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Court of Appeals
Division I
State of Washington

NO. 74528-0-I

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

JAMES and EVELYN CHUMBLEY, husband and wife; IRENE ARTHERHOLT; THE LESTER G. and IRENE ARTHERHOLT REVOCABLE TRUST; GLENN and PATRICIA DALBY, husband and wife; ROY MAIN; THOMAS and MADELINE NORMAN, husband and wife; and BNSF RAILWAY COMPANY, INC., a Delaware corporation,

Appellants,

vs.

SNOHOMISH COUNTY, a Washington municipal corporation; SNOHOMISH HEALTH DISTRICT, a Washington municipal corporation; BEGIS BUILDING, INC., a Washington corporation; JAKE BEGIS; and KEE BONG KIM and DIANA YONG, husband and wife,

Respondents.

BRIEF OF RESPONDENT SNOHOMISH COUNTY

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I. INTRODUCTION

Petitioner/Appellants, James Chumbley, et al., (hereinafter "Appellants"), appeal the decision of the Snohomish County Superior Court, Honorable Michael T. Downes, dismissing Appellants' Complaint for Declaratory and Injunctive Relief filed on September 30, 2015, for failure to timely file under the Land Use Petition Act (LUPA) Ch. 36.70C RCW. (CP 1-22). Specifically, Appellants' complaint sought to invalidate and otherwise compel Snohomish County ("County") to revoke a building permit issued by the County on February 24, 2015, to Respondent Jake Begis d/b/a Begis Building Inc. (collectively "Begis"), for construction of a single family residence on the grounds that the County and/or the Snohomish County Health District ("Health District"), failed to adequately review Begis' application for an Onsite Septic System (OSS) which provides the means of waste disposal serving the residence. (CP 784-85, First Amended Complaint, ¶ 10.4).

Appellants alleged that the Health District's approval of the OSS permit was defective because the County and the Health District failed to also require review of the OSS application under the County's Land Disturbing Activity (LDA) and Critical Areas regulations, as follows:

> The County and the District erroneously failed to require SEPA, LDA and critical Areas review of the OSS; and erroneously failed to require SEPA review of the OSS, which, in turn, would have triggered additional County review processes associated with actions subject to SEPA;

> and those failures constituted unlawful procedure and/or a failure to follow a required process.

(CP 786, First Amended Complaint, ¶ 10.8, lines 14-18). By way of answer to the merits of Appellants' complaint, the County asserted that state law (RCW 18.210.190), designates the local health jurisdiction (i.e. the Health District), as the exclusive permitting authority relating to onsite septic systems and, thus, that the OSS application was not subject to further permitting review under the County's LDA or Critical Areas regulations. (CP 660-64, Answer to First Amended Complaint, ¶ 1.2).

In addition to the above, the County asserted that the issue of whether there was an approved means of waste disposal available to serve the residence was an issue integral to the decision whether to issue the building permit in accordance with Snohomish County Code (SCC) 30.50.104(2) which provides as follows:

> Where a building permit application has been made for construction, other than for maintenance, repairs, and minor alterations, on a parcel of land not served by a public sanitary sewer system, ***a building permit shall not be issued without prior approval from the Snohomish Health District of an approved means of waste disposal***.

(CP 664, Answer to First Amended Compliant, ¶ 1.2). Accordingly, the County asserted as an affirmative defense that the issue of whether the County and/or the Health District should have required some additional permitting review or approval of the OSS application as a condition of, or prior to, issuance of the building permit for the residence was subject to

the exclusive jurisdiction of the Land Use Petition Act (LUPA). (CP 671, Answer to First Amended Complaint, ¶ 5.2).

Because Appellants did not commence the present action until September 30, 2015, more than seven months after the issuance of the building permit, the County moved to dismiss Appellants' complaint for failure to timely appeal under LUPA. (CP 613-635). The Superior Court granted the County's motion dismissing the action based upon the following Conclusions of Law:

> 1. The question of the validity or adequacy of the approval of the Onsite Sewage System by the Health District is integrally related to the County's decision whether to grant a building permit for the proposed structure to be served by the Onsite Sewage System. The County's issuance of the building permit in this matter necessarily required a determination that there was an approved means of waste disposal to serve the proposed structure. While Petitioners' complaint alleges the failure of the Health District and the County to perform certain reviews or follow certain procedures regarding the permitting approval for the OSS, those claims fall squarely within the purview of the Land Use Petition Act (LUPA), Ch. 36.70C RCW, and must be appealed as part of the final land use decision authorizing the land use activity being challenged.
>
> 2. The final "land use decision" in this matter, as it relates to whether the land can be used for a particular purpose (i.e. development of a single family residence), was the County's issuance of the building permit for construction of the single family residence, which embodied an inferential if not express determination that there was an approved means of waste disposal to serve the residence. Failure to timely appeal the issuance of the building permit vested Begis' right in that permit which included having an approved means of waste disposal to serve the residence as authorized under the building permit (i.e. the vested right to construct a residence would be meaningless without the corresponding right of use

> and occupancy which requires an approved means of waste disposal). Accordingly, any challenge to the approval of the OSS should have been raised in the context of a challenge to the County's decision to issue the building permit in this matter.
>
> 3. Based on the above, the issue which Petitioners' seek to appeal is integrally related to the County's land use decision to issue a building permit in this matter and, thus, should have been raised in an appeal of the issuance of the building permit (i.e., Petitioners could have appealed the issuance of the building permit claiming that the County and/or Health District's review of the septic system did not satisfy requirements for establishing that there was an approved means of waste disposal to serve the residence in violation of SCC 30.50.104(2)). As such, LUPA governs the appeal in this matter and provides the sole and exclusive remedy for actions challenging a land use decision.
>
> 4. LUPA requires that an action be commenced within 21 days of the date of issuance of the land use decision. RCW 36.70C.040. The requirement to timely file is jurisdictional and in the absence of a timely filed petition under LUPA, the land use decision becomes final and binding and is deemed valid and lawful and is not subject to further review by the court. RCW 36.70C.040(2). Where LUPA provides an adequate remedy at law, alternative claims for declaratory relief, including statutory and constitutional writs of review, mandamus and prohibition, are barred.

(CP 81-82, Conclusions of law Nos. 1-4).

II. ISSUES PRESENTED

For purposes of the appeal in this matter, Appellants argue that the County's issuance of the building permit for the residence on February 24, 2015, did not constitute a "land use decision" notifying Appellants that the County did not intend to require further review of the OSS application under the County's LDA or Critical Areas regulations stating as follows:

> Simply put, nothing in the Building Permit, which focused entirely on Lot 36, could have alerted Appellants or other members of the public to the fact that the County did not intend to require a land Disturbing Activity permit or enforce its critical Areas ordinances for the OSS Grading Activities on lots 60 and 61.

(Brief of Appellants, pg. 4). Accordingly, Appellants argue that the trial court erred in dismissing Appellants' complaint for failing to timely file an appeal within 21-days after issuance of the building permit.

ISSUE No. 1: Based on the above, the issue on appeal can be stated as follows:

> Where SCC 30.50.104(2) prohibits a building permit from being issued without an approved means of waste disposal, does LUPA require that a party wishing to challenge whether an approved means of waste disposal exists to serve a proposed structure be raised in a timely appeal of the issuance of the building permit for such structure?

In addition to the above, the County asserts as an alternative ground for affirming the decision of the Superior Court the argument on the merits, to wit: That State law vests the local health jurisdiction with exclusive permitting authority over onsite septic systems and, thus, that the County did not error in failing to require that the OSS application be subject to further review under the County's LDA or critical Areas regulations. (CP 622-23, Snohomish County's Cross-Motion to Dismiss, pgs. 10-11).[1]

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[1] *Otis Housing Association v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009) (an appellate court may affirm the trial court on any grounds established by the pleadings and supported by the record.) The issue of the merits of Appellants' argument and whether

ISSUE No. 2: For purposes of ruling upon the merits of Appellants' complaint the issue may be stated as follows:

> Was the construction and installation of the OSS system as approved by the Health District under Permit No. 37915 subject to additional permitting and review under the County's LDA and Critical Areas regulations?

III. STATEMENT OF THE CASE

A. Statement of Facts: On January 7, 2014, Begis submitted an application for an Onsite Sewage System (OSS) Permit to the Health District for the purpose of constructing and installing a septic system to serve a single family residence proposed to be constructed upon Lot 36, Tract 6, Plat of Windland Tide Addition, commonly known as 11706 Marine View Drive, Edmonds, Washington ("Lot 36"). (CP 683-89, OSS Permit Application No. 37915 dated January 7, 2014). Because of the slope of Lot 36 and limited site area for placement of the residence and accompanying drainfield, the septic design called for a 1,000 gallon, two chamber holding tank to be located on Lot 36, with the residual pumped to a drainfield system located on two adjacent lots below and south of the building site comprising lots 60 and 61, Tract 9, Plat of Windland Tide Addition ("Lots 60 and 61"). (CP 686-89, System Schematic).

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state law preempted additional regulation of OSS permits under the County's land use regulations was briefed by the parties as part of the County's cross-motion to dismiss. (CP 615-623, County's Cross-Motion to Dismiss; CP 349-52, Response in Opposition to Motion to Dismiss).

On December 2, 2014, Begis submitted a Residential Building Permit Application (PFN 14-115603-RK), to Snohomish County Department of Planning and Development Services (PDS), for purposes of obtaining a permit to construct the residence upon Lot 36. (CP 692-93, Residential Building Permit Application No. 14-115603 RK, dated December 2, 2014). The building permit application listed the method of sewage disposal as "septic" (CP 692), and the accompanying site plan depicted the septic system as having a holding tank on Lot 36 with a pump chamber discharging residual effluent off-site. (CP 687).

Because the property was not served by a public sanitary sewer system, the County was prohibited from issuing a building permit for the residence until the Health District first granted approval for an approved means of waste disposal for the property in accordance with SCC 30.50.104(2) which provides as follows:

> Where a building permit application has been made for construction, other than for maintenance, repairs, and minor alterations, on a parcel of land not served by a public sanitary sewer system, ***a building permit shall not be issued without prior approval from the Snohomish Health District of an approved means of waste disposal***. [emphasis added]

The foregoing County Code provision is based upon State law which vests in the State Board of Health responsibility for promulgating rules governing the design, construction and installation of septic systems as follows: "***The state board shall adopt rules for the design, construction, installation***, operation, and maintenance of those on-site

sewage systems with design flows of less than three thousand five hundred gallons per day." RCW 43.20.050(3) (emphasis added). Consistent with the above, Ch. 18.210 RCW vests in the local health jurisdictions the responsibility for carrying out the directives of the State Board of Health and issuing permits for construction of septic systems as follows:

> (3) Local health jurisdictions and the state department of health ***retain authority to***:
>
> (a) Administer state and local regulations and codes for approval or disapproval of designs for on-site wastewater treatment systems;
>
> (b) ***Issue permits for construction***;
>
> (c) Evaluate soils and site conditions for compliance with code requirements; and
>
> (d) Perform on-site wastewater treatment design work as authorized in state and local board of health rules.

RCW 18.210.190(3).

Contrary to Appellants characterization of the review performed by the Health District, the State Board of Health permit requirements include review of a site plan for each OSS system which must include description of the following site characteristics:

> (c) A dimensioned site plan of the proposed initial system, the reserve area and those areas immediately adjacent that contain characteristics impacting design including:
>
> (i) Designated areas for the proposed initial system and the reserve area;
>
> (ii) The location of all soil logs and other soil tests for the OSS;
>
> (iii) ***General topography and/or slope***;
>
> (iv) Drainage characteristics;
>
> (v) The location of existing and proposed encumbrances affecting system placement, including legal access

> documents if any component of the OSS is not on the lot where the sewage is generated;

WAC 246-272A-0200(1)(c).

Based on the site plan submitted with an application the local health jurisdiction is responsible for performing a soil and site evaluation in accordance with WAC 246-272A-0220 which provides, in pertinent part, as follows:

> **Soil and Site Evaluation**
>
> (1) Only professional engineers, designers, or local health officers may perform soil and site evaluations. Soil scientists may only perform soil evaluations.
>
> (2) The person evaluating the soil and site shall:
>
> (a) Report:
>
> (i) A sufficient number of soil logs to evaluate conditions within:
>
> (A) The initial soil dispersal component; and
>
> (B) The reserve area.
>
> (ii) The groundwater conditions, the date of the observation, and the probable maximum height;
>
> (iii) ***The topography of the proposed initial system, the reserve area, and those areas immediately adjacent that contain characteristics impacting the design***;
>
> (iv) The drainage characteristics of the proposed initial system, the reserve area and those areas immediately adjacent that contain characteristics impacting the design;
>
> (v) ***The existence of structurally deficient soils subject to major wind or water erosion events such as slide zones and dunes***;
>
> . . .

WAC 246-272A-0220 (emphasis added).

Design criteria governing OSS systems specifically require consideration of critical areas such as slopes and adjacent wetlands and specify maximum slope percentages for hillsides where OSS systems

may be located based on soil type (WAC 246-272A-0234(1)(d)(ii)[2] and (2)(d)(ii)); and require consideration for impacts to adjacent wetlands and other critical areas. See WAC 246-272A-015. Lastly, in performing the soil and site evaluation, the local health officer has the authority to: "require any other soil and site information ***affecting location***, design, or installation". See WAC 246-272A-0220(4)(c).

In keeping with the above, the Health District in this matter required Begis to provide a report from a licensed engineer addressing the slope stability of the subject property and demonstrating how compliance with the applicable State Board of Health construction and design standards would be achieved as follows:

> This general area along Possession Lane has been subjected to previous land-slides. As such, compliance with WAC 246-272A-0210(5)(d) and (e) must be satisfactorily demonstrated. This should be in the form of a written report submitted by a Washington State Licensed Engineer. Said report should include technical reasoning explaining how stability of the land and surface drainage in the proposed primary and reserve areas meets WAC requirements.[3]

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[2] WAC 246-272A-0234(1)(d)(ii) provides as follows:

(d) Soil dispersal components having daily design flow between one thousand and three thousand five hundred gallons of sewage per day shall:

(i) Only be located in soil types 1-5;

(ii) ***Only be located on slopes of less than thirty percent, or seventeen degrees;*** and

(iii) Have pressure distribution including time dosing.

[3] WAC 246-272A-0210 addresses location and placement of onsite septic systems and prescribes the following requirements:

> (5) Persons shall design and/or install a soil dispersal component only if:
> (a) ***The slope is less than forty-five percent (twenty-four degrees)***;
> (b) The area is not subject to:

(CP 695-96, Letter dated December 15, 2014).

In response, Begis submitted to the Health District a Geotechnical Report from a licensed engineer addressing slope and soil stability of the drainfilled area and concluding as follows:

> This portion of the coastal bluffs are not as susceptible to landslides and earth slumps as other nearby areas because it is not saturated and the slope above the drainfilled site is dense cemented glacial till, adding a small amount of moisture at the base of the hill in the loose deep sand will not affect it, and in fact is not even measurable in the stability analysis. A separate summary report is provided with more specific detail.

(CP 698-99, Letter dated January 7, 2015, from Peter Chopelas, PE to Health District). By letter dated January 29, 2015, the Health District requested Begis to provide additional geotechnical analysis specific to lots 60 and 61 as follows:

> Submit a geotechnical report specific to lots 60 and 61 along Possession Lane and lot 34 off Marine View Drive. Given the area has been subjected to previous landslides, as stated in the report for lot 36, compliance with WAC 246-272A-0210(5)(d) and (e) must be satisfactorily demonstrated. This should be in the form of a written report submitted by a Washington State licensed engineer. Said report should include technical reasoning explaining how stability of the

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(i) Encroachment by buildings or construction such as placement of power poles and underground utilities;

(ii) Cover by impervious material;

(iii) Vehicular traffic; or

(iv) Other activities adversely affecting the soil or the performance of the OSS.

(c) Sufficient reserve area for replacement exists to treat and dispose one hundred percent of the design flow;

(d) ***The land is stable***; and

(e) Surface drainage is directed away from the site.

> land and surface drainage in the proposed primary and reserve areas meets WAC requirements.

(CP 701, Letter dated January 29, 2015, from the Health District to Begis).

On February 3, 2015, Begis submitted a Revised Geotechnical Report to the Health District which concluded as follows:

> Onsite inspection of the drain field location on lots 60 and 61 found that the soil is generally stable, there is no significant drainage over the surface at these locations. There is a history of mud flows and surface drainage several hundred feet to the south of this site because of the natural topography that directs surface flows into a natural existing channel. There is no observed feature that direct surface flows onto either lots 60 or 61, the location of the lines, tanks, pump chambers and drip field reserve area. The soil at these sites is below its natural angle of repose, analysis indicates a stability safety factor of 1.6, above the nominal 1.5 minimum (based on a Singh Diagram analysis). The subject site will safely allow a septic system to be installed as long as surface planting of stabilizing vegetation are as required by the health department. The addition of a septic system on the lower slopes in the deep sandy alluvial outwash apron of this bluff will not have any effect on the stability of the upper cemented glacial till bluffs above.

(CP 702-03, Revised Geotechnical report dated February 3, 2015, from Peter Chopelas, PE to Health District).

Based on the Revised Geotechnical Report submitted by Begis demonstrating compliance with the State Board of Health permitting requirements and indicating the stability of the soil to accommodate the OSS system, the Health District proceeded with approving OSS Permit No. 37915 on February 23, 2015. (CP 683). Once the County received

confirmation that the Health District had issued approval for an "approved means of waste disposal" to serve the residence, the County proceeded with issuing Building Permit No. 14-115603 RK to Begis on February 24, 2015, for construction of the residence upon lot 36. (CP 691).

The building permit as issued noted that the residence was to be served by a septic system and that final inspection of the structure was subject to the Health District's approval of the septic system. (CP 691). No appeal was filed by any party seeking review of the OSS permit issued by the Health District on February 23, 2015, or of the building permit issued by the County on February 24, 2015.

Thereafter, the Health District issued a "Permit to Install An Onsite Sewage Disposal System" on June 11, 2015, authorizing Begis to proceed with installation of a "Drip" type septic system. (CP 461). Both the septic system and residence were completed in September 2015, following which final inspection and approval of the septic system installation was approved by the Health District on September 13, 2015. (CP 461). Thereafter, the County issued final inspection approval for construction of the residence on September 22, 2015. (CP 795).

B. <u>Procedural History</u>: Appellants waited until September 30, 2015, after the residence was sold and occupied by Respondents Kee Bong Kim and Diana Yong, to file the complaint in this matter seeking relief in

the form of Declaratory Judgment and Injunctive Relief. (CP 813-871). Recognizing that Appellants had failed to timely appeal the issuance of the building permit, Appellants initially phrased their complaint as challenging the County's conduct in approving the "final inspection" for the residence once it was completed, alleging as follows:

> 10.4 ***The primary County decision challenged here is the County's decision on or around September 22, 2015, to issue a final inspection approval for the building permit covering the home*** associated with the OSS (Permit No. 14-115603-000-00-RK) (the "Final County Inspection") in the absence of SEPA, LDA and critical areas review of the OSS. To the extent that the County made an affirmative decision regarding the need for SEPA, LDA, and critical areas review of the OSS, the Final County Inspection constituted the County's final determination on that subject. The decision-making body or officer for this decision was the County's building official (including designees). Petitioners/Plaintiffs also challenge all related subsidiary County decisions, actions and/or failures and refusals to act with respect to Lots 36, 60 and 61 (as shown on Exhibit 2 to this petition and Complaint, which is attached hereto and incorporated herein by this reference) reflecting the County's preliminary and continuing decisions regarding the OSS, ***including without limitation the County's failure and refusal to take any enforcement action regarding the OSS, such as revocation of the building permit and other approvals*** for failure to comply with the County's SEPA, LDA and critical areas requirements and/or enforcement of permit conditions in the building permit (Permit No. 14-115603-000-000-RK) and other related approvals requiring compliance with the County's LDA code. [emphasis added]

(CP 784, First Amended Complaint, Paragraph 10.4).

As reflected in the complaint above, the relief being requested by Appellants sought to compel the County to take enforcement action consisting of revocation of the building permit and other approvals which

were dependent upon the validity of an approved means of waste disposal to serve the structure. As such, the action was a collateral attack on the building permit itself. Based on the above, the County and the Health District both moved to dismiss the action for failure to timely file an appeal of the building permit decision under the Land Use Petition Act (LUPA), Ch. 36.70C RCW. (CP 613-635, County's Motion to Dismiss; CP 539-558, Health District's Motion for Dismissal).

Specifically, the County argued that the act of issuing a building permit for a structure on a parcel of land not served by a public sanitary sewer system requires an inferential if not express decision by the County under SCC 30.50.104(2) that an approved means of waste disposal exists to serve the structure. (CP 622-630). Accordingly, under the holding of the court in *Samuel's Furniture, Inc., v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002), and its progeny, the County argued that because SCC 30.50.104(2) prohibited the County from issuing a building permit unless an approved means of waste disposal existed to serve the residence, the Appellants could have challenged the issuance of the building permit on the grounds that it violated SCC 30.50.104(2) to the extent they believed the Health District's approval of the OSS permit was deficient or inadequate to establish an approved means of waste disposal to serve the structure. (CP 629-30).

To the extent LUPA provides an adequate remedy at law to raise the issue asserted in this matter, LUPA was the exclusive means of judicial review and precluded Appellants from belatedly filing their action under the guise of a complaint for declaratory and injunctive relief. RCW 36.70C.030(1) (stating: "This 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***, . . .").

In an effort to avoid this argument, Appellants in their response to the County's motion to dismiss attempted to "re-characterize" their complaint as now challenging the County's decision relating to investigation of an unrelated Code Enforcement action affecting Lots 60 and 61 initiated on July 20, 2015 (Case #15-110279 CT). (CP 354-55). As reflected in the exhibits attached to the Appellants' response, the unrelated code enforcement action involved conduct by a contractor for Begis who was trenching a pipeline ditch and struck a shallow perched aquifer which released surface water runoff. (CP 251-262). The contractor attempted to redirect the surface water flow by digging a ditch along the adjacent roadway (Possession Lane), and clearing a portion of the hillside of Lot 61 and in doing so altered a natural drainage course and graded across certain critical areas. (CP 251-55).

While Appellants did submit an engineering report from Shannon & Wilson during this same time period also expressing concern regarding

the location of the drainfield for the OSS system upon Lots 60 and 61 (CP 164-171), the County's Code Enforcement action had nothing to do with the grading activity on Lots 60 and 61 relating to installation of the drainfield for the OSS system. Rather, as reflected in the County's letter to Begis dated August 12, 2015, the County referred the concerns regarding the siting of the drainfield to the Health District as follows:

> A geotechnical review submitted by Shannon & Wilson, Inc., as requested by the BNSF Railroad Company, has raised concerns regarding the location of the proposed drainfield on Lots 60 and 61. Snohomish County did not issue or approve permits for this work ***and has deferred to the Snohomish Health District for review and next steps in addressing this concern***. Approved as-builts are required of the drainfield and pumpline within the road easement prior to issuance of a certificate of occupancy for the house on lot 36. (emphasis added)

(CP 274). That same letter goes on to address the grading violations and diversion along Possession Lane which were the subject of the Code Enforcement action and stated as follows:

> Grading has taken place at the end of possession Lane, including widening of the road and clearing along the hillside of lot 61. A seep has also been intercepted by the applicant and/or his contractor, resulting in surface flow of ground water across Possession lane. This flow was captured and conveyed to the edge of an adjacent property without the appropriate easement for direct pipe discharge onto neighboring properties. A land disturbing activity permit is needed for the work associated with restoring this area. See the letter dated July 22nd, 2015 for more details.

(CP 274).

The letter dated July 22nd referenced above was the County's letter accompanying the Notice of Violation regarding the Code Enforcement action and makes clear that the County's Code Enforcement action pertained solely to the grading violations relating to the redirection of the surface water flows. (CP 254-55). Accordingly, the County's Code Enforcement action did not address nor create any renewed opportunity for Appellants to appeal the validity of the underlying approval of the OSS system or the permit approvals issued by the Health District for construction and installation of the OSS system upon Lots 60 and 61.

Following oral argument, Judge Downes entered the above referenced Order dismissing Petitioners/Appellants complaint as against the County and the Health District for failure to timely appeal under LUPA. (CP 74-87).[4] Appellants filed a Motion for Reconsideration raising the same arguments as asserted on appeal. (CP 64-73). The County's response is set forth at CP 33-54. By Order dated December 17, 2015, Judge Downes denied Petitioners' motion for reconsideration. (CP 23-24). This appeal was subsequently commenced by Appellants on December 31, 2015. (CP 1-22). For the reasons set forth below, Snohomish County respectfully asks that the Court affirm the decision of the Superior Court dismissing Petitioners/Appellants complaint in this matter.

IV. LAW AND ARGUMENT

A. LUPA Provides Exclusive Remedy: The fundamental issue on appeal is whether LUPA provided Appellants with an adequate remedy at law to appeal the issue asserted in this matter, to wit: Whether the Health District's approval of the OSS application was deficient or defective because neither the Health District or the County further reviewed the OSS application under the County's LDA and Critical Areas regulations. If so, LUPA is the exclusive remedy. *Sutter v. Sutter*, 51 Wn.2d 354, 355, 318 P.2d 324 (1957) (holding: "If there is a right of appeal or other adequate remedy available to the relator, the writ of review (or certiorari) will not lie.")

For purposes of framing the issue, the County has stated the issue as follows:

> Where SCC 30.50.104(2) prohibits a building permit from being issued without an approved means of waste disposal, does LUPA require that a party wishing to challenge whether an approved means of waste disposal exists to serve a proposed structure be raised in a timely appeal of the issuance of the building permit for such structure?

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[4] The Court's order did not dismiss Petitioners' claims alleging cause of action for Private Nuisance as against Respondents Begis and Kim and Yong. (CP 83).

In the context of land use decisions, LUPA is the exclusive means of judicial review and replaces the writ of certiorari as follows:

> (1) This 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***, except that this chapter does not apply to:
> (a) Judicial review of:
> (i) Land use decisions made by bodies that are not part of a local jurisdiction;
> (ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;
> (b) Judicial review of applications for a writ of mandamus or prohibition; or
> (c) Claims provided by any law for monetary damages or compensation. .

RCW 36.70C.030(1); *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 109, 38 P.3d 1040 (2002) (dismissing complaint for declaratory relief challenging King County's failure to require a conditional use permit as a condition of issuance of a grading permit holding: "[T]his case is not the proper subject of declaratory relief. There is a completely adequate alternative remedy, LUPA.")

LUPA applies to both affirmative land use decisions and to those actions where a party claims that a land use decision was based on an erroneous interpretation of law and/or failed to require compliance with applicable law. *Habitat Watch v. Skagit County* , 155 Wn.2d 397, 407, 120 P.3d 56 (2005); *Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d

475 (2006), *review denied* 159 Wn.2d 1005 (2006). The reasoning is stated by the court in *Habitat Watch* as follows:

> LUPA embodies the same idea expressed by this court in pre-LUPA decisions - that even illegal decisions must be challenged in a timely, appropriate manner. *See Pierce v. King County* , 62 Wn.2d 324, 334, 382 P.2d 628 (1963) . . . Under LUPA, relief may be granted where "[t]he body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process" and where "[t]he land use decision is outside the authority or jurisdiction of the body or officer making the decision." RCW 36.70C.130 (1)(a), (e). ***Thus, defects in land use determinations that could have resulted in decisions that were void ab initio under pre-LUPA cases fall within LUPA***, with its express 21-day limitation period. Moreover, the act quite clearly declares legislative intent that chapter 36.70C RCW is to be "the exclusive means of judicial review of land use decisions." RCW 36/70C.030 (1).

Habitat Watch, 155 Wn.2d at 407.

The facts at issue in *Asche v. Bloomquist, supra.*, are analogous to those in the present case. In *Asche*, the plaintiffs sought review of an allegedly illegal building permit issued by Kitsap County to the defendant authorizing construction of structures which exceeded the maximum permissible building height. *Asche*, 132 Wn.App. at 788. Defendants were granted the building permit in September 2004 but it was not until construction had commenced and the garage structure was completed in December 2004 that the plaintiffs discovered that the height of the structures exceeded the permissible building height under applicable code. *Id.*, at 789.

Because more than 21-days had passed since the issuance of the building permit, Plaintiffs could not file an action under LUPA and instead filed a complaint for injunctive relief based upon public nuisance and for Writ of Mandamus to compel the County to issue a stop work order. *Asche*, 132 Wn.App. at 788. Because plaintiffs had an adequate remedy at law under LUPA and had failed to timely file a land use petition within 21-days of the issuance of the building permit under LUPA, the court affirmed dismissal of Plaintiff's complaint holding as follows:

> We hold that their failure to file a land use petition within 21 days of the issuance of the building permit as required by RCW 36.70C.040 is determinative. Thus, their claims for nuisance, either public or private, fail, and their due process actions fail because they did not properly file under the Land Use Petition Act (LUPA) chapter 36.70C RCW.

Asche, 132 Wn.App. at 788.

The requirement to timely file a petition under LUPA applies even where a party is alleging the failure to require or obtain a necessary permit. *Samuel's Furniture, Inc., v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002); *Twin Bridges Marine Park, LLC v. Department of Ecology,* 130 Wn.App. 730, 125 P.3d 155 (2005). In *Samuel's Furniture*, the City of Ferndale issued a fill and grade permit and a building permit to the plaintiff for an extension of his store. *Samuel's Furniture*, 147 Wn.2d at 444. The Department of Ecology asserted that the extension was within the shoreline jurisdiction and that

construction could not proceed without a shoreline substantial development permit but did not otherwise file a petition for review of the City's permitting decision under LUPA. *Id.*, at 445. After reviewing the shoreline jurisdiction map the City of Ferndale conclude the work was not within the shoreline jurisdiction and allowed the plaintiff to proceed under the building permit as issued without requiring a shoreline permit. *Id.*, at 445.

Ecology did not appeal issuance of the building permit and instead threatened enforcement action. In response, the property commenced a declaratory judgment action following which the trial court granted the property owner's motion for summary judgment concluding that Ecology had waived its ability to challenge the City's decision that the project did not require a shoreline permit by failing to appeal the City's decision to grant the building permit. *Id.*, at 447. On appeal, our Supreme Court affirmed the trial court's decision granting summary judgment in favor of the property owner holding that Ecology was required to file a timely LUPA petition to challenge a local government's decision to allow a development project when the local government has determined that the project does not require a shoreline permit, stating as follows:

> Samuel's asserts that Ecology was required to file a LUPA petition in order to challenge the land use decisions made by the City as violations of the SMA. Because the SMA prohibits local governments from authorizing

development on shorelines unless it first determines that the development is consistent with the "policy and provisions of the [SMA] and the master program," WAC 173-27-140(1), Samuel's argues that the City made "land use decisions" concerning the shoreline jurisdiction on at least three occasions: when it issued the fill and grade permit, when it issued the building permit, and when it rescinded the stop work order. Relying on *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000), Samuel's contends that Ecology waived its right to challenge the City's decision that the Samuel's project was outside the shoreline jurisdiction by failing to challenge the City's decision to issue the permits and to rescind the stop work order.

Ecology responds that it does not contend that the fill and grade or the building permits were improper, but only that a shoreline permit was required. Ecology asserts that because the City never issued a formal decision as to the shoreline jurisdiction, there is nothing for it to appeal. We disagree.

First, Ecology's current position is in contrast to its earlier position that a substantial development permit could not be issued for this area and that the fill would need to be removed. *See* CP at 792-93. Thus, in effect it did contend that the fill and grade permit was improper.

Second, because WAC 173-27-140 prohibits local governments from authorizing shoreline development that is inconsistent with the SMA, ***the City's issuance of the fill and grade and building permits necessarily required a determination that the project was outside the shoreline jurisdiction***. Under LUPA, a court may grant relief if the party seeking relief shows that "[t]he land use decision is an erroneous interpretation of the law" or that "[t]he land use decision is a clearly erroneous application of the law to the facts[.]" RCW 36.70C.130(1)(b), (1)(d). ***Thus, Ecology could have challenged the issuance of those permits on the basis that they are inconsistent with the SMA because no substantial development permit was issued***

Samuel's Furniture, 147 Wn.2d at 450-51.

Appellants in the present case make the same argument as did Ecology in *Samuel's Furniture*. Specifically, Appellants argue that the County's decision to issue the building permit for the residence on Lot 36 did not constitute a formal decision as to whether the County would also require the OSS application to still be subject to further review and approval under the County's LDA and Critical Areas regulations. However, as with the requirements of the Shoreline Management Act at issue in *Samuel's Furniture*, county regulations prohibit issuance of a building permit on a parcel of land not served by a public sanitary sewer unless there is prior approval of an "approved means of waste disposal." SCC 30.50.104(2).

Accordingly, as with the issuance of the building permit by the City of Ferndale in *Samuel's Furniture*, the County's issuance of a building permit to Begis in this matter necessarily required a determination under SCC 30.50.104(2) that there was an approved means of waste disposal to serve the residence for which the building permit was sought. Accordingly, as with Ecology in *Samuel's Furniture*, Appellants in the present case could have challenged the County's issuance of the building permit to Begis on the grounds that it was inconsistent with SCC 30.50.104(2) to the extent Appellants believed that the OSS application could not be approved without additional review and permitting approval under the County's LDA and Critical Areas regulations.

This is what triggers LUPA's application, to wit: Whether Appellants could have challenged the issuance of the building permit based upon the alleged defects or deficiencies in the Health District's approval of the OSS permit. If so, LUPA is the exclusive means of judicial review and Appellants were required to timely file an appeal of the building permit decision.

Appellants attempt to distinguish the holding in *Samuel's Furniture* by arguing that such holding only bars "collateral attacks" on those activities authorized under the building permit. (Brief of Appellants, pg. 22-24, citing *Twin Bridges Marine Park, LLC v. Department of Ecology, supra.*) In *Twin Bridges*, the court addressed facts similar to those in *Samuel's Furniture* and reached a similar conclusion, to wit: that Ecology was precluded from pursuing enforcement action against the construction of a building for which Ecology failed to file a timely appeal of the issuance of the building permit. In reaching this decision, the trial court in *Twin Bridges* cited an additional rationale under the vested rights doctrine as follows:

> The court ruled that because WAC 173-27-140 prohibited local jurisdictions from authorizing shoreline development inconsistent with the SMA, the County's issuance of the building permits required a determination that the project "was encompassed by the existing Shoreline Substantial Development Permits." ***The court further ruled*** that Ecology's failure to file a timely LUPA challenge to the reissuance of the building permits ***vested Twin Bridge's rights in those permits and precluded Ecology from making a collateral attack on activities authorized by the building***

> ***permits***. The court additionally ruled that Ecology's orders were impermissible collateral attacks, made without jurisdiction. The court held that the orders must be dismissed and that the Board's decision must be reversed. Ecology appealed.

Twin Bridges, 130 Wn.App. at 738.

As reflected above, the trial court in *Twin Bridges* based its decision on two distinct grounds: The first was the traditional analysis under *Samuel's Furniture* that the City's decision to issue the building permit necessarily required a determination on the issue being appealed (i.e. whether a shoreline permit was also required), and, thus, that such inferential decision could have been appealed in an appeal of the issuance of the building permit. The second was an analysis under the vested rights doctrine and the conclusion that Ecology was precluded from making a "collateral attack" on activities authorized under a building permit which is not appealed. In affirming the trial court's decision, this Court specifically recited the holding in *Samuel's Furniture* as being equally applicable and held as follows:

> Under the analysis of *Samuel's Furniture* , Ecology must invoke LUPA to challenge a permit that it believes is inconsistent with the SMA, or it must enlist the aid of the local government. ***An inferential decision by the local government that an additional shoreline permit is not required must be appealed through LUPA to the superior court***.

Twin Bridges, 130 Wn.App. at 743.

Appellants in the present case cite to the language of the trial court's decision in *Twin Bridges* to argue that the holding should be limited to merely barring collateral attacks on activities ***authorized*** by the building permit. (Brief of Appellants, pg. 22-23). Because the County's building permit only applied to the construction of the residence upon Lot 36, Appellants argue that the holding in *Samuel's Furniture* does not apply to the facts of this case.

As set forth above, the reasoning of the court in *Samuel's Furniture* is not limited to whether the specific activity sought to be challenged is authorized by the building permit. Rather, the issue is whether the decision on the building permit necessarily required an inferential decision on the issue subsequently challenged as follows:

> ***[T]he City's issuance of the fill and grade and building permits necessarily required a determination that the project was outside the shoreline jurisdiction***. Under LUPA, a court may grant relief if the party seeking relief shows that "[t]he land use decision is an erroneous interpretation of the law" or that "[t]he land use decision is a clearly erroneous application of the law to the facts[.]" RCW 36.70C.130(1)(b), (1)(d). ***Thus, Ecology could have challenged the issuance of those permits on the basis that they are inconsistent with the SMA because no substantial development permit was issued***

Samuel's Furniture, 147 Wn.2d at 451. That same reasoning applies with equal force to the County's issuance of the building permit in this matter as the issuance of the building permit necessarily required the County to make a determination whether there was an approved means of waste

disposal to serve the residence for which the building permit was sought. Accordingly, Appellants could have challenged the issuance of that permit as inconsistent with SCC 30.50.104(2) for lack of an approved means of waste disposal.

More importantly, Appellants entirely ignore the rationale underlying LUPA and the consequences of allowing belated appeals challenging determinations that are integral to the decision to issue a building permit. While the County's building permit itself did not authorize installation of the OSS system, the issuance of the building permit was specifically dependent upon and subject to there being an approved means of waste disposal to serve the residence as required by SCC 30.50.104(2). The "vested right" to construct the residence would be meaningless without a corresponding right of use and occupancy of the structure which requires an approved means of waste disposal. Accordingly, this is why the County's regulations preclude issuance of a building permit upon a parcel of land not served by a public sanitary sewer unless there is prior approval of an "***approved means of waste disposal***." SCC 30.50.104(2).

To allow a belated attack on the validity or adequacy of the OSS permit as issued by the Health District would for all intents and purposes constitute a collateral attack on the issuance of the building permit itself. This is clearly reflected in Appellants own complaint where they allege

that the failure to review the OSS application under the County's LDA and Critical Areas regulations renders the OSS permit void and requires the County to take enforcement action consisting of revoking the building permit. (CP 784, First Amended Complaint, Paragraph 10.4).

The purpose of LUPA is to require timely appeal of land use decisions to allow for finality in such decisions and avoid the "uncertainty" which Appellants seek to interject in this matter:

> 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.

RCW 36.70C.010. This policy was cited by the court in *Samuel's Furniture* in support of its decision as follows:

> Requiring Ecology to file a LUPA petition to contest a local government decision to allow a land use action when it has determined that the action is not within the shoreline jurisdiction is also consistent with this state's "strong public policy favoring administrative finality in land use decisions." *Skamania County*,144 Wn.2d at 48. *See also Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 5, 829 P.2d 765 (1992) (concluding that a "body of cogent, workable rules upon which regulators and landowners alike can rely" is essential to resolving land use regulation disputes). We have stated that " '[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property.' "*Skamania County*, 144 Wn.2d at 49 (alteration in original) (quoting *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974)).
>
> The blanket enforcement authority sought by Ecology is in sharp contrast to the policy favoring finality in land use decisions. ***Under Ecology's position, even though a party***

> ***relies in good faith on a local government determination that the SMA does not apply, and therefore proceeds with construction, it may still be subject to Ecology enforcement action weeks, months, and even years later for failing to obtain a substantial development permit.*** These belated enforcement actions could result in civil and/or criminal penalties being issued against the party as well as the potential loss of thousands of dollars in construction costs that have already been incurred. Moreover, Ecology's position fails to give a party any notice of an impending enforcement action. Ecology's interpretation of the SMA would leave land owners and developers unable to rely on local government decisions - precisely the evil for which LUPA was enacted to prevent.

Samuel's Furniture, 147 Wn.2d at 458-59.

Appellants argument that it can belatedly challenge the adequacy of a permit for an Onsite Septic System issued by the Health District after construction of the residence to be served by that septic system, would effectively preclude any landowner from being able to rely upon a building permit issued by the County for a structure upon land not served by a public sanitary sewer. As set forth above, this is what LUPA was enacted to prevent.

B. Subsequent decisions Do Not Create New Appeal Periods: Assuming LUPA applies to the review of the adequacy of the OSS permit review, Appellants make two alternative arguments: First, Appellants allege that the County's own building permit required the installation of the OSS system to comply with the County's LDA regulations. (Brief of Appellant, pg. 32). This argument is based on language appearing on the face of the County's building permit which provides as follows:

> "All activity authorized by this permit shall comply with Chapters 30.63A [drainage code] and 30.63B [land disturbing activity code] SCC"

(CP 691). Accordingly, Appellants argue that LUPA does not preclude them from bringing an action for non-compliance of the OSS permit application with this condition. (Brief of Appellant, pg. 34).

The problem with this argument is that the 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. For the reasons set forth above, the authority to issue permits for construction and installation of septic systems is vested exclusively in the local health jurisdiction. By its own language, the conditions appearing on the face of the County's building permit only apply to those activities authorized by the permit. Since the installation of the OSS system was authorized by the Health District's OSS permit, the conditions of the County's building permit do not apply to those activities which are separately authorized by the Health District's OSS permit.

Second, Appellants contend the filing of their complaint was timely under LUPA based upon two subsequent decisions or actions taken by the County consisting of : (1) The County's decision to conclude its Code Enforcement action regarding grading violations (Brief of Appellant, pgs. 39-42); or (2) The County's decision to approve the "final inspection" for the residence. (Brief of Appellant, pgs. 42-43).

At the outset, the failure of Appellants to appeal the issue of the adequacy of the OSS permit at the time of issuance of the building permit precludes them from seeking to challenge such issue in a subsequent LUPA appeal. *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). In *Wenatchee Sportsmen Ass'n*, Chelan County initially approved a site-specific rezone in 1996, rezoning certain property to Recreational Residential (RR-1) which allowed residential subdivisions. 141 Wn.2d at 174. Shortly thereafter, the property owner submitted an application for residential subdivision which was approved by Chelan County. *Id.*

A group appealed the approval of the subdivision arguing that it violated the Growth Management Act (GMA) by allowing urban densities outside of the established urban growth boundary; however, no appeal was ever taken of the original site-specific rezone. In addressing whether the appellants could challenge the original rezoning decision in a subsequent appeal of the subdivision decision, the court held as follows:

> The petition is timely if it is filed within 21 days of the issuance of the land use decision. RCW 36.70C.040(3). WSA did not file a LUPA petition when the decision to rezone was made in 1996. [footnote omitted] Because RCW 36.70C.040(2) prevents a court from reviewing a petition that is untimely, approval of the rezone became valid once the opportunity to challenge it passed. It was too late for WSA to challenge approval of the rezone in a LUPA petition filed in 1998. The only zoning-related issue the court can consider under the LUPA challenge to the development proposal is whether Stemilt's plat application complies with the applicable zoning ordinances. As we noted above, it does.

> WSA argues that the validity of the rezone is irrelevant to its claims because the zoning ordinance is only one of the applicable land use laws in effect. Br. of Resp't at 13. A subdivision which meets the minimum lot size requirement of the zoning ordinance, it argues, must also comply with other applicable laws. *Id.* at 14. WSA claims, and the trial court agreed, that the Highlands project constitutes impermissible urban growth outside of the adopted urban growth boundary. Br. of Resp't at 21; Clerk's Papers at 156, 158. However, the issue of whether the RR-1 zoning allows for urban growth outside of an IUGA ***should have been raised in a timely LUPA challenge to the rezone, not in the later challenge to the plat***. At that time a court reviewing the rezone decision could have considered whether the minimum density allowed by the RR-1 district was compatible with the IUGA. If there is no challenge to the decision, the decision is valid, the statutory bar against untimely petitions must be given effect, and the issue of whether the zoning ordinance is compatible with the IUGA is no longer reviewable.
>
> The only issue that can be raised concerning the rezone is whether the plat application conforms to the zoning requirements. WSA did not argue in the court below and does not argue here that the Highlands project violates the County's RR-1 zoning ordinance. Clerk's Papers at 150; Br. of Resp't at 14. Therefore, with respect to the issue of whether the Highlands project violates the GMA, we hold that the County did not err in its decision. We do not need to reach the other GMA issues raised by the parties.

Wenatchee Sportsmen Ass'n, 141 Wn.2d at 180-82.

As with the belated attempt to appeal the rezone in *Wenatchee Sportsmen*, Appellants in the present case argue that the County's subsequent decisions regarding the Code Enforcement action and/or the final inspection on the residence created new appeal periods for challenging the underlying validity of the OSS permit. As set forth in the County's motion to dismiss, the only issue that would have been subject to

review in an appeal of a decision approving a final inspection under a building permit (assuming a third-party had standing to appeal such a decision), would have been whether the construction work performed complied with the applicable building code. (CP 632-34; SCC 30.50.376).

Appellants in the present case are not challenging whether the residence as constructed complied with the building code; instead, they are seeking to use the decision approving the final inspection as a way of collaterally attacking the original decision made at the time of issuance of the building permit that an approved means of waste disposal existed to serve the residence. As set forth in the holding of the court above, such an issue should have been raised in an appeal of the issuance of the building permit, not in a later challenge to the final inspection of the work performed under that permit.

As for the County's action regarding the Code Enforcement matter relating to improper grading, the Code Enforcement matter had nothing to do with the installation of the septic system. Rather, as set forth above, the Code Enforcement action was initiated as a result of trenching activity by a contractor for Begis who attempted to redirect surface water flow onto a neighboring property. (CP 251-262). While Appellants did submit an engineering report raising concerns about the placement of the septic system with what they deemed to be a critical area, the County never initiated any Code Enforcement action regarding such concerns. Instead,

the County forwarded the engineering report to the Health District who had jurisdiction over permitting of the septic system. (CP 274). Accordingly, neither the County's action approving the final inspection for the residence or the County's action concluding its Code Enforcement action regarding redirecting surface water runoff created any new appeal period for Appellants to challenge the adequacy of the OSS permit in this matter.

C. Department of Health Has Exclusive Jurisdiction to Regulate Onsite Septic Systems: As an alternative ground for affirming the Superior Court, the recital of the State laws and administrative regulations governing design and construction of onsite septic systems set forth above makes clear that the state has preempted the field of regulation and vested authority to grant permits for construction of onsite septic systems in the state Board of Health as follows: "***The state board shall adopt rules for the design, construction, installation***, operation, and maintenance of those on-site sewage systems with design flows of less than three thousand five hundred gallons per day." RCW 43.20.050(3). The local health jurisdictions, in turn, are granted the sole authority to issue permits for construction of onsite septic systems as follows:

> (3) Local health jurisdictions and the state department of health ***retain authority to***:
>
> (a) Administer state and local regulations and codes for approval or disapproval of designs for on-site wastewater treatment systems;
>
> (b) ***Issue permits for construction***;

> (c) Evaluate soils and site conditions for compliance with code requirements; and
>
> (d) Perform on-site wastewater treatment design work as authorized in state and local board of health rules.

RCW 18.210.190(3).

As more fully set forth above, the State Board of Health has promulgated numerous regulations in Ch. 246-272A WAC, governing permitting requirements implemented by the local health jurisdictions including evaluation of slope and soil conditions for siting of septic systems, presence of landslide and erosion hazards, and evaluation of impacts upon adjacent wetlands and critical areas. In short, all of the issues which Appellants claim should have been reviewed under the County's LDA and Critical Areas regulations were reviewed by the Health District under its permitting requirements.

The language in RCW 43.20.050(3) set forth above is explicit and straight forward and directs that the State Board of Health be the entity which "***shall***" adopt the rules governing "***design, construction and installation***" of onsite sewage systems. That board, in turn, has clearly adopted regulations governing site criteria and permitting requirements governing where an onsite sewage system may be installed.

Accordingly, having enacted a general law upon the subject which clearly vests the authority to regulate permitting of onsite septic systems in the State Board of Health as implemented through the local health jurisdiction, such septic system permits are not subject to additional

review and permitting requirements under the County's land use regulations. *Snohomish County v. Thompson*, 19 Wn.App. 768, 770, 577 P.2d 627, *review denied* 91 Wn.2d 1006 (1978) (holding that state regulation governing construction standards for mobile homes preempted County's ability to adopt more stringent standards under the rule that: "the plenary police power in regulatory matters accorded municipalities by Const. Art. 11, 11, ceases when the state enacts a general law upon the particular subject, unless there is room for concurrent jurisdiction." quoting *Lenci v. Seattle,* 63 Wn.2d 664, 669, 388 P.2d 926 (1964)). For this reason, the County does not require duplicative building permits or other review of OSS systems for which a construction permit is issued by the Health District.

V. CONCLUSION

Under County code, SCC 30.50.104(2), the County is precluded from issuing a building permit for construction upon a parcel not served by public sanitary sewer until there is prior approval by the Health District of an "approved means of waste disposal" to serve the residence proposed to be constructed. Accordingly, any decision by the County issuing a building permit for such land necessarily requires a determination that there is an approved means of waste disposal to serve the property.

As such, LUPA requires that any challenge to the validity or adequacy of a determination that an approved means of waste disposal

exists to serve such a parcel of land must be raised in a timely appeal of the issuance of a building permit for such property in accordance with the holding of the court in *Samuel's Furniture*, supra. In the present case, Appellants waited more than seven months after issuance of the building permit and construction of the residence and associated septic system to raise the appeal in this matter. Thus, the Superior Court correctly ruled that such action was barred for failure to timely file under LUPA.

For the reasons set forth above, Snohomish County respectfully asks that this Court affirm the decision of the Superior Court.

Respectfully submitted this 29th day of April, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: _____
BRIAN J. DORSEY, WSBA #18639
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Attorney for Respondent Snohomish County

DECLARATION OF SERVICE

I, Cindy Ryden, hereby declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on the 29th day of April, 2016, I caused to be served the Brief of Respondent Snohomish County and this Declaration of Service on the following parties by the method indicated:

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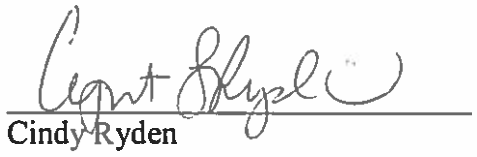
I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 29th day of April, 2016.



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