

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

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EASTGLEN HOMEOWNERS )  
ASSOCIATION, a Washington )  
nonprofit corporation; and )  
SAVEBOTHELL, a Washington )  
nonprofit corporation, )  
 )  
Petitioners, )  
 )  
vs. ) Cause: 24-2-03111-31  
 )  
SNOHOMISH COUNTY; NP SNOHOMISH )  
COUNTY 228th APARTMENTS, LLC, a )  
Delaware limited liability )  
Company, )  
 )  
Respondents. )

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VERBATIM TRANSCRIPT OF PROCEEDINGS

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Heard before the Honorable MILLIE M. JUDGE at the Snohomish  
County Courthouse, 3000 Rockefeller Avenue, Department 2G,  
Everett, Washington 98201

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DATE: July 5th, 2024

REPORTED BY: Megan R. Foote, CCR #3398, CRR, RPR  
Snohomish County Superior Court  
3000 Rockefeller Avenue, M/S 502  
Everett, Washington 98201  
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1                   Everett, Washington; Friday, July 5th, 2024

2                                   MORNING SESSION - 9:37 a.m.

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4                   THE COURT: Please be seated. Good morning,  
5 folks.

6                   MS. KOLOUŠKOVÁ: Good morning, Your Honor.

7                   MR. ARAMBURU: Good morning, Your Honor.

8                   THE COURT: All right. Counsel, since we are all  
9 on Zoom, if you would put your names and identities,  
10 your affiliations, on the record for the court  
11 reporter, please.

12                   MS. CONWAY: Dianne Conway, I am counsel for  
13 petitioner Eastglen Homeowners Association.

14                   THE COURT: Thank you.

15                   Ms. Koloušková?

16                   MS. KOLOUŠKOVÁ: Good morning, Your Honor. My  
17 name is Duana Koloušková. I represent NP Snohomish  
18 County 228th Apartments.

19                   THE COURT: Thank you.

20                   And is anyone here for the County? Oh,  
21 Ms. Kraft-Klehm, there you are.

22                   MS. KRAFT-KLEHM: Yes. Good morning, Your Honor.  
23 Jessica Kraft-Klehm, deputy prosecuting attorney for  
24 Snohomish County.

25                   THE COURT: Thank you.

1 All right. So we're here for --

2 MR. ARAMBURU: Oh, good morning, Your Honor. This  
3 is Rick Aramburu here representing SaveBothell, one of  
4 the petitioners in this matter.

5 THE COURT: My apologies, Mr. Aramburu. Thank  
6 you.

7 Okay. So we're here this morning on the initial  
8 hearing. There are, as far as I understand, two  
9 issues that have been raised: One is standing, and  
10 the other is whether the Court has jurisdiction and/or  
11 whether, as a remedy, a stay should be issued.

12 We'll start with Ms. Conway. Do you wish to make  
13 any oral argument today?

14 MS. CONWAY: So, Your Honor, I suggest we break up  
15 the issues one by one, and I'll just address the  
16 standing issue. The project that's being proposed by  
17 NP and is currently under review --

18 THE REPORTER: I need you to slow down a bit.

19 THE COURT: I'm sorry. The court reporter needs  
20 you to slow down a little bit.

21 MS. CONWAY: Oh, I apologize. I'll just start  
22 from the beginning.

23 I represent Eastglen Homeowners Association, which  
24 is a relatively small development that is directly  
25 adjacent to the development that is being proposed by

1           respondent NP. What's significant about the Eastglen  
2           development is that they have wetlands of which they  
3           are responsible to monitor and maintain and keep in  
4           their current state, if you will. And this project,  
5           which is directly adjacent to it, is going to have  
6           effects on these wetlands.

7           I don't have a whole lot more to add to what I put  
8           in the briefing, but, clearly -- I mean, they  
9           certainly have standing to protect their wetlands.  
10          And I suppose one of the ironies here is, if they did  
11          not and there's some issues with the wetlands moving  
12          forward because of this project, the County could then  
13          turn around and sue them for not maintaining their  
14          wetlands properly. So I think it's a no-brainer that  
15          the Homeowners Association has standing to bring this  
16          LUPA petition, given that it owns those wetlands and  
17          is responsible for them.

18          Also under the law, as I mentioned, RCW 64.38 -- I  
19          forget the subdivision, but they -- the legislature  
20          has found that an organization -- a homeowners  
21          association can bring actions on its behalf, or on  
22          behalf of its members. Mr. Aramburu may want to speak  
23          to SaveBothell, or I can say a few words about that; I  
24          did do the briefing on the motion.

25          THE COURT: Sure. Let's let Mr. Aramburu speak

1 for his client.

2 MR. ARAMBURU: Just briefly, Your Honor, the issue  
3 is well covered in the briefing, particularly, the  
4 reply brief and opening brief by Ms. Conway.  
5 SaveBothell is an organization recently formed to  
6 address concerns in the community, particularly  
7 regarding this project. We have identified members in  
8 the community that live nearby this very large  
9 project, which is 26 acres. And, in particular,  
10 Ms. Thomas, Joan Thomas, who is the founder of  
11 SaveBothell, lives within 4- or 500 feet of the  
12 development, and her property is also adjacent to the  
13 wetlands.

14 So we believe that under the broad authorization  
15 of standing in the state, including the *Save v.*  
16 *Bothell* decision, SaveBothell has standing, along with  
17 Eastglen. And that's all I have to supplement what's  
18 been said. If you have some questions, Your Honor,  
19 let me know.

20 THE COURT: Thank you. I don't at this time.  
21 Let's hear from Ms. Koloušková next.

22 MS. KOLOUŠKOVÁ: Thank you, Your Honor. And I  
23 will let you know that I am working out of a friend's  
24 house this morning. So apologies for using a very  
25 small-screen laptop and flipping back and forth

1           between notes and Your Honor.

2           That being said, I -- I certainly agree that the  
3           issues, when it comes to standing, are well briefed,  
4           and we believe that the answers regarding standing are  
5           probably pretty well established here. No one is  
6           debating the standards related to standing.

7           For an association to have standing, it must show  
8           evidence that a member of the organization has  
9           standing to sue in their own right. And they still  
10          have to show also injury in fact. Certainly, the  
11          situation is different for Eastglen versus  
12          SaveBothell. When it comes to Eastglen, we're  
13          perfectly well aware that they have ownership over the  
14          wetlands; they're adjacent. Our concern over that  
15          issue is that Eastglen has not actually alleged any  
16          injury in fact; they have simply alleged that they  
17          want, essentially, proper enforcement of the home --  
18          of the manual, and that they have a homeowners duty.  
19          That's not quite the standard.

20          Certainly, we recognize that adjacent property  
21          owners to -- or property owners who might own a piece  
22          of property where there is a relatively clear link  
23          have a certain position that's different from an  
24          association, such as SaveBothell, but it is not  
25          appropriate for the Court to simply assume standing in

1           these types of circumstances. And petitioners have  
2           really not made a showing; they have only argued that  
3           they want proper interpretation of the manual, and we  
4           believe that's insufficient.

5           When it comes to SaveBothell, Your Honor, we would  
6           posit that there really is no meaningful standing of  
7           allegation on their behalf. They presented two  
8           declarations to the Court, which say basically nothing  
9           different than what was already in the petition.

10          Mr. Lider's declaration does not allege any basis for  
11          standing at all. And Ms. Thomas's declaration alleges  
12          that she lives in an undescribed location adjacent to  
13          some open space owned by Eastglen, without any detail.  
14          Because SaveBothell chose not to actually substantiate  
15          her location or any actual injury in fact, NorthPoint  
16          did its own research based on Ms. Thomas being the  
17          registered agent for SaveBothell -- and attached to  
18          Mr. Villwock's declarations -- show that  
19          Ms. Bothell's [sic] property is neither near the  
20          NorthPoint site or the wetland that petitioners are  
21          concerned about.

22          Now, they are certainly stating concerns that,  
23          really, any member of the public in Snohomish County  
24          near the city of Bothell could raise, and they can do  
25          that through public comment, and they have amply



1           availed themselves of that opportunity. But standing  
2           does require more. It does actually require some  
3           showing. And the pleadings do not show that -- do not  
4           provide that showing at all. In fact, all they do is  
5           allege almost the exact same things that the  
6           petitioners in the *Nykreim* case allege and that the  
7           *Nykreim* court soundly rejected as insufficient for  
8           purposes of standing.

9           So for SaveBothell, there's no injury in fact and  
10          no membership allegation that they could apparently  
11          perpetuate on behalf of their association. Thank you.

12          THE COURT: Thank you.

13          Ms. Kraft-Klehm?

14          MS. KRAFT-KLEHM: I don't have anything to add,  
15          Your Honor. Thank you.

16          THE COURT: Thank you.

17          We'll go back to Ms. Conway. Any response?

18          MS. CONWAY: You know, as I was listening to  
19          counsel for NP, my initial thought was, "We're trying  
20          to prevent the injury in fact from happening." That's  
21          why we have standing, because if it is -- obviously,  
22          the HOA's contention that, if the project goes forward  
23          under the current way it's managing the drainage,  
24          pursuant to the decision that's at issue in this  
25          appeal, there will be harm. And that does -- that is

1 sufficient to provide standing under the law.

2 And, again, they are required -- you know, I'm  
3 sure they would prefer not to -- but they are required  
4 to maintain and help sustain those wetlands, which are  
5 central to the issue that the -- the decision that's  
6 before the Court today.

7 THE COURT: Thank you.

8 Mr. Aramburu, your response?

9 MR. ARAMBURU: (Indicating.)

10 THE COURT: Oh, I'm sorry. You're on mute.

11 MR. ARAMBURU: Thank you. Thank you, Your Honor.

12 Just a couple of comments. It was indeed Snohomish  
13 County, when they approved the Eastglen plan, that  
14 required Eastglen maintaining those wetlands. And  
15 Eastglen is doing so by filing this petition to  
16 prevent stormwater in, you know, an illegal fashion  
17 and in an illegal manner, to invade their wetlands.

18 As to SaveBothell, SaveBothell's founder lives  
19 very close by, even according to Ms. Koloušková's  
20 analysis and research. She's adjacent to the  
21 subdivision. She's not miles away -- she's feet away  
22 from the subdivision, from the proposed apartments,  
23 and that proximity plus that of its members authorizes  
24 standing in these circumstances. Thank you.

25 THE COURT: Mr. Aramburu, in response to

1 Ms. Koloušková's argument regarding the *Nykreim* case,  
2 can you address that issue?

3 MR. ARAMBURU: Well, yeah, in this case, we have  
4 identified a member who is close by who will suffer  
5 damages because of the circumstances. And in  
6 addition, we have identified members of the larger  
7 group of SaveBothell that are nearby and will be  
8 impacted by not only the water running into the  
9 wetlands but the increased volumes downstream in  
10 Snohomish County streams, including Crystal Creek.

11 THE COURT: Thank you.

12 All right. With regard to the standing issue, I  
13 find in favor of the petitioners. I do believe that  
14 Eastglen has demonstrated appropriate impacts and  
15 standing. They are the Homeowners Association. They  
16 have members who are directly, I guess, downstream, of  
17 the proposed development and will be impacted and are  
18 legally responsible for the maintenance of the wetland  
19 that is being analyzed in the issue of the appeal.

20 With respect to SaveBothell, they're a nonprofit.  
21 They have identified that the member who lives nearby,  
22 and, specifically, in close proximity, within  
23 400 feet, of the adjacent wetland that is at issue in  
24 this case. Their organization is organized for the  
25 purpose of protecting the health and welfare of the

1 adjacent area, and the Court finds they have standing  
2 as well.

3 Let's move next to the issue of jurisdiction and  
4 the motion to dismiss and/or stay. I guess if we --  
5 if you don't mind, we'll go in the same order as we  
6 started with.

7 Ms. Conway?

8 MS. CONWAY: Thank you, Your Honor. I don't have  
9 a whole lot to add to what I put in the briefing. But  
10 as the Court is aware, the County -- it is a little  
11 unusual in some aspects here --

12 THE COURT: We're having a little bit of trouble  
13 hearing you. Is there any way you could be a little  
14 closer to your mic?

15 MS. CONWAY: Sure. Just give me a second. Is it  
16 now better?

17 THE COURT: Yeah, thank you.

18 MS. CONWAY: Yeah. I just turned up the volume;  
19 hopefully, that will take care of it.

20 The -- as I was starting to say, the code -- the  
21 Snohomish County Code is somewhat unusual in how  
22 decisions of the nature that is before the Court are  
23 made. There is no review by the hearing examiner. It  
24 is flat-out not allowed, ergo, why we have this LUPA  
25 petition to take issue directly to this Court.

1           They make a number of arguments about why -- "Oh,  
2           we should wait until the whole project is reviewed,"  
3           but even when the project review is done -- and,  
4           presumably, there will be an appeal to the hearing  
5           examiner by either parties in this case, or other  
6           parties -- the hearing examiner still cannot weigh on  
7           the decision that was made that is the subject of this  
8           appeal. Nobody can argue whether or not that makes a  
9           whole lot of sense, but that is the way that the code  
10          is set up.

11          And although there is certainly some factual  
12          appeal to say, "Well, why don't you just wait until we  
13          go through the hearing examiner process to get these  
14          other determinations made and then appeal everything  
15          altogether," we get that there's appeal, but this is a  
16          fundamental question, that, you know, the methodology  
17          that the County is allowing NP to use, is contrary, we  
18          say, of course, to what the code requires.

19          They use the wrong soil types, which they don't  
20          really ever address. I mean, it is undisputed that  
21          these are Type B soils. It is also undisputed that  
22          that when they ran the model, they used Type C as the  
23          type of soil, which raised -- which, according to our  
24          expert, produces very different results.

25          And then there's the whole Method 1 versus

1 Method 2 issue. You are required -- it says shall in  
2 the code -- to use Method 1, if you can access the  
3 wetlands. Here, they never asked for access to the  
4 wetlands. When the Homeowners Association found out  
5 about it, they offered access to the wetlands. And,  
6 yet, they claim the whole basis of the determination  
7 that's -- you know, that's -- that's before the Court  
8 was -- is based on them not having access to the  
9 wetlands.

10 So, again, we think it's a fundamental issue. We  
11 think it's better to get it done on the front end,  
12 particularly, given how long it's taking right now to  
13 get the actual project approvals. And I think I'll  
14 leave it at that for now and turn it over to  
15 Mr. Aramburu.

16 THE COURT: Thank you.

17 Mr. Aramburu?

18 MR. ARAMBURU: I think the briefing well covers  
19 the issues. The idea that we should defer these --  
20 this decision on the modification, on the correct soil  
21 type, and on the correct method until after there is a  
22 hearing before the hearing examiner on this very large  
23 project makes absolutely no sense. The outcome of the  
24 modification, the question of the soil types, the  
25 question of the method, if that turns out to be in

1 favor of appellants -- that is my clients and  
2 Ms. Conway's clients -- that means the whole thing has  
3 to be re-done, as the entire project may change  
4 dramatically because there will be less space to put  
5 apartment buildings that are planned here.

6 So the County has made it clear that in these  
7 circumstances the hearing examiner has no  
8 jurisdiction, and the -- the decisions that are made  
9 here are -- are crucial to the outcome. And, again,  
10 Your Honor, we're in a preliminary hearing. You have  
11 not heard all of the -- the evidence that would be on  
12 the record to address these issues. This is not the  
13 appropriate time to -- to dismiss these issues and put  
14 them into some sort of stay proceeding.

15 So I think the most important point here is the  
16 outcome of the modification, soil types, the method  
17 can completely change the project, and we will waste  
18 hours of hearing examiner time, counsel time, if  
19 this -- this matter is stayed and the modification  
20 reversed.

21 I have nothing further, Your Honor. Thank you for  
22 the opportunity to speak. I will answer any  
23 questions.

24 THE COURT: Thank you.

25 Ms. Koloušková?

1 MS. KOLOUŠKOVÁ: Thank you, Your Honor.  
2 Petitioners have raised, clearly, two issues, whether  
3 the soil types used were correct and whether the  
4 County chose the right method, under Minimum  
5 Requirement 8 under the manual. Those are fundamental  
6 issues related to the site plan approval itself; they  
7 have nothing to do with a modification. No  
8 modification is needed for the County to administer  
9 the manual with respect to these issues.

10 This is why petitioners have failed to bring a  
11 claim that this Court can adjudicate, because the  
12 modification does not -- is not needed for the County  
13 to administer the manual itself. The modification  
14 pertains to the stormwater methodology that is used --  
15 or pardon me -- the stormwater modeling that is used  
16 after the County makes the decisions as to soil types  
17 and whether Method 1 and Method 2 are being used. The  
18 modification --

19 THE COURT: So let me ask you a question.

20 MS. KOLOUŠKOVÁ: Yes.

21 THE COURT: If the modification is not at issue,  
22 when would the appellants ever have an opportunity to  
23 challenge it?

24 MS. KOLOUŠKOVÁ: If the -- well, first off,  
25 appellants have not raised any issues related to the



1 modification. The issues they have raised go to the  
2 hearing examiner, if they wish to appeal the site plan  
3 approval.

4 If they had raised issues regarding the  
5 modification, which is purely related to how the  
6 stormwater modeling is applied to this specific site,  
7 under the Method 2 provision of the Minimum  
8 Requirement 8, if they had raised those issues, those  
9 could arguably be, ultimately, come to, I guess, a  
10 court, if they wanted to go that far after the site  
11 approval process is done because this modification has  
12 absolutely no utility in the abstract. It's not  
13 entitlement itself. It alone does not entitle the  
14 applicant to do anything. It has no utility, absent  
15 that site plan approval. And so --

16 THE COURT: Wouldn't your client then come back --  
17 had they not brought this appeal now and sat back and  
18 waited, wouldn't your client come back and be in a  
19 position of saying, "Look, you missed your opportunity  
20 to challenge the fact that we used Method 2, and you  
21 don't get to complain about it now. It's the law of  
22 the case," essentially?

23 MS. KOLOUŠKOVÁ: I don't know that we could do  
24 that, because I think this is much more similar to the  
25 County's SEPA process, whereby, for example, the

1 County allows for an administrative appeal to the  
2 hearing examiner but not to County Council. And that  
3 type of interlocutory ultimate decision has to wait  
4 until the final overarching land use decision is  
5 issued.

6 That being said, I think petitioners do have a  
7 problem, because they simply have not actually  
8 appealed any issues related to the modification. I  
9 think the County can speak to its process better, but  
10 that is where I believe Your Honor -- or pardon me --  
11 the petitioners' case fails under both arguments and  
12 why I've presented them as two different arguments.

13 Because under Scenario 1, if petitioners are  
14 right, and this -- this is a standalone land use  
15 decision, then their petition has to be dismissed  
16 because they have not actually raised a claim that  
17 this Court has jurisdiction over; they have only  
18 raised claims that pertain to the County's  
19 administration of the manual in itself. They have a  
20 venue to bring those claims. They can bring those to  
21 the hearing examiner, if they don't like the ultimate  
22 site plan decision, which is yet to be issued. But  
23 they haven't challenged anything about the  
24 modification itself.

25 The second question, then, which is, I believe,

1 the question that the County also addressed, is,  
2 does -- is this a final land use decision, in and of  
3 itself, under the definition of LUPA? And that's a  
4 separate question, of course.

5 THE COURT: And isn't this different from SEPA,  
6 because SEPA has its own statutory conditions that  
7 say, you only get one open-record appeal, and so --

8 MS. KOLOUŠKOVÁ: Well, we --

9 THE COURT: -- we wait -- we wait to hear SEPA  
10 until we have a whole project because of the way the  
11 statute is written? Here, we don't have that. We  
12 simply have an administrative decision made by PDS  
13 that then can't be -- can't be sent to the hearing  
14 examiner. And so what is the appellant left to do?

15 MS. KOLOUŠKOVÁ: Your Honor, I understand that.  
16 There is still a consolidated, open record, and the  
17 problem, I think, petitioners continue to have is they  
18 haven't brought a claim that you can adjudicate under  
19 the modification.

20 I think the Court's raising a hypothetical that  
21 doesn't exist. The hypothetical being that, if  
22 petitioners had raised a claim that the modification  
23 was improperly granted because the stormwater modeling  
24 was incorrectly applied -- talking about the question  
25 of whether the modeling should allow for the

1           exceedances or not, et cetera -- there might be a  
2           claim that this Court could even adjudicate, but  
3           there's not.

4           Petitioners themselves have readily recognized  
5           they have only raised two issues: Whether the right  
6           method, 1 or 2, was applied under Minimum Requirement  
7           Number 8 -- that's strictly application of the  
8           stormwater manual -- and whether soil types were  
9           correctly identified. Again, that is strictly  
10          application of the stormwater manual.

11          If, for example, petitioners -- pardon me -- if  
12          for example, North -- NP 228 never needed a  
13          modification at all, petitioners would still be able  
14          to bring these very issues to a hearing examiner and  
15          the only issues that they raised in their land use  
16          petition. So they are losing nothing. But because  
17          they still have -- they still have the ability to  
18          raise these issues to the examiner, the problem is  
19          they have not raised anything that this Court can  
20          adjudicate.

21                 THE COURT: Okay. Thank you.

22                 Ms. Kraft-Klehm?

23                 MS. KRAFT-KLEHM: Well, I certainly -- I don't  
24                 know that I have all that much more to add to what  
25                 Ms. Koloušková stated and then what was the

1 explanation in the briefing. And I don't dispute the  
2 unusualness of this particular modification, the  
3 section in our drainage code regarding modifications.

4 I think, from the County's perspective, and I  
5 stated it in the briefing, the errors that are raised  
6 by petitioner, the soil typing and the Method 1 versus  
7 Method 2, are not specific to the modification itself  
8 but -- but go toward the application of the County's  
9 drainage regulations to the project. And they can be  
10 raised in an appeal of the underlying permitting  
11 decision for the project.

12 And, in fact, the hearing examiner has  
13 jurisdiction over those -- over those specific errors,  
14 and it will be an open-record hearing on the project,  
15 if the site plan is appealed, where there will be an  
16 opportunity to flesh out these -- what are, I agree,  
17 fundamental issues that go to the project's compliance  
18 with the drainage regulations and ability to meet the  
19 drainage regulations. And those issues are not  
20 specific to compliance with Minimum Requirement 8.

21 So if, indeed, it was determined through an  
22 open-record hearing where evidence could be presented  
23 by all parties and this issue could be fleshed out,  
24 and the hearing examiner would have an opportunity to  
25 say, "You know what, this -- there are some

1           irregularities here, or the wrong soil type was used  
2           in the modeling," then the project would be sent back  
3           to PDS, you know, in a remand.

4           And the modification that PDS had earlier approved  
5           with respect to the method of complying with Minimum  
6           Requirement 8, that modification doesn't say, the  
7           project does not have to comply with Minimum  
8           Requirement 8, but it's the methodology that's used  
9           in -- in determining that the wetland hydroperiod  
10          would be protected by the project. That -- that  
11          modification would have no effect on that then,  
12          because it would be based on information that needed  
13          to be changed.

14          So for that purpose, although, you know, it is --  
15          it is an unusual process, the modification itself  
16          isn't a final land use decision, because, here, we  
17          have a -- you know, the final decision the County is  
18          making on the site plan, that is going to incorporate  
19          the full drainage review that the County does to  
20          determine that the project complies with the drainage  
21          regulations. And that hasn't been completed yet. If  
22          there were changes that occurred between now and then,  
23          they would impact the modification, and then if -- if  
24          there were -- it's, you know, it's possible that the  
25          County would have to go back and relook at that

1           modification, which is why we say that it's not really  
2           final, it's project-specific.

3           THE COURT: Okay. Thank you.

4           Any response, Ms. Conway?

5           MS. CONWAY: Yeah, just briefly, I wanted to bring  
6           us back to the decision that is -- the modification  
7           decision that is at issue here. I think it's on the  
8           second page, it states, "The applicant is requesting a  
9           modification to allow the project to comply with  
10          Method 2 modeling criteria within the maximum extent  
11          feasible." And, again, on page 4, "The applicant has  
12          stated" -- well, it goes on to say that, "The  
13          applicant has stated it does not have legal access to  
14          the wetland in question here," that my client owns,  
15          and, "The applicant's proposal to utilize Method 2 to  
16          demonstrate wetland hydroperiod protection under  
17          Minimum Requirement 8 is appropriate under these  
18          circumstances." The County has made that decision.

19          Now, whether this issue would have come up in a  
20          regular, you know, hearing examiner process if there  
21          had been no modification decision -- possibly. It's  
22          an interesting question, but it's not one we have to  
23          deal with, because that's not what happened here. In  
24          this case, the applicant requested a modification, the  
25          modification was granted, which locks in this whole

1 issue of Method 1 versus Method 2. It is a final  
2 decision with massive ramifications.

3 And that is why we filed the LUPA petition,  
4 because, you know, as -- and the Court mentioned this  
5 in a questioning of NP's counsel -- if there had been  
6 no appeal and we -- of the modification decision, and  
7 we got to the hearing examiner process, everyone on  
8 this call knows that NP would have been arguing, "It  
9 is too late to challenge the use of Method 2."  
10 Nothing further.

11 THE COURT: Thank you.

12 Mr. Aramburu, anything final?

13 MR. ARAMBURU: I'd be gilding the lily,  
14 Your Honor. I think I'll stop. Unless you have a  
15 question for me, I have no further comments.

16 THE COURT: Well, I guess, for both land use  
17 appellants, the question I have is: Why not wait  
18 until the final project goes before the hearing  
19 examiner and just simply argue, "This just doesn't  
20 meet the drainage code. They applied the drainage  
21 code wrongly"?

22 MS. CONWAY: The hearing examiner is not going to  
23 be able to do anything about it.

24 THE COURT: Because he doesn't have the right to  
25 hear the appeal?



1 MS. CONWAY: Right.

2 THE COURT: But he does have the right to  
3 determine whether the entire project meets the  
4 drainage code and whether or not he can touch the  
5 modification. Can't he just then deny the approval  
6 and send it back?

7 MR. ARAMBURU: Your Honor, it's a final decision  
8 that's been made here. It binds -- it binds everyone  
9 involved with it. The decision which has been made  
10 here, to apply Method 2, to apply the soil types, is  
11 the predicate for the modification. And to go through  
12 this entire project -- I know Your Honor has  
13 previously been the Snohomish County Hearing Examiner.  
14 This is a project that is -- this is 541 units,  
15 26 acres; it's a huge project.

16 It's going to have multiple questions of all  
17 variety of things. And if we come to the point in  
18 this process we find out that Method 1 should have  
19 been applied, that they used the wrong soil type, the  
20 whole project may have to be dramatically changed.  
21 And it does not make any sense, administratively,  
22 legally, or with respect to the rights of petitioners  
23 and property owners, to have that process.

24 The County made its own bed here. They said  
25 they -- they refused to make this a part of the

1 hearing examiner decision for reasons which will  
2 remain unexplained. But that's a decision that's  
3 before the Court now. That's the subject matter of  
4 this LUPA appeal.

5 THE COURT: Thank you.

6 Ms. Koloušková, you are the moving party, with  
7 respect to this issue. Would you like the last word?

8 MS. KOLOUŠKOVÁ: Thank you, Your Honor. I think  
9 what Mr. Aramburu just explained was useful, because,  
10 again, this modification does not adjudicate the basic  
11 provisions of the drainage of the stormwater code.  
12 It's only relevant if Method 2 is appropriate for the  
13 site we believe we can substantiate but which lies  
14 squarely within the hearing examiner's jurisdiction.

15 If there's no modification, then what would  
16 petitioners be appealing? They would be appealing  
17 these very issues under the site plan approval to the  
18 hearing examiner. The only purpose of the  
19 modification is the question of how the stormwater  
20 modeling, under Method 2, whether that specific  
21 modeling and those specific numbers can be exceeded,  
22 given the circumstances.

23 And to Ms. Conway's point about the decision  
24 itself, at the end of the decision, the list of  
25 conclusions are very clear on page 8, wherein the

1 County explains that where strict compliance with the  
2 Method 2 modeling criteria cannot be achieved, the  
3 County goes on to conclude the applicant's approach  
4 meets the intent to ensure the hydroperiod is  
5 maintained. A, that question was never raised to the  
6 Court, and, B, that question -- the questions that  
7 petitioners did raise go to the hearing examiner.

8 Thank you, Your Honor.

9 THE COURT: Thank you. So if -- to go back to  
10 your point, you said the only purpose of the  
11 modification is the question of how the stormwater  
12 modeling under Method 2 can, with specific modeling  
13 and numbers, can be exceeded. Isn't the hearing  
14 examiner going to be locked into reviewing the project  
15 as the numbers are generated under Method 2, because  
16 he doesn't have the ability go back and look at  
17 Method 1? Won't he just be stuck with that analysis?

18 MS. KOLOUŠKOVÁ: No, I disagree with that,  
19 Your Honor. And, again, I think the Court hit it on  
20 the head. I think the examiner has to -- if there is  
21 an appeal -- which I think we can all assume that  
22 there will be an appeal of the site plan approval --

23 THE COURT: Sure.

24 MS. KOLOUŠKOVÁ: -- the examiner has to determine  
25 whether the manual was correctly applied. If he

1           disagrees -- which we believe we have quite well  
2           substantiated the use of Method 2 -- but if he  
3           disagrees and says Method 1 should be used, this  
4           modification has no value because it only pertains to  
5           how Method 2 is used.

6           THE COURT: Okay.

7           MS. KOLOUŠKOVÁ: And so we have to have that  
8           answer first. And that's the issue that -- you know,  
9           again, I keep coming back to, is, we might have a  
10          slightly different argument, I suppose, if petitioners  
11          had actually raised a claim with respect to the  
12          modification itself; but, again, Your Honor, they have  
13          not. And we cannot -- we cannot pretend the issues  
14          exist or have been raised but haven't. The only two  
15          issues before the Court are the soils or the selection  
16          of methods, and it's it.

17          THE COURT: Well, you continue to say that they  
18          haven't raised an issue with the modification itself,  
19          but aren't they calling into question the -- the  
20          method that's being used --

21          MS. KOLOUŠKOVÁ: Yes.

22          THE COURT: -- or green-lighted through that  
23          modification?

24          MS. KOLOUŠKOVÁ: No. Your Honor, no. They have  
25          not. That issue, which method, 1 or 2, is a question

1 of the direct application of Minimum Requirement 8.  
2 No modification is required under the plain language  
3 of the manual, which we have attached to our  
4 materials. The absolute, strict administration of  
5 MR 8, Minimum Requirement 8, requires the County to  
6 determine, should you use Method 1 or should you use  
7 Method 2. There's no modification decision related to  
8 that. That is MR 8 itself.

9 THE COURT: Okay. So it's only after they chose  
10 to allow them to use Method 2 that --

11 MS. KOLOUŠKOVÁ: That's right.

12 THE COURT: -- there's a complaint? Okay. I  
13 think I get it.

14 Thank you, everyone. This is a strange case  
15 because of the way the County code is written and the  
16 way the administrative appeal process exists and  
17 doesn't exist in this case. It's a head-scratcher,  
18 but as, I think, Ms. Conway wrote in her brief, it is  
19 what it is.

20 While the code does say -- and the decision on --  
21 on the modification itself says that this is a final  
22 decision, I find that it's not within the meaning of  
23 LUPA; that it is not a final land use decision within  
24 the context of the entire project; and, therefore, I  
25 think that it would be considered an interlocutory

1           appeal. And so I don't believe the Court has  
2           jurisdiction yet over this case.

3           So the Court is going to dismiss the appeal, with  
4           the caveat that I think the County and the NP are now  
5           on record as saying that this matter can be brought  
6           before the hearing examiner. And, obviously, if they  
7           took a different position and this matter were brought  
8           back before this judge, there would be additional  
9           head-scratching. So I find, based on the definition  
10          in the statute of what a final land use decision is,  
11          that we don't have that yet. So for that reason, the  
12          Court is going to grant the motion to dismiss.

13          And, Counsel, Ms. Koloušková, you provided me with  
14          a proposed order. Do you have a final one for me that  
15          you can send in Word that I could print?

16          MS. KOLOUŠKOVÁ: Yes.

17          THE COURT: Okay.

18          MS. KOLOUŠKOVÁ: I need to modify that, because I  
19          included all three issues, and so I need to modify it  
20          to address the Court's oral decision today, and I'll  
21          take care of that.

22          Your Honor, may I do that on Monday, or would you  
23          like me to do that right away, now?

24          THE COURT: No, you can do that on Monday. That's  
25          fine. I'm sure you're all -- hopefully, you're all on

1           vacation somewhere.

2           All right. Thank you. With that, we're in  
3           recess.

4           MS. CONWAY: Thank you, Your Honor.

5           MS. KRAFT-KLEHM: Thank you.

6           (Whereupon the proceedings were adjourned at 10:18 a.m.)

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Dated: July 9th, 2024