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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 29703-9-III

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LAURIE FERGUSON, Appellant,

v.

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

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

Laurie Ferguson repeatedly challenged the City of Dayton's authorization of the construction of a pole building exceeding ten feet in height five feet from her property line and approximately eight feet from her own house. Despite plain language in the Dayton Municipal Code prohibiting buildings in excess of ten feet in height within ten feet of a property line, the construction was upheld by the City Planner, the City Council, the City Planning Committee, and the City Planning Commission based on an interpretation of the Dayton Municipal Code that directly contradicts its plain language.

When Ferguson filed a Land Use Petition Act (LUPA) petition in the Columbia County Superior Court, the City of Dayton moved to dismiss the petition on jurisdictional grounds. Although the City's erroneous interpretation of the Dayton Municipal Code did not occur until after construction commenced on the property, and although Ferguson complied with all of the City's procedural requirements to appeal the interpretation and exhaust her administrative remedies, the trial court concluded that Ferguson was required to file her petition within 21 days of the building permit's issuance. The trial court's interpretation of LUPA's jurisdictional requirements created an absurd result – namely, requiring Ferguson to file a LUPA petition before exhausting her administrative

remedies and in response to a decision that did not, itself, violate Dayton's municipal code – and is contrary to existing case law establishing when the 21-day jurisdictional clock begins to run. Because the ruling required Ferguson to file her LUPA petition before pursuing administrative remedies and failed to distinguish between the issuance of the building permit and the City Planner's subsequent interpretation of the municipal code during the construction process, the ruling should be reversed and the cause remanded for trial on the merits.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in holding that Ferguson did not properly appeal the City Planner's interpretation by raising the validity of the building permit to the Mayor at a City Council meeting, when the appeal process required the appeal to be presented to the Mayor.
2. The trial court erred in finding that the City Council lacked authority to review the issuance of the building permit when Ferguson presented her request for review to the Mayor, and the appeal process directs her to do so.
3. The trial court erred in holding that the issuance of the building permit was the date of the "land use decision" under LUPA when an appeal process was available, and Ferguson utilized it.
4. The trial court erred in holding that Ferguson's injury derived from the issuance of the building permit, rather than the City Planner's subsequent interpretation of the Dayton Municipal Code.

5. The trial court erred in granting the City of Dayton's motion to dismiss the LUPA petition on jurisdictional grounds.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. When the Dayton Municipal Code provides that "[r]equests for reviews of administrative procedures used in applying or enforcing this chapter shall be reviewed by the Mayor," is an appeal of an interpretive decision properly perfected by requesting review of the decision to the Mayor at a public City Council meeting?
2. When the City of Dayton issued a building permit and subsequently interpreted the project's compliance with the height requirement set forth in its zoning ordinance, did Ferguson lose jurisdiction to proceed under LUPA when she filed her land use petition within 21 days of the decision on appeal rather than within 21 days of the issuance of the permit?
3. Did Ferguson's LUPA petitions, filed first within 21 days of the City Council's rejection of her appeal, amended within 21 days of the issuance of a certificate of occupancy, and amended a second time within 21 days after review by the Dayton Planning Commission on remand, satisfy LUPA's jurisdictional requirements?

### **IV. STATEMENT OF THE CASE**

Laurie Ferguson lives at 602 E. Dayton Avenue in Dayton, Washington, located in Columbia County. CP 2. On August 14, 2009, the City of Dayton issued a building permit for a 30' by 36' pole building on the adjoining lot, owned by Thomas Goddard. CP 2, 13, 18. The pole building was located five feet from the boundary line and approximately eight feet from Ferguson's house. CP 3.

On August 27, 2009, the City Planner<sup>1</sup> contacted Mr. Goddard by letter to inform him that the five-foot setback required that the building not exceed 10 feet in height under Dayton Municipal Code (DMC) § 5-12.120. CP 18. DMC § 5-12.120 consists of a chart defining, among other things, maximum building or structure height and provides that “[b]uildings or structures within ten feet of a property line” are limited to 10 feet in height. CP 137. “Building or structure height” is further defined in DMC § 5-12.050 as “the vertical distance measured from the mean elevation of the finished grade around the building to the highest point of the structure or building roof.” CP 130.

Subsequently, the City changed its interpretation. On September 2, 2009, the City Planner sent a letter to Mr. Goddard in which it explained that historically, the maximum building height was measured from the finished grade to the top of the wall plate line, *not* the highest point of the structure or roof. CP 43. Ferguson contacted the City Planner by email on September 5, 2009 about the interpretation and was told on September 9, 2009, that the “wall plate line” is the top of the wall where the roof system attaches. CP 127.

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<sup>1</sup> The Dayton City Clerk/Treasurer is also the City Planner. RP 4.

DMC § 5-12.840 governs appeals of administrative decisions and provides,

Appeals of administrative decisions that relate to interpretations of this Chapter or the Comprehensive Plan and requests for interpretations of this title or the Plan shall be heard and decided by the Planning Commission. The Commission has the authority to reverse or affirm or modify an administrative interpretation of the provisions of this title.

Requests for reviews of administrative procedures used in applying or enforcing this Chapter shall be reviewed by the Mayor.

CP 143. No other procedural mechanisms or requirements are presented in the ordinance, nor is any timeline established in which review must be requested.

On September 28, 2009, Ferguson appeared at a regular meeting of the Dayton City Council to express “concerns regarding the validity of a building permit that was issued for the construction of a building at 604 E. Dayton Avenue” and requesting a stop work order on the project. CP 10. Ferguson states that she asked that the decision be reviewed under any avenue available, such as the Planning Commission or the Zoning Board of Appeals. CP 182. The Mayor referred the issue to the City’s Planning Committee for review. CP 10. At the next regularly scheduled meeting on October 12, 2009, it was announced that the Mayor, Planning

Committee, and staff met to review the building permit for 604 E. Dayton Avenue and determined it was valid and no further action should be taken. CP 8.

Ferguson then contacted the City through her attorney to point out that the City's interpretation of the maximum building height as being measured only to the top of the wall plate line directly contradicted DMC § 5-12.050. CP 15-16. When the City again declined to take action, Ferguson filed her LUPA petition on October 27, 2009, and served it the following day, all within 21 days of the City's October 12, 2009 denial of her appeal.<sup>2</sup> CP 1; RP 5.

The City of Dayton moved to dismiss the action on jurisdictional grounds. CP 51-57. In part, the City alleged that Ferguson failed to exhaust her administrative remedies by failing to appeal to the Board of Adjustment under Chapter 5-19 DMC. CP 56, 126. The City later admitted that Chapter 5-19 DMC was never passed into law and the Board of Adjustment did not, in fact, exist. RP 6-7. Later, it was also learned that the "Planning Committee" to which the Mayor had directed Ferguson's appeal was not the same body as the "Planning Commission," which hears appeals of administrative land use decisions. CP 182-83.

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<sup>2</sup> Ferguson filed and served an amended LUPA petition on November 23, 2009, after the City mailed her a copy of the certificate of occupancy on November 3, 2009. CP 23-24.

To resolve the procedural questions, the parties agreed to remand the matter to the Dayton Planning Commission for review under DMC § 5-12.840 and to stay the Superior Court proceedings. CP 185. The Planning commission conducted a public hearing on June 21, 2010. CP 195. On July 21, 2010, it adopted findings of fact and conclusions of law in which it affirmed the City's interpretation of the maximum building height being measured only to the top of the wall plate line on the grounds that the ordinance was "ambiguous." CP 195, 206-07. Ferguson filed and served a second amended LUPA petition on August 9, 2010, within 21 days of the Planning Commission's adoption of its findings of fact and conclusions of law. CP 190.

The City of Dayton renewed its motion to dismiss on jurisdictional grounds, arguing that Ferguson lacked standing and that the issuance of the building permit, notwithstanding the later appeals, was the final "land use decision" from which the 21 day jurisdictional clock began to run. CP 197-203. Ferguson argued that the City waived any jurisdictional defects by agreeing to remand the matter to the Planning Commission and further contended that the City wanted it both ways – arguing in its first motion to dismiss that Ferguson failed to exhaust administrative remedies, while arguing in its second motion that Ferguson did not file her petition within 21 days of the building permit's issuance. CP 210-18.

At the initial hearing, the trial court concluded that *Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (2006), controlled the outcome of the case by requiring an appeal of the building permit within 21 days of its issuance – that is, within 21 days from August 14, 2009. RP 35. The trial court further held that Ferguson’s request for review at the September 28, 2009 City Council meeting was not “an adequate way to perfect an appeal after LUPA decision,” although nothing in the review ordinance set forth any particular procedure for requesting the Mayor’s review. RP 36. On January 1, 2011, the trial court entered its written Findings, Conclusions and Order on Initial Hearing: 10-12-2010. Among other things, the trial court found that:

- The City Council had no authority to review the issuance of a building permit (CP 225); and
- Issuance of the certificate of occupancy had no relationship to the discretionary decision of the Planner in issuing the building permit on August 14, 2009 (CP 225).

Based on its findings, the trial court concluded that the issuance of the building permit on August 14, 2009 was a “land use decision” within the meaning of LUPA; that Ferguson’s injuries related to the issuance of the building permit; and that Ferguson’s failure to file her LUPA petition

within 21 days of the issuance of the building permit deprived the court of jurisdiction over the matter. CP 225. The LUPA petition was dismissed, and Ferguson timely appealed. CP 222, 226.

### **V. ARGUMENT**

Like many cases arising under Washington's Land Use Petition Act, Chapter 36.70C RCW, this case concerns the question of when Ferguson's 21-day limit to file a land use petition began to run. Ferguson filed and served her land use petition within 21 days of the Mayor rejecting her appeal; within 21 days of the City issuing a certificate of occupancy on the noncompliant structure; and within 21 days of a ruling from the Dayton Planning Commission upholding the City Planner's interpretation of the zoning ordinance to authorize a structure exceeding ten feet in height to be built within ten feet from Ferguson's boundary. Nevertheless, the trial court, apparently misinterpreting *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), held that the 21-day time to file ran from the issuance of the building permit. This holding is legally erroneous and should be reversed.

Washington's Land Use Petition Act establishes uniform, mandatory procedures to obtain review of a local jurisdiction's land use decision. RCW 36.70C.010, 36.70C.030; *Asche v. Bloomquist*, 132 Wn.

App. 784, 790, 133 P.3d 475 (2006). “Land use decisions” under the Act are the “final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination” on government approval of projects, interpretive decisions, and enforcement of zoning and building ordinances. RCW 36.70C.020(1)(a)-(c); *Asche*, 132 Wn. App. at 790-91. A petition must be filed and served within twenty-one days of the issuance of the land use decision, or the petition is barred and review may not be obtained. RCW 36.70C.040(2)-(3); *Mellish v. Frog Mountain Pet Care*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (Slip op. no. 84246-9, filed July 28, 2011). A decision dismissing a land use petition for lack of jurisdiction is reviewed *de novo*. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 373-74, 223 P.3d 1172 (2009).

Here, the trial court held that the “land use decision” for purposes of calculating the 21-day jurisdictional limit was the issuance of the building permit. This holding overlooks two key facts: (1) The City Planner’s interpretation of the zoning ordinance to permit an oversized structure within ten feet of the boundary line did not occur until *after* the building permit was issued; and (2) Both the issuance of the building permit and the City Planner’s interpretation of the zoning ordinance are appealable under Dayton’s municipal code, and Ferguson’s petitions were filed and served within 21 days of the decisions on appeal. Because these

facts establish that Ferguson's petitions were timely filed, it was error to dismiss her claim. The trial court's decision should be reversed and the cause remanded for consideration on the merits.

- A. Ferguson properly exhausted her administrative remedies by presenting a request for review to the Mayor and by presenting her appeal to the Dayton Planning Commission on remand.

In order to have standing to file a land use petition, a petitioner is required to exhaust administrative remedies to the extent required by law. RCW 36.70C.060(2)(d). In this case, the City of Dayton provides an appeal process of interpretive decisions in which the request for review is submitted to the Mayor and considered by the Planning Commission. CP 143. The ordinance does not require any particular process to perfect an appeal, such as by filing a written notice or acting within a certain length of time. Here, Ferguson requested review of the City Planner's interpretation of the height restriction as it applied to the project at issue by presenting her request for review to the Mayor at a City Council meeting within twenty days of being notified of the City Planner's interpretation. CP 10, 182. Nothing in the review ordinance precludes Ferguson from perfecting her appeal in this fashion.

It is well-established that zoning ordinances are to be liberally construed to accomplish their plain purpose and intent. *State ex rel. Standard Mining and Development Corp. v. City of Auburn*, 82 Wn.2d 321, 326, 510 P.2d 647 (1973). The purpose of Dayton's review ordinance is to enable review of the decisions of Dayton's public officials, with notice to the Mayor of the request. Ferguson's request for review at a public meeting at which both the Mayor and the City Planner were present certainly satisfies the spirit of the review ordinance. CP 10.<sup>3</sup>

Moreover, "the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application." *City of Seattle v. Crispin*, 149 Wn.2d 896, 905, 71 P.3d 208 (2003). In the absence of a clearly established procedure for perfecting an appeal, the City should not deprive Ferguson of her right to appeal by claiming that she did not follow the proper procedure.

The City Council decided not to pursue any action on Ferguson's request for review at its October 12, 2009 meeting. CP 8. Ferguson's petition was filed in the Columbia County Superior Court on October 27,

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<sup>3</sup> Trina Cole, the City Planner, was present at the September 28, 2009 City Council meeting according to its official minutes. It was Trina Cole who corresponded with Thomas Goddard about the building height restriction and whose interpretation Ferguson sought to appeal. CP 18, 43, 127.

2009 and filed the next day. CP 1, RP 5. Because the petition was filed and served within 21 days of the rejection of her appeal, it satisfies LUPA's 21-day jurisdictional deadline, and the trial court erred in holding that her petition was not timely filed.

B. The Mayor's rejection of Ferguson's appeal, the issuance of a certificate of occupancy, and the Dayton Planning Commission's decision on appeal are all "final determinations" under LUPA.

A "land use decision" under LUPA is a final determination by the local jurisdiction's body or officer with the highest level of authority to make the determination, *including appeals*, of various decisions. RCW 36.70C.020(2). In this case, the Dayton Municipal Code provides for review of *interpretive* decisions relating to the zoning ordinance. CP 143. Ferguson filed her first petition in response to the City's rejection of her appeal. CP 1. On November 3, 2009, the City mailed Ferguson a copy of the certificate of occupancy it issued on the project and Ferguson filed and served an amended petition on November 23, 2009 to include a challenge to the issuance of the certificate. CP 23-24. Finally, the matter was remanded to the Dayton Planning Commission for consideration and its

decision was issued on July 21, 2010. CP 206-07. Ferguson then filed and served a second amended petition on August 9, 2010. CP 190.

All of these decisions were final determinations by the local body with the highest level of authority to consider the issue. The Mayor's rejection of Ferguson's appeal represented the highest level of authority to consider an appeal of an interpretive decision under Dayton's review ordinance. The issuance of a certificate of occupancy, which involved a ministerial act rather than an interpretive decision, is not clearly appealable under the review ordinance. To the extent that it *was* an appealable decision, the Dayton Planning Commission considered both the City Planner's interpretation *and* the legality of the structure on remand. CP 206-07.

No further appeal mechanisms are provided by the City beyond the request for review to the Mayor and the determination on review by the Dayton Planning Commission; consequently, no other officials or bodies have authority to consider the issue or take any action with respect to the City Planner's interpretation of the zoning ordinance. Each of the decisions left "nothing open to further dispute" and set "at rest the cause of action between parties." *Samuel's Furniture, Inc. v. Dept of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194, 63 P.3d 764 (2002). Consequently,

the decisions that Ferguson sought to challenge in her LUPA petition were all “final determinations” within the meaning of LUPA.

The City argued, and the trial court apparently accepted, that the “final determination” was the issuance of the building permit, *regardless* of Ferguson’s subsequent efforts to appeal the City Planner’s interpretation. But the Supreme Court has recently held that there may be more than one “final determination” of a land use question. In *Mellish v. Frog Mountain Pet Care*, the petitioner filed a motion for reconsideration of a hearing examiner’s decision. The motion was denied and the LUPA petition was filed within 21 days of the mailing of the denial. Slip op. no. 84246-9 at p. 2. In that case, the Supreme Court observed that while the hearing officer’s decision might have been final *before* Mellish filed his motion for reconsideration, *after* Mellish filed the motion, the issues remained open to dispute. Slip op. no. 84246-9 at p. 9. In concluding that the hearing officer’s denial of the motion for reconsideration was itself a “final determination” that could be the subject of a LUPA petition, the Supreme Court observed that the language was sufficiently broad to encompass both the initial ruling and the subsequent denial of reconsideration. Slip op. no. 84246-9 at p. 13.

Similarly here, the issuance of the building permit *could* have been a final decision. Indeed, in cases where no appeal process is provided for the decision to grant a building permit, the issuance *is* the final decision for LUPA purposes. *See, e.g., Samuel's Furniture, Inc. v. Dept of Ecology*, 147 Wn.2d 440, 449, 54 P.3d 1194, 63 P.3d 764 (2002)(decision to grant a building permit was not reviewable under Shoreline Management Act); *Asche v. Bloomquist*, 132 Wn. App. 784, 792, 133 P.3d 475 (2006)(observing that the King County Code does not provide an appeal process for permits; consequently, there was no administrative process to be exhausted prior to filing the land use petition). But, as the *Mellish* court noted, in cases where an appeal process *is* provided, it would effectively close the doors to the courthouse to accept the City's interpretation because, on the one hand, the petitioner is required to exhaust administrative remedies; yet, on the other, the petitioner would be required to file the petition within 21 days of the original decision or jurisdiction would be lost. Slip op. no. 84246-9, at p. 11. This would not create a workable system. Slip op. no. 84246-9, at p. 10.

Statutes should be construed in a manner that effectuates their purpose and avoids absurd results. *Thompson v. Hanson*, 167 Wn.2d 414, 426, 219 P.3d 659 (2009). The purpose of LUPA is to provide a uniform means of reviewing land use decisions – not to close the courthouse doors.

In this case, the trial court's decision creates exactly the absurd results contemplated in *Mellish*: It calculated Ferguson's time to file her petition from the issuance of the building permit *even though* the City Planner's interpretation of the zoning ordinance did not arise until afterward, and *even though* Ferguson exhausted her administrative remedies. Effectively, the trial court closed the courthouse doors to Ferguson because she did what LUPA told her to do – she pursued administrative remedies.

#### V. CONCLUSION

The plain language of the Dayton zoning ordinance does not permit a building exceeding ten feet in height at its highest point to be constructed within ten feet of a property boundary. When the City of Dayton disregarded this plain language and permitted a large pole building in excess of ten feet in height to be constructed five feet from Ferguson's boundary and eight feet from her house, Ferguson attempted in every way possible to show the City its error and to require compliance with the zoning ordinance. Notwithstanding her request for administrative review in a manner consistent with the review ordinance and her timely filing and serving land use petitions within 21 days of the decisions on review, the trial court barred her from obtaining relief because she did not petition within 21 days of the issuance of the building permit. This decision is

contrary to *Mellish*, to LUPA's definition of a "land use decision" to include decisions on appeal, and to LUPA's requirement that Ferguson exhaust her administrative remedies before seeking relief under the Act. Because Ferguson complied with LUPA's jurisdictional requirements, the trial court erred in dismissing her petition. Consequently, this Court should reverse the order dismissing her petition and remand the matter for consideration on the merits.

RESPECTFULLY SUBMITTED this 2nd day of August, 2011.

A handwritten signature in cursive script, appearing to read "Andrea Burkhart", written over a horizontal line.

Andrea Burkhart, WSBA #38519  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

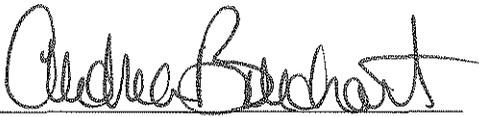
I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Brief of Appellant upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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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 2nd day of August, 2011 in Walla Walla, Washington.

  
Andrea Burkhart