

HONORABLE JOHN D. KNODELL

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

ANSELMO LAND COMPANY, LLC, a  
Washington limited liability company;  
NEVERSWAT LAND COMPANY, LLC, a  
Washington limited liability company; and  
ORPHAN GIRL LAND COMPANY, LLC, a  
Washington limited liability company, and  
PLUM CREEK TIMBER COMPANY, INC., a  
Washington corporation,

Petitioners,

v.

KITTITAS COUNTY,

Respondent.

NO. 13-2-01396-3

PETITIONERS' RESPONSE IN  
OPPOSITION TO RESPONDENT'S  
MOTION TO DISMISS

**INTRODUCTION**

Petitioners Anselmo Land Company, LLC, Neversweat Land Company, LLC, Orphan Girl Land Company, LLC, and Plum Creek Timber Company, Inc. ("Petitioners" or "Anselmo, *et al.*") by and through the undersigned attorneys of record, hereby oppose Respondent's Motion to Dismiss. The matter under review is a final land use decision as to Kittitas County's determination that the land use permit applications at issue here were not subject to the protections of the vested rights doctrine set by the Washington State Subdivision Statute, Ch. 58.17 RCW. Counsel for Kittitas County asserts that "surely" on appeal of a separate, later land use decision, Anselmo, *et al.* would be entitled to dispute the vesting decision made by the Board

PETITIONERS' RESPONSE IN OPPOSITION TO  
RESPONDENT'S MOTION TO DISMISS - 1

CAIRNCROSS & HEMPELMANN, P.S.  
ATTORNEYS AT LAW  
524 2nd Ave, Suite 500  
Seattle, WA 98104  
office 206 587 0700 fax: 206 587 2308

1 of County Commissioners (“BOCC”) in its “Final Order,” issued October 1, 2013. Petitioners  
2 are just as “surely” convinced that had this appeal not been filed, the County’s later position  
3 would have been that the vesting arguments would be time-barred from review. Moreover, the  
4 law is plain that the BOCC’s Final Order was a final land use decision.

5 That said, and as indicated in the Land Use Petition which initiated this action, Petitioners  
6 Anselmo, *et al.* are willing to enter a stay of this proceeding until decisions are rendered by the  
7 County on the Administrative Segregation applications, which decisions may render this appeal  
8 moot, or may result in additional issues to be appealed and consolidated with this case for  
9 review. A proposed order denying the Motion to Dismiss is filed herewith, and a separate  
10 Motion to Stay Proceedings or, in the Alternative, to Set LUPA Case Schedule is being filed on  
11 this same date.

#### 12 LEGAL FRAMEWORK

13 This is an appeal under the Land Use Petition Act, Ch. 36.70C RCW (“LUPA”). A  
14 LUPA petition challenging a land use decision is barred if not filed within 21 days of the  
15 decision. RCW 36.70C.040(3).

16 The purpose of LUPA is “to reform the process for judicial review of land use decisions  
17 made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform  
18 criteria for reviewing such decisions, in order to provide consistent, predictable, and timely  
19 judicial review.” RCW 36.70C.010. Expedited review can be delayed upon a “showing of good  
20 cause for a different date or a stipulation of the parties.” RCW 36.70C.090.

21 In pertinent part, a “land use decision” is defined to mean:

22 **a final determination** by a local jurisdiction’s body or officer with the highest  
23 level of authority to make the determination, including those with authority to  
hear appeals, **on:**

24 **(a) An application for a project permit or other governmental approval**  
25 **required by law before real property may be improved, developed, modified, sold,**  
26 **transferred, or used. . . ;**

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

5 (c) The enforcement by a local jurisdiction of ordinances regulating the  
6 improvement, development, modification, maintenance, or use of real property. . .

7 RCW 36.70C.020(2) (emphasis added). In a case not involving issues of vested rights, the State  
8 Supreme Court has confirmed that a “final” land use decision is “one which leaves nothing open  
9 to further dispute and which sets at rest [the] cause of action between parties.” *Samuel’s  
10 Furniture, Inc. v. Dept. of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2003).

### 11 FACTS

12 In the spring of 2013, County staff issued administrative decisions voiding three 2012  
13 applications filed by Anselmo, Neversweat and Orphan Girl seeking approval of Administrative  
14 Segregations of land; Petitioners appealed those administrative decisions to the Kittitas County  
15 BOCC. *See*, LUPA Petition (October 18, 2013) Exhibit A, p. 1. As a result of Petitioner’s  
16 appeal, on October 1, 2013, the BOCC issued a “Final Order,” which decided: (1) that for two  
17 reasons, including an asserted lack of vested rights, the County’s former ordinance authorizing  
18 and setting the review standards for Petitioner’s Administrative Segregation applications did not  
19 apply, and (2) that the County staff improperly ceased processing Petitioner’s Administrative  
20 Segregation applications under a newer County ordinance, such that the BOCC reversed the  
21 administrative determinations that the applications were void, and remanded the matter so that  
22 Petitioner’s Administrative Segregation applications could be further processed under the  
23 County’s newer ordinance. *See*, LUPA Petition (October 18, 2013) Exhibit A.

24 Within the applicable 21-day LUPA appeal period following issuance of the BOCC’s  
25 Final Order, Petitioners Anselmo, *et al.* filed a land use petition initiating the action now before  
26 this Court. Petitioners’ appeal acknowledged that new decisions on the project permit  
applications themselves were still forthcoming, that Petitioners were willing to stipulate to a  
limited stay of these proceedings so as to allow processing and approval of those project permits

1 on a reasonable timetable, and that Petitioners timely filed the LUPA petition so as to preserve  
2 their challenge to the portions of the BOCC's Final Order ruling that the County's former  
3 ordinance did not apply. *See*, LUPA Petition, dated October 18, 2013, pp. 1 – 2 (Introduction),  
4 and pp. 9 – 10 (¶¶ 42 – 47).

#### 5 ARGUMENT

6 The County correctly states that Petitioners are “concerned with preserving appeal rights  
7 to the BOCC's decision regarding vested rights.” *See*, Motion to Dismiss, p. 5. But the County  
8 errs when asserting that the BOCC's October 1, 2013 “Final Order” was merely an interlocutory  
9 decision, and not a final land use decision subject to review under LUPA. *See*, Motion to  
10 Dismiss, pp. 4 - 5.

11 None of the cases cited by the County involve an administrative decision that one version  
12 of a code applies rather than another, nor any issue of vested rights. Here, the Kittitas County  
13 BOCC's Final Order rejected Petitioners' argument for the vested right to have its applications  
14 processed under the County's former ordinance, the Final Order terminated review of  
15 Petitioners' applications for administrative segregations under that former ordinance, and the  
16 Final Order directed continued review under the County's new ordinance.

17 In contrast, the *Samuel's Furniture* case raised no issue of changing codes. The dispute  
18 in *Samuel's Furniture* centered on whether a State agency with separate and independent legal  
19 authority to enforce the State Shoreline Management Act, was bound by a local jurisdiction's  
20 land use decision. The Court held that a local government's decision on a permit application,  
21 which decision assumed that the specific property at issue was not within the jurisdiction of the  
22 State Shoreline Management Act was a final land use decision which must be appealed within 21  
23 days, and could not be collaterally challenged by the State Department of Ecology via pursuit of  
24 an independent enforcement action. *Samuel's Furniture*, 147 Wn.2d at 463-64.

25 Similarly, in *Stientjes Family Trust v. Thurston County*, 152 Wash. App. 616, 217 P.3d  
26 379 (2009), the Court determined that a Board of County Commissioner decision remanding a

1 project permit application for additional processing and review of impacts to critical areas under  
2 the County's existing codes was not a final land use decision. *Stientjes* is distinguished from the  
3 current case before the Court, because in this case, Kittitas County issued a Final Order both  
4 terminating permit review under the codes to which Petitioners' believe their applications are  
5 vested, and authorizing processing under newly adopted, and different code standards. *Stientjes*  
6 makes no rulings regarding the timing for appeal of the question as to which version of code is  
7 applicable to a permit application.

8         The County relies on *Heller Building, LLC v. City of Bellevue*, and the case of *Vogel v.*  
9 *City of Richland* to argue that the BOCC's determination of which version of the County code  
10 should be applied is merely an interlocutory procedural decision. But the issue in *Heller* was not  
11 which version of a code should apply; the issue was at what point in a three step process did the  
12 City of Bellevue complete its codified code enforcement process for purposes of rendering a  
13 final land use decision. *Heller Building, LLC v. City of Bellevue*, 147 Wash. App. 46, 55-56, 194  
14 P.3d 264 (2008). Similarly, the issue in *Vogel* was not which version of a code was going to be  
15 applied to a specific permit application on a specific property, but whether a staff memo  
16 discussing a possible approach to processing the permit application was a final land use decision,  
17 or whether the formal land use decision was issued later. *Vogel v. City of Richland*, 161 Wash.  
18 App. 770, 777-778, 255 P.3d 805 (2011).

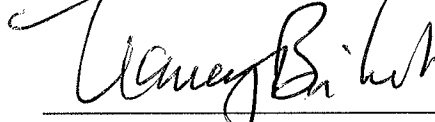
19         Here, the BOCC Final Order expressly rejected Petitioners' arguments that the  
20 administrative segregation applications were legally vested to, and needed to continue to be  
21 processed under, the County's former ordinance. Under RCW 36.70C.020, that was a final land  
22 use decision because it was a final determination by the County's body or officer with the  
23 highest level of authority to make the determination, including those with authority to hear  
24 appeals, on a declaratory decision regarding the application of zoning or other ordinances or  
25 rules regulating the improvement, development, and use of Petitioners' real property.

1 While it is true that the BOCC's Final Order also remanded Petitioners' applications for  
2 processing under the County's newer ordinance, that fact does not change the BOCC's final  
3 determination that the applications were not vested to the prior ordinance. Petitioners Anselmo,  
4 *et al.* appreciate the County's concession at pp. 5 – 6 of its Motion to Dismiss that the County's  
5 view is there is "no risk of losing [the vesting] issue for failure to appeal" and that "the issue of  
6 what regulation was applied to the applications can surely be argued" later. Had a statement  
7 been included in the BOCC's otherwise denominated "Final Order" that the BOCC's decision on  
8 the vesting issue was not final, Petitioners may have chosen not to file this appeal. But no such  
9 ruling was made by the BOCC. Kittitas County's attorney's statement in the Motion to Dismiss  
10 does not – and cannot – either alter the BOCC's decision, or provide assurance to Petitioners that  
11 a judge will not rule that Petitioners' dismissal of this case precludes arguing the vesting issue  
12 later. The BOCC's Final Order was a final land use decision on the vesting issue, and Petitioners  
13 respectfully request that the Court deny the County's Motion to Dismiss.

14 While this case should not be dismissed, Petitioners agree that it also need not be briefed  
15 and argued right now. In papers filed this same date, Petitioners have filed a motion to stay  
16 proceedings, or, in the alternative, to set a case schedule.

17 DATED this 14<sup>th</sup> day of November, 2013.

18 CAIRNCROSS & HEMPELMANN, P.S.

19 

20 Nancy Bainbridge Rogers, WSBA No. 26662

21 E-mail: nrogers@cairncross.com

22 Randall P. Olsen, WSBA No. 38488

23 E-mail: rolsen@cairncross.com

24 524 Second Avenue, Suite 500

25 Seattle, WA 98104-2323

26 Telephone: (206) 587-0700

Facsimile: (206) 587-2308

Attorneys for Petitioners, Anselmo Land Company,  
LLC, Neversweat Land Company, LLC, Orphan  
Girl Land Company, LLC, and Plum Creek Timber  
Company, Inc.