

NOTICE: SLIP OPINION
(not the court’s final written decision)

The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court’s final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously “unpublished” opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court’s opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: <https://www.lexisnexis.com/clients/wareports>.

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FILED
4/13/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PIONEER SQUARE HOTEL
COMPANY and APH CORPORATION,
Washington corporations,

Appellants,

v.

THE CITY OF SEATTLE, acting through
the SEATTLE PUBLIC UTILITIES,

Respondent.

DIVISION ONE

No. 80000-1-1

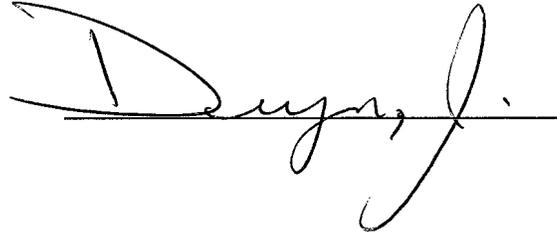
ORDER GRANTING MOTION
FOR RECONSIDERATION
WITHOUT ALTERING RESULT

The respondent, City of Seattle, has filed a motion for reconsideration of the opinion filed on February 18, 2020. The City does not seek alteration of the result. The appellants have filed a response to the respondent's motion, indicating no opposition to the request. The court has determined that the motion should be granted, the opinion withdrawn, and a substitute opinion filed; now, therefore, it is hereby

ORDERED that the motion for reconsideration is granted; and it is further

ORDERED that the opinion filed on February 18, 2020 is withdrawn; and it is further

ORDERED that a substitute opinion shall be filed and published in the
Washington Appellate Reports.



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PIONEER SQUARE HOTEL
COMPANY and APH CORPORATION,
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DIVISION ONE

No. 80000-1-1

PUBLISHED OPINION

DWYER, J. — Pioneer Square Hotel Company (Pioneer) appeals from the trial court’s summary judgment order dismissing its declaratory and injunctive relief claims against the city of Seattle (City). In dismissing the claims, the trial court characterized Pioneer’s action as a land use petition subject to the 21-day statutory limitation period of the Land Use Petition Act¹ (LUPA). We reverse; LUPA and its procedural rules do not govern this action.

I

Pioneer is improving a property in Seattle’s Pioneer Square neighborhood located at 110 Alaskan Way South. As part of this process, Pioneer was required to obtain a multiple use permit and a building permit from the Seattle Department of Construction and Inspections (formerly the Department of Construction and Land Use). Once these permits were obtained, Pioneer was

¹ Ch. 36.70C RCW.

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required to obtain a water availability certificate (WAC) from Seattle Public Utilities (SPU) before its property could be connected to the City's water supply system. SPU issued a WAC in 1999 certifying that water was available from an existing 6-inch diameter water main on Alaskan Way South.

However, construction of the improvement, a 33-unit hotel addition, was significantly delayed for reasons unrelated to the present litigation. During the intervening period, the WAC issued in 1999 expired. Accordingly, when Pioneer approached SPU seeking activation of a meter on the existing 6-inch water main on Alaskan Way South, SPU required that Pioneer apply for a new WAC.

Pioneer did so. On January 29, 2018, SPU issued a new water availability determination, coupled with WAC 20180049, which was not to take effect until Pioneer contracted to install a new 8-inch water main running from Yesler Way, north of the property, to the existing 6-inch main. SPU was to own and operate this main upon its successful installation. Three days later, SPU issued a revised determination, which required Pioneer to contract for construction of a 12-inch main, with an accompanying WAC 20180136. The reason given for the change was a clerical error in the prior determination—applicable regulations required 8-inch mains to serve new developments in residentially zoned areas but required 12-inch mains for new developments that, as with Pioneer's hotel, lie in commercially zoned areas. Again, SPU was to own and operate the new main.

Pioneer appealed this determination to SPU's manager level review committee on February 15, 2018. Pioneer offered evidence that the 6-inch main was adequate for its property's needs and that requiring it to install a 12-inch

main was unnecessary and burdensome. On March 19, Pioneer received SPU's manager level determination, which stated:

The existing 6-inch water main in Alaskan East Roadway Way is not well documented and may not fully support new water services after the reconstruction of Alaskan Way. The new requirement is to design and install approximately 80 feet of 8-inch ductile iron restrained joint pipe from the existing 12-inch water main in Alaskan Way South, crossing Alaskan Way to the south Alaskan Way parcel boundary. New water services will be provided from the new 8-inch ductile iron pipe. A new Water Availability Certificate will be issued to reflect the changes in the water main extension requirement.

Pursuant to this decision, SPU issued WAC 20180570, again not to take effect until these new requirements were met. This determination provided for appeal to SPU's director if Pioneer was unsatisfied. Pioneer so appealed. On May 15, 2018, SPU Director Jeff Bingaman conveyed to Pioneer SPU's director level determination. This determination, again, rejected Pioneer's proposal to use the existing 6-inch water main, and clarified that WAC 20180570 should require a 12-inch and not an 8-inch water main—one that would be owned, operated, and maintained by SPU upon being completed. In the alternative, Pioneer was offered the option of installing two private water lines, one 4-inch main and one 2-inch main, connecting across Alaskan Way South to a 12-inch main. The determination indicated that SPU would issue a new WAC reflecting Pioneer's preferred option.

Pioneer, instead, contacted both Bingaman and assistant city attorney William Foster, restating its argument in favor of allowing the project to be served by the existing water main. Foster replied that the director level determination contained the City's final position on the matter.

In August 2018, Pioneer commenced this action in superior court, seeking a declaratory judgment that the conditions SPU placed on the issuance of a WAC violated RCW 82.02.020, which limits municipal authority to require payments from developers. Pioneer also sought an injunction requiring SPU to activate the meter on the existing 6-inch water main to serve the hotel addition.

The City's answer raised several affirmative defenses: failure to state a claim on which relief may be granted, lack of subject matter jurisdiction, failure to file a claim, and failure to assert the claim within the applicable statutory limitation period. The City then moved to dismiss the complaint and moved for judgment on the pleadings on the basis that the complaint sought review of a land use decision pursuant to LUPA, and that such review was time barred by LUPA's 21-day statutory limitation period.

Because Pioneer's memorandum in opposition to this motion was supplemented with a declaration and exhibits including photographs, the City's motion to dismiss was converted to a CR 56 motion for summary judgment. On summary judgment, the trial court dismissed Pioneer's declaratory and injunctive relief claims with prejudice, holding them to be time barred under LUPA. Pioneer moved for reconsideration of this order on the basis that, because SPU's director level determination offered it two options for proceeding, it was not a final agency determination. The trial court granted this motion and modified its order to dismiss the complaint without prejudice.² Pioneer appeals both the original

² Since this time, the City has in fact issued a new determination and WAC, which has also been appealed to the superior court in a separate action. That action has been stayed pending the result of this proceeding.

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dismissal order and the order on its motion for reconsideration, averring that both orders incorrectly characterized its action as a LUPA petition.

II

Pioneer's primary contention on appeal is that the City's decisions that give rise to this court challenge do not fall within the purview of LUPA because they were not "land use decisions." Accordingly, Pioneer argues, LUPA's 21-day limitation period is inapplicable. We agree.

A

The purpose of statutory interpretation is to determine, and give effect to, the intent of the legislature. Columbia Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 80, 91, 392 P.3d 1025 (2017). Questions of law regarding the construction of a statute are reviewed de novo for errors of law. McTavish v. City of Bellevue, 89 Wn. App. 561, 564, 949 P.2d 837 (1998). When a statute or ordinance is unambiguous, construction is not necessary, as the plain meaning controls. McTavish, 89 Wn. App. at 565.

LUPA "replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions." RCW 36.70C.030(1). In turn,

"[l]and use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding

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applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020(2).

Neither party contends that subsection (c) applies to the decision at issue.

The City contends that its determination meets the definition of a land use decision pursuant to either subsection (a) or (b) of RCW 36.70C.020(2).

B

First, we must determine whether the City's action constituted a "land use decision" as that term is defined in RCW 36.70C.020(2)(a). Again, a land use decision as defined in subsection (2)(a) requires

[a]n application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, *but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property*; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses.

RCW 36.70C.020 (emphasis added). The parties dispute the applicability of the exception contained herein for "applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property."

Pioneer notes that the water mains in question are public property, as is the water that they carry and that Pioneer desires to purchase—the entire water

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distribution system to which it seeks connection is owned by the public through SPU. Pioneer asserts that SPU's decisions regarding how adjacent landowners access its public water supply, using public infrastructure in a public right-of-way, fall within the exception in RCW 36.70C.020(2)(a) for "applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property."

Our opinion in Wescot Corp. v. City of Des Moines, 120 Wn. App. 764, 86 P.3d 230 (2004), is instructive. Therein, a construction company sought approval to build a conveyor system for the direct transport of fill material from the waterfront to an inland construction site. Wescot, 120 Wn. App. at 766.

Engineering necessity dictated that the conveyor system traverse a city park.

Wescot, 120 Wn. App. at 766-67. When the city declined to permit this activity,

Wescot filed a LUPA petition. The city contended that LUPA did not apply.

Wescot, 120 Wn. App. at 767-68. We agreed, stating:

Wescot contends that the legislature intended to limit the park use exclusion to minor usages, but this argument finds no support in the actual language of the statute. . . . The statute is constructed so that an application to "use" a "park" is in the same category as an application to vacate a street, or an application to "use, vacate or transfer" other types of public property that are similar to streets and parks. *Read as a whole, the exclusion evinces a legislative intent to treat the decisions a city makes as an owner of public property more deferentially than decisions a city makes as a regulator of private property.*

Wescot, 120 Wn. App. at 769 (emphasis added).

Our reasoning in Wescot is applicable herein. The water availability certification process adopted by SPU requires an application for approval to use public property—the water distribution infrastructure and the water to be

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purchased are publicly owned and, were Pioneer to construct the new 12-inch water main, that main would also be publicly owned. Subsection (a) exists to recognize and give effect to the distinction between when a government acts as a regulator of private land and when a government acts as a property owner. Here, the City's decision on how and when Pioneer may connect to its water system is a decision it makes "as an owner of public property." Wescot, 120 Wn. App. at 769. As such, it is not a "land use decision," as that term is defined in subsection (a).

C

We now turn to an analysis of RCW 36.70C.020(2)(b). This subsection provides a second definition for a land use decision as

[a]n interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules *regulating* the improvement, development, modification, maintenance, or use of real property.

RCW 36.70C.020(2)(b) (emphasis added).

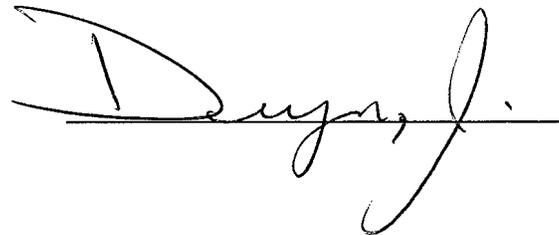
Because SPU's water availability determination did not apply ordinances or rules regulating the use of Pioneer's private property, the determination falls outside this second LUPA definition of "land use decision."

Cave Properties v. City of Bainbridge Island, 199 Wn. App. 651, 401 P.3d 327 (2017), is distinguishable. In Cave Properties, Division Two of this court ruled LUPA governed a local government's determination in part because the applicable ordinances "'regulated' Cave's use and development of its property." 199 Wn. App. at 664. SPU's determination involved no ordinance regulating Pioneer's use and development of its property.

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Given that none of the definitions of “land use decision” set forth in RCW 36.70C.020(2) encompass the City’s decision herein, LUPA does not apply to Pioneer’s action. The trial court thus erred by applying LUPA’s 21-day limitation period to this action. It further erred by dismissing Pioneer’s action as untimely. The complaint should not have been dismissed. It must be reinstated and further proceedings are warranted.

Reversed and remanded.

A handwritten signature in cursive script, appearing to read "Dwyer, J.", written over a horizontal line.

WE CONCUR:

Two handwritten signatures in cursive script, "Verellen, J." and "Appelwick, J.", written over a horizontal line.