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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY: ²⁵
No. ~~35783-4-II~~

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Martin Mellish, *Respondent*,

v.

Frog Mountain Pet Care, Harold Elyea, Jane Elyea, *Appellants*
and Jefferson County, *Respondent*.

Clallam County Superior Court
Cause No. 07-2-00791-4

REPLY BRIEF OF APPELLANTS

David P. Horton, WSBA No. 27123
LAW OFFICE OF DAVID P. HORTON, INC. P.S.
3212 NW Byron Street, Suite 104
Silverdale, WA 98383
(360) 692-9444
(360) 692-1257 Facsimile
Attorney for Appellants

ORIGINAL

11/18/08

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I. INTRODUCTION

Jefferson County issued a land use permit to Frog Mountain – a decision they stated in writing was a “final decision.” But Jefferson County now claims the “final decision” is not a “final determination.” They assert that “there was no land use decision” in spite of the fact that they issued a permit. They claim that because it was possible for someone to file (without any notice to the applicant) a motion for reconsideration, the permit was not final. But a motion for reconsideration is not mandatory and does not change a final decision to a non-final decision.

Under the case law cited by respondents the definition of a land use decision includes the conditional use permit issued here. The county’s arguments fail.

Mr. Mellish admits that the permit was a land use decision,¹ but claims that the time to appeal that decision was somehow stayed because he filed a motion for reconsideration. This admission should be dispositive because under LUPA a land use decision must be appealed 21 days from its issuance. And neither Jefferson County’s Code, nor LUPA have any provision for extensions.

¹ Brief of Respondent Martin Mellish at 16.

II. ARGUMENT

A. THE PERMIT ISSUED BY JEFFERSON COUNTY WAS “A LAND USE DECISION.”

A “land use decision” is a *final determination* under RCW 36.70C.020(1)(a). The permit issued by the County states that “any aggrieved party may appeal this *final decision*.”² So, in order to make their argument respondents must assert that under the Jefferson County Code, a “final decision” is not a “final determination.” This construction is illogical and not supported by any authority. For guidance as to how courts determine administrative finality one need look no further than the case cited by Mr. Mellish, *State Dept. of Ecology v. City of Kirkland*:³

[W]hether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency, but rather upon a realistic appraisal of the consequences of such action.⁴

Mr. Mellish applies this principle to his motion for reconsideration. He believes the question under this case to be “what are the consequences of a decision on a motion for reconsideration?” But under LUPA the question must be, “what are the consequences of the conditional use permit’s issuance?” This is because the “decision” we are concerned with

² CP 349 (Emphasis added).

³ *State Dept. of Ecology v. City of Kirkland*, 84 Wash.2d 25, 29, 523 P.2d 1181, 1183 – 1184 (1974).

⁴ *Id.*

is the conditional use permit, not the reconsideration. The County identified the permit as a “final decision.” (This representation was relied upon by Frog Mountain). But once litigation commenced, the County affixed a different label to the decision. In the real world a permit gives an applicant a vested right to move forward with her project. The consequences of a permit are final:

The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control. Thus, administrative orders are ordinarily reviewable when ‘they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.’⁵

The conditional use permit issued meets this standard. And the fact that a motion for reconsideration was filed does not change the nature of the decision. Again, *State Dept. of Ecology v. City of Kirkland* is helpful:

In addition, the language of RCW 34.04.130 providing for reconsideration of agency determinations is not of a mandatory nature. The fact that the petitioners did not request a

⁵ *Id* at 1184.

reconsideration of this matter before the board does not render the board's action nonfinal.⁶

Reconsideration under the Jefferson County Code is also not mandatory. (“A party of record at a public hearing *may* seek reconsideration...⁷ As such, reconsideration does not render a final decision non-final.

This authority contradicts Mr. Mellish’s key argument regarding reconsideration – that “[o]nce a timely motion for reconsideration is filed by a potential appellant; the appellant must wait for that motion to be decided in order to exhaust administrative remedies.”⁸

This statement is made without any citation to authority – because there is no authority for this statement. Reconsideration is not mandatory. There is no requirement in the Jefferson County Code, LUPA, or case law requiring an aggrieved party to file a motion for reconsideration. (Frog Mountain is unaware of any regulation, ordinance or court rule in Washington that requires reconsideration as a predicate to an appeal).

Respondents’ argument, in essence, is that the “land use decision” at issue in the Land Use Petition is the hearing examiner’s decision on the motion for reconsideration. But from Frog Mountain’s perspective (and

⁶ *Id.*

⁷ JCC 18.40.310.

⁸ Brief of Respondent at 3.

the perspective given by the Land Use Petition Act, the “land use decision” is the conditional use permit. It was a permit that could have been acted on upon its issuance. It was a permit that vested legal rights in the applicant the moment it was issued. A motion for reconsideration did not change the finality of that permit. Because that permit was not appealed within 21 days, it vested.

B. JEFFERSON COUNTY’S POORLY DRAFTED
CODE SHOULD NOT PREJUDICE FROG
MOUNTAIN.

That the motion for reconsideration did nothing to affect the conditional use permit’s finality is best illustrated by Mr. Mellish’s argument made at page 16 of his brief. There he points out, correctly, that the Conditional Use Permit was a land use decision. He also correctly points out that under the Jefferson County Code an aggrieved party has two options. They *may* file a motion for reconsideration or they *may* file an appeal. There is no requirement that they do one before the other – they can choose.

This argument admits that 1) the Conditional Use Permit was a land use decision as the term is used in LUPA; and 2) an appeal could have been filed without filing a motion for reconsideration.

Mr. Mellish then posits that the denial of his motion for reconsideration was a “land use decision” that could be appealed. But the

denial of the motion for reconsideration was not a land use decision under RCW 36.70C.020. As discussed above, the land use decision was the permit. Otherwise, under Mr. Mellish's interpretation, there were two land use decisions arising from the same permit application.

Mr. Mellish argues that it would lead to absurd results under Frog Mountain's interpretation because he would have to simultaneously file a LUPA petition and a motion for reconsideration. Granted, it is unfortunate that Jefferson County did not have the foresight to draft its code to allow for orderly, efficient, reconsideration. They could have provided this mechanism simply, as was done in our Civil Rules. For example, the code could provide that a Hearing Examiner's decision is final after only fourteen days if no motion for reconsideration is filed. But that was not done. And in practice, the County issued a final decision.

Additionally, as pointed out in Frog Mountain's opening brief, the reconsideration process is supposed to take less than 21 days – leaving an aggrieved party not satisfied by a reconsideration result time to file a LUPA petition.

Moreover, a rational reading of the code would be that an aggrieved party has a choice of remedies. She can seek reconsideration *or* file a LUPA petition.

Finally, even if Jefferson County's Code does require an aggrieved party to simultaneously file a motion for reconsideration and a LUPA petition to protect its rights, this does not affect the rights afforded Frog Mountain under LUPA – LUPA's strict limitation period. As set out in Frog Mountain's opening brief, our courts have imposed stringent rules on timely filing of LUPA petitions. These rules have created a minefield for land use practitioners.⁹ That minefield is in place, however, to protect applicants and provide them a speedy, predictable appeal process – a process that was deprived to Frog Mountain.

C. JEFFERSON COUNTY CANNOT CHANGE THE LUPA DEADLINE POST-HOC

When referring to Frog Mountain's factual statement regarding the LUPA deadline, Mr. Mellish states that, “[n]either Mr. Mellish, nor Jefferson County agrees that this was in fact the LUPA deadline.”¹⁰ While Mr. Mellish can credibly make this argument, the County cannot. When they issued the permit, they stated the LUPA deadline as 21 days from the decision's issuance. The permit said:¹¹

Appeals:

Pursuant to RCW 36.70C, the applicant or any aggrieved party may appeal this final decision to

⁹ See e.g. Justice Chambers' concurrence in *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005).

¹⁰ Brief of Respondent at 2.

¹¹ CP 349.

Jefferson County Superior Court within twenty-one (21) calendar days of the date of issuance of this land use decision. For more information related to judicial appeals see JCC 18.40.340.

Under the County's argument the Land Use Petition Act's limitation period is a moving target, affected by non-mandatory motions for reconsideration.

To avoid this trap, the County argues that the reconsideration process is the two- step process permitted by RCW 36.70B.060. Under that type system a record is developed in an open record hearing (generally by a hearing examiner) and appeals are permitted in a closed record hearing (generally in front of a county commission or city council).¹² But here we have no such two-step process. The Jefferson County Code has no appeal to its commissioners (a closed record appeal). If Jefferson County's reconsideration process is the second part of a two step appeal process it is blatantly unconstitutional because it makes no provision for notice to the applicant.¹³

Under respondents' interpretation, the following hypothetical is possible:

January 1 Conditional Use Permit – Final Decision Issued

¹² See e.g. Kitsap County Code 21.04.120.

¹³ See Brief of Respondent Mellish at 18-19.

January 5 Unbeknownst to applicant, motion for
reconsideration filed

January 24 No appeal filed so applicant begins construction

January 30 Reconsideration granted

In this situation a permit was issued, and then revoked, without notice to the applicant. The applicant expends resources in reliance on the permit. This is exactly what *Chelan County v. Nykreim*¹⁴ and its progeny seek to avoid. The Land Use Petition Act is intended to promote certainty for applicants in the land use process.

D. COMPLIANCE WITH THE LOCAL CODE IS JURISDICTIONAL

In its opening brief Frog Mountain notes that even if a motion for reconsideration stays the Land Use Petition Act clock from running, the ordinance only allows a certain time for reconsideration – a time limitation that was exceeded by the county. To counter this argument, Mr. Mellish states that “[t]his confuses compliance with LUPA itself with compliance with the provisions of local code.”¹⁵ But, as stated in *KSLW by Wells v. City of Renton*, a case cited by Mr. Mellish, compliance with local codes is required for the superior court to acquire jurisdiction.

¹⁴ *Chelan County v. Nykreim*, 146 Wash.2d 904, 52 P.3d 1(2002).

¹⁵ Brief of Respondent at 17.

When a municipal ordinance provides a definite time within which review must be taken, compliance with that time limit is essential for the court to acquire jurisdiction... A court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal.¹⁶

Here, the ordinance provided a definite time for reconsideration. It was not complied with. The superior court lacked jurisdiction. The only option for the trial court was to dismiss the petition.

III. CONCLUSION

Frog Mountain's permit was a land use decision. Because Mr. Mellish filed the Land Use petition more than 21 days after the permit was issued, the superior court lacked jurisdiction. The superior court's denial of the motion to dismiss must be reversed.

Respectfully submitted this 7th day of November, 2008.



David P. Horton, WSBA# 27123
LAW OFFICE OF DAVID P. HORTON, INC. P.S.
3212 NW Byron Street, Suite 104
Silverdale, WA 98383
(360) 692-9444
Attorney for Appellants

¹⁶ *KSLW by Wells v. City of Renton*, 47 Wash.App. 587, 595, 736 P.2d 664, 669 (1986).
(Internal citations omitted).

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MARTIN MELLISH,

Petitioner/Respondent.

v.

FROG MOUNTAIN PET CARE, HAROLD
ELYEA, JANE ELYEA, and JEFFERSON
COUNTY,

Respondents /Appellants,

WASHINGTON STATE COURT OF
APPEALS DIVISION II

No. 35783-4-II

DECLARATION OF SERVICE

On the 7th day of November, 2008, and in the manner indicated below, I caused a copy of the Reply Brief of Appellants and a copy of this Declaration of Service, to be delivered to:

Martin Mellish
930 Martin Road
Port Townsend, WA 98368

David Alvarez
Jefferson County Prosecuting
Attorneys Office
PO Box 1220
Port Townsend, WA 98368

Court of Appeals, Division II
Clerk's Office
950 Broadway
Tacoma, WA 98402

DECLARATION OF SERVICE -1

LAW OFFICE OF DAVID P. HORTON, INC. PS
3212 NW Byron Street Suite 104
Silverdale, WA 98383
Tel (360) 692 9444
Fax (360) 692 1257

1 by US Mail.

2 I declare under penalty of perjury under the laws of the State of Washington that the
3 foregoing is true and correct.

4 Executed at Silverdale, Washington this 7th day of November, 2008.

5
6 

7 Colleen E. Brennan