On November 22, Ms. Noble left a voice message with DPD. Noble Dec. ¶ 7 (CP 100). That afternoon, Ms. Noble spoke with somebody at DPD, but again DPD could not accept payment over the phone. *Id.* Ms. Noble inquired whether DPD could simply accept a check, and the cashier responded in the affirmative. *Id.* On Wednesday, November 23, Ms. Noble mailed a check for \$26.15 to DPD. *Id.* ¶ 8 (CP 100).

The following Monday, November 28th, (the first work day after the Thanksgiving holiday), Ms. Stubbert sent an e-mail to Ms. Putnam

asking when and where the documents would be available. Stubbert Dec. ¶ 8 (CP 104). Ms. Putnam responded that day, writing: “We are waiting for it to come back from the County Records office. We will send the copies out as soon as we pick it up.” *Id.* (CP 104) & Exhibit A (CP 106).

B. The City Delivered Neither a Copy of the November 2, 2011 Letter Nor the December 2, 2011 LBA Permit in Response to Appellants’ Records Request

On Friday, December 2, the City finally delivered the promised file: two full-sized copies of the recorded LBA plat. Schneider Dec. ¶ 17 (CP 112). The City’s delivery did not include the November 2, 2010 letter that the City now alleges constituted the decision in this matter. *Id.* Appellants filed this action on Tuesday, December 6, two working days after receiving what the City represented to be the file. Appellants first learned of the November 2, 2011 letter upon receiving service of the motion to dismiss and the supporting Anderson Declaration. *Id.*

C. The City Issued the LBA Permit on December 2, 2011

Unbeknownst to Appellants, on December 2, 2011, the City issued the LBA Permit. *See* Supplemental Declaration of Malli Anderson in Support of Respondents’ Motion to Dismiss, ¶ 5 (CP 148) & Attachment A (CP 151). The City thus impliedly concluded that the applicant, Additional Respondents here, had satisfied all of the requirements listed in the November 2, 2011 letter. The City updated its website to reflect a

December 2, 2011 permit issuance date. Schneider Dec. Ex. A (CP 114). The LBA Permit lists an “Issued Date” of December 2, 2011 and an “Expiration Date” of November 15, 2014 (CP 151).

D. Respondents Filed Their Motion, With a Supporting Declaration and Evidence, Only Nine Days Before Hearing

Respondents filed their “Motion to Dismiss for Lack of Jurisdiction,” on January 3, 2012. They supported their Motion with the Declaration of Malli Anderson and evidence attached thereto (CP 43-80). They noted it for hearing at the Initial Hearing on this matter, January 12, 2012. While the evidence Respondents relied upon included the November 2, 2011 letter, it did not include the December 2, 2011 LBA permit. *Id.*

E. Relying on the November 2, 2011 Letter as the Final Land Use Decision, the Trial Court Dismissed the Appeal

Appellants responded to Respondents’ untimely motion to dismiss with largely the same arguments laid out below, pointing out specifically that the cases did not allow the court to construe the letter as the final land use decision. Although the November 2, 2011 letter reads “Your Lot Boundary Adjustment has been APPROVED,” it contains instructions for “securing issuance of your LBA permit,” noting that “final sign off by the Department” will occur in the future. CP 58. It requires the applicant to submit final documents to DPD after the date of the letter. *Id.*

After briefing and argument, the trial court granted Respondents' motion and dismissed the case. CP 152-153. Appellants timely moved for reconsideration, supporting their motion with the Declaration of Jonathan Drezner, MD, in Support of Motion for Reconsideration (CP 167-168). As Dr. Drezner declared, a week after the trial court handed down its ruling that the LBA decision "issued" on November 2, 2011, DPD continued to tell callers that the LBA decision date was November 15, 2011 and the LBA issuance date was December 2, 2011. *Id.* ¶¶ 2-3 (CP 167-68).

The trial court requested additional briefing, but ultimately denied the motion for reconsideration. This timely appeal followed.

IV. ARGUMENT

This is a simple case. To reverse the trial court, the Court need only give effect to the language on the face of the challenged land use decision. The City issued the LBA Permit on December 2, 2011, and Appellants filed their land use petition four days later. The issuance of the LBA Permit fixed Additional Respondents' rights and allowed them to develop their land in accordance with the LBA. Even if the Court elects to give effect to an earlier "decision date," every contemporaneous document confirms that the relevant decision date was November 15, 2011. Any decisions prior to that date, including the determination of consistency

with the land use code contained in the November 2, 2011 letter, were necessarily intermediate and therefore not final “land use decisions” appealable under LUPA. This conclusion is bolstered by the fact that the letter itself contained instructions for securing issuance of the LBA Permit in the future, as well as by the cases that define when a letter contains an appealable decision. Even if the letter were merely ambiguous about whether it contained a final decision, the ambiguity should have been resolved against the City and in favor of a hearing on the merits.

Assuming, *arguendo*, that the November 2, 2011 letter did constitute a final land use decision, this case presents a matter of first impression. Although no case has addressed these facts, dicta in at least two prior cases—one in the Supreme Court and one in Division 2 of this Court—suggests that the 21-day LUPA appeals clock should not commence running until after would-be challengers receive actual notice after a diligent attempt to discover the decision. Appellants here did exactly that, yet were met, if one assumes the letter was a land use decision, with obfuscation and misinformation from City staff. The Court can, and should, either delay the commencement of the LUPA appeals clock until Appellants received actual notice, or estop the City from asserting a decision date prior to November 15, 2011.

The trial court's decision fails to effect the plain purpose of LUPA to provide a clear set of rules to replace an arcane writ system. The trial court allowed the City's attorney to repudiate, in the LUPA proceeding, the City's own public records and the contemporaneous statements of City staff, and to assert that an interim determination of consistency set forth in a letter and followed by subsequent decisions and issuance of a permit, is the issued land use decision. In doing so the trial court in effect returned the parties to the pre-LUPA world where land use cases were often dismissed because of the procedural ingenuity of municipal attorneys rather than decided on their facts and the merits of the dispute.

The Court should reverse the trial court's grant of Respondents' procedurally improper motion to dismiss.

A. The City Issued the Challenged Permit on December 2, 2011

The Court need look no further than LBA Permit challenged herein to resolve this case. On its face, the LBA Permit states that its own "issue date" was December 2, 2011 (CP 151). The date of permit issuance triggers the appeal period. RCW 36.70C.040(3). Because Appellants filed only four days after the permit issued, their land use petition was timely. They could have filed their petition as late as December 23rd.

B. The Expiration Date on the Face of the LBA Permit Demonstrates that the Decision Date was November 15, 2011

Even if the Court disagrees that the permit issuance date on the face of the LBA Permit settles the question and elects instead to focus on the date the permit was approved for issuance, the LBA Permit's expiration date demonstrates that the LBA decision issued no earlier than November 15, 2011. As Respondents argued below, the Seattle Municipal Code defines when a land use decision is approved for issuance. *See* SMC 23.76.020 ("Type I Master Use Permits shall be approved for issuance at the time of the Director's decision that the application conforms to all applicable laws"). Respondents argued to the trial court that the LUPA appeals period begins to run when the permit is "approved for issuance," and the November 2, 2011 letter contained this approval. Even if Respondents were correct that "approved for issuance" under the Seattle Municipal Code is the same thing as "issued" under LUPA, another section of the Seattle Municipal Code refutes the conclusion that the November 2, 2011 letter was the date the LBA was approved for issuance.

Type I permits such as the LBA Permit expire three years after they are approved for issuance: "An issued Type I or II Master Use Permit **expires three years from the date a permit is approved for issuance** as described in Section 23.76.028" SMC 23.76.032.A.1 (emphasis added). Thus, under Respondents' view, the LBA Permit—a

Type I Master Use Permit—should expire on November 2, 2014. However, the face of the LBA Permit (CP 151), as well as the DPD website (CP 48) are both in accord: the LBA Permit expires on November 15, 2014, three years to the day after the date listed in the website as the “decision date” (CP 50) and the date of the last approval (CP 49), as well as the date Malli Anderson declared to be the date when DPD confirmed that the applicant (Additional Respondents) paid the outstanding fees owed (CP 46).

Although Ms. Anderson stated in her declaration that she personally interprets SMC 23.76.028 as confirming that her signature on the November 2, 2011 letter constituted the date the LBA was “approved for issuance,” the contemporaneous documents demonstrate that DPD as an agency interprets its own code differently. The date of decision issuance is the date all the permit requirements are satisfied—not just the zoning compliance, but Addressing as well, and payment of all outstanding fees. The LBA Permit’s expiration date, when read in light of the City’s code, confirms that this land use decision was approved for issuance no earlier than November 15, 2011.

C. The November 2, 2011 Letter was an Interim Determination of Consistency, not an Appealable Final Decision

Prior to its attorney's signature on Respondents' motion to dismiss, the City never deviated from the position that the decision challenged here issued no sooner than November 15th. As discussed above, DPD labeled this date the "decision date" on its website for all the world to see. (CP 50). Andy McKim acknowledged in a contemporaneous e-mail that the City's internal permit tracking system reflected the fact that the LBA issued on November 15 (CP 119). Later, Sue Putnam suggested that the LBA permit had not yet issued as of November 16th (CP 118). Indeed, the DPD website labels December 2, 2011—the same day the City finally delivered to Appellants the copies of the approved plans—as the LBA Permit's "issue date" (CP 48), and November 15, 2011 as the "decision date" (CP 50). Only after Appellants challenged the LBA did the City assert that the previously undisclosed November 2nd letter is something the letter itself says it is not: the issued land use decision.

The face of the letter itself demonstrates that it does not contain a final land use decision. The cases confirm that before a letter is determined to contain an appealable land use decision, it must clearly assert a legal relationship and make clear that it is the final point in an administrative process. The November 2, 2011 letter lacks either indicia. Finally, any doubts regarding whether a letter contains a final land use

decision are resolved against the jurisdiction and in favor of judicial review. For all these reasons, the trial court erred in concluding that the letter constituted the final land use decision in this case.

1. The November 2, 2011 Letter Stated it was not the Final Land Use Decision

A LUPA “petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.” RCW 36.70C.040(3). Yet, the November 2, 2011 letter itself acknowledges that the LBA permit had not yet issued: “Instructions for preparing and submitting final recording documents, paying fees, and securing issuance of your LBA permit are attached.” (CP 58 (emphasis added)). There would be no need to “secure issuance” of the LBA permit if the letter was itself the issued permit. The DPD website is in accord, defining “Approved” as a preliminary step prior to pre-issuance plan processing. *See* CP 49 (“once the final review is approved the plans must be processed for Issuance.”).

A “land use decision,” as defined by LUPA, cannot precede any additional action on the application because it is:

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

RCW 36.70C.020(2) (emphasis added). By contrast, here, the DPD website and the letter itself both indicate that additional action was necessary on the LBA Permit. According to the website, the “Addressing” review was not completed until November 15 (CP 49), and the letter itself states that the LBA permit would issue when the applicant took a number of additional steps, including “final sign off” by DPD (CP 58). Presumably, had Addressing never been completed, for example, DPD could have withheld its final sign off and ultimately refused to issue the LBA Permit. Thus, the letter itself demonstrates that it is not the “final determination” whose issuance triggers the LUPA appeal period.

Far from containing the “final land use decision,” the language of the November 2, 2011 letter establishes that it was a determination of consistency with land use and zoning controls, which any land use entitlement must undergo prior to issuance. As demonstrated by the DPD website printout attached to the Anderson Declaration (CP 48-50), and the Declaration of Patrick J. Schneider (CP 114-116), a permit such as the LBA undergoes several separate reviews before issuance. If the City’s argument were correct, then an appellant who did not agree, say, that adequate electrical capacity existed to serve the revised lot would have to have filed an appeal within 21 days of October 20, 2011, the date that City

Light approved the electrical capacity of the revised lot. A challenge to the sufficiency of the water supply for the LBA would have to have been filed within 21 days of October 12, 2011, and so on. But this is not the law: there is only one judicial appeal of a land use decision under LUPA, the “final determination” by the local government, subsumed in the issued permit.

That there are no interim or interlocutory appeals under LUPA was confirmed by one of the very first appellate cases to analyze LUPA. *Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn. App. 777, 964 P.2d 1211 (1998). The 21-day appeal period commences the day the permit *issues*, and the permit, not one of the interim determinations that DPD makes along the way towards issuance, is the *final determination* by DPD. As demonstrated by the City’s website and confirmed by two different City employees, the LBA did not issue until at least November 15, 2011, the date it was “approved for issuance” after the determination regarding addressing was completed.

The Client Assistance Memo (“CAM”), offered by Ms. Anderson as a description of the process for approving LBAs, confirms this conclusion, stating:

After the lot boundary adjustment is recorded, the permit for this platting action **will be issued**. A lot boundary adjustment permit

must be issued before a building permit can be issued for new structures on any newly configured lots.

(CP 76 (emphasis added)). By contrast, if the November 2, 2011 letter constituted the final land use decision, the applicant should have been able to act on it immediately—say, by filing a building permit application on November 3—and the City would have no discretion to prevent it. But, by the letter’s plain language, the November 2, 2011 letter could not represent a final land use decision when the applicant could not do anything with it (such as acquire a building permit) until a month later, when the LBA permit issued on December 2, 2011.

2. Case Law Confirms that Letters do Not Constitute Final Land Use Decisions

The conclusion that the November 2, 2011 letter does not represent the “issuance” of a final land use decision is also consistent with case law that holds that letters reflecting interim determinations, such as Ms. Anderson’s conclusion that the LBA complied with zoning and land use controls, are not final, appealable land use decisions. *See Harrington v. Spokane County*, 128 Wn. App. 202, 212-13, 114 P.3d 1233 (2005) (citing *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 634, 733 P.2d 182 (1987)). In *Harrington*, the trial court ruled that two letters from Spokane County to a landowner, which imposed certain permit requirements on the landowner, were final land use decisions under LUPA

that must be appealed within the 21-days. *Harrington*, 128 Wn. App. at 211. However, the appellate court reversed the trial court, holding that the landowner was not required to seek review of the County's "interim communications." *Id.* at 212. Specifically, the appellate court held that a letter is not a final appealable decision unless it "clearly asserts a legal relationship and makes clear that it is the final point of the administrative process." *Id.* "A decision must be clearly cognizable as a final determination of rights." *Id.* Moreover, any doubts as to finality are resolved against the agency. *Id.* (citing *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 679, 86 P.3d 1169, *rev. denied*, 152 Wn.2d 1034, 103 P.3d 202 (2004)).

Every "decision" that came before the December 2, 2011 issuance of the LBA Permit, was interim and by definition not a "final decision" appealable under LUPA. Here, the November 2, 2011 letter expressly stated that the administrative process would continue: it provided directions to the applicant to secure permit issuance and—most importantly—stated that the LBA Permit issuance would occur in the future. *See* CP 58 (referring to events that must occur prior to "final sign off by the Department" and "securing issuance of your LBA permit"). Under *Harrington*, the November 2, 2011 letter **could not be** a "final land use decision."

In an earlier case, *Valley View, supra*, the Court analyzed a city's representations, made after the letter at issue in that case, that suggested the land use decision had not yet been made at the time of letter issuance. 107 Wn.2d at 635 ("Moreover, after the letter was sent, City officials twice assured Valley View that it still had vested rights in the buildings."). Relying in part on this post-letter-issuance evidence of the city's intent, the Court determined that the letter was not the final point in the administrative process. *Id.* Similarly here, after DPD sent the letter that the City's attorney asserts is the land use decision, DPD personnel and the DPD website made affirmative representations to Appellants' attorney regarding the appealability of the land use decision that demonstrated that the letter was not the final land use decision. Under *Valley View*, the Court can and should consider these subsequent statements as additional evidence that the letter was not the final point in the administrative process.

3. Any Doubts as to Finality are Resolved Against the Agency and in Favor of Judicial Review

Assuming *arguendo* that the November 2, 2011 letter is ambiguous regarding whether it constitutes the final land use decision, the cases confirm that ***any doubts as to finality are resolved against the agency*** and in favor of the right to judicial review. *Harrington*, 128 Wn. App

212-13 (citing *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 679, 86 P.3d 1169, *rev. denied*, 152 Wn.2d 1034, 103 P.3d 202 (2004)). The plain language of the November 2, 2011 letter lacked the certainty that the cases require to establish finality, and any doubt must be resolved against the City. In addition, even if the letter had clearly stated it was the final decision (which it did not), the City's website stated that the "decision" date was November 15, 2011 (CP 50). Well prior to the alleged expiration of the appeal period, two different City employees—highly regarded and experienced DPD supervisors personally known to Appellants' attorney—represented in writing that the LBA decision was made on November 15 and that the LBA permit would issue after November 16. And, in support of their reply briefs, Respondents finally submitted a copy of the LBA Permit itself, which states on its face that its issuance date was December 2, 2011 (CP 151). Under the cases (and under any sense of fundamental fairness), any confusion, created entirely by the City and its staff, must be resolved against the City.

In marked contrast to the November 2, 2011 letter, which states that issuance will happen in the future, the actual LBA Permit is plain on its face: it says it was issued on December 2, 2011 (CP 151). In accordance with RCW 36.70C.040(3), the appealable event here was the

issuance of the LBA Permit. As our Supreme Court wrote in response to another allegation that a letter contained an appealable order:

That is nonsense. If every letter from every agency of state government which arrives on a lawyer's desk must be scrutinized to determine if it contains an appealable order, indeed a burden of considerable magnitude will have been created by fiction.

Lee v. Jacobs, 81 Wn.2d 937, 940-41, 506 P.2d 308 (1973) (cited by *Valley View*, 107 Wn.2d at 635). The trial court's decision erroneously relied on that very fiction to create exactly the "burden of considerable magnitude" the Supreme Court sought to avoid.

In short, the undisputed facts here show that the November 2, 2011 letter bears little resemblance to a "final land use decision," and whatever finality part of the letter might appear to contain is directly undermined by the text of the very same letter—as well as every other publication, statement, and communication made by the City outside of this LUPA proceeding concerning this permit, including one made after the trial court issued its order anointing the November 2 letter as the final land use decision. The November 2 letter does not "clearly assert[] a legal relationship **and** make[] clear that it is the final point of the administrative process." *Harrington*, 128 Wn. App. at 212-13 (emphasis added). Instead it does just the opposite, referring to permit issuance *in the future*, and the later-issued LBA Permit expressly states it was issued on December 2.

Even if one assumes that there is ambiguity in these facts, the case law requires that this Court resolve any such ambiguity against the City. The November 2, 2011 letter did not constitute the “final land use decision” here, and the trial court erred to conclude otherwise.

D. The LUPA Appeal Period Did Not Commence Until Appellants Received Actual Notice Of The Decision

If the Court assumes, *arguendo*, that the November 2, 2011 letter constituted the final land use decision in this case,³ then this case presents a matter of first impression. The facts establish that Appellants could do nothing that would have compelled the City to disclose the November 2, 2011 letter prior to the expiration of the appeal period, **a letter the City never disclosed to Appellants before filing it in support of this Motion,** despite the Appellants’ request for DPD’s records. While no decision squarely addresses the facts presented to this Court, both the Supreme Court and Division 2 of this Court have left open the possibility that a good-faith petitioner may file their LUPA petition within 21 days of receipt of actual notice, following a diligent effort to obtain notice. *Cf. Felida Neighborhood v. Clark County*, 81 Wn. App. 155, 162, 913 P.2d

³ The arguments in this section and the section that follow are presented entirely in the alternative. As mentioned above, the Court may resolve this entire appeal simply by affirming the face of the LBA Permit, which plainly states that the City issued the LBA Permit on December 2, 2011, four days before Appellants filed their land use petition. Appellants do not concede that the November 2, 2011 letter constituted the issuance of a final land use decision. Even assuming the contrary, however, the mailing of the letter did not trigger the 21-day appeal period for all the reasons described herein.

823 (1996) (pre-LUPA case reversing summary dismissal of appeal where County failed to provide notice in accordance with ordinance, remanding for determination of whether Appellants filed within time period of receipt of actual notice). Under the circumstances of this case, the Court can and should toll LUPA's 21-day appeal period until Appellants received actual notice that an LBA had issued.

The facts recited above demonstrate that Petitioners made diligent attempts, beginning well before Respondents allege the appeals period expired, to obtain actual notice of the land use decision. Appellants learned on November 13, 2011 that the DPD website indicated that Additional Respondents had filed an LBA application, but the web site did not indicate that a decision had been made. On November 15, 2011, the City updated its website to state that a decision on the LBA was made that day. Andy McKim, a respected DPD official, confirmed this fact in an e-mail sent that same day. His e-mail accurately reflected the fact that Appellants had made an urgent request for public records—the LBA file. Mr. Schneider responded that he wanted “a copy of the file as soon as possible, particularly the approved plans.” At 6:41 the next morning, Sue Putnam, another highly-regarded member of the DPD staff, responded to Mr. Schneider's request with instructions on how to make payment. Her

e-mail implied that the LBA was not yet final and would be issued when it was recorded with the County.

Thereafter, Appellants diligently attempted to obtain a copy the City's LBA file, but could not complete payment for a week due to difficulties with City staff. After a week of attempts to complete payment over the phone as prescribed by Ms. Putnam, Appellants finally mailed a \$26.15 check to DPD on November 23. On November 28, the day that the City now alleges the appeal period expired, the City still had not responded to Appellants' November 15 request for public records and stated that **the City did not even have the records in its possession**—the County had not yet returned the documents. Not until December 2, 2011, four days after the expiration of what the City asserts was the appeal deadline, did the City finally provide a copy of the file, which comprised only the approved plans. The City did not provide the November 2, 2011 letter, and Appellants learned of the existence of that letter for the first time when they saw it attached to the Anderson Declaration filed in support of a motion to dismiss signed by the City's attorney. Appellants did not receive a copy of the issued LBA Permit until it was filed with Respondents' reply brief in support of their motion to dismiss.

Appellants diligently sought to protect their rights but were met with misdirection and obfuscation that was negligent at best. On the final

day of the appeal period now asserted by the City's attorney, the City represented that it did not even possess the requested documents. Thus, nothing Appellants could have done—not even requesting a file in person—would have resulted in timely notice of the November 2, 2011 letter.

Under these facts, if the Court assumes *arguendo* that November 2nd was the date of permit issuance, the Court can and should delay the commencement of LUPA's 21-day appeals period. The cases allow this relief in such a situation. In *Habitat Watch v. Skagit County*, petitioner Habitat Watch was unaware of two extensions to a special use permit to build a golf course that were granted without public notice, despite the fact that Habitat Watch was a party of record at the original hearing and the hearing that granted a first request. 155 Wn.2d 397, 402-03, 120 P.3d 56 (2005). Thus, one of Habitat Watch's members was surprised in May 2002, seven years after the last public hearing on the permit and five years after it was to have expired, to find logging on the subject site. *Id.* at 403. Habitat Watch submitted a request for public records on June 7 and, on June 24, received documents that put them on actual notice of the additional extensions. *Id.* at 404. On July 11, Habitat Watch filed with the County a petition to revoke the special use permit. *Id.* On July 31, one week after the County issued a grading permit but 37 days after

Habitat Watch received actual notice of the permit extensions, Habitat Watch filed a LUPA petition challenging the grading permit and the special use permit extensions granted five years earlier. *Id.* The trial court dismissed the challenge to the validity of the permit extensions as untimely. *Id.* The Supreme Court affirmed the dismissal, but in so doing wrote:

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

Id. at 409. The Court held that Habitat Watch had not filed within 21 days of even the last possible date. *Id.* n.6. The Court clarified:

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

Id. at 409 n.7. Thus, the Supreme Court acknowledged that there may be situations in which a good-faith appellant who receives no notice of a land use decision may appeal within 21 days of receiving actual notice.

Division 2 of the Court of Appeals picked up this potential exception to the rule in the case of *Nickum v. Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009). In that case, the Nickums (permit

challengers) were unaware that, on September 14, 2007, Verizon had obtained a permit to construct a cell tower on neighboring property until they noticed work being done on the site on October 30, 2007 (47 days after permit issuance). *Id.* at 372. Nine days later, the Nickums filed an appeal with the City hearing examiner challenging the building permit. *Id.* When the hearing examiner dismissed the appeal as untimely on January 14, 2008, the Nickums appealed to the superior court under LUPA on January 22, 2008 (130 days after permit issuance, but only eight days after their appeal was dismissed). *Id.* at 372-73. Division 2 affirmed the dismissal on a number of grounds while noting:

Our Supreme Court has suggested that a LUPA appeal filed within 21 days of actual notice of certain land use decisions . . . not requiring notice, may be timely. But, here, the Nickums failed to file their LUPA petition within 21 days of actual notice of the permit; thus, we need not address this possibility.

Id. at 382 n.11 (quoting *Habitat Watch, supra*, 155 Wn.2d at 409 & n.7).

Assuming, *arguendo* and in spite of the contemporaneous evidence to the contrary, that November 2nd was the date of LBA permit issuance, then this case would present the set of circumstances described in dicta by *Habitat Watch* and *Nickum*—innocent Appellants without timely notice of an adverse land use decision who file within 21 days of receiving actual notice after a diligent search. In such circumstances, the Court can and should delay the commencement of the 21-day appeal period at least until

a potential challenger receives constructive notice of the land use decision, if not actual notice procured after reasonable diligence. Under either standard, Appellants' filing was timely.

E. The City's Affirmative Acts Misleading Appellants Estop the City from Denying a Later Issuance Date

Even if one assumes *arguendo*, and contrary to the case law and facts cited above, that the November 2nd letter was a final land use decision, the trial court should still have denied the City's motion because the City affirmatively misled Appellants to believe the "issuance date" was something other than what the City's Attorney argued to the trial court, and Appellants reasonably relied upon the City staff's multiple misrepresentations to their detriment. The point is not whether the City Code required DPD to affirmatively provide notice of the land use decision to Appellants (it plainly does not), but whether the City will be allowed to avoid substantive review of a meritorious appeal by contradicting its multiple, affirmative, contemporaneous representations about the decision and issue dates for the subject permit. If the earlier letter was a final land use decision, then City staff's various contemporaneous representations were misrepresentations. Yet, the trial court concluded as a matter of law that the City may benefit from its own misrepresentations and should not be estopped from doing so.

The facts of this case represent a misuse of power by the City. The City (1) notified the world that the LBA decision was made on November 15, (2) told Appellants' attorney that the LBA Permit issued on November 15, (3) implied to Appellants' attorney that the LBA had not issued prior to November 16, (4) posted on its website that the "decision date" was November 15 while the "issue date" was December 2, 2011, and (5) failed to provide the November 2, 2011 letter to Appellants in response to a timely filed and diligently pursued public records request. After all that, the City argued that Appellants' LUPA petition is untimely based upon a document that it produced for the first time as an attachment to its motion to dismiss. Because City staff made representations of fact regarding the date of issuance, upon which Appellants reasonably relied to their detriment, the Court should estop the City from denying that the LBA issued earlier than November 15, 2011. The facts supporting estoppel cannot be resolved against Appellants as a matter of law.

The familiar elements of equitable estoppel are as follows:

[E]quitable estoppel requires a showing that the party to be estopped (1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement or act.

Heg v. Alldredge, 157 Wn.2d 154, 165, 137 P.3d 9 (2006). While equitable estoppel against a government is not favored, courts will estop governments if necessary to prevent a manifest injustice, provided that the exercise of government functions is not impaired as a result of the estoppel. *State, Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998).

Here, the City made affirmative statements that the LBA issued on November 15, or that it would issue later, after it was recorded. At no point did the City suggest that the decision had issued earlier. The City knew at the time that Appellants had no way to independently verify the issue date of the LBA and were relying on the City's representations. Appellants did in fact rely upon the City's representations by filing the instant LUPA petition within 21 days of the date the City claimed the LBA issued. Finally, should the Court allow the City to disclaim its earlier representations and claim an issue date of November 2, 2011 (and should the Court not toll the LUPA appeal period), Appellants would be harmed because they would lose their only avenue of appeal.

Appellants plainly relied upon the City's representations. Had City informed Appellants on November 15 (or, for that matter, at any time before November 28) that the LBA had issued on November 2, Appellants could have filed their petition within 24 days (21 days + 3 days for

mailing) of November 2. They were represented by counsel, familiar with the parties and property involved, and would have had no problems drafting a petition, even on a short turnaround. The only way to prevent the injustice of denying Appellants' day in court is to estop the City from denying that the LBA issued on November 15. Estopping the City would not impair the functioning of government functions; nothing remains for the City to do on this LBA, and the presence or absence of the LBA has no implications for other City activity.

Estopping the City would also work no prejudice on Additional Respondents. The record on their motion to dismiss is devoid of facts demonstrating they have a need to rely upon the LBA.

By contrast, Appellants suffered prejudice when the trial court allowed the City to change its position. Under Appellants' theory of the case, the Additional Respondents filed for an LBA seeking to change the boundaries of property partly owned by Appellants (via adverse possession), without Appellants' permission. The Court should not excuse this type of intrusion on Appellants' property rights without a hearing on the merits. The Court should estop the City from asserting an issue date prior to November 15, 2011.

F. The Trial Court's Order Does Not Effect the Purpose of LUPA

An appeal period as short as LUPA's—21 days—can only work if the local jurisdiction supplies accurate and timely information about decision dates. If the Court allows the trial court's dismissal to stand, cities and counties will be able to prevent review of meritorious appeals simply by failing (whether intentionally or negligently) to accurately and timely convey the date of a land use decision's issuance, or will be able to do so by having their attorneys assert, when a decision is challenged in court, that the "real" land use decision was issued earlier than the local government's records say it was. The trial court's ruling thus renders meaningless the right of non-applicants—neighbors, environmental activists, or even other governmental agencies—to appeal adverse land use decisions that cause injury in fact.

LUPA exists to provide clarity and certainty to the judicial appeal process for land use decisions, but the trial court's ruling defeats this fundamental purpose. These policy implications of the City's motion are discussed in the Declaration of Patrick J. Schneider in Support of Motion for Reconsideration (CP 163-166), incorporated herein by reference.

G. The Motion was Untimely and Should be Dismissed

Finally, Respondents filed their motion only nine days—seven court days—before the hearing. The Civil Rules protect the rights of non-

moving parties by giving them adequate time to respond to motions for summary judgment. CR 56 requires that the moving party file the motion 28 days before the hearing. Because Respondents did not request that the trial court shorten time for hearing their motion, it should have been dismissed as untimely.

Respondents' "Motion to Dismiss for Lack of Jurisdiction," would arguably fall under CR 12(b) or 12(c) but for the fact that they supported it with the Declaration of Malli Anderson and the evidence attached thereto. Under both CR 12(b) and 12(c), this additional evidence transformed their Motion into a motion for summary judgment under CR 56. *E.g.* CR 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.").

This is not a situation where the moving party attempts to file under CR 12(b) or (c) and the responding party transforms the motion into a motion for summary judgment by offering outside declarations. Here, the moving parties themselves offered the outside evidence. Under the Civil Rules, they must have known they were moving for summary judgment under CR 56. Yet they neither moved to shorten time under the

Local Rules, nor asked to reschedule the initial hearing. Respondents violated the Civil Rules and the Local Rules, and the trial court should have dismissed their motion as untimely.

V. CONCLUSION

The undisputed facts in the record demonstrate that the LBA Permit—the challenged land use decision—issued on December 2, 2011. Appellants filed their land use petition four days later, on December 6, 2011. For all the reasons discussed above, this Court should reverse the trial court’s dismissal of the land use petition and remand this matter for a hearing on the merits.

Dated this 6th day of August, 2012

FOSTER PEPPER PLLC



Patrick J. Schneider, WSBA No. 11957
Steven J. Gillespie, WSBA No. 39538
Attorneys for Appellants

DECLARATION OF SERVICE

I am a legal assistant at Foster Pepper PLLC. I have personal knowledge of the facts in this declaration and am competent to be a witness in the above-entitled proceeding. On August 6, 2012, I caused to be delivered in the manner indicated below a true and correct copy of the foregoing Appellants' Opening Brief to each of the following:

Melody McCutcheon
Hillis, Clark, Martin & Peterson
500 Galland Building
1221 Second Ave., Ste. 500
Seattle, WA 98101-2925
By Legal Messenger

James Schermer
Samuel M. Jacobs
Mosler Schermer & Jacobs
1001 Fourth Ave., Ste. 4105
Seattle WA 98154-1156
By Legal Messenger

Mr. Patrick Downs
Assistant City Attorney
Seattle City Attorney's Office
600 Fourth Ave, 4th Floor
Seattle, WA 98124-4769
By Legal Messenger



Helen M. Stubbert

ATTACHMENT A

FILED
KING COUNTY, WASHINGTON

APR 16 2012

SUPERIOR COURT CLERK
SUNG KIM
DEPUTY

ORIGINAL

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

JONATHAN DREZNER, MD; and HEIDI
GRAY, MD, Husband and Wife,

Petitioners,

v.

CITY OF SEATTLE,

Respondent/Defendant,

and

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

Additional Respondents.

The Honorable Dean Lum

No. 11-2-34632-3 SEA

DL
~~PROPOSED~~ PARTIAL ORDER ON
LUPA APPEAL

THIS MATTER came on for hearing for oral argument by the parties on March 23, 2012, on Petitioners' Land Use Petition, and again for the Court's oral decision at a telephonic hearing on April 2, 2012. The Court considered the following documents both before and after oral argument:

1. The Petition;
2. The Documentary Record certified by the City of Seattle, including the supplemental materials certified by the City on January 25, 2012 in accordance with the Court's Order

DL
~~PROPOSED~~ PARTIAL ORDER ON LUPA APPEAL - 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 9400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 Granting Motion to Supplement and the Court's disposition of Respondents' motions for
2 reconsideration;

3 3. Petitioners' Opening Brief;

4 4. The Declaration of Steven J. Gillespie in Support of Petitioners' Opening Brief and
5 attachments thereto;

6 5. The City's Response;

7 6. The Declaration of Patrick Downs in Support of City's Response and attachments
8 thereto;

9 7. Brief of Additional Respondents in Response to Petitioners' Opening Brief;

10 8. The Declaration of James Schermer in Support of Additional Respondents' Brief and
11 attachments thereto;

12 9. Petitioners' Reply Brief;

13 10. Declaration of Patrick J. Schneider in Support of Petitioners' Reply Brief on the Merits
14 and attachments thereto;

15 The Court is fully advised in the premises.

16 NOW THEREFORE, it is hereby ORDERED that the matter is STAYED pending the
17 final outcome of Petitioners' quiet title action, King County Cause Number 11-2-31648-3 SEA.

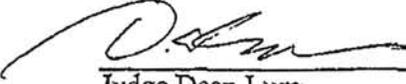
18 Petitioners' request for relief under RCW 36.70C.130(1)(f) is DENIED. The challenged
19 land use decision did not violate the Washington State Constitution.

20 Before ruling on Petitioners' remaining issues, the Court will allow the parties the
21 opportunity to further brief the question of the extent of the deference the Court owes the City's
22 interpretation of its own Code, specifically SMC 23.44.010.B. The parties shall meet and confer
23 on a briefing schedule, which may, in their discretion, occur in the near future or after the
24 completion of the quiet title action discussed above. In addition, the Court will allow additional
25 briefing related to Petitioners' claims pertinent to the quiet title action discussed above,
26 following conclusion of that quiet title action.


[PROPOSED] PARTIAL ORDER ON LUPA APPEAL - 2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1
2 DONE IN OPEN COURT this 13 day of April, 2012.

3
4 
5 Judge Dean Lum

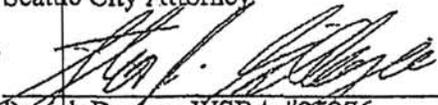
6 Presented by:

7 FOSTER PEPPER PLLC

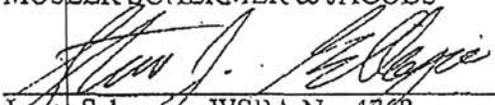
8 
9 Patrick J. Schneider, WSBA # 11957
10 Steven J. Gillespie, WSBA # 39538
11 Attorneys for Plaintiffs

12 Copy received, approved as to form:

13 PETER S. HOLMES
14 Seattle City Attorney

15 
16 Patrick Downs, WSBA #25276 per e-mail authorization
17 Assistant City Attorney
18 Attorney for Respondent/Defendant

19 MOSLER SCHERMER & JACOBS

20 
21 James Schermier, WSBA No. 4768 per e-mail authorization
22 Samuel Jacobs, WSBA No. 8138
23 Attorney for Additional Respondents

24
25
26 
[PROPOSED] PARTIAL ORDER ON LUPA APPEAL - 3

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700