

68538-4

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No. 68538-4-I

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

Appellants,

vs.

CITY OF SEATTLE,

Respondent,

and

DAN DUFFUS; SOLEIL LLC; SOLEIL HOMES, LLC;
and DL Dalton, LLC,

Additional Respondents.

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CITY OF SEATTLE'S RESPONSE BRIEF

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ORIGINAL

TABLE OF CONTENTS

Page(s)

I. INTRODUCTION1

II. STATEMENT OF THE CASE2

 A. The LBA approval process.2

 B. On November 2, 2011, the LBA is approved and mailed to Duffus.3

 C. Drezner requests a copy of the LBA file.4

 D. The recording fee was paid on November 15, 2011 and the Master Use Permit issued on December 2, 2011.5

 E. LUPA litigation.5

III. STATEMENT OF THE ISSUES6

IV. ARGUMENT7

 A. The City issues the LBA decision on November 2, 2011.7

 B. Neither November 15, 2011, when Duffus paid the recording fee; nor December 2, 2011, when the City issued the Master Use Permit is when the City approved the LBA.....8

 1. *November 15, 2011 was when Duffus paid the fee to record the LBA—not when the LBA was approved.*8

 2. *December 2, 2011 was when a Master Use Permit was issued—not when the LBA was approved.*10

 C. The November 2, 2011 approval was the City’s final decision on the LBA application—not an interim determination.11

 1. *The November 2nd decision triggered LUPA’s 21-day appeal period.*11

| | | |
|----|---|----|
| 2. | <i>General statements by two City employees not involved in LBA reviews did not establish the LBA approval date.</i> | 15 |
| 3. | <i>The City's LBA Client Assistance Memo is consistent with determining the LBA decision was the City's final decision.</i> | 17 |
| 4. | <i>Case law does not support's Drezner's argument that the LBA decision was not a final decision.</i> | 18 |
| 5. | <i>The November 2nd decision is unambiguous in its approval of the LBA application.</i> | 20 |
| D. | Under LUPA, the appeal period started when the City issued and mailed the LBA decision. | 23 |
| E. | The City should not be estopped from determining the LBA approval is not a final land use decision. | 27 |
| 1. | <i>Equitable estoppel cannot apply when Drezner could have examined the LBA file and viewed the November 2nd decision.</i> | 27 |
| 2. | <i>Equitable estoppel would impair the City's ability to process LBAs and building permits.</i> | 29 |
| F. | Determining that Drezner's appeal is untimely is consistent with LUPA's purpose. | 30 |
| G. | The Motion to Dismiss was timely according to the court-issued case schedule. | 30 |
| V. | CONCLUSION | 31 |

TABLE OF AUTHORITIES

Page(s)

Cases

| | |
|--|----------------|
| <i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 52 P.3d 1 (2002)..... | 30 |
| <i>Cornerstone Equipment Leasing, Inc. v. MacLeod</i> , 159 Wn. App. 899, 247 P.3d 790 (2011)..... | 28 |
| <i>Felida Neighborhood v. Clark County</i> , 81 Wn. App. 155, 913 P.2d 823 (1996)..... | 24, 25, 26 |
| <i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005)..... | 24, 25, 26, 30 |
| <i>Hale v. Island County</i> , 88 Wn. App. 764, 946 P.2d 1192 (1997)..... | 11, 12, 13, 14 |
| <i>Harrington v. Spokane County</i> , 128 Wn. App. 202, 114 P.3d 1233 (2005)..... | 18, 19, 21 |
| <i>Keep Watson Cutoff Rural</i> , 145 Wn. App. 31, 184 P.3d 1278 (2008)..... | 26, 30 |
| <i>Lee v. Jacobs</i> , 81 Wn.2d 937, 506 P.2d 308 (1973)..... | 22, 23 |
| <i>Nickum v. Bainbridge Island</i> , 153 Wn. App. 366, 223 P.3d 1172 (2009)..... | 24, 25, 26, 30 |
| <i>Pacific Rock Environmental Enhancement Group v. Clark County</i> , 92 Wn. App. 777, 964 P.2d 1211 (1998)..... | 15 |
| <i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 830 P.2d 318 (1992)..... | 28 |
| <i>Samuel's Furniture, Inc. v. Department of Ecology</i> , 147 Wn.2d 440, 54 P.3d 1194 (2002)..... | 12, 13, 14 |
| <i>San Juan Fidalgo Holding Co. v. Skagit County</i> , 87 Wn. App. 703, 943 P.2d 341 (1997)..... | 26 |
| <i>Spice v. Pierce County</i> , 149 Wn. App. 461, 204 P.3d 254 (2009)..... | 30 |

| | |
|--|------------|
| <i>Valley View Industrial Park v. City of Redmond</i> , 107 Wn.2d 621, 733 P.2d 182 (1987)..... | 18, 19, 20 |
| <i>Vogel v. City of Richland</i> , 161 Wn. App 770, 255 P.3d 805 (2011)..... | 12, 14 |
| <i>WCHS v. City of Lynnwood</i> , 120 Wn. App. 668, 86 P.3d 1169 (2004)..... | 21, 22 |

Statutes

| | |
|-----------------------------|--------|
| RCW 36.70C.010..... | 30 |
| RCW 36.70C.020 (2)..... | 11 |
| RCW 36.70C.040 (3)..... | 23 |
| RCW 36.70C.040 (4) (a)..... | 15, 23 |

Court Rules

| | |
|--------------------|----|
| CR 7 | 30 |
| CR 56 | 31 |
| KCLCR Rule 7 | 31 |

Seattle Municipal Code

| | |
|----------------------------|---------------|
| SMC, Chapter 23.28 | 3 |
| SMC, Chapter 23.38 | 3 |
| SMC 23.28.020.A | 9, 11 |
| SMC 23.28.030.A | <i>passim</i> |
| SMC 23.28.030.A.1-6..... | 17 |
| SMC 23.76.004 | 2 |
| SMC 23.76.018(C) (1) | 24 |
| SMC 23.76.020 | 2 |
| SMC 23.76.028 | 5 |
| SMC 23.76.028.A | 17 |
| SMC 23.76.28.A.1 | 3 |

I. INTRODUCTION

Seattle's Municipal Code provides that when the Department of Planning and Development ("Department") determines that a Lot Boundary Application ("LBA") complies with a set of LBA-specific code review requirements, the LBA *shall* be approved.

The code also provides that after the application is approved, the applicant will be notified of the approval; and once any administrative processing fees are paid, the City *shall* issue a Master Use Permit. The code does not require that notice be given to the public when a LBA application is approved or when a Master Use Permit is issued.

This process was followed when on November 2, 2011; the City determined the LBA application submitted by Dan Duffus, Soleil, LLC, Soleil Homes, LLC, and DL Dalton, LLC ("Duffus") complied with all applicable codes, and sent Duffus a decision telling him the LBA was "APPROVED." Duffus paid the fee to record the LBA and after that the City issued Duffus a Master Use Permit.

Because Jonathan Drezner and Heidi Gray ("Drezner") failed to file their Land Use Petition Act ("LUPA") appeal within the required 21-day appeal period, they argue this Court should look to when the post-LBA-approval recording fee was paid or when a subsequently-issued Master Use Permit was issued as the LBA approval date. These dates, as

explained below, are not when the City determined with finality that the Duffus LBA complied with all applicable LBA-permit-review code.

Drezner also argues this Court should equitably toll the 21-day appeal period based on general permit-processing statements of two City employees who do not process LBA applications and did not review and approve the Duffus LBA.

The Court should not reach this result when equitable tolling does not apply to LUPA's 21-day appeal period that if not complied with deprives a court of jurisdiction to hear the appeal; and when Drezner could have determined the existence of the LBA decision by viewing the file at any time after the decision was sent to Duffus on November 2, 2011.

II. STATEMENT OF THE CASE

A. The LBA approval process.

Under City code,¹ LBAs are Type I land-use decisions involving little to no discretion.² These decisions do not require public notice when they are made,³ but applicants are notified when an application has been approved.⁴ The code also provides that LBA applications *shall* be approved when the Department determines the applications “conform to

¹ SMC (Seattle Municipal Code) 23.76.004.

² CP 52.

³ SMC 23.76.020.

⁴ CP 44; CP 76.

all applicable laws.”⁵ These code provisions are identified in a Client Assistance Memo that also states if the proposed LBA meets code criteria the application will be approved,⁶ and the Department will notify the applicant of the decision by mail.⁷

B. On November 2, 2011, the LBA is approved and mailed to Duffus.

On October 11, 2011, Duffus applied for a LBA as provided for under the code.⁸ The application was processed by Malli Anderson, a Land Use Planner designated by the Department Director as responsible for reviewing all LBA applications, including the Duffus application.

On November 2, 2011, the Department issued its written decision approving the LBA. The decision stated in part: “Your Lot Boundary Adjustment has been “APPROVED.” The decision was accompanied by a written “Lot Boundary Review Checklist” that determined that the LBA complied with all applicable LBA review criteria found in Chapter 23.28 of the Seattle Municipal Code.⁹

The LBA decision also gave Duffus instructions for the ministerial steps taken after the LBA was approved including paying the King County

⁵ SMC 23.76.28.A.1.

⁶ CP 75.

⁷ CP 76.

⁸ CP 44; Chapter 23.38 SMC.

⁹ CP 44; CP 58-60.

recording fee, and obtaining the Master Use Permit that reflects the lot's buildable status after the LBA approval.¹⁰ At no point after the LBA approval were the merits of the LBA decision revisited.

The LBA decision and the checklist were signed by Ms. Anderson and mailed to Duffus on November 2, 2011,¹¹ and a copy placed in the Department's official file and made available for viewing the same day.¹²

C. Drezner requests a copy of the LBA file.

On November 15, 2011, counsel for Drezner requested that Andy McKim, a Department planner, provide him with a copy of the lot boundary adjustment file and plans.¹³ In response, Mr. McKim sent an email to two Department employees including Sue Putnam. Mr. McKim's email said: "Pat Schneider has indicated that he intends to challenge this approval in court, and he requires documentation of our approval for that purpose. *I assume there is no written decision as this is an LBA, but something else from the file, such as an approve drawing may suffice.*"¹⁴

In the same email chain, Ms. Putnam said the Department was taking the LBA to the County for recording and after that the Department would

¹⁰ CP 58.

¹¹ CP 44; CP 76.

¹² CP 44; CP 130-31; CP 146-48.

¹³ CP 111 ¶ 9.

¹⁴ CP 108; CP 119 (emphasis added).

issue a permit (the Master Use Permit).¹⁵ A copy of the LBA file was then provided on December 2, 2011.¹⁶

D. The recording fee was paid on November 15, 2011 and the Master Use Permit issued on December 2, 2011.

Under the code, Master Use Permits are issued as a matter of right after: (1) a LBA is approved, (2) the LBA is recorded, (3) and any owing administrative fees are paid.¹⁷

On November 15, 2011, Duffus paid the fees to record the LBA as referenced in Ms. Anderson's decision.¹⁸ The date when the fees were paid, November 15, 2011, was entered by data-processing staff in the Department permit-tracking database as the LBA "decision date."¹⁹

On December 2, 2011, after the approved LBA was recorded, the Department issued a Master Use Permit to Duffus.²⁰

E. LUPA litigation.

Drezner learned about the Duffus LBA application on November 13, 2011 from the Department's permit-tracking database,²¹ and learned about the November 2, 2011 LBA decision on January 3, 2012 when they

¹⁵ CP 107.

¹⁶ CP 104 ¶ 9.

¹⁷ SMC 23.76.028; CP 76; CP 148.

¹⁸ CP 45 ¶ 14.

¹⁹ CP 16; CP 45-46.

²⁰ CP 134.

²¹ CP 102.

were served with the City's motion to dismiss.²² At no time, however, after learning about the LBA application on November 13, 2011 did Drezner request to see the City file that contained the LBA decision.²³

On December 6, 2011, 34 days after the November 2, 2011 LBA decision was mailed to Duffus, Drezner filed a LUPA petition requesting the court reverse the Department's LBA approval.²⁴

On January 23, 2012, the Superior Court granted the City's motion to dismiss finding that Drezner's LUPA petition was not filed within 21 days after the November 2, 2011 LBA decision was issued.²⁵

On February 2, 2012, Drezner filed a Motion for Reconsideration of the Superior Court's decision granting the City's motion to dismiss.²⁶ Then on March 16, 2012, the Superior Court denied the motion and reaffirmed its order granting the City's Motion to Dismiss.²⁷

III. STATEMENT OF THE ISSUES

- Whether the City's November 2, 2011 decision approving the Duffus LBA is a final land use decision commencing LUPA's 21-day appeal period?
- Whether despite case law to the contrary, should LUPA's 21-day period be equitably tolled until Drezner received notice of

²² CP 81 at ln. 26 – CP 82 at ln. 1.

²³ CP 146.

²⁴ CP 1.

²⁵ CP 152-53.

²⁶ CP 154-162.

²⁷ CP 201-202.

the LBA decision even though they would have learned of the decision by examining the LBA file?

IV. ARGUMENT

A. The City issues the LBA decision on November 2, 2011.

The code's LBA-review section provides that when the Department determines the LBA application conforms to this section of the code—the same code provisions contained in a checklist attached to the Duffus LBA decision showing the application conformed to the code—the Department *shall* approve the LBA application.²⁸ Then, after the LBA is recorded and any outstanding fees paid, the City issues a Master Use Permit:

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.

...

Once a Master Use Permit has been approved for issuance . . . the applicant shall pay any required fees and pick up the Master Use permit

Ms. Anderson, the Department employee who is responsible for the LBA review and approval process—and who Drezner's counsel did not communicate with—determined the LBA application conformed with the code and stated in her decision: "Your Lot Boundary Adjustment has been APPROVED."²⁹ Accompanying the LBA approval was the checklist

²⁸ SMC 23.28.030.A.

²⁹ CP 58 (emphasis in original).

indicating the LBA conformed to the code.³⁰ After Ms. Anderson made her decision, she mailed a copy to Duffus.³¹ The Duffus LBA decision is the same document the Department issues for all approved LBAs.³²

The fact that Duffus paid to record the LBA application and picked up the Master Use Permit does not change the fact that when Ms. Anderson mailed the decision to Duffus, the City had made a final decision that the LBA application was approved and conformed with the code.

B. Neither November 15, 2011, when Duffus paid the recording fee; nor December 2, 2011, when the City issued the Master Use Permit is when the City approved the LBA.

1. *November 15, 2011 was when Duffus paid the fee to record the LBA—not when the LBA was approved.*

City data-processing staff entered November 15, 2011 into its permit-tracking database, according to Ms. Anderson, as a “decision date” after Duffus paid a five-dollar recording fee.³³ Ms. Anderson did not state that November 15, 2011 was when she approved the LBA application; instead Ms. Anderson stated the approval occurred on November 2, 2011.³⁴

³⁰ CP 59-60.

³¹ CP 44, ¶ 7.

³² CP 45, ¶ 12.

³³ CP 45, ¶¶ 14, 15 and 16.

³⁴ CP 45, ¶ 16.

Drezner, for the first time, argues that November 15th must be the LBA approval date because according to City code,³⁵ a Master Use Permit expires three years after it is issued and the Master Use Permit indicates November 15, 2014 is the permit expiration date.³⁶

This argument does not change the effect of the November 2nd decision that states the LBA application was approved and conformed to the code.³⁷ A permit expiration date cannot change when an LBA application is approved.

Drezner then argues that because an address had not been assigned until November 15, 2011 the LBA application did not meet all City requirements.

But what the code states is a LBA permit *shall* be approved when it is determined that it conforms to all applicable LBA review code.³⁸ Ms. Anderson indicated all applicable code was complied with in the review checklist she attached to the decision.³⁹

Moreover, the code does not state that an address must be assigned before the LBA application shall be approved. Nor does it say the recording

³⁵ SMC 23.28.030.A.

³⁶ Appellants' Opening Brief at 14.

³⁷ CP 58-60.

³⁸ SMC 23.28.020.A.

³⁹ CP 59-60.

fee must be paid before the LBA shall be approved. Neither of these actions are codified predicates to approving a LBA.⁴⁰

Finally, Drezner cannot rely on the City's database and claim the LBA was approved on November 15th when the database states that any person relying on the database does so at their own risk.⁴¹

2. December 2, 2011 was when a Master Use Permit was issued—not when the LBA was approved.

The Master Use Permit issued on December 2, 2011, states “[t]his Land Use Permit authorizes the use of the property and/or work described above. Permission is hereby given to develop the site address shown”⁴²

Consistent with the description on the Master Use Permit, Ms. Anderson stated the “Land Use Permit issued on December 2, 2011, gave Duffus permission “to develop the site” and the December 2, 2011 date “reflects DPD’s [the Department’s] recognition that the LBA had been recorded in the King County Recorder’s Office.”⁴³ For other types of Master Use Permits where administrative appeals are authorized or required, the permits are not issued until the appeals have been completed.

Likewise, Ms. Putnam stated the City “[i]ssued a Land Use Permit on December 2, 2011 after the LBA decision was made on November 2,

⁴⁰ SMC 23.28.030.A.1-6.

⁴¹ CP 194, § J Disclaimer.

⁴² CP 134.

⁴³ CP 148, ¶ 5.

2011, the applicant paid the necessary LBA recording fee and the LBA was recorded. December 2, 2011 is not the LBA decision date.⁴⁴

Contrary to Drezner's argument that the Master Use Permit was the LBA approval, it was not according to City code,⁴⁵ and according to the statement of Ms. Anderson, who administers the City's LBA review process.

C. The November 2, 2011 approval was the City's final decision on the LBA application—not an interim determination.

1. The November 2nd decision triggered LUPA's 21-day appeal period.

LUPA provides that a land use decision is "a final decision by the local jurisdiction's body or office with the highest level of authority to make the determination . . . on: (a) An application for a project permit or governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used"⁴⁶

In *Hale v. Island County*,⁴⁷ the Court of Appeals ruled that under the County's two-step process to change a rural residential land use to a commercial or industrial use, the preliminary use approval triggered LUPA's 21-day appeal period,⁴⁸ notwithstanding that after the preliminary approval

⁴⁴ CP 146, ¶ 3.c.

⁴⁵ SMC 23.28.020.A.

⁴⁶ RCW 36.70C.020 (2).

⁴⁷ *Hale v. Island County*, 88 Wn. App. 764, 766, 946 P.2d 1192 (1997).

⁴⁸ *Id.* at 769.

the applicant was required to obtain a site plan approval before the change in use was finally approved.⁴⁹

In *Vogel v. City of Richland*,⁵⁰ the Court of Appeals determined that City memoranda that did not memorialize in any way a decision to allow a previously-platted public road to be a private road was not a final land use decision. Instead, the decision occurred when the City first approved a plat entrance permit showing the street as a private street.⁵¹ To analyze what is a final decision under LUPA, the *Vogel* court turned to *Samuel's v. Ecology*.⁵²

In *Samuel's v. Ecology*,⁵³ the State Supreme Court determined that the City of Ferndale's decision to approve grading and building permits to allow construction of a furniture store addition defined a final decision as is "[o]ne which leaves nothing open to further dispute and which sets at rest cause of action between parties."⁵⁴ Applying this, the court determined that "[o]nce the City determined that the permits should be issued, that was the end of the controversy. Samuel's received the relief it had requested. No additional issues remained."⁵⁵ As a result, the court held that Ecology was

⁴⁹ *Id.* at 767.

⁵⁰ *Vogel v. City of Richland*, 161 Wn. App 770, 779, 255 P.3d 805 (2011).

⁵¹ *Id.* at 780.

⁵² *Id.* at 778.

⁵³ *Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 444-45, 54 P.3d 1194 (2002).

⁵⁴ *Id.* at 452.

⁵⁵ *Id.* at 453.

precluded from challenging the permits as being subject to the Shoreline Management Act because it failed to timely file a LUPA petition.⁵⁶

Here, the City's November 2nd decision and its accompanying checklist determined that:

- The City reviewed and approved the LBA application as conforming to all City code;
- All Department reviews including Drainage, and Structural and Ordinance, had been completed and approved the LBA application;
- Other City Departments providing services to the lot including Seattle City Light, Seattle Fire Department, and Seattle Public Utilities approved the application; and
- The application was determined to be consistent with the City's Regulations for Environmentally Critical Areas.⁵⁷

Once the review was complete and the LBA decision mailed to Duffus, his rights to the LBA had been established and LUPA's 21-day appeal period was triggered.

Reaching the result that the City's November 2nd decision is a final decision is consistent with the permit approval process in *Hale* and the

⁵⁶ *Id.* at 463-64.

⁵⁷ CP at 59-60.

finality of the approvals in *Hale* and *Samuel's*. And unlike the letter in *Vogel* that did not memorialize a decision in any way, the Duffus LBA decision and review checklist established that the LBA was approved and complied with the code.

The City's November 2nd decision is the earliest point in the review process where the City determined that the application complied with all applicable code and communicated its approval to Duffus. Even though the City issued a Master Use Permit after the LBA was recorded, the LBA decision was a final decision because it left nothing to dispute as to whether the LBA application conformed to all applicable code.

In contrast, Drezner argues the LBA decision was not a final decision because an address had not been assigned to the lot after the LBA was approved.⁵⁸ But addressing is not identified in the code as a LBA review standard and cannot act as a basis to approve or deny an LBA application.⁵⁹

Drezner then argues the LBA approval only demonstrated consistency with land use and zoning controls, and as a consequence, an appellant could file LUPA appeals when electrical,⁶⁰ and water supply reviews were completed.⁶¹ This argument fails because utility adequacy and

⁵⁸ Appellants' Opening Brief at 17.

⁵⁹ SMC 23.28.030.A.

⁶⁰ Appellants' Opening Brief at 17.

⁶¹ *Id.* at 18.

all other Department reviews were addressed and approved in the LBA decision and checklist.⁶²

Going on, Drezner cites *Pacific Rock v. Clark County* for the proposition that the LBA decision is an interlocutory determination and cannot be the basis for a LUPA appeal.⁶³ *Pacific Rock* determined that a Hearing Examiner's discovery order was not subject to LUPA because it was an interlocutory order. *Pacific Rock* has no application to our facts when a hearing examiner discovery order is not at issue. *Pacific Rock* is not, therefore, a basis to determine the LBA decision is an interlocutory decision.

The November 2nd LBA decision was a final decision triggering LUPA's 21-day appeal period when it was mailed to Duffus.⁶⁴

2. *General statements by two City employees not involved in LBA reviews did not establish the LBA approval date.*

Drezner claims the general-permit-processing emails of Andy McKim and Sue Putnum establish when the LBA was approved.⁶⁵ That is not the case.

⁶² CP 60.

⁶³ Appellants' Opening Brief at 18, citing *Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn. App. 777, 782, 964 P.2d 1211 (1998).

⁶⁴ RCW 36.70C.040 (4) (a) (LUPA's 21-day appeal period commences three days after a written decision is mailed by the local jurisdiction).

⁶⁵ Appellants' Opening Brief at 18.

First, Mr. McKim’s email to Drezner’s counsel did not identify November 15th as the Department’s decision date. Instead Mr. McKim *assumed* the Department had not issued a written decision approving the LBA.⁶⁶ It is apparent Mr. McKim did not know the Department issued a written LBA decision on November 2nd.

Second, Ms. Putnam was under the same assumption as Mr. McKim—that the City had not issued a written LBA decision—when she communicated to Drezner’s attorney that once the LBA was recorded with King County, the City would issue a “permit” meaning a Master Use Permit.⁶⁷ After reviewing the file, however, Ms. Putnam stated the Duffus LBA was approved on November 2, 2011 when Ms. Anderson issued the LBA decision, and that November 15, 2011 was not the date the City approved the LBA application.⁶⁸

The emails from Mr. McKim and Ms. Putnam cannot be read as determining the LBA application was approved on any date other than November 2nd.

⁶⁶ CP 119.

⁶⁷ CP 118.

⁶⁸ CP 146, ¶ 3.

3. ***The City's LBA Client Assistance Memo is consistent with determining the LBA decision was the City's final decision.***

The City's LBA Client Assistance Memo, like the code it is based on,⁶⁹ provides that if an application meets all codified LBA review criteria the application will be approved, and a letter documenting the decision and outlining the recording process will be sent to the applicant:

If the proposed lot boundary adjustment meets the criteria mentioned above [SMC 23.28.030.A.1-6], the application *will be approved.*

...

A *decision* documenting the Director's *Decision* and outlining the recording process will be sent to the designated contact person.

...

After the lot boundary adjustment is recorded, the permit for the 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 lot.⁷⁰

The Client Assistance Memo identifies the document sent to the LBA applicants as a "*decision*," and supports the City's position that the LBA decision was the City's final approval of the LBA application.

The fact that the Master Use Permit was issued does not, as Drezner argues, prevent the November 2nd decision from being a final decision as to the LBA application.⁷¹ All Duffus had to do after the LBA application was

⁶⁹ SMC 23.28.030.A.; 23.76.028.A.

⁷⁰ CP 75-77 (emphasis added).

⁷¹ Appellants' Opening Brief at 19.

approved was pay the recording fee and the Master Use Permit would be issued.

What established Duffus's rights to the LBA application was the November 2nd decision, not the later-issued Master Use Permit.

4. Case law does not support's Drezner's argument that the LBA decision was not a final decision.

Case law cited by Drezner, *Harrington* and *Valley View*, do not support their argument that the City's LBA decision and the attached checklist indicating the LBA conformed to the code was not a final decision.⁷²

In *Harrington*,⁷³ before the County approved a building permit it sent two letters that the County later argued were subject to LUPA review: the first told Harrington his septic system did not comply with the County's shoreline master program,⁷⁴ and a second told Harrington that County regulations did not allow the County to consider alternative septic system designs.⁷⁵ The court held the County's interim communications did not trigger LUPA's 21-day appeal because the "negative communications

⁷² Appellants' Opening Brief at 19-21.

⁷³ *Harrington v. Spokane County*, 128 Wn. App. 202, 114 P.3d 1233 (2005).

⁷⁴ *Id.* at 206.

⁷⁵ *Id.* at 207; 211.

from the County were not clearly cognizable as a final decision of rights and did not, therefore, trigger the statutory time for seeking relief.”⁷⁶

The *Harrington* letters—neither of which could have the effect of being the approval or denial of a building permit—are distinguishable from the LBA decision stating the LBA has been approved and conformed to the code. The LBA decision was a final decision of Duffus’s rights and triggered LUPA’s 21-day appeal period.

In *Valley View Industrial Park*,⁷⁷ the City of Redmond notified Valley View that the building permit it submitted had lapsed and notwithstanding this letter, the City assured Valley View that it could proceed under the permits it previously said had lapsed.⁷⁸ In determining that a final order had not been issued, the court said the City had no clear process to determine if a permit had lapsed:

[T]he City lacked a clear administrative decision-making process regarding building permit lapses. Moreover, after the letter was sent, City official twice assured Valley View that it still had vested rights in the buildings. Because of the unclear and inconsistent nature of the permit lapse process, the letter was insufficient to constitute a final order.

The lack of a clear permit recession process and recession letter in *Valley View* is distinguishable from the City’s LBA approval process

⁷⁶ *Id.* at 212.

⁷⁷ *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987).

⁷⁸ *Id.* at 187-88.

requiring that the City *shall* approve the LBA once it has determined the permit complies with applicable code,⁷⁹ and the City’s LBA decision and attachment indicating the LBA complied with the code.

Finally, the Court should reject Drezner’s argument that *Valley View* controls when Mr. McKim’s and Ms. Putnum’s general permit processing statements did not establish the LBA-approval date, and the City’s website cannot dictate when a LBA is approved.

5. *The November 2nd decision is unambiguous in its approval of the LBA application.*

The November 2nd decision and its attachment state that the LBA was “APPROVED” and the application complied with all applicable code. The effect of this decision is supported by the code that provides when the City determines a LBA application is consistent with the code, the LBA shall be approved.⁸⁰

Drezner argues that Mr. McKim’s and Ms. Putnam’s email statements, based on the Department’s database—not the LBA decision, and the City issuing the Master Use Permit on December 2nd, created ambiguity as to when the LBA was approved that must be construed

⁷⁹ SMC 23.28.030.A.

⁸⁰ *Id.*

against the City.⁸¹ To support their argument Drezner again cites *Harrington*, and then *WCHS v. Lynnwood*.⁸²

Harrington, discussed above, is distinguishable because the LBA decision and checklist that plainly stated the application was “APPROVED” and complied with all applicable code.

In *WCHS*, the City of Lynnwood unsuccessfully claimed a building permit had not vested,⁸³ and the applicant failed to exhaust administrative remedies by challenging two letters the City issued during the permit process.⁸⁴ The first letter told the applicant the permit was incomplete but would remain open for 180 days,⁸⁵ and the second letter denied a business license for the proposed chemical-treatment care-center.⁸⁶ The court determined the City’s incomplete-permit letter was not a final order because it failed to comply with the City’s procedural requirements,⁸⁷ and the business-denial letter was not a final order because the City later sent a letter stating the business license was only incomplete.⁸⁸

⁸¹ Appellants’ Opening Brief at 21-24.

⁸² *WCHS v. City of Lynnwood*, 120 Wn. App. 668, 86 P.3d 1169 (2004).

⁸³ *Id.* at 674-678.

⁸⁴ *Id.* at 679.

⁸⁵ *Id.*

⁸⁶ *Id.* at 680.

⁸⁷ *Id.*

⁸⁸ *Id.*

Here, the City followed its LBA-permit-review process when it: (1) reviewed the LBA application and, as mandated by code, approved the application once the City determined the application complied with all applicable code; (2) mailed a copy of the LBA decision to the applicant; and (3) placed a copy of the LBA decision in the City's official file.⁸⁹ Unlike the letters in *WCHS*, the Duffus LBA decision complied with all procedural requirements.

The December 2, 2011 Master Use Permit does not create ambiguity either. The code and the Client Assistance Memo provide that after the City determines the LBA conforms to applicable code, the Director shall approve the application and notify the applicant that the LBA has been approved. That happened here, and after Duffus recorded the LBA, the City issued a Master Use Permit. These are not inconsistent actions as in *WCHS*.

Drezner next turns to *Lee v. Jacobs*⁹⁰ to support their ambiguity argument.⁹¹ In *Lee*, the Board of Industrial Insurance Appeals ordered the Department of Labor and Industries to provide an injured workman with additional medical treatment. In response, a Labor and Industries claim

⁸⁹ CP 44, §§ 7, 8.

⁹⁰ *Lee v. Jacobs*, 81 Wn.2d 937, 506 P.2d 308 (1973).

⁹¹ Appellants' Opening Brief at 23.

consultant wrote letters refusing to comply with the Board's order.⁹² Labor and Industries argued the claim consultant's "refuse to comply" letters were a final decision that were required to be appealed to Board of Industrial Insurance.⁹³ The *Lee* court held the letters were not final orders because the letters did not meet the requirements of a Labor and Industries order.⁹⁴

The letters in *Lee* that were not an approval or denial of a regulatory action are distinguishable from the LBA decision that stated the LBA was approved and complied with the code.

Contrary to Drezner's argument, what remained after the LBA was approved, recording the LBA and issuing the Master Use Permit, did not alter Duffus's rights under the approved LBA and did not create ambiguity.

D. Under LUPA, the appeal period started when the City issued and mailed the LBA decision.

LUPA provides that the 21-day appeal period starts when the land use decision is issued,⁹⁵ and the land use decision is issued three days after a written decision is mailed by the local jurisdiction.⁹⁶

⁹² *Lee* at 937-938.

⁹³ *Id.* at 940.

⁹⁴ *Id.* at 941.

⁹⁵ RCW 36.70C.040 (3).

⁹⁶ RCW 36.70C.040 (4) (a).

As described in the Client Assistance Memo,⁹⁷ the City provides notice to LBA applicants of the Director's decision to approve a LBA.⁹⁸ In addition to sending the LBA decision to Duffus, the City placed a copy of the decision in Duffus's LBA file.⁹⁹ Accordingly, the 21-day appeal period started when the City approved the LBA and sent Duffus a copy of the approval. As a result, Drezner's appeal was untimely.¹⁰⁰

In an effort to avoid their untimely appeal, Drezner turns to *Felida*, *Habitat Watch*, and *Nickum*; and asks the Court to rule that even though the City followed all notice requirements and placed a copy of the LBA decision in the City's file, the 21-day appeal period should not have commenced until Drezner had constructive notice of the November 2nd decision.¹⁰¹

In pre-LUPA *Felida Neighborhood v. Clark County*,¹⁰² after determining the County failed to give public notice as required by statute for a subdivision,¹⁰³ the Court of Appeals remanded the case for a determination on whether the Board substantially complied with the notice requirements "more than 30 days before" the appellant filed its writ of review.¹⁰⁴

⁹⁷ CP 76.

⁹⁸ SMC 23.76.018(C) (1).

⁹⁹ CP 44, ¶ 8.

¹⁰⁰ CP 1.

¹⁰¹ Appellants' Opening Brief at 24-30.

¹⁰² *Felida Neighborhood v. Clark County*, 81 Wn. App. 155, 913 P.2d 823 (1996).

¹⁰³ *Id.* at 160-62.

¹⁰⁴ *Id.* at 162.

Like Clark County in *Felida*, Skagit County in *Habitat Watch v. Skagit County* failed to give the required public notice each of the two times the County extended a special use permit to build a golf course.¹⁰⁵ After Habitat Watch filed a public disclosure request and learned the extensions had been granted,¹⁰⁶ Habitat Watch filed a LUPA petition challenging the permit extensions issued five years earlier and a grading permit issued one week earlier.¹⁰⁷ The Supreme Court upheld dismissing the LUPA petition that challenged the permit extensions stating that at the latest, the permit extension decisions were issued when the County made them available in the public disclosure request and the LUPA petition was filed more than 21 days after that.¹⁰⁸

In *Nickum v. Bainbridge Island*,¹⁰⁹ the City determined a building permit application to construct a cell tower was exempt from SEPA review and then issued a building permit to construct the tower.¹¹⁰ After Verizon started construction, Nickum appealed the permit to the hearing examiner who dismissed the appeal as untimely.¹¹¹ The Court of Appeals upheld a

¹⁰⁵ *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 402-03, 120 P.3d 56 (2005).

¹⁰⁶ *Id.* at 403.

¹⁰⁷ *Id.* at 402-04.

¹⁰⁸ *Id.* at 409.

¹⁰⁹ *Nickum v. Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009).

¹¹⁰ *Id.* at 372

¹¹¹ *Id.*

dismissal of the LUPA petition and rejected Nickum’s argument that the 21-day filing period should be equitably tolled:

The LUPA deadline controls access to the trial court’s jurisdiction over LUPA appeals, unlike the 14 day administrative statute of limitations previously discussed with respect to standing [before the Hearing Examiner], and, thus cannot be equitably tolled.¹¹²

Then, citing *Keep Watson Cutoff Rural*,¹¹³ the *Nickum* court held that LUPA “filing deadlines and service on the proper parties are jurisdictional requirements” and “the Nickums’ arguments urging equitable tolling cannot be considered.”¹¹⁴

This Court should reach a similar result as in *Nickum*. First, unlike the public notice requirement in *Fielda* or *Habitat Watch*, but similar to the public notice requirement in *Nickum*—none required, the City was not required by City code or statute to provide Drezner with a copy of the LBA decision and a failure to provide notice as required by code or statute is not at issue here.

Second, equitable tolling does not apply to LUPA’s 21-day-jurisdictional-filing requirement making it immaterial that Drezner exchanged emails with Mr. McKim who “assumed” there was not a

¹¹² *Id.* at 381.

¹¹³ *Id.* at 382; citing *Keep Watson Cutoff Rural*, 145 Wn. App. 31, 38, 184 P.3d 1278 (2008); citing *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 943 P.2d 341 (1997).

¹¹⁴ *Nickum* at 382.

written LBA decision; and Ms. Putnam who was also unaware of the November 2, 2011 written LBA decision when she implied a Master Use Permit would be issued after the LBA was recorded.¹¹⁵

Equitable tolling cannot be applied under the law, or the facts of this case.

E. The City should not be estopped from determining the LBA approval is not a final land use decision.

As discussed above, equitable tolling does not apply to LUPA's 21-day jurisdictional appeal period and Drezner's estoppel or equitable tolling argument should be rejected on this basis alone.

1. *Equitable estoppel cannot apply when Drezner could have examined the LBA file and viewed the November 2nd decision.*

To establish equitable estoppel, Drezner must show: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.

¹¹⁵ CP 118; CP 119; CP 146.

Equitable estoppel is not favored, and a party asserting it must prove each of its elements by clear, cogent, and convincing evidence.¹¹⁶

Central to Drezner's argument is the City "affirmatively misled" Drezner as to the LBA issue date,¹¹⁷ and Drezner "had no way to independently verify the issue date of the LBA and were relying on the City's representations."¹¹⁸

First, no one at the City *affirmatively misled* Drezner. Mr. McKim and Ms. Putnam provided Drezner with their general understanding of LBA permit process. What Drezner should have done is contact Ms. Anderson who is responsible for reviewing LBA applications and approved the Duffus LBA. Second, Drezner had a way to independently verify the existence of the LBA decision—they could have at any time after November 2nd asked to see the LBA file and would have found the LBA decision in the file.

The trial judge was correct: "since the Plaintiff is not a party to the LBA and the City has no duty to inform the Plaintiff of the LBA decision, his requests for information are not part of the LBA or LUPA process, but

¹¹⁶ *Cornerstone Equipment Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 907, 247 P.3d 790 (2011); citing *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318 (1992).

¹¹⁷ Appellants' Opening Brief at 30.

¹¹⁸ *Id.* at 32.

more appropriately analyzed as Public Disclosure requests, and as such are not part of this LUPA proceeding.”¹¹⁹

2. *Equitable estoppel would impair the City’s ability to process LBAs and building permits.*

Drezner incorrectly argues that applying equitable estoppel would not impair government functions.¹²⁰

If equitable estoppel applies to the City’s processing of LBAs and building permits, every time a City employee makes a statement about a permit—when a review was completed or a permit issued—new decision dates and LUPA appeal periods would be established by the employee’s statement, and not by the code and written decisions. As a result, the City’s permit approval date and the LUPA appeal period would be in a state of flux.

In a Type I permit context, LBAs and building permits, there must be a code-based review process—the process the City applied when it reviewed then approved the Duffus LBA on November 2, 2011—and not a process based on an employee statement.

¹¹⁹ CP 153.

¹²⁰ Appellants’ Opening Brief at 33.

F. Determining that Drezner’s appeal is untimely is consistent with LUPA’s purpose.

LUPA’s purpose is to establish uniform appeal procedures and criteria for reviewing land use decisions in order to provide for consistent, predictable, and timely judicial review.¹²¹ Central to this purpose is LUPA’s 21-day jurisdictional appeal period where the courts have consistently determined that a failure to file a petition within the appeal period deprives the reviewing court of jurisdiction and requires the petition be dismissed.¹²²

Contrary to Drezner’s argument that the trial court’s order did not affect LUPA’s purpose¹²³—it did exactly that. By dismissing Drezner’s untimely appeal, the Court followed what is required by statute and case law.

G. The Motion to Dismiss was timely according to the court-issued case schedule.

LUPA provides that jurisdictional issues including an untimely filing or service of the petition must be raised at the initial hearing.¹²⁴

The Order Setting Case Schedule in this case states that: “Motions on jurisdictional and procedural issues shall comply with Civil Rule 7 and

¹²¹ RCW 36.70C.010.

¹²² *Nickum v. City of Bainbridge Island*, 153 Wn. App 366, 382, 223 P.3d 1172 (2009), citing *Habitat Watch*, 155 Wn.2d at 406-07; *Chelan County v. Nykreim*, 146 Wn.2d 904, 932-33, 52 P.3d 1 (2002); *Spice v. Pierce County*, 149 Wn. App. 461, 467, 204 P.3d 254 (2009); *Keep Watson Cutoff Rural v. Kittas County*, 145 Wn. App. 31, 37-38, 184 P.3d 1278 (2008).

¹²³ Appellants’ Opening Brief at 34.

¹²⁴ RCW 36.70C.080(3).

King County Local Civil Rule 7, except that the minimum notice of hearing requirement shall be 8 days.”¹²⁵

The City and Duffus filed their joint motion to dismiss nine days before the hearing and complied with the case schedule order and the controlling local rule. Further, there is nothing in LUPA that states that a motion to dismiss for lack of jurisdiction must be filed under CR 56.

The motion was timely filed and Drezner’s argument should be rejected.

V. CONCLUSION

The City’s November 2, 2011 decision that approved the Duffus LBA and determined the LBA conformed with all applicable code established Duffus’s rights under the LBA review process and was the City’s final land use decision triggering LUPA’s 21-day appeal period.

Further, the 21-day period should not be equitably tolled when case law has rejected equitable tolling of LUPA’s appeal period, and Drezner would have learned of the decision by examining the LBA file.

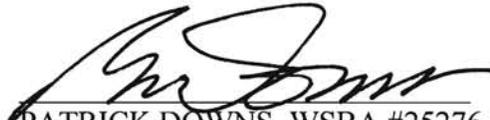
¹²⁵ CP 121 at 2:14-19.

For all of the above-argued reasons, the City respectfully requests the Court uphold the dismissal of Drezner's untimely petition.

DATED this 5th day of September, 2012.

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CERTIFICATE OF SERVICE

I certify that on the 5th day of September, 2012, I sent a copy of this document to the following parties in the manner indicated below:

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