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No. 97910-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONFEDERATED TRIBES AND BANDS
OF THE YAKAMA NATION,

Petitioner,

v.

YAKIMA COUNTY, GRANITE NORTHWEST, INC., FRANK
ROWLEY, and THE ROWLEY FAMILY TRUST,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals applied RCW 36.70C.040(4)(b), a clear and unambiguous statute, to the facts presented in this case and correctly concluded that the Confederated Tribes and Bands of the Yakama Nation's ("Yakama Nation") Land Use Petition Act, RCW 36.70C.005 *et seq.* ("LUPA"), petition was time barred. The Court of Appeals applied well-settled principles of law to dismiss this untimely appeal, and therefore, no basis for discretionary review exists under RAP 13.4(b).

LUPA requires that petitions be filed and served within 21 days of the issuance of the land use decision being appealed. Compliance with this requirement is strict. Land use decisions that are not timely filed must be dismissed. In the case at bar, the Yakama Nation filed their LUPA petition one day late. The only two issues before the Court of Appeals below were whether (1) the Board of Yakima County Commissioners ("Board") acted in a quasi-judicial capacity when it conducted a closed record appeal of a local land use decision and (2) the resolution denying the Yakama Nation's administrative appeal constituted a "land use decision" for purposes of RCW 36.70C.040(4)(b). The Court of Appeals found that the Board did act in a quasi-judicial manner when it conducted a closed record appeal of a local land use decision and that RCW 36.70C.040(4)(b) was

the controlling statute of limitations. Therefore, the Court of Appeals held that the Yakama Nation's appeal was time-barred and must be dismissed.

The decision below does not conflict with any decision of this Court or the Court of Appeals. The decision below does not "subvert the Land Use Petition Act" or "upend precedent on statutory construction" as alleged by the Yakama Nation. The decision below does not raise any issues of substantial public interest.

Rather, the Court of Appeals accepted review of a wrongly decided Superior Court decision under RAP 2.3(b)(1)'s obvious error standard and rectified an obvious error. There is no basis for discretionary review under RAP 13.4(b). The Petition should be denied.

II. RESTATEMENT OF ISSUES

1. Does the Yakama Nation's Petition for Review establish that the decision of the Court of Appeals in this case conflicts with *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) or any other decision of the Supreme Court?

2. Does the Yakama Nation's Petition for Review establish that the decision of the Court of Appeals in this case conflicts with *King's Way Foursquare Church v. Clallam Cnty.*, 128 Wn. App. 687, 116 P.3d 1060 (2005) or *Northshore Inv'rs, LLC v. City of Tacoma*, 174 Wn. App. 678, 301 P.3d 1049 (2013) or any other decision of the Court of Appeals?

3. Does the Yakama Nation's Petition for Review establish that the decision of the Court of Appeals in this case involves an issue of substantial public interest that should be determined by the Supreme Court?

III. COUNTERSTATEMENT OF THE CASE

A. Administrative Proceedings

On April 7, 2017, after nearly two years of public comment, three preliminary threshold Mitigated Determinations of Non-Significance ("MDNS") under the State Environmental Policy Act, Chapter 43.21C RCW ("SEPA"), and multiple revisions to mitigation measures that would be imposed on the project,¹ the County issued the Final MDNS and a Type 2 Conditional Use Permit ("CUP") allowing the expanded use of Granite's existing quarry east of Selah, Washington, on the south side of Interstate 82. CP 34-39, 65-68, 73, 90.

¹ The Yakama Nation alleges the County granted Granite a permit to mine within the confines of its ancestral burial grounds. Pet. at 3-4. These allegations run to the merits of the Yakama Nation's untimely LUPA petition, which the Court of Appeals did not reach. As the Hearing Examiner found below, no portion of the Expansion Area covered by the CUP decision is designated as a "cemetery" or "burial grounds," as those terms are used in the state archeological laws. CP 59-60. No "burial grounds" will be disturbed by this expansion, as the County has required that any archaeological resources that reveal evidence of human remains shall not be disturbed. *Id.* The County has also imposed mitigation that requires any artifacts (not otherwise protected by Washington Department of Archaeology and Historic Preservation permitting requirements) to be "documented, collected, and identified in accordance with best practices." CP 51.

On April 21, 2017, the Yakama Nation filed an administrative appeal of the CUP with the County Planning Division to be heard by the Hearing Examiner. CP 29. After a six-month-long open-record proceeding that included two rounds of prehearing motions, written discovery, depositions, and a hearing on the merits, the Hearing Examiner affirmed the County's CUP Decision, subject to further administrative review by the Board. CP 28-63.

On February 13, 2018, the Yakama Nation appealed the Hearing Examiner's decision to the Board of Yakima County Commissioners ("Board"). CP 227. This appeal was taken pursuant to YCC 16B.09.050(1) (2017),² which authorized the County legislative body (the Board) to conduct a closed record quasi-judicial review of the Hearing Examiner's decision. The County Planning Division transmitted the record before the Hearing Examiner and the transcript of the open-record hearing to the Board for review. CP 25, 256. The Board subsequently reviewed the record and thereafter notified the clerk that it was prepared to schedule a closed-record public meeting, as required by YCC 16B.09.050(1). CP 256. The purpose of the public meeting was, pursuant to YCC 16B.09.050

² Title 16B.09 of the Yakima County Code was amended during the pendency of the administrative appeal in this case by Ordinance No. 7-2017. This brief cites to the former version of the code. The applicable portions of the former version of the 2017 Yakima County Code are attached hereto as Appendix 1.

(2017), to render its decision or, at its election, the Board could request further briefing and hear oral argument at a public hearing. Resp't. App. 1 at 5-6.

As was its prerogative under YCC 16B.09.050 (2017), the Board, unanimously upheld and affirmed the Hearing Examiner's decision at the public meeting on April 10, 2018. CP 25-26. Counsel for the Yakama Nation was present. RP 26:9. The Board's quasi-judicial review was then concluded. The Board's written decision Resolution 131-2018 (the "Resolution") was signed and dated on April 10, 2018. CP 25-26. The Resolution states, in relevant part:

WHEREAS, the record of the open record appeal hearing and transcripts were provided to the Board of County Commissioners (BOCC) for review in accordance with Yakima County Code 16B.09.055; and

WHEREAS, at a public meeting with the BOCC on April 10, 2018, the BOCC decided to affirm the Hearing Examiner's decision in accordance with Yakima County Code 16B.09.055(3); and

NOW, THEREFORE, the Decision of the Hearing Examiner in APL2017-00003 is affirmed. The appeal of the Yakama Nation (under APL2018-00001) is denied.

Id. On April 10, 2018, the Resolution became a final administrative action, ripe for judicial review.

Three days later, on April 13, 2018, Noelle Madera, Senior Project Planner in the County's Planning Division, sent a transmittal letter to parties of record enclosing a copy of the Resolution. CP 24. This letter refers to the decision *made by the* Board on April 10th. The letter does not purport to be the decision of the Board:

On April 10, 2018, the Board of County Commissioner's (BOCC) *held* a public meeting in regards to your appeal (APL2018-00001) to decide whether to affirm the Hearing Examiner's decision or hold a closed record hearing. *The BOCC unanimously decided* to affirm the Hearing Examiner's decision and *signed Resolution 131-2018, which is attached for your records*. YCC 16B.09.050(1)(a) requires written notification of this decision. At this point, all administrative appeals have been exhausted. Please feel free to contact me if you have any questions at 509-574-2300.

Id. (emphasis added). On May 2, 2018, 22 days after the passage of the Resolution, the Yakama Nation filed their LUPA petition in Yakima County Superior Court, challenging the Resolution. CP 1-20. That same day, the Yakama Nation also served a copy of the LUPA petition on the County Auditor and Granite. CP 93-94.

B. The Trial Court's Ruling

On August 3, 2018, Respondents filed a Motion to Dismiss for Lack of Jurisdiction the Yakama Nation's LUPA petition on the grounds that the 21-day statute of limitations established by RCW

36.70C.040(4)(b) had run. CP 95-110. Yakima County joined in the Respondents' motion. RP 20:22-25, 21:1. After hearing arguments and reviewing the documentary evidence, the trial court entered an Order denying Respondents' motion. The trial court erred by disregarding the unambiguous and controlling language of RCW 36.70C.040(4)(b) and concluding that the LUPA petition was timely filed pursuant to RCW 36.70C.040(4)(a). CP 264-265. The trial court erroneously concluded that the statute of limitations began to run on the date the County Planning Division sent a letter transmitting the Board's "written decision" to the Yakama Nation's counsel. RP 49:1-20. Relying on the date on the transmittal letter rather than the date of the Board's Resolution, the trial court erroneously ruled that the Yakama Nation's LUPA petition had been timely filed on May 2, 2018. RP 49:1-20, 50:1-4.

C. Court of Appeals Proceedings and Decision

On September 14, 2018, Respondents filed a Notice of Discretionary Review with the trial court, indicating its intent to request interlocutory review of the trial court's order denying Granite's Motion to Dismiss. On September 28, 2018, Respondents filed their Motion for Discretionary Review, asserting that the trial court committed an obvious error that would render further proceedings useless. Commissioner Wasson heard oral arguments on Respondents' Motion on November 14,

2018. On December 21, 2018, Commissioner Wasson granted Respondents' Motion for Discretionary Review of the trial court's order.³

The Court of Appeals received briefing and heard oral argument on September 12, 2019. In its October 29, 2019 ruling, the Court of Appeals reversed the trial court, finding that the Board sat in a quasi-judicial capacity and that the Board's resolution dated April 10, 2018 triggered the statute of limitations pursuant to RCW 36.70C.040(4)(b). Pet'r's App. at 18. The Court of Appeals reversed the trial court and dismissed the Yakama Nation's LUPA petition as untimely.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

"A petition for review will be accepted by the Supreme Court only" if the decision under review conflicts with a decision of this Court or the Court of Appeals, involves a significant question of law under the State or federal constitutions,⁴ or presents an issue of substantial public interest that should be decided by this Court. RAP 13.4(b). The decision below does not qualify for review. The Court of Appeals applied settled law to the facts of this case. No further reviewed is warranted.

³ The Court of Appeals did not grant Granite's motion for review of the trial court's decision on a separate LUPA petition filed in 2017. The Court of Appeals did not comment on the validity of this action. Pet'r's App. at 11.

⁴ The Yakama Nation have not challenged the Court of Appeals' decision based on this review criteria.

A. The Court of Appeals Applied the Correct Statute of Limitations

A land use petition is “barred, and the court may not grant review, unless the petition is timely filed with the court and timely served.” RCW 36.70C.040(2). A petition is timely if filed and served “within twenty-one days of the issuance of the land use decision.” RCW 36.70C.040(3). A land use decision 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]n application for a project permit.” RCW 36.70C.020(2)(a). A “final determination” is one that ends an action between the parties. *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002), *amended on recons.*, 63 P.3d 764 (2003).

The Court of Appeals correctly applied RCW 36.70C.040(4)(b) as the statute that commenced the 21-day period for an appeal of the Resolution. This statute is clear and unambiguous on its face: “If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity,” the date a land use decision is issued is ***“the date the body passes the ordinance or resolution.”*** RCW

36.70C.040(4)(b) (emphasis added). This deadline is “stringent.”⁵ *Asche v. Bloomquist*, 132 Wn. App. 784, 795, 133 P.3d 475 (2006), *review denied*, 159 Wn.2d 1005, 153 P.3d 195 (2007). “Requiring strict compliance with the statutory bar against untimely petitions promotes the finality of local land use decisions.” *Knight v. City of Yelm*, 173 Wn.2d 325, 338, 267 P.3d 973 (2011) (citation omitted). Therefore, untimely LUPA petitions must be dismissed. *Id.*

The Court of Appeals found that the Board acted in a quasi-judicial capacity in deciding the Yakama Nation’s appeal. Pet’r’s App. at 13-18. The Nation does not take issue with the court’s conclusion and has not requested further review of that issue. The Court of Appeals also ruled that the Resolution was the Board’s final decision on the Yakama Nation’s administrative appeal of the CUP and was passed and dated on April 10, 2018, and that pursuant to RCW 36.70C.040(4)(b), the 21-day appeal period began to run on that day. Pet’r’s App. at 18-21. The Yakama Nation filed and served their LUPA Petition 22 days from and after the date the Board passed the Resolution. *Id.*

⁵ See *San Juan Fidalgo Holding Co. v. Skagit Cnty.*, 87 Wn. App. 703, 705-706, 710-711, 943 P.2d 341 (1997), *as amended* (Sept. 30, 1997), *as amended* (Nov. 5, 1997) (LUPA appeal dismissed because petition delivered to the Skagit County Auditor's Office approximately 15 minutes after the office had closed on the last day of the 21-day service period for commencing land use appeals).

B. In Applying the Statute of Limitations, the Decision Below Does Not Conflict with Any Other Decisions

1. The Decision of the Court of Appeals Is Consistent with Supreme Court Precedent and with *Habitat Watch*.

The Court of Appeals decision does not conflict with this Court's precedent. The Yakima Nation misreads *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), to assert a conflict that does not exist. Pet. at 7-10. The Yakama Nation asserts that *Habitat Watch* requires courts to "look[] to the latest possible date under both LUPA and the local jurisdiction's administrative appeals process" when determining if a LUPA petition is timely. *Id.* at 9.

Respectfully, *Habitat Watch* does not stand for this proposition. In that case, this Court had to determine when the statute of limitations period had begun to run for two land use decisions that had been issued without proper notice under the County's code. *Habitat Watch*, 155 Wn.2d at 406, 408. The Court started its analysis with the text of the statute, RCW 36.70C.040. *Id.* at 407-08. Based on the text of the statute alone, the Court reasoned that LUPA "designates the exact date a land use decision is 'issued' based on whether the decision is written, made by ordinance or resolution or in some other fashion." *Id.* at 408 (citing RCW 36.70C.040(4)). The Court then looked to the record and briefing before it to determine when the two land use decisions were issued within the

meaning of RCW 36.70C.040(4). *Id.* The Court did not look to the County's ordinance to determine when the land use decision was issued. *Id.* at 407-410.

Finding no clear evidence in the record as to when the land use decisions were issued, the Court in *Habitat Watch* noted the "very latest" date upon which the land use decisions could have issued. *Id.* at 409. But the Court ultimately declined to rule on when the decisions were issued because even under the last possible date, petitioners had failed to file a timely LUPA petition. *Id.* at 409 n.6. This Court did not hold that a reviewing court must adopt the latest of the possible dates a land use decision could have issued in determining the applicable statute of limitations trigger under RCW 36.70C.040(4). *Id.* at 407-410.

Contrary to being in conflict with *Habitat Watch*, the Court of Appeals in the case at bar analyzed the statute of limitations issue presented to it from the same starting point as *Habitat Watch*—the words in LUPA. The Court of Appeals looked to the statute, RCW 36.70C.040(4), to determine when the statute of limitations began to run. Pet'r's App. at 12. The Court of Appeals then looked to the record and the law to determine whether the Board "sat in a quasi-judicial capacity in reviewing and resolving the Yakama Nation's appeal from the hearing examiner's decision[.]" *Id.* at 12-18. The Court of Appeals then turned to

whether Resolution 131-2018 constituted a land use decision for purposes of RCW 36.70C.040(4)(b). *Id.* at 12, 18-19. Nothing in the Court of Appeals' analysis or reasoning conflicts with this Court's analysis in *Habitat Watch*. There is no conflict with a decision of the Supreme Court that merits review under RAP 13.4(b).

2. The Decision of the Court of Appeals Is Consistent with Published Court of Appeals Decisions.

RCW 36.70C.040(4)(b) states that if a land use decision is made by a resolution by a legislative body sitting in a quasi-judicial capacity, the date triggering the commencement of the 21-day statute of limitations is the date the legislative body passes the resolution. The Washington Court of Appeals has unambiguously held that when a county board of commissioners sits in a quasi-judicial capacity, "the date of a decision is generally the date on which the decision is reduced to writing,"—that is, the date a resolution is signed. *King's Way Foursquare Church v. Clallum Cnty.*, 128 Wn. App. 687, 691, 116 P.3d 1060 (2005)

The court in *King's Way* had to decide whether the LUPA statute of limitations under RCW 36.70C.040(4)(b) was triggered on the date the county board of commissioners voted to pass a resolution affirming the Hearing Examiner's decision or the date the resolution was signed. *Id.* at 691-92. The court held that the date the resolution was signed started the

clock under RCW 36.70C.040(4)(b). Consistent with *King's Way*, the Court of Appeals below found that the clock started running on the date Board passed and signed Resolution 131-2018—that is, on April 10, 2018. Pet'r's App. at 18, 20-21.

The Court of Appeals' decision follows, and does not conflict with, the analysis of Division II in *Northshore Inv'rs, LLC v. City of Tacoma*. 174 Wn. App. 678, 301 P.3d 1049 (2013), *disapproved of on other grounds by Durland v. San Juan Cnty.*, 182 Wn.2d 55, 340 P.3d 191 (2014).⁶ In *Northshore*, a case with similar but not identical facts, the Court of Appeals refused to accept petitioner's argument that a "notice of appeal results" sent by the city clerk constituted a written decision that triggered LUPA's statute of limitations where the City Council had made an oral vote on the appeal days earlier. 174 Wn. App. at 689-695. The city code did not require the City Council to enter a written decision. *Id.* at 688. Several days after the City Council orally voted to deny an administrative appeal from the Hearing Examiner's recommendation to deny a rezone request, the City Clerk mailed a notice of appeal results that stated that the City Council had met and made a decision. *Id.* at 685-86.

⁶ Although the Court of Appeals' decision refers to *Northshore* as a Supreme Court case, this misstatement does not merit this Court granting review as the Court of Appeals' decision was still consistent with *Northshore*, a published decision of the Court of Appeals.

Like the Yakama Nation, Northshore argued that because the city clerk mailed “‘a written decision’ to the parties the day after the hearing,” subsection (a) [of RCW 36.70C.040(4)] applies.” *Id.* at 693. The *Northshore* court rejected that argument. Rather, the *Northshore* court held that the LUPA statute of limitations began to run on the day that the City Council voted; not the day the clerk issued the letter. *Id.* at 695. The Court of Appeals found the same here, consistent with the analysis and the decision rendered by the *Northshore* court.

As in *Northshore*, Ms. Madera’s letter indicates that the Board had already made a decision. Her letter to the Yakama Nation states, in part:

On April 10, 2018, the Board of County Commissioner’s [sic] (BOCC) **held** a public meeting in regards to your appeal (APL2018-00001) to decide whether to affirm the Hearing Examiner’s decision or hold a closed record hearing. The BOCC unanimously **decided** to affirm the Hearing Examiner’s decision and **signed** Resolution 131-2018, which **is attached for your records**.

CP 24 (emphasis added). Additionally, Ms. Madera works for the Planning Department, is not a member of the Board, and it is not authorized to render decisions in closed-record appeals. The letter itself leaves no room for confusion on this point. The letter refers to the decision made by the Board in the past tense (referring back to the April 10 public

meeting). Were there any other doubt, the letter encloses the Board's written decision, the Resolution, **dated April 10, 2018**. Nothing on behalf of the Board is decided by this transmittal letter. No additional action on the part of Ms. Madera was needed to finalize the Board's resolution. The Court of Appeals concurred. Pet'r's App. at 20-21. There are no conflicting decisions on these points of law.

C. The Court of Appeals' Decision Does Not Conflict with Canons of Statutory Construction

The Yakama Nation next argues that the Court of Appeals decision "threatens this Court's line of cases on interpreting unambiguous ordinances according to their plain meaning and contravenes this Court's acceptance of the canon of *expression* [sic] *unius est exclusion alterius*." Pet. at 12. The Court of Appeals decision presents no such threat. Rather, the Court of Appeals applied two long-standing and controlling canons of interpreting statutes and local ordinances.

The statute of limitations in this case, as the name suggests, is provided by statute, not a local ordinance. Therefore, the first principle applied by the Court of Appeals was that, even if there is a conflict between the governing statute and the local ordinance (a conflict that the Court of Appeals did not find and which Respondents now do not concede), the statute controls. The Court of Appeals stated:

Yakama Nation's argument assumes that the Yakima County Code takes precedence over the state LUPA and that YCC 16B.09.050(5) reads differently from RCW 36.70C.040.

We reject both assumptions. *Neither LUPA nor any case law permits a local ordinance or code to conflict with RCW 36.70C.040's language as to the day of activation of the twenty-one day limitation period.*

Pet'r's App. at 19 (emphasis added).

The court's reasoning here is consistent with the well-established rule that state statutes control conflicting local ordinances (again assuming, *arguendo*, that any such conflict exists). *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 226, 351 P.3d 151 (2015) (a state statute preempts a local ordinance "if the statute occupies the field, leaving no room for concurrent jurisdiction, or if a conflict exists such that the statute and the ordinance may not be harmonized"). In enacting LUPA, it is clear that the state legislature intended to occupy the field. RCW 36.70C.010 states the legislature's purpose:

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing *uniform, expedited appeal procedures* and uniform criteria for reviewing such decisions, in order to provide *consistent, predictable, and timely judicial review*.

(Emphasis added.) RCW 36.70C.030 goes on to state that "[t]his chapter replaces the writ of certiorari for appeal of land use decisions and shall be

the *exclusive means of judicial review of land use decisions*[.]”

(Emphasis added.)

The second long-standing and controlling canon of interpreting statutes and local ordinances applied by the Court of Appeals was to give an unambiguous and controlling statute its plain meaning. The controlling statute is clear on its face. RCW 36.70C.040(4)(b) applies “[i]f the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity,” and the statute of limitations is thereby triggered on the date the body passes the ordinance or resolution.” If the language of the statute is unambiguous, the statute is given its plain meaning and the judicial inquiry ends there. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *see also, State v. Jones*, 168 Wn.2d 713, 722, 230 P.3d 576 (2010) (if a statute is clear on its face, its meaning is to be derived from the language of the statute alone).

That the Resolution was a land use decision for purpose of LUPA and that the Board of Commissioners is a legislative body are undisputed facts. The Court of Appeals determined that the Board acted in quasi-judicial capacity based on its review of the record and by application of the four-part test established by this Court in *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244-45, 821 P.2d 1204 (1992). Pet’r’s App. at 18. The Resolution is a “resolution” for purposes of RCW

36.70C.040(4)(b) that was passed, reduced to writing, and issued by the Board on April 10, 2018. *Id.* By operation of RCW 36.70C.040(4)(b) the 21-day statute of limitations began to run on April 10, 2018. *Id.* On May 2, 2018, 22 days after the passage of the Resolution, the Yakama Nation filed and served their LUPA petition. Applying a clear and unambiguous statute to these facts, the Court of Appeals correctly concluded that the Yakama Nation's petition was time barred. *Id.* at 22. The strict application of LUPA's statute of limitations to dismiss untimely LUPA petitions is settled law. *Knight*, 173 Wn.2d at 336-38; *Keep Watson Cutoff Rural v. Kittitas Cnty.*, 145 Wn. App. 31, 38, 184 P.3d 1278 (Div. III, 2008); *San Juan Fidalgo Holding Co.*, 87 Wn. App. at 709-13.

D. This Case Does Not Raise Issues of Substantial Public Importance That Should Be Determined by this Court

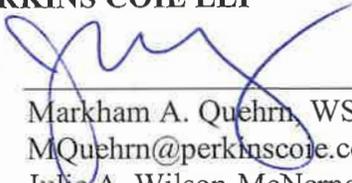
The decision below does not raise any issues of substantial public interest. The Court of Appeals accepted review of the trial court's ruling under RAP 2.3(b)(1)'s obvious error standard. This case presents a straightforward statute of limitations issue under LUPA. Based on this Court's and Court of Appeals' precedent, the public should be adequately informed regarding how the courts will analyze statute of limitations issue under LUPA.

V. CONCLUSION

This Court should deny review.

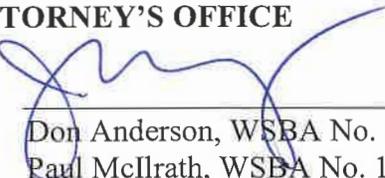
RESPECTFULLY SUBMITTED this 23rd day of December,
2019.

PERKINS COIE LLP

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**YAKIMA COUNTY PROSECUTING
ATTORNEY'S OFFICE**

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per
email
authorization*

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APPENDIX 1

RCW 36.70C.040

Commencement of review—Land use petition—Procedure.

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The 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.

(4) For the purposes of this section, the date on which a land use decision is issued is:

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

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

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

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW 4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first-class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

[1995 c 347 § 705.]

specified:

- (1) Adoption and amendment of development regulations as defined by RCW 36.70A;
- (2) Area-wide rezones to implement new county policies; and
- (3) Adoption of the county comprehensive plan, sub-area plans, other general purpose or specific county plans and any plan amendments.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.01.040 Legislative Enactments not Restricted.

Nothing in this Title shall limit the authority of the Board of County Commissioners to amend the County's comprehensive plan or development regulations.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.01.050 Conflict of Provision.

In the event of conflicts between any portion of this Title and other rules, regulations, resolutions, ordinances or statutes lawfully adopted by Yakima County, the procedures contained in this Title shall govern.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

Chapter 16B.02 DEFINITIONS

Sections:

- 16B.02.010 Definitions.
- 16B.02.020 Administrative Official.
- 16B.02.030 Agency with Jurisdiction.
- 16B.02.040 Board of County Commissioners.
- 16B.02.045 Buildable Land.
- 16B.02.050 Closed Record Appeal.
- 16B.02.055 Day.
- 16B.02.060 Decision Maker.
- 16B.02.070 Hearing Examiner.
- 16B.02.080 Open Record Hearing.
- 16B.02.082 Optional Consolidated Permit Review.
- 16B.02.085 Policy Plan Map.
- 16B.02.090 Project Permit Application.
- 16B.02.093 Public Meeting.
- 16B.02.095 Reviewing Official.
- 16B.02.100 SEPA.

16B.02.010 Definitions.

Certain terms and words used in this Title are defined in the following Sections. When not inconsistent with the context, words used in the present tense include the future; the singular includes the plural, and the plural the singular; "shall" is always mandatory and "may" indicates a use of discretion in making a decision. Whenever terms defined elsewhere in the Yakima County Code appear in this Title, they shall be given the meaning attributed to them.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.02.020 Administrative Official.

"Administrative Official" means the Yakima County Planning Director or the director's designee. This term is synonymous with "Director" or "Administrator."

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exhs. A, B) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.02.030 Agency with Jurisdiction.

"Agency with Jurisdiction," for purposes of this Title, means any agency with authority to approve, veto, or finance, all or part of any project permit application as defined by this Title.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.02.040 Board of County Commissioners.

"Board of County Commissioners," also abbreviated as "BOCC," or "Board," is the legislative authority of Yakima County.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.02.045 Buildable Land.

"Buildable Land," for the purposes of 16B.10.095(2)(a), means land suitable and available for residential, commercial, and industrial uses and includes both vacant land and developed land that, in the opinion of the planning agency, i.e., the Planning Division together with its Planning Commission as defined in RCW 36.70.020(13)(b), is likely to be redeveloped.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exhs. A, B) (part), 2012).

16B.02.050 Closed Record Appeal.

"Closed Record Appeal" means an administrative appeal or hearing, conducted by the Board of County Commissioners following an open record hearing conducted by the Hearing Examiner on a project permit application. The appeal or hearing is on the record with only appeal argument allowed. See also RCW 36.70B.020(1).

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

jurisdiction on the proposed action. Hearings shall be combined if requested by an applicant, provided that:

- (a) The hearing is held within the geographic boundaries of Yakima County;
 - (b) Each agency is not expressly prohibited by statute from doing so;
 - (c) Sufficient notice of the hearing is given to meet each of the agencies' adopted notice requirements as set forth in statute, ordinance, or rule;
 - (d) Each agency has received the necessary information about the proposed project from the applicant in enough time to hold its hearing at the same time as the local government hearing; and
 - (e) The joint hearing can be held within the required time periods or the applicant may agree to a particular schedule in the event that additional time is needed in order to combine the hearings.
- (2) All agencies participating in a combined hearing may issue joint hearing notices and develop a joint format, select a mutually acceptable hearing body or officer, or take such other actions as may be necessary to hold joint hearings consistent with each of their respective statutory obligations.

(Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

Chapter 16B.09 ADMINISTRATIVE APPEALS, CLOSED RECORD HEARINGS, AND JUDICIAL APPEALS

Sections:

- 16B.09.010 Administrative Appeal of Project Permits and Environmental Determinations.
- 16B.09.020 Standing to Initiate Administrative Appeals.
- 16B.09.030 Notice of Appeal.
- 16B.09.040 Open Record Appeals.
- 16B.09.045 Open Record Appeal Procedures.
- 16B.09.050 Closed Record Decisions and Appeals.
- 16B.09.055 Closed Record Appeal Procedures.
- 16B.09.060 Judicial Appeals.
- 16B.09.070 Appeals Standards and Criteria.

16B.09.010 Administrative Appeal of Project Permits and Environmental Determinations.

(1) An appeal of a Type 1, 2, or 3 project decision or an appeal of a final environmental determination (SEPA) shall be filed with the Planning Division within fourteen calendar days of the mailing of the final decision or environmental determination issued under SEPA. If the decision does not require mailing, the appeal shall be filed within fourteen calendar days following the issuance of the final decision. Appeals shall be delivered to the Planning Division by mail or

The following procedures (Subsections 1 through 3) shall apply to any appeal heard by the Examiner under this Title unless the Examiner holds a prehearing conference under Subsection 4 of this Section and issues an order establishing the appeal procedure.

(1) Memorandum to Examiner. Within ten days of filing the appeal, the appellant shall file with the Planning Division a memorandum setting forth the appellant's arguments and authority. The appellant's memorandum to the Hearing Examiner shall clearly identify whether the subjects of the appeal are concerned either with procedural issues or substantive determinations, or both, as defined in YCC 16.04.040. Such arguments and authority shall be restricted to those issues set forth in appellant's written appeal statement;

(2) Staff Report. At least twenty days prior to the date of the scheduled hearing before the Examiner, County staff shall file with the office of the Hearing Examiner and provide the appellant with a staff report responding to the appellant's memorandum concerning the appeal; and

(3) Reply Memorandum. At least ten days prior to the date of the scheduled hearing before the Examiner, the appellant or landowner may file with the Planning Division any reply memorandum which the appellant or landowner desires to file. The scope of the reply memorandum shall be restricted to responding to issues raised in the staff report.

(4) Prehearing Conference. Any party may request a prehearing conference not later than ten days following the filing of appeal. The prehearing conference may be held at the discretion of the Examiner, in consultation with the Administrative Official. If the Examiner exercises his discretion to hold a prehearing conference on an appeal the Examiner may issue an order establishing the procedure and schedule for the hearing and for the submittal of reports by County staff, applicant, and appellant, not inconsistent with this Title. The Examiner's order shall provide for the submittal of appellant's memorandum setting forth the appellant's arguments and authority, a County staff report responding to appellant's memorandum, applicant's memorandum responding to the appellant's memorandum, and appellant's reply memorandum. All written reports shall be submitted prior to the appeal hearing, consistent with the terms of the order. The parties shall provide copies of all submitted material to the other parties.

(5) Failure to Comply. Failure to comply with the requirements of this Section may result in the Examiner taking such action in regard to the failure as is appropriate including, but not limited to dismissing the matter, continuing the hearing, postponing the hearing or limiting testimony at the hearing. The Hearing Examiner or Yakima County may require any appellant(s) who cause(s) a delay in the proceedings by not adhering to the submittal schedule to pay all additional fees associated with rescheduling meetings, including Hearing Examiner fees.

(Ord. 5-2012 § 2 (Exh. A) (part), 2012).

16B.09.050 Closed Record Decisions and Appeals.

(1) Closed record appeals or closed record hearings shall be on the record. The record before the Board shall include all materials received in evidence at any previous stage of the review, audio/visual tapes of the prior hearing, a transcript in the case of an appeal, the Hearing

Examiner's determination or recommendation, and argument by the parties at the Examiner's hearing. Upon receipt of a written appeal of a Hearing Examiner's decision on a Type 3 permit or a Type 2 appeal, the Board will decide how it will dispose of the appeal based on the record of the Hearing Examiner's decision and in accordance with this Section and YCC 16B.09.055.

(a) The Board may decide to affirm the Hearing Examiner's decision based on its review of the written request and transcript without a public hearing, further written brief or oral argument. The appellant and parties of record shall be so notified in the manner provided by YCC 16B.05.050; or,

(b) The Board may elect to consider the appeal based on the record of proceedings before the Hearing Examiner, the written appeal statement, any written memoranda of authorities submitted in compliance with the schedule of YCC 16B.09.055 and oral argument at a closed record public hearing. The appellant and other parties of record shall be notified of the Board's decision to consider the appeal, the invitation of written memoranda and its final decision on the appeal after its consideration in the manner provided by YCC 16B.05.050.

(2) Oral argument at a closed record public hearing is limited to parties of record. Oral argument is allowed on a Type 4 recommendation of the Hearing Examiner and may be allowed for a closed record appeal in accordance with YCC 16B.09.055(7) if the Board chooses to conduct a public hearing.

(3) The Board's action on a closed record hearing or appeal shall be as follows:

(a) Following the Board's closed record hearing on a Type 4 recommendation of the Hearing Examiner, the Board may affirm the recommendation of the Hearing Examiner, remand the matter back to the Hearing Examiner with appropriate directions, or may reverse or modify the Hearing Examiner's recommendation.

(b) Following the Board's review of a closed record appeal of a Hearing Examiner's Type 2 or 3 decision, the Board may grant the appeal or grant the appeal with modifications if the appellant has carried the burden of proof and the Board finds that the recommendation or determination of the Hearing Examiner is not supported by material and substantial evidence. In all other cases, the appeal shall be denied.

(4) If the Board renders a decision different from the Hearing Examiner's determination or recommendation, the Board shall adopt amended findings and conclusions accordingly. If the Board affirms the Examiner's determination or recommendation, it may adopt the findings and determinations or recommendations of the Examiner as the final decision.

(5) The Board's final written decision shall constitute a final administrative action for the purposes of Chapter 36.70C RCW.

(Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.09.055 Closed Record Appeal Procedures.

The following procedures shall apply to any appeal considered by the Board of County Commissioners.

(1) Appeal Statement. The appellant's written appeal statement shall specify the claimed error(s) or issue(s) which are being appealed and shall specifically state all the grounds for such appeal, limited to stating why the record does or does not support the decision of the Hearing Examiner because the decision:

- (a) Was based on improper procedures that prejudiced the appellant;
- (b) Was not based on substantial evidence; or
- (c) Constitutes clearly erroneous application of the development regulations to the proposed project.

Issues or grounds of appeal which are not so identified shall not be considered by the Board.

(2) Transcript. The appellant shall order preparation of a written transcript or portion of the transcript agreed upon by the appellant and Administrative Official. The transcription must be performed and certified by a County approved transcriber. In addition, the certified transcription must be received by the Administrative Official directly from the transcriber not more than thirty days following receipt of the appeal statement.

- (a) The Administrative Official shall maintain a list of pre-approved transcribers that are court approved; and if needed, shall coordinate with parties to the appeal so that no more than one official transcription is admitted into the record.
- (b) The cost of the transcript must be paid by the appellant within five days of receipt of the transcriber's statement for the cost. Upon payment of the statement the transcriber will deliver a copy of the transcript to the Administrative Official. If the statement is not paid, the appeal will be dismissed.

(3) Disposition of Appeal. The Administrative Official will consult with the Clerk of the Board who shall set the date, time and place at which the matter will be considered. Copies of the record, to the extent practicable, will be furnished by the Administrative Official to the Board, the appellant and the applicant. At the next regular meeting of the Board following receipt of the record from the Administrative Official, the Board will decide at a public meeting whether to affirm the decision of the Hearing Examiner, or to invite written memoranda of authorities and direct the Clerk to schedule a closed record public hearing.

(4) Notice of Hearing. If the Board decides to invite written memoranda of authorities and conduct a closed record public hearing in accordance with YCC 16B.09.050, the Planning Division shall notify the parties of record that an appeal has been filed and that copies of the notice of appeal and any written argument or memorandum of authorities accompanying the notice of appeal may be obtained from the Planning Division. The notice to parties shall also state that parties of record wishing to respond to the appeal may submit written argument or memorandum to the Planning

Division at least fourteen days prior to the date of the scheduled hearing before the Board. The notice shall further specify that such written argument or memorandum shall not include the presentation of new evidence and shall be based only upon the facts presented to the Examiner. A copy of the notice shall be sent to the appellant and parties of record.

(5) Staff Report. At least fourteen days prior to the date of the scheduled hearing, the Administrative Official shall file a staff report concerning the appeal with the Board, and provide a copy to the appellant and other parties of record.

(6) Memoranda from Appellant and other Parties of Record. Any party of record may submit a written argument or memorandum of authority at least fourteen days prior to the date of the scheduled hearing before the Board of County Commissioners. Such invited written argument or memorandum of authorities shall be filed with the Board with copies to the Planning Division and the other parties. No written argument or authorities may be thereafter submitted. Memoranda, written argument or comments shall not include the presentation of any new evidence and shall be based only on the facts presented to the Examiner. The memoranda are limited to stating why the record does or does not support the decision of the Hearing Examiner.

(7) Oral Argument. Oral argument shall be confined to the issues raised in the hearing record, appeal statement, the Hearing Examiner's decision, staff report, and memoranda of authorities timely filed by the deadlines set for briefing. Oral argument shall be limited to stating why the record does or does not support the decision of the Hearing Examiner. Time allowed for oral argument shall be appropriately limited by the Board.

(8) Decision by the Board. The Board shall deliberate on the matter in public at the advertised public hearing to reach its decision. The decision on the appeal shall be made on the appeal statement, written memoranda of authorities, staff report and any documents comprising the record that formed the basis for the administrative appeal. No additional evidence or testimony shall be given or received except for oral argument as allowed in Subsection 16B.09.055(7) above. A written decision will be made within thirty days of the close of the deliberation and vote on the appeal.

(9) Failure to Comply. Written memoranda of authorities, if invited, must be received by the Clerk of the Board by mail or personal delivery before the close of business on the due date. Late submittals received after the deadline or uninvited memoranda shall not be accepted or distributed for consideration no matter when such submittals were mailed or postmarked.

(Ord. 5-2012 § 2 (Exh. A) (part), 2012).

16B.09.060 Judicial Appeals.

(1) A final determination on an application may be appealed by a party of record with standing to file a land use petition in Superior Court. Such petition must be filed within twenty-one days of issuance of the Board's decision, as provided in Chapter 36.70C RCW.

CERTIFICATE OF SERVICE

On December 23, 2019, I caused to be served upon the below named counsel of record via the method of service indicated, a true and correct copy of the foregoing document.

Ethan Jones Shona Voelckers Yakama Nation Office of Legal Counsel P.O. Box 150, 401 Fort Road Toppenish, WA 98948 ethan@yakamanation-olc.org shona@yakamanation-olc.org <i>Attorneys for Petitioner Confederated Tribes and Bands of the Yakama Nation</i>	<input checked="" type="checkbox"/> Via the Appellate Court Web Portal <input type="checkbox"/> Via hand delivery <input type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email
Joe Sexton Galanda Broadman, PLLC P.O. Box 15146 Seattle, WA 98115 joe@galandabroadman.com <i>Attorneys for Petitioner Confederated Tribes and Bands of the Yakama Nation</i>	<input checked="" type="checkbox"/> Via the Appellate Court Web Portal <input type="checkbox"/> Via hand delivery <input type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email

**I certify under penalty of perjury under
the laws of the State of Washington that
the foregoing is true and correct.**

EXECUTED at Seattle, Washington, on December 23, 2019.



 Teresa McLain
 Legal Practice Assistant

PERKINS COIE LLP

December 23, 2019 - 3:04 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97910-3
Appellate Court Case Title: Confederated Tribes and Bands of the Yakama Nation v. Yakima County, et al.
Superior Court Case Number: 18-2-01517-0

The following documents have been uploaded:

- 979103_Answer_Reply_20191223145654SC368880_0258.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
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A copy of the uploaded files will be sent to:

- don.anderson@co.yakima.wa.us
- ethan@yakamanation-olc.org
- joe@galandabroadman.com
- mquehrn@perkinscoie.com
- paul.mcilrath@co.yakima.wa.us
- shona@yakamanation-olc.org

Comments:

Appendix and the Certificate of Service are attached to the Answer to Petition for Review

Sender Name: Julie Wilson-McNerney - Email: JWilsonMcNerney@perkinscoie.com

Address:

1201 3RD AVE STE 4900
SEATTLE, WA, 98101-3099
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