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No. 74528-0-1

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

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JAMES CHUMBLEY, et al,

Appellants,

v.

SNOHOMISH COUNTY, et al,

Respondents.

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**APPELLANTS' REPLY TO HEALTH DISTRICT'S OPPOSITION**

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## INTRODUCTION

The Snohomish County Health District (the “District”) does not deny that the County Department of Planning and Development Services (the “County”) failed to enforce County Land Disturbing Activities (“LDA”) and Critical Areas ordinances, resulting in substantial, and potentially dangerous, grading activities taking place on the steep bluff, in a historic landslide zone, directly above the state’s primary north-south commuter railroad tracks (the “OSS Grading Activities”).

Despite this concession, the District contends that there is no recourse for the Appellants or the public because, by issuing a Building Permit on Lot 36, where the house was to be located, the County created a “natural inference” that it did not intend to enforce its ordinances with respect to the OSS Grading Activities on Lots 60 and 61, where the on-site sewage system (“OSS”) was to be located. Thus, according to the District, the County made an “inferential” land use decision under the Land Use Petition Act (“LUPA”) when it issued the Building Permit, and because Appellants did not challenge that “inferential” decision within 21-days, they were barred from subsequently challenging express decisions addressing the County’s failure. The District’s argument fails as a matter of law and fact.

As an initial matter, with one narrow exception, land use decisions may not be “issued” under LUPA by implication, “natural inference,” or mere “reference.”<sup>1</sup> The *only* instance in which a land use decision may be “issued” by implication is when the decision is “necessarily implied” before another express written decision may be made. Under *Samuel’s Furniture*<sup>2</sup> and *Twin Bridge*,<sup>3</sup> a decision is not “necessarily implied” unless the local jurisdiction had *no authority* to make the express written land use decision without having first decided the specified preliminary issue. That is not the case here, where the County had clear authority to issue the Building Permit *before* conducting LDA and Critical Areas review for the OSS Grading Activities.

In addition to being expressed in the County code, the County’s authority to issue the Building Permit *prior* to having made such a determination regarding the OSS Grading Activities is made explicit on the face of the Building Permit itself which states that “[a]ll activity authorized by this permit shall comply with Chapters 30.63A and 30.63B SCC,” *e.g.*, the Land Disturbing Activity ordinance. CP 690 (emphasis added). In spite

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<sup>1</sup> *Durland v. San Juan Cnty.*, 174 Wn. App. 1, 13-14, 298 P.3d 757, 770, 779–80 (2012) (“*Durland I*”) (quoting *Vogel v. City of Richland*, 161 Wn. App. 770, 779–80, 255 P.3d 805 (2011)). See also *Habitat Watch v. Skagit Cnty.*, 155 Wn. 2d 397, 408 n. 5, 120 P.3d 56, 61 (2005) (land use decision must be “memorialized such that it is publicly accessible”).

<sup>2</sup> *Samuel’s Furniture, Inc. v. State Dep’t of Ecology*, 147 Wn. 2d 440, 54 P.3d 1194 (2002).

<sup>3</sup> *Twin Bridge Marine Park, L.L.C. v. State Dep’t of Ecology*, 130 Wn. App. 730, 125 P.3d 155 (2005).

of substantial argument regarding this issue in Appellants' Brief (*see* AB 5, 8-9, 32, 36), the District's response is conspicuously silent on this critical issue. The District's silence is unsurprising, as the condition completely undermines its position.

Even had there *not* been an explicit statement in the Building Permit regarding required future compliance with the County's own ordinances (which there is), and even if an "implied" decision *were* sufficient to trigger the LUPA limitations period (which it is not), the District's assertion that the County's Building Permit constituted an "inferential decision" regarding the application of, or need for, an LDA permit and Critical Areas review for the OSS Grading Activities still fails in light of the relevant legal framework and the record in this case.

Like the County, the District relies on the fact that the Building Permit required the County to confirm that the District had found an "approved means of waste disposal." Based on that approval under an entirely different regulatory scheme, which the District admits does not address LDA or Critical Areas compliance, the District argues that the public was on "inferential" notice that the County did not intend to enforce its own ordinances. The District's argument is without merit.

For the reasons set forth below, under the specific language of the regulatory scheme and admitted facts in this case, the County's Building

Permit decision for the structure on Lot 36 did not include, and could not have included, a “necessarily implied” determination that the County would *not* apply its LDA and Critical Areas ordinances to grading on Lots 60-61. The evidence makes clear that the County’s decision not to enforce its ordinances was not finalized, memorialized, and “issued” as a final land use decision under LUPA until months *after* the Building Permit was issued, either when the County closed its enforcement action, or when the County issued its Certificate of Occupancy. It is undisputed that Appellants’ LUPA petition was filed and served within 21 days of both. Accordingly, Appellants’ LUPA petition was timely.

For all the reasons set forth herein, Appellants respectfully request that the Court reverse the trial court’s order dismissing Appellants’ case and rule that Appellants’ Petition is timely, as a matter of law.

### **ARGUMENT**

#### **I. THE DISTRICT CONCEDES THAT THE COUNTY FAILED TO PERFORM REQUIRED LDA AND CRITICAL AREAS REVIEW, AND THE COUNTY WAS NOT PREEMPTED FROM DOING SO**

Unlike the County, the District unequivocally concedes in its response brief that the County was required to perform LDA and Critical Areas analysis; was not preempted from doing so; and failed to do so. District’s Respondent’s Brief (“DRB”) 4-5, 12-14.

**II. DISTRICT CONCEDES THAT NO EXPLICIT DECISION REGARDING LDA AND CRITICAL AREAS APPROVAL FOR OSS GRADING ACTIVITIES WAS INCLUDED IN THE BUILDING PERMIT**

In its response brief, the District does not address, and therefore concedes, the obvious fact (which is expressly admitted by the County) that the County's Building Permit for Lot 36 itself did not expressly authorize installation of the OSS system or any of the OSS Grading Activities on Lots 60 and 61. The District further admits that the County made no explicit consideration of the need for LDA and Critical Areas review of the OSS Grading Activities at any time *before* the Building Permit was issued. DRB 4, 28. Indeed, the *only* evidence in the record is that the County's first consideration of the need for LDA and Critical Areas review (and its accompanying "preemption theory") came months *after* the Building Permit had been issued. CP 155 at ¶¶ 6, 8, 9.

No final land use decision regarding the OSS Grading Activities was ever "memorialized" and "issued" by the County at the time of the Building Permit. RCW 36.70C.020(2), RCW 36.70C.040(4). Accordingly, the District's arguments fail unless it can prove that, by issuing the Building Permit, the County made a "necessarily implied" determination that no Land Disturbing Activity and Critical Areas analysis on Lots 60 and 61 would be required, and that such a "necessarily implied" determination should have been known to a diligent member of the public. *Samuel's*

*Furniture, Inc.*, 147 Wn. 2d at 451. For the multiple reasons set forth below, the District has not and cannot make that showing.

**III. NO “NECESSARY DETERMINATION” REGARDING OSS GRADING ACTIVITIES ON LOTS 60 AND LOTS 61 WAS MADE AT THE TIME OF THE BUILDING PERMIT**

Having conceded that no explicit decision regarding OSS Grading Activities was ever issued, the District argues that a “determination by inference” that permitting for the OSS Grading Activities on Lots 60 and 61 would not be required was made when the Building Permit issued, and that “a challenge to the OSS approval because of lack of critical areas or LDA review naturally flows from a challenge to the building permit.” DRB 25-31. This logic fails for several independent reasons.

**A. A “Natural Inference” or “Inferential Decision” Is Insufficient Under LUPA**

The District repeatedly claims that there was a “*natural inference*” that no LDA or Critical Areas analysis would be performed on Lots 60 and 61, or an “*inferential decision*” to that effect. DRB 4, 5, 31, 32, 39. Even were this true (which it is not, as set forth in Sections III(B)-(D)), neither a “natural inference” nor an “inferential decision” is sufficient to constitute the “issuance” of a “final” land use decision under LUPA.

As set forth in detail in Appellants’ Brief, LUPA requires that, in order to serve as a trigger for the LUPA statute of limitations, a land use

decision must be “final” and must be “issued” as those terms are defined in LUPA. *See* AB 17-20 and citations therein. A document purporting to be a land use decision must also “memorialize the terms of the decision, not simply reference them, in a tangible and accessible way so that a diligent citizen may ‘know whether the decision is objectionable or, if it is, whether there is a viable basis for a challenge.’” *Durland I*, 174 Wn. App. at 13-14 (quoting *Vogel v. City of Richland*, 161 Wn. App. 770, 779-80, 255, 255 P.3d, 805). *See also* AB 20-22 and citations therein.

There is only one exception to the requirement that LUPA decisions must be expressly memorialized in the public record before they may be “issued” as a final land use decision. This exception applies only when one land use decision “*necessarily implied*” another land use decision. *Samuel’s Furniture, Inc.*, 147 Wn. 2d at 451. A decision is not “necessarily implied” unless an express, memorialized land use decision could not have been “issued” without the local jurisdiction having first reached the necessarily-implied determination. *Id.*

In *Samuel’s Furniture*, for instance, the Court found that the issuance of a fill and grade permit “necessarily required a determination that the project was outside the shoreline jurisdiction.” *Id.* As the Court explained, this is “because WAC 173-27-140 prohibits local governments from authorizing shoreline development that is inconsistent with the SMA.”

That regulation explicitly states that “[n]o *authorization* to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.” WAC 173-27-140 (emphasis added).

Accordingly, by *authorizing* the permit, the county in *Samuel’s Furniture* had necessarily and explicitly either made a determination that the development was consistent with the SMA or that it was not “on a shoreline.” The county simply did not have *authority* to issue the permit without having made one of those two determinations. *Samuels Furniture, Inc.*, 147 Wn. 2d at 451.

The holding in *Samuel’s Furniture* does not broadly extend to all “inferential decisions,” as suggested by the District. While one court of appeals case uses the term “inferential decision,” it does so only in *dicta* to describe the rule announced by *Samuel’s Furniture*. See *Twin Bridge Marine Park, L.L.C.*, 130 Wn. App. at 743. However, *Twin Bridge* reached its holding based on the same “necessarily implied” test invoked by *Samuel’s Furniture*, and under the exact same regulatory scheme as *Samuel’s Furniture* – the Shoreline Management Act. *Id.* at 742 (“Because WAC 173–27–140 prohibits a local government from authorizing shoreline development unless it is consistent with the SMA and the local

government's shoreline master program, the issuance of the building permits necessarily required a determination by the County that [the] new plans were consistent with the already existing shoreline permits.”).

Rather than confronting facts that distinguish *Samuel's Furniture* and *Twin Bridge*, the District attempts to oversimplify the facts and law, and even encourages this Court to join the trial court in oversimplifying the issue of what constitutes a “necessarily implied” decision. *See* DRB 39 (asserting that trial court “correctly simplified the issue”). When the facts and law surrounding the issue of a “necessarily implied” decision are appropriately considered rather than “simplified,” it is clear that the County did not make such a decision when it issued its Building Permit.

This result is also supported by LUPA's policy of consistency and predictability in the land use process. *See* RCW 36.70C.010. By treating a so-called “natural inference” or “inferential decision” as a final LUPA decision, where the result is not explicitly *mandated* by the statutory scheme, the District's position would allow local governments to adopt a wide variety of inconsistent approaches to such “inferred” decisions, and would also encourage developers to make all sorts of arguments about the types of activities they believe are “implied” by local land use decisions, undermining the goal of consistency. The District's position would leave even diligent members of the public wondering whether a “final” land use

decision addressing a particular activity had been “issued” by implication, undermining the goal of predictability and encouraging filing of wasteful preventative appeals. Such a vague standard is inconsistent with rules for issuing final land use decisions under LUPA case law, is inconsistent with LUPA’s statutory goals, would turn traditional notions of notice on their head, and cannot be sufficient to afford the public due process.

**B. Explicit Condition In Building Permit Requires Future Compliance With LDA Ordinance, And Establishes That the County Did Not Make a “Necessarily Implied” Determination To Disregard Ordinances**

As a fundamental matter, the District’s argument that the County made an “inferential decision” (let alone a “necessary inferential” determination) regarding the OSS Grading Activities when it issued the Building Permit is directly contradicted by the face of the Permit itself.

Among the special conditions listed on the Building Permit is an explicit requirement that “[a]ll activity authorized by this permit shall comply with Chapters 30.63A and 30.63B SCC,” e.g., the Land Disturbing Activity ordinance. CP 690 (emphasis added). In another condition, the Building Permit was explicitly subject to a separate application for a LDA permit on Lot 36, which was reviewed and approved separately from the Building Permit. CP 690, CP 234. As set forth below, nothing in the County code (or any other authority cited in these proceedings) required the

County to make any determination regarding land disturbing activities on Lots 60 and 61 before the County could issue the Building Permit. Accordingly, the County's Building Permit decision did not authorize or "necessarily imply" the authorization of any grading or other land disturbing activities on Lots 60 and 61, and the decision expressly deferred any issues relating to land disturbing activities to a separate, *future* process: the County's LDA process.<sup>4</sup>

Where a permittee "obtains a permit and then proceeds to violate the conditions of the permit," LUPA does not preclude a third party who did not bring a LUPA action challenging the initial permit decision from later bringing a challenge based on the permittee's subsequent noncompliance with the permit's conditions. *Samuel's Furniture, Inc.*, 147 Wn. 2d at 456.

Despite substantial argument in the Appellants' brief regarding the *explicit* condition for *future* compliance with the LDA ordinance (*see* AB 5, 8-9, 32, 36), the District's response brief completely ignores this dispositive issue. It does so because the existence of the express condition on the face of the Building Permit undermines the District's entire position. To reach the conclusion that the Building Permit constituted a "final land use

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<sup>4</sup> As is made plain by the express condition in the building permit, as well as in the relevant portions of the ordinances themselves, LDA permits can be required at any time, either before *or after* the building permit is issued. Indeed, the County did ultimately require LDA permits on other portions of work performed on Lots 60 and 61 long after the Building Permit was issued. *See* CP 251-252, 254-255, 265-272.

decision” that the County *did not intend to require LDA analysis*, in spite of the express condition in the Building Permit *requiring future compliance with the LDA code*, the Court would need to make a number of substantial, and highly improbable assumptions. Notably, the Court would need to assume that a diligent citizen would ignore the express condition on the face of the Building Permit (which explicitly requires *future* compliance with the County’s LDA code), and instead somehow assume that a decision by the County had already been made to ignore that express condition based upon the County’s newly-concocted, undocumented, and legally incorrect preemption theory.<sup>5</sup> Such an assumption would be illogical, at best, and cannot form the basis for the issuance of a final land use decision within the meaning of LUPA. *See, e.g., Vogel*, 161 Wn. App. at 780 (“until its scope and terms have been memorialized in some tangible, accessible way, even the most diligent citizen cannot know whether the decision is objectionable or, if it is, whether there is a viable basis for a challenge”).

Here, the explicit condition on the face of the Building Permit made clear that all work on the project would be subject to *future compliance* with the LDA ordinance. CP 690. Accordingly, the Building Permit could not

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<sup>5</sup> The *only* evidence in the record is that the County’s “preemption theory” was an after the fact justification for the County’s failure to address the LDA and Critical Areas Review on Lots 60 and 61. CP 155 at ¶¶ 6, 8, 9. Accordingly, at the time the Building Permit issued, it is likely that even the County could not have even predicted this result.

have constituted a “final land use decision” that the County *did not intend to comply* with the LDA ordinance. Indeed, had Appellants attempted to bring a LUPA petition challenging the County’s failure at the time of the Building Permit, it would certainly have been deemed premature and unripe, in addition to being misdirected at the wrong approval process. *See* RCW 36.70C.040; *Durland I*, 174 Wn. App. at 13-14 (“It would have been premature, then, for him to bring a LUPA petition appealing the compliance plans when it was not apparent that Heinmiller would proceed in an objectionable manner.”)

**C. Statutory Scheme Also Establishes That the County Did Not Make a “Necessarily Implied” Determination To Disregard LDA And Critical Areas Ordinances**

Even had the Building Permit not had an explicit requirement that the County follow its LDA Ordinance (which it did), and even had the District claimed that the County had made a “necessarily implied” determination rather than just an “implied determination” (which it did not), the District’s argument would still fail. The District’s argument incorrectly assumes that, when the Building Permit was issued, “*the project* was approved to move forward.” DRB 29. The Building Permit authorized the Developer to build the residential structure, but it did not represent an overarching County approval of the larger residential “project,” which can only be approved through separate County authorizations to conduct

specific discrete activities, such as the construction of structures and land disturbing activities.

The County code makes it clear that, even when multiple permit applications are “consolidated” into a single review process, “[a] final decision on certain consolidated permit applications may be preliminary and contingent upon approval of other permits or actions considered in the consolidated permit process.” SCC 30.70.120(5).<sup>6</sup> Indeed, the County code provides that “[a] land disturbing activity permit shall only be issued *after* . . . [s]tormwater site plan approvals and *all other permits and approvals* required by the county for site development *have been obtained*.” SCC 30.63B.050(1)(b) (emphasis added).

Thus, contrary to the District’s argument, the law does not require the County to make a final determination regarding all “project” issues at the time of Building Permit issuance. Instead, the County code expressly anticipates the issuance of LDA permits *after* building permits and all other permits have been issued. The code is consistent with the record, which confirms that the County’s final determination regarding “project” issues

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<sup>6</sup> It is unclear whether the County “consolidated” permits for the project at issue in this appeal. Even if the permits were not consolidated, however, the same principle would apply (and perhaps even more so in the context of un-consolidated permits): some County decisions on certain permit applications may be “preliminary and contingent upon approval of other permits or actions considered,” which means that the County is not required to simultaneously issue all approvals needed for a particular project.

for the Developer's project, including the question of whether the County would require LDA and Critical Areas review for the OSS Grading Activities on Lots 60 and 61, was not made until the County conducted its final inspection and issued its Certificate of Occupancy.

More fundamentally, the County's assertion flies in the face of law defining a final land use decision under LUPA. *See Durland I*, 174 Wn. App. at 13-14 (a final "land use decision" "should memorialize the terms of the decision, not simply reference them, in a tangible and accessible way so that a diligent citizen may 'know whether the decision is objectionable or, if it is, whether there is a viable basis for a challenge.'") (quoting *Vogel*, 161 Wn. App. at 779-80).

In its response brief, the District completely ignores the concept articulated in *Vogel* and *Durland I* that the terms of a land use decision must be fully "memorialized" before it can be "issued" under LUPA. Indeed, the District goes one step further, suggesting (without citing any relevant case law) that the case law "*does not mean* that the development permit on its face must spell out all that it did." DRB 30 (citing *Twin Bridge* without addressing *Vogel* or *Durland I*). Contrary to the District's suggestion, the fact that the *Twin Bridge* court (in *dicta*) used the phrase "reasonable notice to Ecology" does not undermine the subsequent holdings in *Vogel* or *Durland I* regarding the need to memorialize the terms of a land use

decision before it can be “issued” under LUPA. *See Twin Bridge Marine Park, L.L.C.*, 162 Wn. 2d at 829 (mentioning “reasonable notice” in the narrow context of a “necessarily-implied” SMA decision).<sup>7</sup> The Court should reject the District’s dangerous assertion that development permits need not “spell out” their terms, and should reaffirm the requirement articulated in *Vogel* and *Durland I* that a land use decision’s terms must be fully “memorialized” before it can be “issued” under LUPA. Moreover, where a local jurisdiction sets forth a process for making a land use decision, the land use decision is not final unless the jurisdiction has complied with the process and the entire process is complete. *Durland I*, 174 Wn. App. at 13-14.

Here, as explained above, the County’s code expressly anticipated that LDA permits would be issued sometime after the Building Permit had been issued. SCC 30.63B.050(1)(b). Thus, the County’s issuance of the Building Permit cannot be seen as the culmination of the LDA review process for the Developer’s residential project because, under the code, the entire process of reviewing land disturbing activities associated with the project was not yet complete.

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<sup>7</sup> Nor does the district actually cite to the record documents that purportedly would have directed even a diligent citizen down the convoluted path to conclude that the County “impliedly” did not intend to enforce its own LDA and Critical Areas ordinances, in spite of the County’s explicit statements to the contrary on the face of the Building Permit.

The fallacy in the District’s argument can be most clearly seen on page 20 of its brief. At one point on that page, the District asserts that the Building Permit “placed all on notice of the extent the County had conducted critical area and LDA review of the Begis project.” DRB 20. In the previous paragraph of that same page, however, the District admits that the Developer *subsequently* “submitted an application for LDA permit dated August 5, 2015” for another component of the same project. *Id.* If the Building Permit had represented the full extent of possible LDA and Critical Areas review by the County, there would have been no need for the Developer to submit a subsequent LDA application because, as has been incorrectly suggested by the District and the County, the Building Permit would have given the Developer a “vested right” not only to construct the residential structure but also to construct the OSS, occupy the residence, and start using the OSS. As the record and the County code confirm, however, the County’s issuance of the Building Permit did not limit or otherwise affect the scope of the County’s ability to enforce its LDA and Critical Areas ordinances. Instead, the County simply chose not to enforce its ordinances, and that choice was not memorialized until much later in the permitting process.

**D. Recognition Of “Authorized Means Of Waste Disposal”  
Was Not A “Natural Inference” Or “Inferential Decision”**

**That LDA And Critical Areas Analysis Would Not Be Required**

Contrary to the District's argument, nothing in the County code required the County to address issues related to LDA and Critical Areas review on Lots 60 and 61 (or for that matter on Lot 36 itself) before issuing the Building Permit for Lot 36. As noted above, the code expressly anticipates that, consistent with the County's practice, different land use decisions authorizing different components of a project may be issued at different times, and that LDA permits will not be issued until "after" all other approvals are issued. *See* SCC 30.70.120(5); SCC 30.63B.050(1)(b).

While it is true that many times (and perhaps even typically) the County would have conducted LDA and Critical Areas analysis before issuing a Building Permit and issued the permits simultaneously, that is not always the case. Because future LDA compliance was a possibility (and was not "necessarily implied" by the Building Permit), LUPA case law does not support the District's suggestion that the public should have assumed, at the time the County issued the Building Permit, that the County would refuse to conduct LDA and Critical Areas analysis in the future. As noted above, it is not enough to "simply reference" the terms of a land use decision; instead, the written document must "memorialize the terms of the decision . . . in a tangible and accessible way so that a diligent citizen may

‘know whether the decision is objectionable or, if it is, whether there is a viable basis for a challenge.’” *Durland I*, 174 Wn. App. at 13-14. That the County *could* require LDA and Critical Areas analysis *after* the Building Permit was issued is made plain by both the statement on the face of the Building Permit that “[a]ll activity authorized by this permit shall comply with Chapters 30.63A and 30.63B SCC,” and by the County’s subsequent requirement that the Developer submit an LDA with respect to other work performed on Lots 60 and 61. CP 251, 254, 265.

Nor does the mere fact that the County recognized the District’s issuance of an “approved means of waste disposal” somehow “necessarily imply” that the County would not perform its obligations under its own LDA and Critical Areas ordinances. The County’s code and the historic practice of the County and the District confirm that an “approved means of waste disposal” simply means, as the District concedes, that an OSS application had been approved by the District, indicating that the proposed plans conform to the District’s internal “technical/functional” requirements. WAC 246-272A-0200(4)(c), DRB 7.

The County’s confirmation of the District’s OSS application approval does not “imply” (or even indirectly suggest) that the County would decline to enforce its own LDA and Critical Areas ordinances, which address entirely different sets of concerns. Notably, while the District

approved the OSS application in February of 2015, before the Building Permit was issued, the District did not issue its “Permit to Install an Onsite Sewage Disposal System (Permit #37915)” (the “OSS Permit”) until June 11, 2015, and the record confirms that the County and the District continued to discuss the question of whether the County would enforce its LDA and Critical Areas ordinances long after the District approved the OSS application and issued the OSS Permit. *See* CP 400-403 at ¶ 7; CP 257-260. These basic facts contradict the District’s repeated suggestion that the Building Permit somehow included an implied resolution of that issue.

Simply stated, the District has offered no authority or evidence that any determination regarding an “approved means of waste disposal” required any analysis, let alone a “necessarily implied” determination, regarding the County’s compliance with its own LDA and Critical Areas ordinances. As a result, this case is easily distinguishable from *Samuel’s Furniture* and *Twin Bridge*. In *Samuel’s Furniture*, the Court found that the issuance of a fill and grade permit “necessarily required a determination that the project was outside the shoreline jurisdiction.” *Samuel’s Furniture, Inc.* 147 Wn. 2d 451. As set forth above, the court’s “necessarily implied” statement was linked directly to the SMA’s unique regulatory framework under WAC 173-27-140, which prohibits local governments from authorizing shoreline development that is inconsistent with the SMA. *Id.*

*See also Twin Bridge Marine Park*, 130 Wn. App. at 742. Accordingly, in *Samuel's Furniture* and *Twin Bridge*, the county was ***without authority*** to issue the fill and grade and building permits, ***unless and until*** it had made a determination that the project was not on a shoreline or was in compliance. Because the County had issued the permit, it had necessarily made such a determination.

Under the statutory scheme here, on the other hand, there is no similar limitation in the relevant Snohomish County ordinances regarding *when* the County's determination regarding LDA and Critical Areas analysis must be made. Indeed, consistent with the Code's requirement that LDA permits be issued "after" all other approvals, the face of the Building Permit itself was explicit regarding anticipated *future* compliance with the County's Land Disturbing Use ordinance.

Accordingly, the County's determination that there was an "approved method of waste disposal" at the time the Building Permit issued did not require the County to make a "necessarily implied" determination regarding whether the County would comply with its own LDA and Critical Areas ordinances. As the record makes clear, this determination was made at a much later date. CP 155 at ¶¶ 6, 8, 9.

**E. Public Policy Cannot Tolerate Cutting Off Legitimate Disputes Where No Notice Was Provided To The Public**

The position advocated by the District and the County would allow local governments and developers to assert, after the LUPA appeal period has expired, that an express land use decision authorizing one type of activity actually implied the authorization of other activities. As this case confirms, the County's position would facilitate the evasion of public review of important issues such as whether an on-site septic system is consistent with the County's regulations governing landslide hazard areas, wetlands, critical aquifer recharge areas, and other critical areas.

If adopted, the District's position would place an unreasonable burden on LUPA petitioners. Rather than merely asking LUPA petitioners to raise objections to specific permitted activities when the first County permit is issued authorizing those activities (such as when a fill and grade permit is issued, as in *Samuel's Furniture*), the District would ask LUPA petitioners to raise objections to specific activities that were *never authorized at all*. The District's position turns traditional notions of notice and due process on their head, and unreasonably expects the public to anticipate that complex legal positions that *might* be articulated by government lawyers at some point in the future, requiring the public to file anticipatory appeals of permits authorizing specific activities because those permits might later be deemed to have implied the authorization of other, unspecified activities. That cannot be the law.

The District's position, which is inconsistent with the *Samuel's Furniture* line of cases and with LUPA's purpose "to provide *consistent, predictable, and timely* judicial review," should be rejected. RCW 36.70C.010 (emphasis added).

**IV. LUPA PETITION WAS FILED WITHIN 21 DAYS OF COUNTY'S CLOSING ITS ENFORCEMENT ACTION AND ISSUANCE OF CERTIFICATE OF OCCUPANCY**

The District spends several pages arguing that the County's Enforcement Action against the Developer was aimed at Grading Activities other than the OSS Grading Activities. DRB 19-20, 34-36. The evidence suggests that the Enforcement Action was initially opened specifically to address OSS Grading Activities, and the decision to omit the OSS Grading Activities from the scope of the Enforcement Action was only made later, after the County met with the District and "put this issue" in the District's jurisdiction. CP 106, CP 220, CP 251-260, CP 262-263, CP 265-272, CP 274-275; *see also* AB 11-15, 39-42.

Yet even accepting the District's contention, it would not change the result here. If the closing of the Enforcement Action was not a "final land use decision" that the County would not require LDA and Critical Areas analysis, then the first "final land use decision" addressing the subject was "issued" when the County "finalized" its permit (which it concedes is the

equivalent of issuing its certificate of occupancy). CP 670 at ¶ 3.15, CP 288-289, CP 156 at ¶ 10; *see also* AB 15-17, 42-43.

Whether the first “final land use decision” was the closing of the Enforcement Action or whether it was “finaling” of the permits does not, matter because both events occurred within twenty-one days of Appellants filing their LUPA Petition, and were thus timely. *See* AB 39-43.

### CONCLUSION

For all the reasons set forth herein, Appellants respectfully request that the Court reverse the trial court’s order dismissing Appellants’ case and rule that Appellants’ Petition is timely, as a matter of law.

Dated May 31, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Michael Chait" and "Bradley P. Scarp", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

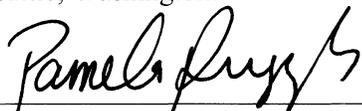
I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp , PLLC, whose address is 1218 Third Avenue, Suite 2500, Seattle, Washington, 98101.

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

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

DATED this 31st day of May, 2016, at Seattle, Washington.

  
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Pamela Ruggles, Paralegal