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DEC 19, 2011

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 29703-9-III

LAURIE FERGUSON, Appellant,

v.

CITY OF DAYTON, a Washington Municipal Corporation, and THOMAS GODDARD, in his individual capacity, Respondents.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

The City's argument is based entirely on its misinterpretation of the case law interpreting LUPA's jurisdictional requirements, as holding that the issuance of a building permit is the only "land use decision" from which a land use petition can be filed in the context of a construction project. Under the City's theory, Ferguson was required to file her land use petition within twenty-one days of the issuance of the building permit, notwithstanding the following facts:

- The City Planner's written interpretation of the height restrictions applicable to the project at hand did not occur until several weeks after the permit was issued. CP 125.
- The City Planner admits that she changed her position on the site plan after issuing the building permit based on her interpretation of the height restriction. CP 125.
- Ferguson sought review of the interpretation by request at the September 28, 2009 City Council meeting. CP 10, 182.
- The Dayton Municipal Code does not establish any specific procedures or timelines for requesting review or perfecting an appeal of an administrative interpretation. CP 143.

- The Dayton Planning Commission reviewed the City Planner's interpretation of the height restriction and issued written findings and conclusions in July 2010. CP 195.
- Ferguson timely amended and served her LUPA petition within 21 days of the Planning Commission's ruling. CP 190.

Under the City's argument, none of the City's subsequent reviews of the City Planner's interpretation of the height restriction are decisions from which a LUPA petition can be filed. *Respondent's Brief* at 6 ("When Ms. Ferguson failed to file her LUPA petition within 21 days of the issuance of the building permit, Ms. Ferguson lost the possibility of judicial review of the issuance of the permit."). But this interpretation is plainly contradicted by both the statutory language and by the Washington Supreme Court's ruling in *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 257 P.3d 641 (2011).

First, under the applicable statutes, the City Council's decision declining further review and the Planning Commission's decision upholding the City Planner's interpretation of the height restriction are appealable land use decisions on par with the issuance of the building permit. A "land use decision" under LUPA is defined as "a final determination by a local jurisdiction's body or officer with the highest

level of authority to make the determination, including those with authority to hear appeals" on a variety of matters including the interpretation of land use codes and the issuance of permits, as well as decisions on motions for reconsideration. RCW 36.70C.020(2) (emphasis added).

Second, as observed in *Mellish*, petitioners are required to exhaust their administrative remedies before obtaining standing to file a land use petition. RCW 36.70C.060(2)(d); *Mellish*, 172 Wn.2d at 217-18. Requiring persons injured by erroneous land use decisions to appeal the initial decision while simultaneously requiring the exhaustion of administrative remedies would effectively close the courthouse doors:

> If a petitioner such as Mellish files a land use petition without waiting for the hearing examiner's decision on the reconsideration motion, the petitioner would lack standing because he or she would not have exhausted administrative remedies yet. On the other hand, if the petitioner were to wait, the LUPA deadline might expire before the hearing examiner issues a decision. Yet under our decision in Habitat Watch, that fact would not matter. The doors of the superior court would be closed tight.

Mellish, 172 Wn.2d at 218. Thus, in *Mellish*, the Supreme Court inferred that the time to petition for relief under LUPA is tolled while administrative relief is sought pursuant to the remedies afforded by the jurisdiction at issue. 172 Wn.2d at 217.

Thus, under both a straightforward reading of the statute and under the *Mellish* decision, Ferguson did not lose jurisdiction under LUPA because she sought and obtained administrative review, consistent with requirements of the ordinance, and pursued LUPA relief after the review procedures failed to correct the erroneous interpretation.

The City's reliance on *Samuels Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002) to support its assertion that the issuance of the permit finally established the rights between the parties and was, therefore, the action from which the time to petition began to run is misplaced[1] because the *Mellish* court expressly rejected the precise argument the City is making. *Mellish* addressed whether filing a motion for reconsideration tolled the twenty-one day period in which to file a land use petition. The Supreme Court held that it did, because if the motion for reconsideration had been granted, the rights of the parties would have been changed; accordingly, the issues were not finally resolved until the motion for reconsideration was decided. *Mellish*, 172 Wn.2d at 216-17.

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[1] The City's argument is also factually inconsistent with *Samuels Furniture*, because the interpretive act of the City Planner that authorized the height of the building to exceed limit set forth plainly and expressly in the zoning ordinance did not occur until almost three weeks after the building permit was issued. CP 125. Thus, the building permit itself was not the cause of Ferguson's injury; it was the subsequent decision to allow the building to be oversized based on its proximity to the property boundary that plainly violated the zoning ordinance and caused Ferguson's injury.

Applying the reasoning of *Mellish* to the present case, the City's argument is plainly erroneous because the question of whether the whether the City Planner had correctly interpreted and applied the zoning ordinance to the project at issue was not final until after the interpretation was reviewed in accordance with DMC § 5-12.840. The City does not proffer any explanation as to why the City Council's decision denying review or the Planning Commission's ruling upholding the City Planner's interpretation are not themselves "land use decisions" under LUPA.

It appears that the justification for the City's insistence that the only appealable decision arising from the construction project at issue here is based on an overbroad reading of *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006). The City relies heavily on *Asche* to contend that the building permit issuance is not just a land use decision, but is the *only* land use decision from which LUPA relief can be sought. *Respondent's Brief*, at 7-8. But the dispositive fact in the *Asche* decision – namely, the absence of a procedure for reviewing building permits – is not applicable here. In *Asche*, the court observed, "The KCC provisions do not specify an appeal process for building permits. The closest analogous code provisions indicate that an applicant can appeal ministerial decisions, but it does not provide for appeals by neighbors." 132 Wn. App. at 792 (internal citations omitted). Thus, the reason why the issuance of the

building permit was a "land use decision" in *Asche* was because there was no appeals process available and no higher authority to make any determination concerning the building permit.

The critical difference between King County in *Asche*, and the City of Dayton here, is that unlike King County, the City of Dayton provides a mechanism for appealing the City Planner's interpretation and application of its zoning ordinance. CP 143. The relevant ordinance provides, "Appeals of administrative decisions that relate to interpretations of this Chapter . . . and requests for interpretations of this title . . . shall be heard and decided by the Planning Commission." CP 143. The ordinance does not set forth any required procedure to present or perfect an appeal under the ordinance, nor any time limitation on pursuing an appeal under the ordinance.

Accordingly, Ferguson appeared at a regular meeting of the Dayton City Council, in the presence of the City Planner, and requested that the project be reviewed under any available avenue. CP 10, 34, 182. The Mayor, who is in charge of the administrative procedures pertaining to the land use code (CP 143), referred her request to the Planning Committee, which recommended at the next regular City Council Meeting that no further action should be taken. CP 31-32. Interpreting the

recommendation to take no further action as a denial of her appeal, Ferguson timely filed and served her land use petition within twenty-one days of the Planning Committee's decision. CP 1.

As it later turned out, the Planning Committee to whom the Mayor directed Ferguson's request for review was not the same entity as the Planning Commission. CP 182-83. The City Planner also initially argued that Ferguson was required to appeal to the "Board of Adjustment," which the City Planner subsequently admitted did not actually exist. CP 56, 126, RP 6-7. In spite of the City's many difficulties in directing Ferguson's request for review to the proper authority, the parties ultimately agreed that the LUPA proceedings would be stayed while the matter was remanded to the Planning Commission for consideration. CP 185. After a delay of several months, the Planning Commission heard Ferguson's appeal and upheld the City Planner's interpretation of the height restriction on the grounds that the ordinance was ambiguous. CP 195, 206-07. Ferguson then timely amended and served her land use petition to address the Planning Commission's decision on review of the City Planner's interpretation. CP 190.

Thus, *Asche* is distinguishable from the present case because unlike the *Asche* petitioners, procedures for review of the building permit

issuance and the City Planner's interpretation of the height restriction as applied to the subject project were available to Ferguson, and she used them. When those procedures did not correct the plainly erroneous interpretation of the height restriction that permitted construction of an oversized garage within a few feet of Ferguson's house, under *Mellish*, Ferguson was entitled to file and serve her LUPA petition within twenty-one days of those decisions.

II. CONCLUSION

While there is no question that the jurisdictional requirements to obtain LUPA relief are strict, they were intended to promote timely judicial review, not to act as a complete bar to claims that are timely presented to the highest reviewing authority. Ferguson repeatedly and consistently sought administrative recourse as soon as she became aware of the City's plainly erroneous interpretation of the height restriction. The City has pointed to no procedural requirement that Ferguson did not follow. The City has not even addressed the *Mellish* decision in its briefing, nor has the City explained why the Planning Commission's ruling on administrative appeal is not a final "land use decision" from which a LUPA petition can be filed. In short, the City's argument rests on no more than its unfounded insistence that *only* the building permit was a

"land use decision." For the reasons set forth herein, the City's position is both factually and legally incorrect. Because Ferguson timely sought LUPA relief following administrative review of her complaint, the trial court erred in concluding that it lacked jurisdiction to consider her petition and the order dismissing her petition should be reversed.

RESPECTFULLY SUBMITTED this 19th day of December, 2011.

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CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Brief of Appellant upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 19th day of December, 2011 in Walla Walla, Washington.

Andrea Burkhart