

CASE REPORT

LAND USE PETITION ACT (LUPA) - INVERSE CONDEMNATION. Claim for inverse condemnation pursued after the city granted a variance to allow for construction of an electrical substation was not a “land use decision” subject to LUPA. *Lakey v. Puget Sound Energy*, No. 87679-7, Washington Supreme Court (March 7, 2013).

I. Facts. The City of Kirkland approved a variance sought by Puget Sound Energy (PSE) to replace an existing electrical substation with a new, larger substation. Neighboring homeowners appealed the hearing examiner’s approval of the variance to the City Council, which affirmed the decision. The homeowners did not appeal the City Council’s decision to superior court. After PSE constructed the substation, the homeowners sued PSE, alleging the electromagnetic fields emanating from the substation trespassed on their property and constituted both a public and private nuisance. Later, the homeowners added the City as a defendant in the litigation, alleging that the City’s decision to grant PSE the variance amounted to an inverse condemnation. The trial court dismissed the homeowners’ trespass and nuisance claim after excluding their expert’s testimony. In addition, the trial court dismissed the homeowners’ inverse condemnation claim against the City because the homeowners had failed to file a land use petition under LUPA within 21 days following the City Council’s decision affirming the variance.

II. Applicable Law and Analysis. The Supreme Court concluded that the trial court erred, but affirmed its decision to dismiss the inverse condemnation claim against the City on other grounds.¹ The homeowners argued that because they sought compensation due to a taking on their property, rather than seeking to challenge the City’s decision to issue the variance, the trial court erred by applying LUPA procedures to dismiss their claim. The Supreme Court agreed.

While the legislature intended LUPA to be the exclusive means of obtaining judicial review of land use decisions, it exempted claims provided by law for “monetary damages or compensation.”² The homeowners argued that their inverse condemnation action sought constitutionally mandated “compensation” and that they did not seek judicial review or reversal of the height, setback, or buffer variances approved by the City requiring application of LUPA. The City relied upon previous case law holding that LUPA extends to damage claims that a plaintiff may have arising from issuance of a land use decision. However, the Court concluded that all of the case law cited by the City involved damage claims where the relief required a judicial determination that the land use decision was invalid or partially invalid in order to

¹ The Supreme Court also affirmed the trial court’s dismissal of the homeowners’ trespass and nuisance claims on other grounds, holding that PSE’s operation of the substation was not an unreasonable interference with the use of the homeowners’ property. By weighing the social utility of the substation to the community against the harm to the aggrieved homeowners, the Court concluded dismissal was proper.

² RCW 36.70C.030(c).

recover damages. For example, in *Mercer Island Citizens for Fair Process v. Tent City 4*,³ the court dismissed a citizens' group challenge to the city's issuance of a temporary use permit which included claims for damages under 42 U.S.C. § 1983. The court determined that because the claim for damages depended upon the validity of the temporary use permit, such claim was also time-barred under LUPA. Unlike *Mercer Island*, the Court concluded that the homeowners' constitutional claims for compensation, which could not have been decided by the hearing examiner, were not dependent upon the variance approved by the City. Nevertheless, the Supreme Court upheld dismissal of the inverse condemnation claim based upon *Phillips v. King County*,⁴ which rejected government liability for permit approval under a theory of inverse condemnation.

III. Conclusion. This case stands for the proposition that not all claims for compensation associated with a land use action are subject to LUPA. Rather, a more nuanced analysis is required to determine whether the claim for damages is sufficiently intertwined with the land use decision to require application of LUPA's procedural requirements. If you have any questions regarding land use decisions, please do not hesitate to contact your city attorney.

³ 156 Wn. App. 393 (2010).

⁴ 136 Wn.2d 946 (1998).