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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

LAURIE FERGUSON, Appellant,

v.

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

RESPONDENT CITY of DAYTON'S BRIEF

Kimberly R. Boggs, WSBA# 24387
Attorney for Respondent, City of Dayton
Nealey & Marinella
PO Box 7 -- 338 E Main Street
Dayton, Washington 99328
Tel: (509) 382-2541
Fax: (509) 382-4634

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I. ASSIGNMENTS OF ERROR

A. Whether the trial court erred when it dismissed Appellant's, Ms.

Ferguson, LUPA petition on procedural and jurisdictional grounds:

1. Was the City of Dayton's August 14, 2009 issuance of a building permit a "land use decision" under RCW 36.70C?
2. If the permitting decision is a "land use decision" then is Ms. Ferguson's LUPA petition time-barred?
3. Were the injuries complained of and relief requested by Ms. Ferguson all related to the August 14, 2009 building permit?
4. Did the Dayton City Mayor or City Council have the authority to revoke the August 14, 2009 planning permit or issue a stop-work order?

II. STATEMENT OF THE CASE

1. Issuance of Building Permit. On August 14, 2009 a building permit was issued for an accessory building on real property located

in the City of Dayton, Washington. CP 13. September 4, 2009 is the 21st day after the permit was issued.

2. Filing of LUPA Petition. Ms. Ferguson's LUPA petition was filed on October 27, 2009. CP 1.
3. City Council Meeting. On Sept 28, 2009 Ms. Ferguson attended a Dayton City Council meeting and stated her concerns regard the validity of the building permit. During the Council meeting Ms. Ferguson did not voice concerns about the administrative procedure – the *process* followed – in the issuance of the building permit. CP 10, 171. Furthermore, Ms. Ferguson has never asserted objections to the administrative process followed in the issuance of the permit in pleading (CP 1), declaration (CP 182) or argument. The City Mayor referred Ms. Ferguson's concerns to the Council's Planning Committee, an advisory entity. CP 10, 171. At the next Council meeting, October 12, 2009, the Committee recommended "no further action" on Ms. Ferguson's concerns. CP 8. Ms. Ferguson filed a LUPA petition objecting to the Dayton City Council's refusal to review the issuance of the building permit. CP 1.
4. Certificate of Occupancy. On October 30, 2010 the City issued a Certificate of Occupancy to the owner of the accessory building at 616 E.

Dayton Avenue. CP 41. The act of issuing the Certificate of Occupancy is no comment on whether City's zoning laws have been complied with; the act of issuing the Certificate of Occupancy is to declare that the building may now be used for the type of occupancy proposed in the building permit. CP 208, 227. Ms. Ferguson amended her LUPA petition to include the issuance of the Certificate of Occupancy. CP 23.

5. Request for Review by City of Dayton Planning Commission. On March 8, 2010 Ms. Ferguson requested that the City of Dayton Planning Commission review the issuance of the Occupancy Permit on the accessory building. The request for review questioned the accuracy of Ms. Cole's interpretation of DMC 5-12. CP 204-205.
6. Review by City of Dayton Planning Commission. On June 21, 2010, the Dayton Planning Commission conducted a review. The Commission affirmed the City Planner's interpretation of DMC 5-12 and issued a July 20, 2010 resolution. The Planning Commission did not decide whether the placement of the accessory building complied with DMC 5-12. CP 206-207.
7. August 9, 2010. Ms. Ferguson filed her second amended LUPA petition alleging the following errors:

- i. City of Dayton abused its discretion in interpreting DMC 5-12.120 to allow construction of the accessory building.
 - ii. City of Dayton erred in refusing to invalidate the building permit and issue a stop work order on October 12, 2009.
 - iii. City of Dayton erred in issuing a certificate of occupancy for the accessory building.
 - iv. City of Dayton Planning commission erred in concluding that the plain language of DMC 5-12.050 is ambiguous. CP 190, 193-94
8. Allegation of Injury. Ms. Ferguson complains that the construction of the accessory building – in the location and at the height permitted by the building permit – “negatively impacts the light and air to her home and, upon information and belief, will have a negative impact on the resale value” of her property. CP 192
9. Prayer for Relief. Ms. Ferguson’s relevant prayer for relief is: “For an order reversing the decision of the Respondent, and directing the Respondent and its agencies to *invalidate the building permit* and certificate of occupancy for the accessory building at 604 E. Dayton Avenue until such time as the project is brought into compliance with DMC 5-12.050 and 5-12.120, and to take corrective action as required by the City’s ordinances.” CP 196.

10. RCW 36.70.080 Initial Hearing. On October 12, 2010 the parties argued City's Motion to Dismiss Ms. Ferguson's LUPA petition on procedural and jurisdictional grounds and the Court orally pronounced its decision to grant the City's Motion. The oral decision of the court was documented in the pleading titled: *Findings, Conclusions and Order on Initial Hearing: October 12, 2010* and signed by the Honorable John W. Lohrmann on January 10, 2011. CP 219-21. The trial court dismissed Ms. Ferguson's LUPA petition with prejudice. The findings of the trial court confirmed the facts, above. The conclusions of the trial court were:

- i. The August 14, 2009 issuance of a building permit was a land use decision under RCW 36.70C.
- ii. The injuries complained of by Petitioner are related to the August 14, 2009 building permit.
- iii. RCW 36.70C.040 requires a petitioner to file and serve its Land Use Petition no later than 21 days following the complained of land use decision. This time restriction is jurisdictional and failure to comply divests the court of its ability to hear the case.
- iv. As a result of Petitioner's failure to file her LUPA Petition - alleging injury from the issuance of the August 14, 2009 building permit - within the statutorily mandated timeframe, the court is

divested of jurisdiction to hear Petitioner's LUPA petition. CP

219-21

11. Appeal. Ms. Ferguson has appealed the decision of the trial court. CP 222.

III. ARGUMENT

Ms. Ferguson filed a LUPA petition seeking review of the issuance of a building permit. The trial court correctly dismissed Ms. Ferguson's LUPA petition on procedural and jurisdictional grounds.

A. The Land Use Petition Act (LUPA), RCW 36.70 controls the judicial review of the City of Dayton's August 14, 2009 issuance of a building permit. Ms. Ferguson's LUPA petition is time-barred because it was filed more than 21 days after the issuance of the permit.

The City of Dayton issued a building permit for an accessory building on August 14, 2009. An authorized official issued the permit. Once the permit was issued the cause of action between the parties was settled, the rights of the parties were concrete and the question of whether that specific request for a building permit would be granted was answered. 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.

The issuance of a building permit is a land use act. Asche v. Bloomquist, 132 Wash.App. 784, 790, 133 P.3d 475 (2006). RCW 36.70C.030(1) declares that a LUPA petition is the exclusive means for judicial review of a land use decision. RCW 36.70C.040(3) requires that a LUPA petition be filed and served on the parties within 21 days of the land use decision and RCW 36.70C.040(2) states that a LUPA petition is barred if it is not timely filed.

Excerpts of relevant statutes:

RCW 36.70C.030(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions ...

RCW 36.70C.040(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed ...

RCW 36.70C.040(3): The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

In Asche v. Bloomquist, 132 Wash.App. 784, 133 P.3d 475 (Div. 2, 2006), the Court held that the issuance of a building permit was a LUPA land use decision. Because the decision to issue the permit was made by an authorized official, the court reasoned that the LUPA 21-day timeline began when the permit was issued. Asche at 791. The building permit was issued on September 9, 2004 and the LUPA petition was filed in February 2005. The Court ruled that the trial court lost jurisdiction to

hear the LUPA petition 21 days after the permit was issued. Asche at 796.

The facts and conclusions in Samuel's Furniture, Inc. v. State, Dept. of Ecology, 147 Wash.2d 440, 54 P.3d 1194 (2002) *As Amended on Denial of Reconsideration Jan. 31, 2003* are relevant to the present case.

Facts: Landowner Samuels applied for a fill permit and a building permit. The City of Ferndale issued both: fill permit August 1998, building permit April 1999. Samuels at 445. Many months after the issuance of the permits, the Washington State Department Of Ecology objected to the issuance of the permits stating that Ferndale should have required a Shoreline Management evaluation process. Ferndale issued a stop-work order. Ferndale determined that no Shoreline Management evaluation process was needed and thereafter revoked the stop-work order on August 10, 1999. DOE did not pursue any non-judicial appeals of Ferndale's decisions to issue the permits or the decision to revoke the stop-work order. Samuel's at 445. DOE continued to pressure the landowner and Ferndale.

The landowner filed a declaratory action to resolve the dispute between Ferndale and DOE. The landowner moved for summary judgment arguing that DOE was estopped from challenging Ferndale's permitting decisions because DOE failed to file a timely RCW 36.70C LUPA petition. Samuel's at 446-47. The trial court granted landowner's motion for summary judgment on the basis that DOE failed to timely file a LUPA petition.

DOE appealed the trial court's granting of summary judgment. The Court of Appeals, Division I held that the Ferndale's permit decisions were not "final" decisions because the Shoreline Management Act of 1971 provides DOE with an opportunity to review local decisions (e.g. fill and building permits). The Division I Court reasoned that if DOE has the opportunity to review a local jurisdiction's permitting decision then the local jurisdiction's act of issuing a permit cannot be "final" and if not "final" then that permitting decision is not a RCW 36.70C.020(2) LUPA "land use decision" and the 21 day timeline was therefore irrelevant. Samuel's at 447.

On review, the Supreme Court disagreed with the Court of Appeals interpretation of "final" for the purpose of the LUPA judicial

review process. The Supreme Court reasoned that a decision must either be “final” or interlocutory” and provided definitions of both:

A “final decision” is “[o]ne which leaves nothing open to further dispute and which sets at rest cause of action between parties.” ... “A final judgment is such a judgment as at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues”... “A judgment is considered final on appeal if it concludes the action by resolving the plaintiff’s entitlement to the requested relief.” ...

In contrast to a final decision, an “interlocutory” decision is one that is “not final,” but is instead “intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy.” Samuel’s at 452

The Court criticized the Court of Appeal’s interpretation of “final”:

Thus, the Court of Appeals interpretation of the term “final” appears to create a kind of nonfinal final decision depending on whether Ecology decides to “review” the City’s actions. The decision is final if Ecology decides not to challenge the decision, but nonfinal, although not interlocutory, if it does. This is an incorrect reading of the term “final” for the purposes of LUPA’s appellate jurisdiction. Samuel’s at 453.

The Supreme Court held: 1) Ferndale’s permit decisions were land use decisions subject to LUPA judicial review and 2) Because DOE failed to file a LUPA petition within the statutory timeframe, DOE’s was estopped from judicially attacking the permit decisions.

Like Ferndale's permit decisions, judicial review of the City of Dayton's decision to issue a building permit on August 14, 2009 is controlled by LUPA. Ms. Ferguson's failure to file her LUPA petition within 21 days of the issuance of the permit results in her loss of any judicial relief affecting the validity the permit.

This Court's analysis in Vogel v. City of Richland, 161 Wash.App. 770, 255 P.3d 805, 807 (2011) goes through the above analysis and further clarifies when a decision is final. The City of Richland allowed construction to begin on a private road based on the City's oral permission and written memorandums to City Council articulating City Staff's decision to allow construction to begin. But it wasn't until a permit was issued by the City – the first public record memorializing the City's decisions regarding the private road – that the land use decision was final and the LUPA 21-day clock began ticking.

The City of Dayton's issuance of a building permit on August 14, 2009 was a public record memorializing the City's decision to issue the permit requested by a landowner. The cause of action between the parties was defined, the rights of the parties were concrete and the question of whether that specific request for a building permit would be granted was answered. 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.

B. The injuries complained of and relief requested by Ms. Ferguson in her LUPA petition all related to the issuance of the August 14, 2009 building permit; by failing to file her LUPA petition within 21 days of the issuance of the building permit, Ms. Ferguson lost all judicial relief associated with the issuance of the permit.

Ms. Ferguson alleges that she is an aggrieved party having standing under RCW 36.70C because the August 14, 2009 building permit allowed the construction of the accessory building in the location and at the height that “negatively impacts the light and air to her home and, upon information and belief, will have a negative impact on the resale value” of her property. In her prayer for relief, Ms. Ferguson requested as a remedy to her LUPA petition an order reversing the permitting decision of the City of Dayton, and directing the City and its agencies to invalidate the building permit for the accessory building. Ms. Ferguson’s injury and remedy are linked exclusively to the issuance – or revocation – of the building permit. Ms. Ferguson failed to file her LUPA petition within 21 days of the issuance of the building permit therefore Ms. Ferguson lost all judicial relief associated with the issuance of the permit.

To be an aggrieved party – and avail herself of LUPA judicial appeal – Ms. Ferguson must allege facts showing that he or she would suffer injury-in-fact as a result of the land use decision (Thornton Creek Legal Defense Fund v. City of Seattle, 113 Wash.App. 34, 52 P.3d 522 (2002)) and show that her interest in the land use decision is more than an abstract interest equivalent to that of the general public (Chelan County v. Nykreim, 146 Wash.2d 904, 935, 52 P.3d 1, (2002)). The only injury or interest adversely impacted by City’s land use decision alleged by Ms. Ferguson are linked only to the issuance of the building permit.

The opportunity to judicially appeal the City’s issuance of the building permit expired on September 4, 2009 and Ms. Ferguson missed that filing date; therefore, the injury claimed is irrelevant and the relief requested in her LUPA petition is unattainable.

C. Neither the Dayton City Mayor nor City Council had the authority to revoke the August 14, 2009 planning permit or issue a stop-work order.

Applicable code:

Dayton Municipal Code 5-12.840 Appeals of administrative decisions or requests for interpretations. 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.

Ms. Ferguson relies on the language of DMC 5-12.840 as authority for the City of Dayton Mayor or City Council to reverse the City's permitting decision or invalidation of the August 14, 2009 building permit. This reliance is mistaken. First, the City Council is not mentioned in this code section – or anywhere else – as having the authority to review the issuance of a building permit. Second, the final sentence of the code authorizes the mayor to review *administrative procedures*. “Administrative procedure” is defined as: Methods and processes before administrative agencies as distinguished from judicial procedure which applies to courts. Black's Law Dictionary 43 (Fifth Ed. 1979). Therefore, DMC 5-12.840 authorized the mayor to review the *method or process* by which the building permit was issued but not the decision to issue the permit.

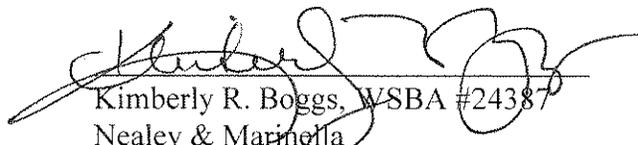
Ms. Ferguson has never alleged that the City engaged in unlawful procedure or failed to follow a prescribed process leading up to the issuance of the permit. The process or procedure of issuing a building

permit was within the Mayor's purview; *whether* the permit should be issued was outside of the Mayor and Council's jurisdiction.

IV. CONCLUSION

The City of Dayton issued a building permit on August 14, 2009. The issuance of the permit was a land use decision. Judicial appeals of a land use decision are controlled by RCW 36.70C. It is a jurisdictional requirement that a LUPA petition be filed and served no later than 21 days following the appealed land use decision. Ms. Ferguson failed to file her LUPA petition within the required timeframe. Ms. Ferguson is estopped from seeking judicial relief on the issue of whether the building permit should have been issued. The injury complained of and relief requested in Ms. Ferguson's LUPA petition are all arising out of the issuance of the building permit. The trial court correctly ruled that it was divested of its jurisdiction to hear Ms. Ferguson's LUPA petition. This Court should affirm the decision of the trial court.

Respectfully submitted this 30th day of August 2011.


Kimberly R. Boggs, WSBA #24387
Nealey & Marinella
Attorneys for the City of Dayton

CERTIFICATE OF MAILING

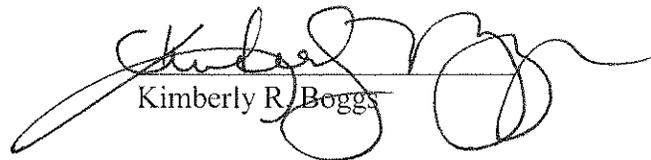
I certify under penalty of perjury under the laws of the State of Washington that on the 30th day of August 2011 I mailed by regular mail with postage thereon prepaid a copy of the foregoing Respondent City of Dayton's Brief to the following:

Renee S. Townsley
Clerk/Administrator
Court of Appeals Division III
500 N. Cedar Street
Spokane WA 99210-1905

Thomas Goddard
PO Box 291
Dayton WA 99328

Andrea Burkhart
Burkhart & Burkhart, LLC
PO Box 946
Walla Walla, WA 99362

Signed this 30th day of August 2011 at Dayton, Washington.


Kimberly R. Boggs