



RAP 18.14, to affirm the decision of Superior Court Judge Honorable Craddock D. Verser, dismissing Appellants' land use petition with prejudice for lack of standing and jurisdiction. Verizon Wireless further requests an award of costs and attorney fees pursuant to RCW 4.84.370.

## II. FACTS

On December 14, 2006, Verizon Wireless filed an application with the City of Bainbridge Island for a building permit to install a Facility I Wireless Communication Facility ("WCF") on a Puget Sound Energy (PSE) pole in the NE Blakely Avenue right-of-way and for an equipment shelter on an adjacent property owned by respondents Jeff Powers and Deborah Haase. Clerk's Papers ("CP") at 5. The proposed WCF would be placed on a 45-foot PSE pole which would replace an existing 30-foot pole. *Id.* The height limit on structures in this zone is 30 feet, except for utility poles, which are permitted up to 50 feet. BIMC §18.33.070.

The proposed WCF is a Facility I, which is defined as "an attached wireless communications facility which consists of antennas equal to or less than four feet in height with an area of not more than 580 square inches in the aggregate." BIMC §18.88.090(F). A Facility I is permitted in any zone, requiring only a building permit. It is exempt from the height restrictions of the zone in which it is to be located. BIMC §18.88.010. It is exempt from public notice requirements. BIMC §2.16.085(G)(noting

that building permits or other construction permits do not require a notice of application and public comment period or notice of decision). It is exempt from SEPA review if it meets the definition of “microcell” in RCW 43.21C.0384(2)(c) and is to be “attached to an existing structure that is not a residence or school and does not contain a residence or school.” RCW 43.21C.0384.

Here, the City determined that the proposed WCF on the replacement 45-foot pole was exempt under SEPA and approved the building permit for the WCF on March 22, 2007. CP at 5. The building permit was issued on September 14, 2007. *Id.* On October 30, 2007, PSE began installing a 45-foot pole to replace the existing pole. *Id.* Appellants George and Margaret Nickum and David and Bonnie Snedeker, neighboring property owners (collectively, “the Nickums”), allege that they first became aware of the building permit for the WCF at this time. *Id.*

On November 8, 2007—more than 50 days after the issuance of the building permit, and after the expiration of all applicable appeal periods—the Nickums filed an appeal with the City Hearing Examiner challenging the City’s grant of the building permit for the WCF and the City’s decision exempting the proposal from SEPA review. CP at 6. On December 19, 2007, Verizon Wireless moved to dismiss the appeal on the

grounds that it was not timely filed, thus depriving the Hearing Examiner of jurisdiction to consider it. CP at 15. On January 3, 2008, the Hearing Examiner dismissed the appeal as untimely pursuant to BIMC 2.16.130 (“An appeal of an administrative land use decision must be ‘...*filed with the City Clerk 14 days after the date of the decision or 21 days if the land use decision requires a SEPA threshold decision comment period*’ ...”).  
*Id.*

The Examiner affirmed her ruling on January 14, 2008, and dismissed the Nickums’ motion for reconsideration, stating:

In order for the Hearing Examiner to have jurisdiction to hear and decide an appeal, it must be timely filed. The Hearing Examiner has no authority to alter Code-establish [sic] appeal periods. Nothing in the Motion for Reconsideration alters the facts or the law: this appeal was not timely filed and it was correctly dismissed.

CP at 16.

On January 21, 2008, the Nickums filed a Land Use Petition seeking reversal of: (1) the Hearing Examiner’s dismissal of their appeal; (2) the City’s issuance of the building permit for the WCF; and (3) the City’s determination that the WCF is exempt under SEPA. CP at 12-13. The trial court, on a motion by Verizon Wireless, dismissed the appeal

with prejudice for lack of standing and jurisdiction. CP at 42. The Nickums here appeal this dismissal.

### III. STATEMENT OF ISSUES

1. Did the trial court properly determine that the Nickums—in filing an untimely appeal of the City’s issuance of the building permit—failed to exhaust their administrative remedies to the extent required by law, and thus lacked standing to sue?
2. Did the trial court properly determine that the Nickums appeal was time-barred, and that it lacked jurisdiction to consider it?
3. Whether the doctrine of equitable tolling may apply to the toll the time limits for appealing the City’s land use decisions?
4. Whether the City’s issuance of its land use decisions without notice violated procedural due process?

### IV. ARGUMENT

A motion on the merits to affirm will be granted if an appeal is determined to be clearly without merit. RAP 18.14(e)(1); *see also State v. Rolax*, 104 Wash.2d 129, 132, 702 P.2d 1185 (1985). An appeal is clearly without merit if the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency. *Id.* Here, the Nickums’ appeal raises standing and jurisdictional issues that are clearly controlled by settled law.

**A. The Trial Court Properly Held that the Nickums—in Untimely Appealing the Building Permit—Failed to Exhaust Their Administrative Remedies and Thus Lack Standing to Sue.**

A LUPA petitioner has standing to bring a land use petition only if the petitioner has “exhausted his or her administrative remedies to the extent required by law.” RCW 36.70C.060(2)(d). Exhaustion of administrative remedies ensures that proper deference is given to “that body possessing expertise in areas outside the conventional experience of judges, so that the administrative process will not be interrupted prematurely, so that the agency can develop the necessary factual background on which to reach its decision, so that the agency will have the opportunity to exercise its expertise and to correct its own errors, and so as not to encourage individuals to ignore administrative procedures by resorting to the courts prematurely.” *Phillips v. King County*, 87 Wn. App. 468, 479-80, 943 P.2d 306 (1997), *aff’d*, 136 Wn.2d 946 (1998).

The building permit the Nickums challenge is an administrative land use decision, which was appealable to the Hearing Examiner no later than 14 days after September 14, 2007, the date of the decision.<sup>1</sup> BIMC

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<sup>1</sup> The City’s determination that the building permit was exempt from SEPA, also challenged by the Nickums, was issued on September 14, 2007. Unlike the building permit decision, the SEPA exemption decision was not appealable to the Hearing Examiner. Under the SEPA statute and SEPA Rules, the City may only allow administrative appeals of two types

§§ 2.16.025(A), 2.16.095(H), 2.16.130(B)(1). To exhaust their remedies to the extent required by the law, the Nickums were required to **timely** file their appeal for consideration on its merits. *See Prekeges v. King County*, 98 Wn. App. 275, 279, 281, 990 P.2d 405 (1999)(affirming dismissal of LUPA petitioner’s action pursuant to RCW 36.70C.060(2)(d) where untimely filing deprived hearing examiner of opportunity to consider appeal). The Nickums, however, filed an untimely appeal, thus depriving the Examiner of jurisdiction to consider the appeal. The Examiner so held, and dismissed Nickums’ appeal on this basis. Because the Nickums’ appeal was not first considered by the Examiner—as required by LUPA—this Court should find that the trial court properly dismissed the Nickums’ appeal for failure to exhaust their administrative remedies to the extent required by law.

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of agency decisions: (1) a final threshold determination (a determination of significance or non-significance) and (2) a final environmental impact statement. RCW 43.21C.075(3)(b); WAC 197-11-680(3)(a)(iii) (“Appeals of SEPA procedures shall be limited to review of a final threshold determination and final EIS.”). Like the building permit decision, however, the SEPA exemption determination was not timely appealed under LUPA. *See* Section IV-B, *infra*.

**B. The Trial Court Properly Determined that the Nickums' Appeal Was Time-Barred, and that It Lacked Jurisdiction to Consider It.**

Regardless of whether the Nickums exhausted their administrative remedies, their appeal of the building permit and SEPA exemption was properly dismissed as time-barred and for lack of jurisdiction.

Under LUPA, a “land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served.” RCW 36.70C.040(2); *Chelan County v. Nykreim*, 146 Wn.2d 904, 932, 52 P.3d 1 (2002); *see also Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56, 60 (2005)(“LUPA’s stated purpose is ‘timely judicial review’ ... “and is intended to prevent parties from delaying judicial review at the conclusion of the local administrative process.”). A LUPA petition is timely only if it is filed and served within 21 days of the issuance of the land use decision. RCW 36.70C.040(3); *Nykreim*, 146 Wn.2d at 932, 52 P.3d 1. LUPA’s statute of limitations begins to run on the date a land use decision is issued. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005), citing RCW 36.70C.040(2)-(4). Failure to comply with the 21-day time limits for LUPA appeals deprives a court of jurisdiction to consider the appeal. *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 900, 83 P.3d 433 (2004)

Here, the building permit and determination that the building permit was exempt from SEPA were issued on September 14, 2007, thereby requiring a LUPA appeal to be filed by no later than October 5, 2007. The Nickums' land use petition, however, was not filed until January 23, 2008, more than four months after the issuance of the permit, placing it squarely outside the time limits for appeal, and thus outside the trial court's jurisdiction. Thus, the trial court properly dismissed the Nickums' appeal for lack of jurisdiction.

**C. Time Limits for Appeal Are Jurisdictional And Thus May Not Be Subject to Equitable Tolling**

The Nickums do not dispute that their appeal of the building permit was untimely as a matter of law. Instead, they premise their entire appeal on the doctrine of equitable tolling, urging that the City's 14-day time limit for appeal "be tolled...for the 46 days it took the Nickums to learn of the permit application." App. Br. at 6. The Nickums not only seek a remedy that is in itself, extraordinary, they urge application of a doctrine that Washington law explicitly makes inapplicable to jurisdictional time limits. *See In re Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000) (The doctrine of equitable tolling applies to statutes of limitation, **but not** to time limits that are considered jurisdictional)(citing *Miller v. New Jersey State Dept. of Corrections*, 145 F.3d 616, 617-618

(3d Cir. 1998) (“when a time limit is jurisdictional, it cannot be modified and non-compliance is an absolute bar”); *see also State v. Littlefair*, 112 Wn. App. 749, 759, 51 P.3d 116 (2002) (jurisdictional time limits are not subject to equitable tolling); *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997) (if a time limit is jurisdictional, instead of normal statute of limitation, waiver, estoppel, and doctrine of equitable tolling cannot be argued). Because the time limits at issue in this case are jurisdictional, the appeal should be rejected on this basis alone. Indeed, in **eight** pages of argument for equitable tolling, the Nickums cite to no LUPA case wherein the doctrine has been applied to jurisdictional time limits.<sup>2</sup>

To determine whether a specific time limitation should be viewed as an ordinary statute of limitations or jurisdictional bar, courts consider the statute’s legislative intent, as determined by the language of the statute, legislative history and statutory purpose. *Duvall*, 86 Wn. App. at 874; *see also Miller*, 145 F.3d at 618. When a time limitation is

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<sup>2</sup> The only land use cases cited by the Nickums are pre-LUPA cases in which parties to a quasi-judicial proceeding were not given notice of an adverse decision to which they were entitled by law. *Felida Neighborhood Association v. Clark County*, 81 Wn. App 155, 161-62, 913 P.2d 823 (1996) (Clark County Board of Commissioners failed to give notice of adverse decision to party/appellant as required by ordinance and statute); *Leson v. Department of Ecology*, 59 Wn. App. 407, 799 P.2d 268 (1990) (Shorelines Hearings Board failed to mail notice of decision adverse to party as required by statute). These cases are inapposite. Here, the Nickums are not parties to a quasi-judicial proceeding; nor were they entitled to notice of a quasi-judicial decision.

considered jurisdictional, it cannot be modified and non-compliance is an absolute bar. *Miller*, 145 F.3d at 618. Here, the time limits to appeal to the City Hearing Examiner were jurisdictional. In her Order on Motion for Reconsideration—affirming her dismissal of the Nickums’ untimely appeal—the Examiner noted:

In order for the Hearing Examiner to have jurisdiction to hear and decide an appeal, it must be timely filed. The Hearing Examiner has no authority to alter Code-establish [sic] appeal periods...this appeal was not timely filed and it was correctly dismissed.

CP at 16.

The Examiner’s decision relies on procedural/jurisdictional constraints imposed by the City Code and Hearing Examiner rules. CP 15. Under BIMC 2.16.025A, building permits must be processed in accordance with BIMC 2.16.095. BIMC 2.16.095H authorizes appeals to the hearing examiner pursuant to procedures of BIMC 2.16.130, which sets the 14-day time limit for appeal. Further constraining jurisdiction is that under Hearing Examiner Rule 3.2 Chapter III, “an appeal must be received no later than the last day of the appeal period” to be considered timely. Thus, the Hearing Examiner properly noted that the untimely filing was dispositive of her jurisdiction over the appeal.

Similarly, it is well established that failure to comply with the 21-day time limits for LUPA appeals deprives a court of jurisdiction to consider the appeal. *See Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 900, 83 P.3d 433 (2004) (Superior court does not have jurisdiction to hear a land use petition where the petition was not filed within 21 days); *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 597, 972 P.2d 470, 472 (1999) (“Procedural requirements must be met before this appellate jurisdiction is properly invoked”); *Skagit Surveyors and Eng’r, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998) (“all statutory procedural requirements must be met before jurisdiction is properly invoked”)(citing *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990)).

Where, as here, the Nickums failed to comply with BIMC and LUPA jurisdictional time limits, their appeal may not be equitably tolled.

**D. The Nickums Cannot Establish A Due Process Violation.**

As they did before the trial court, the Nickums allege that issuance of the building permit and SEPA decision without notice violated their right to procedural due process. As the trial court determined, this argument should be rejected for two **independent** reasons. First, the Nickums cannot establish that a property right was harmed, as required for

due process claims. Second, as plainly established in *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006) and *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005), LUPA time limits apply even when a litigant complains of lack of notice under the procedural due process clause.

**1. The Nickums Do Not Have a Cognizable Property Right in a View.**

A property right is protected by the United States Constitution when an individual has a reasonable expectation of entitlement deriving from existing rules that stem from an independent source such as state law. *Wedges/Ledges of CA v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir.1994).

Here, the Nickums apparently seek to protect an alleged right to an unobstructed view. App. Br. at 1, 3, 5. In Washington, however, there is no common law property right to a view. *Asche*, 132 Wn. App. at 797 (citing *Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 485, 778 P.2d 534 (1989)). In *Collinson*, the Court rejected nuisance claims of a property owner who sought an injunction against a multi-story apartment building to protect his view. *Id.* at 488. In determining that there was no property right to a view, the court relied on the Washington Supreme Court's holding that a person may build a structure as high as he wants on

his own property without liability for nuisance to a neighbor, even if the structure completely blocked the neighbor's light and air. *Id.* at 487-488. Thus, as in *Asche*, the Nickums' due process claim may not be predicated on a common law property right to an unobstructed view.

Aside from a common law property right, a zoning ordinance may explicitly confer property rights enforceable by neighbors in a nuisance action. See *Asche*, 132 Wn. App. at 797-98 (citing *Veradale Valley Citizens' Planning Comm'n v. Bd. of Comm'rs of Spokane County*, 22 Wn.App. 229, 232, 588 P.2d 750 (1978)). In *Asche*, for example, a zoning ordinance that required approvals for buildings taller than 28 feet that impaired the views of adjacent properties was held to confer an enforceable property right on the Asches—a right on which the due process claim in that case could be based. *Asche*, 132 Wn. App. at 798.

That is not the case here. Here, under the City's zoning ordinance, issuance of the permit is purely a ministerial act and an applicant is entitled to a building permit as a matter of right, once certain provisions are met. These provisions include: BIMC 18.33.070, setting height limits on structures; and BIMC 18.88.010, permitting a Facility I Wireless Communication Facility in any zone and exempting it from height restrictions of such zone. Unlike the zoning ordinance in *Asche*, however, none of these provisions confer on the Nickums a property right to a view,

nor have the Nickums alleged as much. Thus there is no property right on which their procedural due process claim may be predicated.<sup>3</sup>

**2. *Asche* and *Habitat Watch* Require Dismissal of The Nickums' Due Process Claim.**

Neither can the allegation of lack of notice support a due process claim. Recent appellate court decisions resolve this. *Asche*, 132 Wn. App. at 798-799 (citing *Habitat Watch*, 155 Wn.2d at 407).

In *Asche*, the appellants argued that the 21-day appeal deadline in LUPA should not bar their appeal when they were not provided notice of the permit decision at issue, and that to do so would violate due process. *Asche*, 132 Wn. App. at 797. The Court of Appeals rejected this argument, finding dispositive the bright-line rule established in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005). The *Asche* court stated:

**Our Supreme Court has established a bright-line rule in *Habitat Watch*; LUPA applies even when the litigant complains of lack**

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<sup>3</sup> The Nickums suggest that they would have had such a right under SEPA if the City—at the outset—had not exempted the proposed WCF from SEPA. App. Br. at 4. The Nickums argue that attaching the WCF to the 45-foot replacement pole (as opposed to the existing 30-foot pole) belied the City's finding that the WCF was attached to an "existing structure," and thus exempt under RCW 43.21C.0384. App. Br. at 10. The argument presumes—without any authority—the narrowest definition of existing structure. In any event, their failure to timely appeal this aspect of the land use decision precludes this collateral attack. *See* discussion in Section E.

**of notice under the procedural due process clause.** We note that Habitat Watch had been given notice and had participated in proceedings to oppose the special use permit. *Habitat Watch*, 155 Wn.2d at 402, 120 P.3d 56. Then, in two instances, Habitat Watch was not given notice required by the local ordinance and therefore did not have the opportunity to challenge the special use permit's extension. *Habitat Watch*, 155 Wn.2d at 403, 120 P.3d 56. The court held that **despite the lack of notice, LUPA barred Habitat Watch's challenges.** *Habitat Watch*, 155 Wn.2d at 401, 120 P.3d 56. The court stressed that LUPA's "statute of limitations begins to run on the date a land use decision is issued," *Habitat Watch*, 155 Wash.2d at 408, 120 P.3d 56, and that "even illegal decisions must be challenged in a timely, appropriate manner." *Habitat Watch*, 155 Wn.2d at 407, 120 P.3d 56. Given that position, we are constrained to hold that the Asches' due process challenge fails. **Having failed to file a land use petition within 21 days of the building permit's issuance, they have lost the right to challenge its validity.**

*Asche*, 132 Wn. App. at 798-99 (emphasis added).

The Nickums attempt to distinguish *Asche* and *Habitat Watch* by arguing that the parties in those cases had initially received notice and thus could have been expected to keep abreast of developments and to issue timely challenges. App. Br. at 12-13. This argument is unavailing. As noted in *Asche*, *Habitat Watch* articulated a bright-line rule: LUPA applies even where—as here—the litigant complains of **lack of notice** under the

procedural due process clause. It even applies, unlike in this case,<sup>4</sup> where notice was required for the land use decision at issue.

**E. Failure to Timely Appeal Land Use Decision Precludes Collateral Attack on the Decision.**

The Nickums attempt to buttress their appeal by launching a collateral attack on the City's decision to exempt the Verizon Wireless' proposal from SEPA review under RCW 43.21C.0384(a)(1). App. Br. at 9. This argument is unavailing. It is established in Washington that failure to timely appeal a land use decision under LUPA precludes collateral attack, and renders even an improper approval valid. *Chelan County v. Nykreim*, 146 Wn.2d 904, 932, 52 P.3d 1 (2003), citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181-182, 4 P.3d 123 (2000) (Failure to timely appeal site-specific rezone decision under LUPA precluded collateral challenge to validity of rezone in approval of plat application to develop that property, even if rezone failed to comply with Growth Management Act). Thus, the Nickums' failure to timely appeal the building permit precludes any review of or challenge to its validity.

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<sup>4</sup> Under BIMC 2.16.085, a building permit or other construction permit is explicitly exempt from public notice, requiring no "notice of application and public comment period or notice of decision." Thus, the City's issuance of the permit decision without notice followed proper procedure, and properly triggered time limits for appeal.

**F. Respondent is Entitled to Attorneys Fees Under RCW 4.84.370.**

RCW 4.84.370, in pertinent part, provides:

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if: (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town...; and (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

Under the statute, a party—in whose favor a municipality's decision is rendered—is entitled to attorney fees if such decision is affirmed by at least two courts: the superior court and the Court of Appeals and/or the Supreme Court. *Habitat Watch*, 155 Wn.2d at 413. In *Habitat Watch*, the court noted that “parties challenging a land use decision get one opportunity to do so free of the risk of having to pay other parties' attorney fees and costs if they are unsuccessful.”

Furthermore, the statute does not require that a party must have prevailed on the merits. A rejection of an appeal on timeliness or other jurisdictional grounds is sufficient to make Verizon Wireless a prevailing party. *See San Juan Fidalgo v. Skagit County*, 87 Wn. App. 703, 943 P.2d 341 (1997) (party prevailed in superior court when court dismissed opponent's LUPA petition for failure to achieve timely service). Here, Verizon Wireless is a prevailing party in superior court and in all prior judicial proceedings. Thus by the terms of the statute, Verizon Wireless is entitled to an award of reasonable attorneys' fees under RCW 4.84.370 if this motion on the merits is granted.

#### **V. CONCLUSION**

For the foregoing reasons, Verizon Wireless respectfully requests that the Court affirm the decision dismissing the Nickums' land use

petition with prejudice. Verizon Wireless further requests an award of costs and attorney fees pursuant to RCW 4.84.370.

DATED this 2<sup>nd</sup> day of December, 2008.

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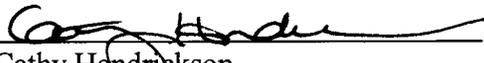
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Declared under penalty of perjury under the laws of the state of  
Washington dated at Seattle, Washington this 2<sup>nd</sup> day of December, 2008.

  
Cathy Hendrickson