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No. 74528-0-1

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

JAMES CHUMBLEY, et al,

Appellants,

v.

SNOHOMISH COUNTY, et al,

Respondents.

APPELLANTS' REPLY TO COUNTY'S OPPOSITION

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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INTRODUCTION

At the heart of this dispute is the fact that Snohomish County failed to comply with its review and permitting obligations under its own Land Disturbing Activities (“LDA”) and Critical Areas ordinances, resulting in substantial 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”).

In its response brief, the County Department of Planning and Development Services (the “County”) concedes many of the facts and issues central to this dispute. However, the County still seeks to affirm the trial court’s erroneous dismissal by arguing either that the County was preempted from enforcing its own ordinances or that the County made a “necessarily implied” determination that no such review was required at the time it issued the Building Permit. Both arguments fail.

As a matter of law, the County was not preempted from enforcing its own LDA and Critical Areas ordinances. While citing only to a single case standing for the general proposition that the state legislature *can*, in some cases, show an intent to preempt an entire field, the County ignores the specifics of the actual regulatory scheme. Here, the legislature did not express an intent to occupy the field in either of the statutes at issue, and

instead left room for concurrent jurisdiction, a fact expressly confirmed by the implementing regulations under those laws. Thus, the County cannot avoid its obligations by asserting preemption.

Nor can the County avoid its responsibilities by claiming that the Appellants are time-barred from challenging the County's issuance of the Building Permit. Contrary to the County's assertions, its Building Permit decision did not include or "necessarily imply" a decision regarding enforcement of its LDA and Critical Areas ordinances on Lots 60-61. Under *Samuel's Furniture*¹ and *Twin Bridge*,² a decision is not "necessarily implied" unless the local jurisdiction had ***no authority*** to make its ultimate written land use decision without having 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.

The evidence makes clear that the County's decision not to enforce its ordinances was not finalized, memorialized, and "issued" under the Land Use Petition Act ("LUPA") as a final land use decision until months *after* the Building Permit was issued, when the County closed its enforcement

¹ *Samuel's Furniture, Inc. v. State Dep't of Ecology*, 147 Wn. 2d 440, 54 P.3d 1194 (2002).
² *Twin Bridge Marine Park, L.L.C. v. State Dep't of Ecology*, 130 Wn. App. 730, 125 P.3d 155 (2005).

action or 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, rule that Appellants' Petition is timely, as a matter of law, and rule that the County is not preempted from enforcing its ordinances.

ARGUMENT

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

Central to the argument in the County's response brief is its after-the-fact assertion that the County was either *not required* to perform reviews under its own LDA and Critical Areas ordinances, or was *preempted* from doing so. The County is wrong on both counts.

A. The County Was Required To Conduct Critical Areas Analysis And Issue A Land Disturbing Activity Permit

As set forth in detail in the Appellant's opening brief, and unchallenged in the County's response brief, Lots 60 and 61 are located entirely within an area designated as a "critical area" under the Growth Management Act (GMA), RCW Chapter 36.70A. In particular, the County has designated the area as a particular type of "geologically hazardous area"

referred to as a “landslide hazard area,” thereby creating a presumption that most development activities are not appropriate due to public health and safety concerns. Appellants’ Brief (“AB”) 24-28.

The County does not, and cannot, contest that grading critical areas in general – and in geologically hazardous areas and landslide areas in particular – requires following explicit procedural requirements under the Snohomish County Code, including conducting Critical Areas review and obtaining a Land Disturbing Activity permit prior to performing any clearing or grading in such an area. AB 24-28; *see also* SCC 30.62B.110-170, 340, SCC 30.63B.010 *et seq.*

The County also concedes, as it must, that it did not perform these critical safety requirements or issue an LDA permit for the activities on Lots 60 and 61 at any time before the Building Permit was “finalized.”³ CP 637, CP 403-404 at ¶ 9, CP 254-255, CP 274 at ¶ 1, CP 154-155 at ¶ 4-9. The County further concedes that it failed to do so in spite of language on the face of the Building Permit requiring that 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.

³ As set forth in Appellant’s Opening Brief, in Snohomish County residential construction, “finaling” the permit is the equivalent of issuing a certificate of occupancy. AB 17, CP 670 at ¶ 3.15, CP 288.

To the extent that the County is implying that the functional analysis performed by the County Health District (the “District”) satisfied the County’s obligations under the County code, it is simply wrong. The two regulatory frameworks, while having minimal overlap, serve different functions and have substantially different requirements. *Compare* WAC 246-272A-0001 *et seq.* with RCW 36.70A.010 *et seq.*, SCC 30.62B, SCC 30.63B; *see also* CP 333-348 (and citations therein), AB 28-29. Even the District itself flatly denies that it satisfied the County’s obligations under County ordinances (CP 545), and is explicit that the “County is charged with the responsibility to address LDA and Critical Areas reviews as provided by its Snohomish County Code and its land use regulations apply to all property within Snohomish County including land parcels with OSS or proposed to be the site of an OSS.” CP 645 at ¶ 32.

Moreover, as practical matter, the District could not perform the work of the County, as it does not have any “engineers on staff who could review the engineering reports required for this type of development activity in a designated landslide area.” CP 154 at ¶ 4. The County, on the other hand, not only has trained engineers on staff (*see* CP 193, 246), but is specifically authorized to require independent expert review if needed. SCC 30.62B.150 (“If the department lacks the necessary expertise, the

department may require independent consultant review of the [LDA] application by a qualified professional to assess compliance with this chapter. . . .”). In spite of having both the obligation and the expertise, however, the County simply failed to perform its regulatory function.

B. The County Was Not Preempted From Enforcing Its Own LDA and Critical Areas Ordinances

Realizing that it made this critical safety error, the County now claims that it was “preempted” from enforcing its own ordinances. Again, neither the facts nor the law support the County’s contention.

In support of its preemption argument, the County relies on a single case, *Snohomish Cty. v. Thompson*, 19 Wn. App. 768, 770, 577 P.2d 627, 629 (1978). *Thompson* held that, in the particular context of mobile home construction, the legislature intended to wholly occupy regulation of the field. *Id.* at 770. Unlike the County’s simplistic argument, however, the *Thompson* court recognized the possibility of “*concurrent jurisdiction*,” noting that “[w]hether there be room for the exercise of concurrent jurisdiction in a given instance necessarily depends upon the legislative intent to be derived from an analysis of the statute involved.” *Id.* at 770-771 (internal citations omitted). The *Thompson* Court found that, under the express terms of the statute at issue in that case, there was “no room for doubt concerning the legislature’s intent to exclusively regulate mobile

home construction.” *Id.* at 771. The Court reached that conclusion because, in enacting the statute at issue, the legislature had expressly negated the effect of any city or county requirements regarding mobile home construction, adopting a provision stating as follows:

Any mobile home, commercial coach and/or recreational vehicle that meets the requirements prescribed under RCW 43.22.340 shall not be required to comply with any ordinances of a city or county prescribing requirements for body and frame design, construction or plumbing, heating and electrical equipment installed in mobile homes, commercial coaches and/or recreational vehicles.

Id. Here, the legislature did not include a similar provision in any of the relevant statutes. Unlike in *Thompson*, the legislature declined to expressly state an intent to occupy the field. To the contrary, the legislature left room for concurrent jurisdiction, allowing the agencies promulgating regulations under both of the relevant statutes to fill in the gaps in their regulations, which are codified in WAC Chapter 246-272A (the “OSS Rules”) and WAC Chapter 365-196.

As explained in detail in Appellants’ trial brief, the OSS Rules require the District to coordinate its OSS permitting process with the County’s land use plans and regulations. CP 338-341. The OSS Rules expressly state that they are “intended to coordinate with other applicable statutes for land use planning under chapters 36.70 and 36.70A RCW [the GMA], and the statutes for subdivision of land under chapter 58.17 RCW.”

WAC 246-272A-0001(5). By requiring such coordination between the District and the County, the Board of Health confirmed that the District's jurisdiction under the OSS Rules is concurrent, not exclusive. Indeed, the District's OSS Management Plan, adopted pursuant to the OSS Rules, states that coordination between the District and PDS is "mutually beneficial" because "*PDS is able to determine if the location of an existing or proposed OSS is consistent with the critical areas regulation and comprehensive plan, while the Health District is able to review proposed projects for compatibility with the OSS.*" CP 497. Thus, the regulations implementing the statute that the County claims has preemptive effect (RCW 43.20.050(3)) make it plain that the Board of Health has ***concurrent jurisdiction***, not exclusive jurisdiction. The regulations are consistent with the District's position throughout this dispute that its OSS permitting process "***does not*** preclude Snohomish County from applying its land use regulations to parcels where the District approves an application to it for an OSS permit." CP 637 at ¶ 1 (emphasis added).

The GMA's implementing regulations also make clear that the County is not preempted from applying its regulations, stating explicitly that "[a]bsent a clear statement of legislative intent or judicial interpretation to the contrary, ***it should be presumed that neither the act nor other***

statutes are intended to be preemptive. Rather they should be read together and, wherever possible, construed as mutually consistent.” WAC 365-196-705(2) (emphasis added).

Thompson, therefore, makes plain that the County’s obligation to enforce its own safety ordinances is *not* preempted. *Thompson*, 19 Wn. App. at 770-771. *See also Brown v. City of Yakima*, 116 Wn. 2d 556, 560, 807 P.2d 353 (1991) (where legislation grants “some measure of concurrent jurisdiction,” there is “no room for doubt’ [that] the Legislature did not intend to preempt the entire field of fireworks regulation”); *Petstel, Inc. v. King Cty.*, 77 Wn. 2d 144, 160, 459 P.2d 937 (1969) (“A state statute is not to be construed as impliedly taking away a power of a municipal government to regulate in an area if the two enactments can be harmonized.”). This is particularly true because “field” preemption of local regulation is disfavored, with courts generally presuming that “state legislation and local legislation are concurrent in the absence of a direct conflict” – “even when they address the same field of activity.” *Baker v. Snohomish Cty. Dep't of Planning & Cmty. Dev.*, 68 Wn. App. 581, 590, 841 P.2d 1321 (1992).

Accordingly, the County's assertion of "preemption" is entirely without merit, and its failure to enforce its own land use ordinances needlessly jeopardized public safety.

II. THE COUNTY CONCEDES THAT IT MADE NO EXPLICIT DECISION REGARDING LDA AND CRITICAL AREAS FOR THE OSS GRADING ACTIVITIES

In its response brief, the County admits that "the County's building permit itself did not authorize installation of the OSS system." County's Respondent's Brief ("CRB") at 29. Similarly, the County admits that it made no explicit consideration of the need for LDA and Critical Areas review of the OSS Grading Activities. *Id.* at 32 ("[T]he County has never asserted, nor does the County's building permit purport to authorize, any activity related to the installation of the onsite septic system"). 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 substantially after the Building Permit had issued. CP 155 at ¶¶ 6, 8, 9.⁴

⁴ This set of facts easily distinguishes this case from *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), *review denied* 159 Wn. 2d 1005 (2006) and *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 2d 169, 4 P.3d 123 (2000). In both cases, explicit decisions had previously been "issued," and petitioners attempted to bring subsequent actions to challenge those exact same decisions. The courts held that they could not bring a LUPA Petition challenging the previous explicit decision more than 21-days after the decision was "issued," regardless of whether it was implicated by another

Accordingly, no tangible, final land use decision regarding the OSS Grading Activities was ever “issued” by the County at the time of the Building Permit. RCW 36.70C.020(2), RCW 36.70C.040(4). The County’s arguments, therefore, fail unless it can prove that, by issuing the Building Permit for the structure on Lot 36, the County made a “necessarily implied” determination that no Land Disturbing Activity and Critical Areas analysis would be required on Lots 60-61, and that such a “necessarily implied” determination should have been known to a diligent member of the public. For the multiple reasons set forth below, the County has not made and cannot make that showing.

III. LOT 36 PERMIT DID NOT INCLUDE A “NECESSARILY IMPLIED” DETERMINATION REGARDING OSS GRADING ACTIVITIES ON LOTS 60 AND LOTS 61

Having conceded that no explicit decision regarding OSS Grading Activities was ever issued, the County is left to argue that the County made a “necessarily implied” determination that no LDA or Critical Areas review would be required for the OSS Grading Activities on Lots 60 and 61. CRB 25-31. This logic fails for multiple independent reasons.

A. Express Condition On Building Permit Requiring Future Compliance With LDA Ordinance Is Incompatible With

subsequent decision. Here, as the County admits, no express decision regarding compliance with the County’s LDA and Critical Areas ordinances was issued at the time of the Building Permit.

**County’s Assertion That It Made A “Necessarily Implied”
Determination To Disregard LDA Ordinance**

As a fundamental matter, the County’s argument that it made a “necessarily implied” determination regarding the OSS Grading Activities when it issued the building permit is directly contradicted by the face of the issued Building 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. 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.⁵ It is black letter law that, 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.

The County’s only argument in response to the express permit condition is to fall back on its failed preemption argument. CRB 36. More specifically, the County argues that the express condition in the Building Permit does not apply to its “inferential decision” regarding Lots 60 and 61 because “the authority to issue permits for construction and installation of septic systems is vested exclusively in the local health jurisdiction.” *Id.* As set forth above, that position is legally incorrect, and, accordingly, cannot defeat the express provision.

More fundamentally, the County’s assertion flies in the face of the law regarding what constitutes a final land use decision under LUPA. *See Durland v. San Juan County*, 174 Wn. App. 1, 13-14, 298 P.3d 757 (2012)

⁵ 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.

(“*Durland I*”) (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 v. City of Richland*, 161 Wn. App. 770, 779–80, 255, 255 P.3d, 805). In its response brief, the County 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.

To reach the conclusion that that the issuance of the Building Permit included a “necessarily implied” 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.⁶ 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. *Vogel*, 161 Wn. App. at 780.

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 Land Disturbing Activities ordinance. CP 690 Accordingly, the Building Permit could not have constituted a “final land use decision” that the County *did not intend to comply* with the Land Disturbing Activities ordinance. Indeed, had Appellants attempted to bring a LUPA petition challenging the County’s failure at the time of Building Permit issuance, it would certainly have been deemed premature and unripe. RCW 36.70C.040; *Durland I*, 174 Wn. App. at 13-14 (noting that a “land use decision” is “final” for purposes of LUPA when it “leaves nothing open to further dispute” and “sets at rest [the] cause of action between the parties” and holding that “It would have been premature, then, for him to bring a LUPA petition appealing the compliance plans when it was not apparent

⁶ 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.

that Heinmiller would proceed in an objectionable manner.”) (internal quotations omitted).

B. Recognition Of An “Authorized Means Of Waste Disposal” Was Not A “Necessarily Implied” Determination That An LDA And Critical Areas Analysis Would Not Be Required

Even had there not been an explicit statement in the Building Permit regarding required future compliance with the County’s own ordinances, which there was, the County’s assertion that it had made a “necessarily implied” determination regarding the application of or need for an LDA permit and Critical Areas review still fails.

The County repeatedly claims that by issuing the Building Permit, it necessarily made an implied “determination that there is an *approved means of waste disposal* to serve the property.” CRB 25, 38 (emphasis added). It does so in hopes of invoking the *Samuel’s Furniture* doctrine that a party is estopped from challenging a land use act, where the activity in question was authorized by a “necessarily implied” determination as part of an earlier express final land use decision. This is a red herring.

While repeating its mantra that it made a “necessarily implied” determination that there was an “approved means of waste disposal,” the County actively avoids discussion of what was actually involved in making this determination, and how it relates to the County’s obligations under its

own LDA and Critical Areas ordinances. In reality, the County's code and the historic practice of the County and the District confirm that an "approved means of waste disposal" simply means that an OSS permit has been issued by the District, indicating that the proposed plans conform to the District's internal "technical / functional" requirements. WAC 246-272A-0200(4)(c). The County's confirmation of the District's OSS permit issuance does not "necessarily imply" (or even indirectly suggest) that the County would decline to enforce its LDA and Critical Areas ordinances. 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 Onside 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. CP 400-401 (Ketchel Decl, ¶ 7); CP 257-260. As the District concedes, "the County 'normally' would have conducted LDA and Critical Areas review for the OSS Grading Activities but failed to do so here 'by an oversight,' possibly due to the fact that the OSS was located on a different site." CP 155 at ¶ 6.

Simply stated, the County 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 4at 51. As the Court explained, this is “because WAC 173-27-140 prohibits local governments from authorizing shoreline development that is inconsistent with the SMA.” Specifically, that provision 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). Compliance with the WAC (or a decision that the regulation did not apply), therefore, was explicitly tied to the authorization (the fill and grade permit). Accordingly, by **authorizing** the permit, the county in *Samuel’s Furniture* had either made a determination that the development was consistent with the SMA or that it

was not “on a shoreline.” *See also Twin Bridge* (“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 Twin Bridge’s new plans were consistent with the already existing shoreline permits.”). In either case, because the fill and grade permit and building permit at issue in *Samuel’s Furniture* and *Twin Bridge* authorized the exact same activities that would have been authorized by a shoreline substantial development permit,⁷ a determination regarding the potential need for the second permit (shoreline substantial development permit) was required before the local government had authority to issue the first permit (fill and grade permit or building permit).

That is simply not the case here. Here, the County admits that its Building Permit did not purport to authorize the OSS Grading Activities that would have been authorized by LDA and Critical Areas review; instead, the Building Permit only authorized building activities, not grading activities. Moreover, unlike the regulatory scheme at issue in both *Samuel’s Furniture* and *Twin Bridge*, which required a determination regarding

⁷ *See* RCW 90.58.030(3)(a) (defining “development” to include “the construction or exterior alteration of structures,” “filling,” or “removal of any sand, gravel, or minerals”); RCW 90.58.140(2) (requiring a shoreline substantial development permit for any non-exempt “development”).

shoreline jurisdiction *before* the local government could issue the fill and grade permit or building permit, there is no similar limitation in the relevant County ordinances regarding the County's determination regarding LDA and Critical Area analysis requiring that such decisions be made before issuance of the Building Permit. To the contrary, 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). Moreover (and 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.

There is also no merit to the County's suggestion that the reasoning in *Samuel's Furniture* and *Twin Bridge* "is not limited to whether the specific activity sought to be challenged is authorized by the building permit." CRB 28. The County attempts to sidestep this clear limitation in those cases, arguing that "the issue is whether the decision on the building permit necessarily required an inferential decision on the issue subsequently challenged." *Id.* As explained above, however, *the very*

reason why the fill and grade and building permits in *Samuel's Furniture* and *Twin Bridge* “necessarily implied” a decision regarding the need for a shoreline substantial development permit is that *the same activities are regulated* by those permits as the activities regulated by a shoreline substantial development permit. Because the same cannot be said of the Building Permit and LDA/Critical Areas review, which regulate different activities, the County’s argument fails.

Similarly, there is no merit to the County’s argument that the Building Permit not only gave the Developer a “vested” right to construct a residence on Lot 36, but also “a corresponding right to use and occupancy of the structure.” CRB 29. On the contrary, the County code expressly provides that the right to occupy a structure does not vest until the County issues a certificate of occupancy. SCC 30.50.466 (“No building or structure shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made until the building official has issued a certificate of occupancy for the building or structure.”). As the County concedes, the certificate of occupancy is not issued until the County conducts its final inspection. CP 670 at ¶ 3.15, CP 288-289, CP 156 at ¶ 10; *see also* AB 15-17, 42-43. Thus, the Building Permit vested only the right to construct a structure on Lot 36.

It did not vest (and could not have vested) “a corresponding right of use and occupancy of a structure,” as asserted by the County. That right can only vest through the County’s issuance of a certificate of occupancy. Similarly, the Building Permit did not vest (and could not have vested) the right to conduct grading activities in a critical area on Lots 60-61. That right can only vest through the County’s issuance of an LDA permit, after conducting Critical Areas review.

Accordingly, nothing about the County determining that there was an “approved method of waste disposal” (or anything else) required the County to make a “necessarily implied” determination that it would not comply with its own LDA and Critical Areas ordinances at the time the Building Permit issued. As the evidence makes clear, that determination was made at a much later date. CP 155 at ¶¶ 6, 8, 9.

C. 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 County would ask LUPA petitioners to raise objections to specific activities that were *never authorized at all*. The County'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 County'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. THE FIRST TIME THE COUNTY MADE A "FINAL LAND USE DECISION" REGARDING WHETHER LDA AND

**CRITICAL AREAS REVIEW WOULD BE REQUIRED WAS
WHEN IT CLOSED ITS ENFORCEMENT ACTION OR
ISSUED ITS CERTIFICATE OF OCCUPANCY**

The County spends a substantial portion of its response brief in an effort to convince the Court that its enforcement action against the Developer were not intended to address the OSS Grading Activities, but instead were targeted at other grading activities. CRB 16-18. The evidence suggests that the enforcement action was initially opened specifically to address the 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, CP220, CP 251-260, CP 262-263, CP 265-272, CP 274-275; *see also* AB 11-15, 39-42.

Yet even accepting the County’s contention, it would not change the result. 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 “finaled” 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.

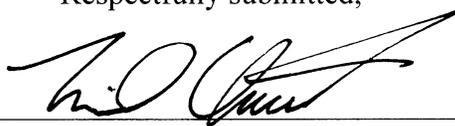
Whether the first final land use decision was the closing of the enforcement action, or whether it was the “finaling” of the permits does not, however, matter because both events occurred within twenty-one days of Appellants’ filing their LUPA Petition. *See* AB 39-43.

CONCLUSION

The County failed in their duty to protect the public by enforcing their LDA and Critical Areas ordinances. Now, the County seeks to avoid being held accountable for its error, and forced to fix it, by claiming that Appellants are time barred from pursuing their claims. For all the reasons set forth herein, the County is wrong. Accordingly, Appellants respectfully request that the Court reverse the trial court’s dismissal, and find Appellants’ Petition timely, as a matter of law.

Dated May 31, 2016

Respectfully submitted,



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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.



Pamela Ruggles, Paralegal