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# Court of Appeals Confirms When LUPA's 21-Day Appeal Period Begins to Run and When "Collateral Attacks" on Prior Unchallenged Land Use Decisions Are Barred

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On December 27, 2016, Division I of the Washington Court of Appeals issued *Chumbley et al. v. Snohomish County et al*, which further clarified when local land use decisions are considered "issued," triggering the 21-day statute of limitations for appeals under the Land Use Petition Act (LUPA), Chapter 36.70C RCW.[1] The *Chumbley* decision also clarified the scope of prior court holdings that prohibit so-called "collateral attacks" on land use decisions that are not directly challenged within LUPA's 21-day appeal period.

## Background

The Legislature adopted LUPA in 1995 with an ambitious goal: "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."[2] To achieve this goal, LUPA established a 21-day period within which all challenges to a land use decision must be filed or forever barred.[3] Because the 21-day appeal period begins on the date the land use decision is "issued," questions about whether and when certain decisions have been "issued" become critical in LUPA litigation.

Once a land use decision is "issued" under LUPA, a LUPA petition challenging the decision is barred under LUPA unless the petition is filed and served within 21 days of the date of "issuance."[4] In addition, under court cases interpreting LUPA, a party may not "collaterally attack" the activities authorized by a land use decision via a challenge to a subsequent land use decision (or lack thereof) addressing the same activities.[5]

1 Chumbley v. Snohomish Cty., ___ Wn. App ___, 386 P.3d 306 (2016).
2 RCW 36.70C.010.
3 RCW 36.70C.040.
4 Id.
5 Twin Bridge Marine Park, L.L.C. v. Washington State, Dep't of Ecology, 130 Wn. App. 730, 738, 125 P.3d 155, 158 (2005), aff'd, 162 Wn. 2d 825, 175 P.3d 1050 (2008) (agreeing with trial court's ruling that Department of Ecology's failure to file a timely LUPA challenge to building permits vested the developer's rights in those permits and precluded Ecology from making a "collateral attack on activities authorized by the building permits") (emphasis added); Samuel's Furniture, Inc. v. State, Dep't of Ecology, 147 Wn.2d 440, 443, 54 P.3d 1194 (2002) (Ecology could not collaterally attack fill-and-grade and building permits issued by City by bringing enforcement action to require shoreline substantial development permit for the same fill, grade, and structural work authorized by the City's permits); Habitat Watch v. Skagit Cnty., 155 Wn.2d 397, 410, 120 P.3d 56, 61 (2005) (challenge to grading permit "on the sole ground that it was issued for an impermissible use" amounted to untimely collateral attack of earlier special use permit that specifically authorized the golf course use in question); Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 180–82, 4 P.3d 123 (2000) (appeal of county's approval of plat application based on challenge to density of plat was untimely collateral attack on rezone decision establishing allowed density for project two years earlier).

A land use decision is generally not "issued" under LUPA until its scope and terms have been fully "memorialized" in writing.[6] The courts have emphasized that "[i]t must be clear to a reviewing court what decision is presented for review,"[7] stating that a final land use decision under LUPA "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.'"[8]

The only exception to this "memorialization" requirement is that in some cases, an ordinance or statute will require the local government to make one land use decision – such as a decision about whether a shoreline permit is required—before making another land use decision—such as a decision about whether to issue a building permit.[9] In those cases, the courts have said that the shoreline permit decision is "implicit" in and "necessarily required" by the building permit decision, even if not "memorialized" in the building permit decision.[10]

In the *Samuel's Furniture* line of cases, the Washington Department of Ecology (Ecology) had attempted to challenge development activities within the shoreline jurisdiction by bringing enforcement actions under the state Shoreline Management Act (SMA), Chapter 90.58 RCW, even though the activities in question had previously been authorized by local fill-and-grade or building permits and LUPA's 21-day appeal period had already expired.[11] In those cases, Ecology argued that, even though Ecology had not filed a timely LUPA petition challenging the activities in question, it still had enforcement authority because the development activities remained subject to shoreline permit requirements imposed by the SMA. The courts rejected Ecology's position as a "collateral attack" on the local permit decisions that should have been brought via timely LUPA petitions. The courts held that, even though the local decisions did not expressly state that shoreline permits were not required under the SMA, they "necessarily required a determination that the project was outside the shoreline jurisdiction." This is because the statutory and regulatory provisions of the SMA expressly prohibit local governments from authorizing shoreline development that is inconsistent with the SMA, and the SMA specifically requires that "the issuance of a substantial development permit, when required, *must precede the issuance of a building permit*."[12] As a result, the local decisions in the *Samuel's Furniture* cases were deemed to have "necessarily" included an implied, unwritten determination that the project was outside the shoreline jurisdiction, and the courts held that Ecology was required to challenge that implied determination within 21 days of the local decision.[13]

## The Chumbley Case

In the *Chumbley* case, the Court of Appeals reaffirmed the "memorialization" requirement articulated in prior LUPA cases.[14] More importantly, the *Chumbley* case confirmed that the exception created by the *Samuel's Furniture* cases is narrowly limited to situations where the issuance of one land use decision "necessarily required" another decision in the sense that an ordinance or statute (such as the SMA) mandated that the second decision be made. The Court of Appeals rejected Snohomish County's argument that the *Samuel's Furniture* cases should be extended to include situations where a second

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6 Durland v. San Juan Cnty., 174 Wn. App. 1, 13-14, 298 P.3d 757, 763 (2012) (quoting Vogel v. City of Richland, 161 Wn. App. 770, 779–80, 255 P.3d 805 (2011). See also Habitat Watch v. Skagit Cnty., 155 Wn.2d 397, 408 n. 5, 120 P.3d 56, 61 (2005) (land use decision must be "memorialized such that it is publicly accessible").

7 Id.

8 Id. (quoting Vogel 161 Wn. App. at 780).

9 Samuel's Furniture, 147 Wn.2d at 451, 468; Twin Bridge, 130 Wn. App. at 742.

10 Id.

11 Id.

12 Twin Bridge Marine Park, L.L.C. v. Washington State, Dep't of Ecology, 162 Wn. 2d 825, 175 P.3d 1050 (2008) (concurring opinion). See also Samuel's Furniture, 147 Wn.2d at 451 ("[B]ecause 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.").

13 Id.

14 Chumbley, ___ Wn. App ___, 386 P.3d at 312-16.

decision is not truly "necessarily required" by any ordinance or statute, but instead, is merely implied by some logical relationship between one land use decision and other regulatory processes.

In particular, the *Chumbley* court rejected Snohomish County's argument that, when the County issued a building permit for a residential structure, that decision "necessarily required" the County to make a decision not to enforce the County's grading and critical areas ordinances by applying them to grading activities associated with the septic system for the residence. The County argued that its building permit decision was a "determination by inference" that the developer could build the residence without any further reviews and permits, including land disturbing permitting and critical areas review for grading activities associated with the construction of a septic system that would support the residential use. The County took this position despite the fact that the septic system was proposed to be located downhill from the residence, on a separate lot, within an area designated as a "landslide hazard area" under the County's critical areas regulations. To support its argument, the County pointed to a Snohomish County code provision prohibiting the County from issuing a building permit "without prior approval from the Snohomish Health District of an approved means of waste disposal."[15]

The Court rejected the County's arguments, holding that the building permit "did not memorialize or imply a decision that permits and review under the land disturbing activity and critical areas ordinances was unnecessary." In adopting this holding, the Court confirmed the following framework for evaluating "collateral attack" issues: in order for a decision to fall within the scope of prior land use decision such that a "collateral attack" will be barred, the decision must either be (1) "memorialized" or (2) implied because it is "necessarily required" by ordinance or statute. The Court then described the reasons for its conclusion that a decision not to enforce the County's ordinances was neither memorialized nor implied by the County's building permit decision.

First, the Court explained that "the building permit did not memorialize in a tangible, accessible way any terms controlling development on" the downhill lot where the septic system was to be built, so a "diligent citizen who examined the building permit and the land disturbing activity permit . . . would have learned only about the construction proposed for" the building on the lot for the residential structure, not the lot for the septic system.[16] The Court also pointed to language in the building permit stating that "all activity authorized by this permit shall comply with" the county code provisions governing drainage and land disturbing activity, noting that "[t]his language speaks to future activity, *after* the building permit is issued," which undercut the County's contention that the building permit implied a completion of drainage and land disturbing review process.[17]

Second, the Court explained that the building permit did not "necessarily require" a decision not to enforce the County's grading and critical areas ordinances:

> The analogy to *Samuel's Furniture* is unsound. The issuance of a building permit did not necessarily require County Planning to make a preliminary decision approving grading for the drain field on lots 60 and 61. No ordinance or statute requires such preliminary approval . . . The Health District's approval of the onsite sewage system is not a substitute for County Planning's ongoing duty to enforce the critical areas ordinances when a sewage system is installed in a landslide hazard area. Unlike in Samuel's Furniture, the two regulatory agencies—County Planning and the Health District—did not have the same decision to make and did not have regulatory authority over the same activities. They operate under different governing statutes with different purposes.[18]

The County also argued that it was preempted from enforcing its regulations as a result of the statute authorizing the Health District to issue septic permits. The Court flatly rejected this argument, noting

15 Id. at 308 (quoting Snohomish County Code 30.50.104(2)).

16 Id. at 313.

17 Id. at 314.

18 Id. at 310.

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that "[t]he statute authorizing the Board of Health regulations, RCW 43.20.050, is concerned with the appropriate design and construction of onsite sewage" and "contains no preemptive language negating a county's ability to concurrently enforce ordinances protecting slope stability."[19]

## Implications of the *Chumbley* Case

These holdings in the *Chumbley* case represent a victory for potential project challengers: they reaffirm the public's right to have each individual land use decision fully "memorialized," giving potential challengers a realistic chance to discover a particular decision before their right to challenge that decision may be cut off. But the court's holdings also hold lessons for project developers and local planning and permitting departments.

For project developers, the holdings in *Chumbley* underscore the need to carefully and independently evaluate the potential need for additional permits under local land use codes. They also show the risk of relying on a novel interpretation by a local government that seems favorable on its face, but may leave a project vulnerable to challenge. Even if the local government issues construction permits and tells a developer to move forward with development, the project can still be successfully challenged, potentially requiring abatement of already-built project elements. If a required permit decision is not fully "memorialized" in the construction permit decision or implied by the construction permit decision because it is "necessarily required" by ordinance or statute, that permit requirement could come back to haunt the developer long after construction permits are issued. When in doubt, developers can ask for written confirmation about such permit decisions in writing, and if the local government follows the locally-adopted process for issuing an interpretation of the code as applied to a specific property, that interpretation will be a "land use decision" that must be challenged under LUPA.

For local planning and permitting departments, the *Chumbley* holdings underscore the need to fully memorialize the scope of a land use decision. They also confirm that a land use decision will be "implied" under the *Samuel's Furniture* cases only if an ordinance or statute "necessarily requires" that decision to be made before another land use decision may be made. In many cases, these holdings will benefit local governments because they will prevent developers from attempting to use the *Samuel's Furniture* cases as a loophole. Before *Chumbley*, developers could attempt to argue that they had received "implied" authorization to conduct wholly un-reviewed activities because of some loose implication or logical connection between regulatory requirements that falls short of the "necessarily required" standard from the *Samuel's Furniture* cases. After *Chumbley*, those types of arguments are no longer viable.

## For more information

For more information on this, or other land use matters, please contact Partner Duncan Greene at dmg@vnf.com.

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19 Id. at 314.